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THE

PRINCIPLES OF HINDU LAW.

BY

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THIRD EDITION.

VOL. I.

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DEDICATED

TO

MY FATHER

SIR CHUNDER MADHUB GHOSE, Kt.,

Who for many years as Judge and for some time as
Acting Chief Justice of Bengal administered
the Law of this Country and helped in settling
the Law dealt with in these pages, and
whose honoured name I have with
some diffidence ventured to asso-
ciate with this book, which is
the fruit of my labour of
many years.

PREFACE TO THE THIRD EDITION.

The second edition has been out of print for many years. The onerous duties cast on me left me little leisure. I am thankful that I have been able to bring out this edition.

When my book was first published, Sir Raymond West, the greatest of the judges who administered Hindu Law and whose book on Hindu Law is one of the best on the subject, wrote to me that it "will gradually improve and clarify professional opinion so as to make a repetition of some past blunders impossible." I am reminded of this generous observation because when my book was first published, some of the principles enunciated in it were considered as opposed to current authority. That reproach has now been practically removed.

The errors pointed out in my book of not allowing a Mitakshara coparcener to separate, except by suit or with the consent of all the other members of the family, of not recognizing the doctrine of spiritual benefit in the determination of the position of distant heirs, of basing the law of adoption on Niyoga, of denying to illegitimate children rights to their mother's property and to unchaste women their just rights of inheritance, of considering that a suit by or against the managing member alone did not bind the family and of placing idols not set up in the category of unborn person have been rectified by the decisions of the Privy Council and of the High Courts.

It was abundantly shown in my book that the rule established by our courts that under the Hindu Law gifts and devises to persons unborn were invalid had no foundation in the Smritis. It has been found necessary to remove the error by legislation, which only restores true Hindu Law.

In regard to the law of the Dayabhaga the errors, pointed out by me, of excluding barren or sonless widowed daughters,

the daughters of predeceased sons, the daughter's grandson and relations through females called Bandhus on the unfounded ground that there is no room for the rule of propinquety in the Hindu Law of Bengal and also the error of postponing the son's and grandson's daughter's son, though they perform the Parvana Sraddha, to other Sapindas who are not entitled to do so, have not yet been rectified. But the cruel and unreasonable law, which is against the Smritis, disqualifying the poor sonless daughter has been to some extent modified by recent decisions declaring that a daughter by adopting a son may be considered as a daughter with a son.

The error of considering the Putrikaputra as obsolete on the strength of a probably misunderstood text of a very modern and little known Purana called the Aditya Purana, still prevails. The Oude Talukdars had to restore the true Hindu Law on the subject by a Government act. It is to be hoped that as in the case of devises to unborn sons, the just rights of the Putrikaputra will be restored by legislation.

Again the cruel law of excluding the after-born sons of poor blind, deaf and dumb persons still prevails in all the Provinces except Madras, on the strength of a rule of law about vesting and divesting foreign to Hindu Law. The Madras High Court has however, laid down the correct Hindu Law on the subject. Here also the rational and merciful law of the Smritis should be restored by legislation.

The anomalous laws of marriage prevalent among certain low class Hindus and Nairs should also be regulated by legislation and the disabilities of remarriage on conversion should also be in like manner removed.

When the first edition was published the great orientalist M. Barth of the French Institute, while giving me high and probably undeserved praise, was good enough to point out certain mistranslations which have been corrected. He wrote to me that my attempt to trace all the rules of Hindu Law to

the time of the Vedas was futile. In this edition, I have by quotations omitted in the first edition, shown, beyond the possibility of doubt, that the laws of the Hindus were settled before the time of the Rig Veda.

The main position of my book is that Hindu Law is based on the Smritis and that it is an error to consider that the commentators embodied the customary law of their respective provinces. The commentators expressly repudiated that position. It is a matter of satisfaction to find that recent decisions of the Privy Council and of the Indian Courts have held that the commentaries cannot override the law of the Smritis when it is clear and unambiguous. I have attempted to show that the rules of the Smritis are seldom in conflict with one another in matters of vital importance about positive law and that there should therefore be one identical law for all Hindus. If India was under a Hindu King that would have followed as a matter of course. I have noticed with great pleasure that by recent decisions the doctrine of spiritual benefit has been introduced into the Mitakshara system and the doctrine of succession on account of propinquity has been introduced into the Dayabhaga system. Decisions of Indian Courts have made alienations for consideration of joint undivided shares valid in Bombay and Madras and an equitable rule about them introduced in other provinces. The laws of the Mitakshara and the Dayabhaga are thus approximating each other and the dream of having one identical Hindu Law for all Hindus may yet be realized.

For furthering the above object and for making the book perfect so far as embodying the original texts and commentaries, I have this time added additional volumes containing all the extant important ancient commentaries with their original texts in Sanskrit and with English translations, on matter of law which are of importance now.

All the important reported cases on Hindu Law, so far as they are known to me, up to the end of May 1917, have been recorded in this edition.

The book has cost me much labour and trouble. I shall however, feel amply rewarded, if it will save some labour and trouble on the part of scholars, investigators, practising lawyers, judges and legislators, dealing with the laws of the Hindus.

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July, 1917.

JOGENDRA CHUNDER GHOSE.

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INTRODUCTION.

THE object of this work is to place before the student of Hindu Law all the texts of the Rishis now extant, upon the subjects dealt with in it, all what the leading Commentators of the different schools say on those subjects and all the important decisions up to date of our Courts upon them. It also purports to embody in it the result of modern scholarship in the elucidation of the history of old Aryan institutions and customs. This is what has been attempted to be done in these pages.

It have drawn my own conclusions from the texts collected in this book as well as from facts of ancient history established by modern scholarship. Every statement of mine is supported by the texts at the end of each section. The conclusions are sometimes opposed to accepted theories My position is that the texts as a rule lead only to one conclusion. If I have been wrong, no harm has been done, for the texts, all the different readings of the texts and the glosses of the commentators in doubtful cases are there and the reader may draw his own conclusions. I have been under the necessity of pointing out some errors into which writers on Hindu Law as well as Judges have fallen. I trust, however, that the reader will be satisfied that the book has been written by an honest enquirer after truth, who not unnaturally loves the Rishis of India, with the object of elucidating the correct law and not with the object of exposing the errors of other people, though it has been impossible sometimes, to restrain feelings of indignation at errors leading to cruel and unreasonable practices and rules of law. However that may be, I have given in full detail the rules of law, as have been established by the decisions, and the reasons given in them, and the practical student and the practitioner will be under no difficulty and may probably sometimes find reasons which are omitted in current text-books. This book has the advantage of being the latest book on the subject and as many important rules of law have been changed by the decisions of the Privy Council during the last three years, it may be found useful.

In European countries, all students of Roman Law have to study it from Latin books. It is far more necessary to known the original texts in order to have a clear apprehension of Hindu Law. There is thus a great necessity for a book on Hindu Law purely from original sources. Colebrooke's digest and other digests, very useful in their day do not present the Hindu Law as it really is but as Jagannath and other Pundits wished it to be. The Pundits of those days compiled their books from such of the older digests as were available to them, without reference to the original Dharma Shastras which were not then easily accessible, and without reference to many of the ancient digests of Madras and Bombay which were not available in Bengal. The publication of the original Dharma Shastras and their translation by European scholars have now made it possible to ascertain the true law of the Hindus. If the Sacred Books of the East Series had been published before, many errors into which our Courts have fallen would have been avoided. The translations in the Sacred Books of the East Series are by the most eminent Sanskrit scholars and philologists of Europe based upon the most authoritative commentaries and executed with a critical power, which, it is no disgrace to admit, our Hindu commentators did not possess. But nothing is perfect in this world The European translators have fallen into mistakes here and there. I have taken the liberty of correcting some of them, I have always given reasons for making the corrections which I hope will be found satisfactory.

On each particular subject I have collected the texts of Manu, Gautama, Vasista, Baudhayana, Apastamba, Vishnu, Yajnavalkya, Narada, Vrihaspati and Parasara, as found in the texts as printed in Europe and India, and given the translations as found in the Sacred Books of the East Series. I have also collected the texts of Sankha Likhita, Harita, Katyayana, Devala, Vyasa, and other lawgivers from the digests and commentaries namely, those of Medhatithi and Viswarupa, the Kalpataru, the Madanaparijata, the Mitakshara, the Vivada Ratnakara, Vivada Chintamani, the Apararka, the Dayabhaga, the Parasara Madhava, the Vyavahara Mayukha, the Smriti Chandrika, the Sarasvati Vilasha, the Ujjvala of Hara Datta, the Nirnaya Sindhu, the Vivada Tandava, the Vira Mitrodaya, the Dayatatwa and other such books. I have also consulted the digests of Colebrooke, *i. e.*, of Jagannath and of Halhed

and the treatises of Sri Krishna. But these latter are of little authority as they are very modern and apparently copied from the Dayabhaga, the Ratnakara, the Mitakshara and one or two other digests then available in Bengal. I have adopted the translations of Colebrooke of the texts taken from the Dayabhaga and the Mitakshara, those of Mandlik of the texts in the Mayukha and of Krishna Swamy Iyer of the Smriti Chandrika and those of Babu Golap Chunder Sircar of the Ratnakara and the Vira Mitrodaya and those of Prosonno Kumar Tagore of the texts found in the Vivada Chintamani and of Dr. Foulkes of the texts in the Saraswati Vilasha. I have also translated a large number of texts myself. In doing so I have followed the most authoritative commentators. There are no doubt mistakes unavoidable in a first edition. But I hope that the translations as printed in this book may under the circumstances be considered correct and as representing Hindu Law more correctly than any other translations or digests made before. My endeavour has been to bring together all the texts now extant of the Vedas, the Smritis and the Puranas on the subjects dealt with in this book, so that in future, students of Hindu Law may not have to look to any other source, for texts on Hindu Law, and what is above all, that there may be no doubt as to what Hindu Law really is. I do hope my labours will to some extent lighten the labours of all serious students of Hindu Law and scholars who would like to study our ancient Shastras. That probably will be the only reward of my labours but I will consider it as sufficient. For any future legislator also, who would desire to codify Hindu Law there would no longer be any difficulty in ascertaining it and putting it in the form of a Code.

A few words now about the Rishis and the Commentators: There is a great diversity of opinion about the age of the sacred books of the Hindus. The Rigveda has been considered by European scholars to be not more than 4,000 years old. Hindus however, consider some of their books to be as old as the Satyayuga. Unfortunately, Hindus have got no authentic history nor have any finds of tablets like those of Babylon or of any papyrii like those of Egypt, helped to throw any light on the antiquity of their civilization. The Assyrians and the Egyptians were, it is said, very civilized nations more than 5,000 years before Christ. Indian civilization is very modern when compared to theirs, according to European scholars,

There are no means of ascertaining the truth in the present state of our knowledge. The only link which connects the inhabitants of ancient Persia and India is the Zendavesta. Future discoveries may bring out facts, which may elucidate the relations between the ancient nations of the world. It is difficult to believe however that Indian civilization is more modern than that of the Assyrians or of the Egyptians. For the present it is sufficient to say that the reasons for fixing the time of the Vedas and the Dharma Shastras to comparatively modern times are not convincing.

Professor Bloomfield in his learned book on the Atharva Veda in the Encyclopedea of Indo-Aryan Research makes the following undoubtedly correct observations on the antiquity of Hindu Customs (p. 2): "In fact both (*i. e.* Atharvanic house customs and Rigvedic hieratic Mantras) in some form or other both are prehistoric. The hieratic religion joins the Avestan *haoma* worship: the Atharvanic charms and practices are very likely rooted in an even earlier, perhaps Indo-European, antiquity. At least he who does not regard the analoga between Atharvantic charms and practices and those of the Teutonic and other Indo-European peoples as entirely accidental (anthropological) must hesitate to ascribe all the Mantras of the Atharva Veda and the Grihya Sutras to a late Vedic period. In the case of some *e. g.* the wedding charms and funeral hymns this is manifestly impossible." About the Grihya Sutras also he makes the following observations (p. 5): "Ancient India, as is well-known, has no history in the ordinary sense, no secular history. In lieu thereof the history of its religion and the history of its institutions are unrivalled among the peoples of olden times in their continuity and completeness. Especially the obscurer and more sluggish currents of ordinary daily life, a knowledge of which is so important for the true estimate of a people, are laid bare to the eye of the historian by an altogether unusual kind of tradition. We are not left to reconstruct a picture of the private life of the Vedic Hindu from scattered incidental statements of their ancient literature alone. In addition to such incidental statements, Vedic literature has preserved native systematic treatises on home-life which have searched out and stated systematically a well-defined body of facts connected with the every-day existence of the individual and the family. These are the Grihya-Sutras or house-books.

composed as formal treatises at a comparatively late Vedic period but reporting practices and prayers of great antiquity."

The truth of the above observations has been amply proved in these pages. The reader will find that the laws of Manu are really the traditional laws of the Indo-European peoples The marriage customs and laws about inheritance, which were based on them, the joint family system, partition and woman's rights were in all probability settled before the Indo-European nations parted company with one another. The Vedas, the Grihya Sutras and the Dharma Sutras only codified the customs earlier in India than elsewhere and stereotyped them and made alterations in them more difficult here than among other Aryan nations. For the original customs and laws of the Aryan nations, we must therefore look to the Vedas, the Grihya Sutras and the Dharma Sastras as affording the best available evidence.

As regards the Dharma Sastras, the age of Manu has been fixed at 1280 B. C. by Sir Willam Jones. Dr Buhler does not consider it to be earlier than the first century B. C. Gautama's Dharma Sutra is considered to be the most ancient of all but it is supposed to be later than the fifth century B. C. Vasista is supposed to be earlier than Baudhayana, who again is earlier than Apastamba, the latest of the Sutrakaras, whose book is placed sometimes between the third and fifth centuries B. C. Vishnu, who mentions the Greek name of a week day, is supposed to be not older than the fifth or sixth century A. D. Narada is considered by Dr. Jolly to be not earlier than the fifth century A. D. Vrihaspati comes after him and before the seventh century A. D. Hindus however, do not agree with European scholars in this matter.

Manu is considered by Hindus to be as old as the Vedas, which again are more ancient than any other human record. We find Manu mentioned in the Vedas and in the Zenda vesta. Then we have got Minos of the ancient Greeks and Menus of the Egyptians. Hindus have got several Manus and it is difficult to say which of them was the lawgiver. That Manu's law was considered to be the original law of Aryan race may be assumed from the common tradition of ancient countries. The existing institutes of Manu are certainly not his original Laws. The language and the metre show that the present book is a modern production. The old Dharma Sastras were composed in a form which was capable of being sung and were committed to memory. What was

the original form we do not know. But we know that there was a time when they existed in the form of Gathas, for we find such Gathas mentioned in the Manu Sanhita and quoted in the other Dharma Sutras. The Gathas were considered so old by the composers of the Manu Sanhita and of the Sutras of Gautama, Vasista and Apastamba that some of them were supposed to have been sung by Vayu, the good of wind and other mythological persons. Many centuries must have intervened between the coming into existence of the original laws or customs and the Gathas. Equally great was the distance of time between the Gathas and the Dharma Sutras. We have got in prose the Dharma Sutras of Gautama, Vasista, Apastamba, Baudhayana, and fragments of Sankha Likita, Hareeta, and Katyayana. We have got Smritis of lawgivers in verse too. The Smritis of Manu and Yajnavalkya alone are full and complete. We have got only a portion of the Smriti of Narada. The Smritis of Vrihaspati, Katyayana, Devala and other Rishis exist in a very fragmentary shape in the quotations of the commentators and Nibandhakars. We have over and above these got a mass of literature in the shape of Smritis in verse now published as the Astavinshati Smritis. Most of these deal with ritual and purification and with but little of matters of law proper. They bear the impress of having been composed in Pauranic times, which began a little before the Christian era. Some portions of these Smritis are actually found embodied in the Puranas. A large portion of Chapters I. and II. of the Smriti of Yajnavalkya is found in the Agni Purana, Chapters 163, 265, 256-257. Chapters I. to XIII. of the Garudapurana agree to a great extent with Yajnavalkya, Chapters I. to III. It is difficult to belive that the authors of these Puranas were so ignorant or thought that their readers were so ignorant that they would not be able to detect the interpolation of an entire Smriti, so well-known as Yajnavalkya's Smriti, in their books. It is equally difficult to conceive that the Yajnavalkya Smriti originally appeared in the Agni Purana or the Garudapurana. However that may be, it seems more than probable that the metrical Smritis were composed in Pauranic times.

Having assumed that the metrical Smritis were composed, most of them not earlier than the third century after Christ and that the prose Dharma Sastra were more ancient than they, we are met with another difficulty, namely that Manu's Smriti is considered by all Hindus as more ancient than the

Dharma Sutras we have got. We find some verses of Manu's Smriti appearing in identical language in Gautama, Vasista, Vishnu and Yajnavalkya. The prose Dharma Sutras that we have got may or may not therefore be more ancient than Manu's Smriti. We have evidence that Manu's Smriti existed about the first century before Christ and Gautama's Sutra existed about the fifth century B. C. It is more than probable that Manu's Smriti existed at some time in Sutra form. And it also appears that before the prose Sutras, the laws had been handed down from generation to generation in the Gatha form, for we find the Sutras every now and then referring to the Gathas whenever they refer to ancient times or ancient law. The Sutras, as their name denotes, were written books the pages of which were sewn together. The Gathas existed before them. The Sutras were long posterior to the time, when there was no writing and all knowledge was imparted from memory and retained by students possessing marvellous powers of memory. Before all these, there was a Code of Law which was known as Manu's Law, which must originally have existed in a form which was capable of being sung and committed to memory, from which all the lawgivers composed their treatises.

Now the history of the Sutras has been well ascertained. Ancient Brahminical Society was divided into several schools called Charanas, each of which had its own Sakha of the Veda and the Vedangas containing grammar and ritualistic, moral and legal codes. Each had its own Kalpa Sutras, which included the Srauta, the Grihya and the Dharma Sutras. There were Charanas of the early Vedic period, called the Sanhita Charanas, and afterwards, there were Charanas in the Brahmana period. The Muktika Upanishada says there were 1180 Sakhas. The numerous Brahmana Charanas gave place to equally numerous Sutra Charanas. From the Charan Vyuha we learn that there were five Sakhas of the Rigveda—the Sakalas, the Bashkalas, the Asvalayanas and the Mandukayanas. Of the Yajurveda, twenty-seven Sakhas are mentioned, including the Maitrayiniyas, of which the Manavas were a sub-division, the Hiranyakesins and the Apastambins. There were fifteen Sakhas of the Vajasaneyins mentioned, among whom we find the Baudheyas, the Kanvas, the Madhyandinas and the Parasaryas. The number of Sakhas of the Sama Veda is supposed to have been one thousand but the Charana Vyuha mentions only seven. Of the Atharva Veda, nine sub-divisions are mentioned

including the Saunaka. (1) The Gautama Dharma Sutra belonged to the Samavedins. The Vasista belonged to the Vasista school of the Rigvedins, the Asvalayana and the Sankhayana to the Rigvedins, the Katyayana to the white Yajurvedins, the Gobhila to the Samavedins, and the Manava, the Apastamba, the Baudhayana and Satyasadha to the Taittiriyas. (2)

It is the opinion of Max Muller and other European scholars that the Sutra Charanas came into existence shortly before the Christian era. But the Buddistic work called the Divyavadana, which was translated into Chinese about A. D. 148-170 and was probably composed some time before the Christian era, contains a statement of the different schools of Brahmans. It mentions 25 divisions of the Rig Veda, 1080 divisions of the Sama Veda and 105 of the Yajur Veda and says that "thus innumerable Vedic schools and classes of Brahmanas arose." (3)

It would be absurd to place the Sutras at a period later than the begining of the Christian era. They had come into existence long before the Divyavadana. Indeed, the account given by the Divyavadana is an account of Charanas more ancient than those mentioned in the Charana Vyuha, and must have been copied from an older book. However that may have been, there was a time before Buddha when the Sub-divisions of Brahmans were very numerous and each of them had its own ritualistic and legal code.

Dr. Buhler in his introduction to the translation of the Gautama Dharma Sutra rightly observes : "As we know from the Charana Vyuha, from the writings of ancient grammarians and from the numerous quotations in the Kalpa Sutras and other books on the Vedic rituals, that in ancient times the number of Vedic Schools, most of which possessed Srauta, Grihya and Dharma Sutras, was exceedingly great and that the books of many of them have either been lost or been disintegrated." The mass of literature once existing in India on the subjects must have been very great indeed. Buddhism became the religion of all India about the time of Asoka and according to Buddhist tradition, it flourished here in its glory only for five hundred years Thus for five hundred years from the third century B. C. all Brahminical literature fell

(1) Max Muller's History of Ancient Sanskrit Literature, p 364
(2) Mandlika's Introduction to the Mayukha.
(3) Divyavadana, Ch. 33, edited by E. B. Cowell and R. A. Neil.

into disuse and most of it was completely lost. It is indeed marvellous that any were preserved in this great deluge, having regard to the manner of those ancient times. However, when Brahminism which had not been quite destroyed, began to revive mainly through corrupt and so called occult practices creeping into Buddhism and agreeable colours being given to the disagreeably white light of its pure and cold doctrines, the Smritis which in reality then existed only in tradition and in fragments, were collected. It was then that the Grihya Sutras and the Dharma Sutras that we have now got were composed from tradition and older material which existed in a fragmentary form. This explains the fact why the lawgivers quote one another leaving us in confusion as to the priority in age among them. This also explains how doctrines and practices actually obsolete are discussed in those books. This again is the reason why we find mention of Greek and Roman terms which proves the books to be posterior to the time when communication between those countries and India commenced. As a matter of fact the existing texts of Manu and Gautama, Vasista and Yajnavalkya, Atri and Angira, Sankha Likhita and Hareeta and the other Rishis are only traditions, remembered texts of the older Manu and Gautama and others. The great majority of the metrical Smritis, such as those of Daksha, Vriddha Hareeta, Vridha Gautama, Vrihat Parasara, were composed at this time with the object of inculcating the practices of Yoga and the doctrines of the Vaishnava and Shaiva sects. The Smritis of Yajnavalkya, Manu and some others purport to be composed by persons other than their authors. For example the first verse of Yajnavalkya is very similar to the first verse of some of the Tantras and the Puranas. The Yajnavalkya Smriti mentions some Rishis as lawgivers. The Parasara Smriti also names the lawgivers. The Mahabharata makes an enumeration of the Rishis which is slightly different from those of the others. Rishis mentioned by one are omitted by the others, not because as Vijnaneswara thought that the enumeration was not intended to be exhaustive but because they were composed at different times. The Mahabharata mentions Rishis whose books were not considered by the composer of the Parasara Smriti as of authority in his time, probably because they were not available at that time.

The fact that the existing Smritis were composed about the beginning of the Christian era only proves the great

antiquity of the original books of the Rishis. Five hundred years before, the Dharma Sastras existed by hundreds We have it that there were hundreds of Schools of Brahmans in Buddhistic times, and probably many more before Buddha. There were probably as many Dharma Sastras as there were Schools. This extraordinary literary activity must have been the product of more than a thousand years, if not, of many thousands of years The books were named after the Rishis, probably because they were composed by their learned descendants and governed their Charanas. There was a School called the Manava and some are of opinion that Manu's Smriti belonged to it But Manu's Smriti was the common property of all and all the Smritis purported to be based on it. Manu is cited in the other Dharma Sastras as an authority binding on all The Manava School had a Dharma Sutra but that was not the original of Manu From the fragments that have come to light, it is stated that it was probably the original from which the Yajnavalkya Smriti was composed This is another proof that the original Manava Dharma Sastra was the law from which all the other lawgivers composed their treatises at different times Manu's Smriti existed before the divisions of the Charanas What it was originally we have no means of ascertaining All that we know is that the Dharma Sastras agree with one another in a most remarkable manner in thought and in language What seems to have happened is this First there was the original customary law of the Indo-Aryans known as Manu's Law In early Vedic times ritualistic rules were incorporated in the rules of customary law or both existed together, as was usual in ancient times The division of Brahmans into Charanas and their extraordinary literary activity led to the composition of hundreds of books of law and ritual based upon the old law with characteristic variations These were mostly lost during Buddhistic times During the Puranic times, when the Charanas were again attempted to be formed, some books were composed from older material Hence we find the lawgivers quoting each other and hence we find mention of more modern terms in many of their books. It is difficult to say which of these are more ancient than the others, except by a comparison of the doctrines inculcated in them The prohibition of the Niyoga, the modification of the laws of inheritance and marriage, the abolition of the system of the different kinds of sons, except the Dattaka, these are the matters by which the

comparative age of the Smritis have to be determined. Judged by these tests, the Sutra work of the Gautama is the earliest, after him comes Vasista, then Baudhyayana and last of all Apastamba.

It is necessary to say a few more words about Manu and Yajnavalkya. I have already shown that the age of Manu is lost in dim antiquity. It is coeval with the establishment of settled government among Indo-Aryans. Bhrigu's version of Manu, and the Smritis of Narada, Vrihaspati and Angira are said to be only versions of Manu. There was thus a Manu of which four versions existed. This only shows how ancient Manu's law is. When however the present metrical Manu of Bhirgu was composed, it is difficult to ascertain. According to European scholars it must have been before the second century A. D. Next we have to consider the time of Yajnavalkya. According to Stenzler and Lassen, Yajnavalkya must have existed after Buddha, for he refers to the coin called Kanaka which came into existence in India about that period. But their calculations have not been considered satisfactory by other scholars. Now it should be remembered that though Manu's authority is unquestioned by all Hindus, it is the law of Yajnavalkya by which they are really governed. Yajnavalkya's authority is supreme in India. It was Yajnavalkya who modified the old law of inheritance. The present law is the law of Yajnavalkya. When was the change made? It is difficult to unravel the tangled skein of this part of the history of Hindu Law. Manu, Gautama, Vasista, Baudhayayana and Apastambha do not give to the widow any rights of inheritance. Narada seems not to have allowed such rights and the texts of Narada giving such rights are probably interpolations. Vrihaspati is emphatic in giving the widow the right to inherit her husband's property. But it appears that there was an older code of Vrihaspati which disallowed such rights, for side by side with the texts allowing such rights, we have certain texts disallowing them. We have also certain anomalous texts of Devala, Katyayana and Sankha about the same matter. These only show that the new Smritis are books in verse composed from texts so far as they were remembered after the Buddhistic period. We may therefore safely take the age of present Smritis as settled by European scholars for very good reasons for which the reader is referred to the introductions of the Sacred Books

of the East Series Where the learned authors of those books have fallen into error is that they think that the original Smritis were composed at those dates.

We know this much about the Smritis. There are no means of ascertaining the age of the original Smritis of the Rishis Lost they were during the Buddhistic period but of a certainty they existed at very remote antiquity That there was a code of Laws during the time of the Rigveda may be very safely assumed for it speaks of civilized communities governed by great kings The laws of marriage, sonship and inheritance of the Indo Europeans must have been established long before that time. There is no proof that the Riks were composed by the Rishis who are supposed to be their authors At the time the Rigveda was put into its present form by Vyasa or whoever he may have been, the Riks traditionally went by the names of the several Rishis who are supposed to have been their authors The Dharma Sastras went by the names of the same Rishis It would therefore not be right to say that the Dharma Sastras were posterior to the composition of the Rigveda in its present form I shall give one instance to show how the Dharma Sastras may safely be assumed to be of a date anterior to the time of some of Vedic Rishis We find it mentioned in Baudhayana that it was Aupjanghini, one of the Rishis mentioned in the Satapatha Brahmana, who prohibited Niyoga The Niyoga and the different kinds of sons must have existed for centuries before the controversy was started In the Rigveda itself, the abhorrence of the practice of getting sons in irregular ways is very freely expressed The traditional law on the subject must therefore have existed at a period long anterior to the Rigveda Indeed it is now proved by modern scholarship that it was an Indo-European custom In human literature the earliest landmark is the Rigveda As to the origin of the Dharma Sastras all that can be said is that it is lost in dim antiquity They probably existed before the Greeks besieged Troy, before Egypt was or Babylon held regal away over Central Asia.

The late Mr. Mandlik prepared a very interesting statement showing the Smritis which are quoted in other Smritis. He thus sammarises the result. "Manu precedes Laghu Atri, Vridda Atri, Vriddha Harita, Vriddha Gautama, Laghu Vyasa, Vasista and Laghu Parasara Atri precedes Vriddha

Harita and Laghu Parasara. Gautama precedes Vriddha Gautama, Katyayana, Vasista and Laghu Parasara. Vyasa precedes Vrihaspati. Vasista precedes Vriddha Harita, Usanas, Katyayana, Vrihat Parasara and Laghu Parasara. Katyayana precedes Vridha Harita and Laghu Parasara. Parasara precedes Vriddha Gautama. Vrihaspati precedes Laghu Arti and Katyayana. Usana precedes Apastamba, Laghu Parasara and Vriddha Gautama. Prajapati precedes Vridha Gautama, Laghu Vyasa and Vasista. Harita precedes Laghu Parasara. Yajnavalkya precedes Vriddha Gautama and Laghu Parasara. Yama precedes Sankha and Vriddha Gautama Sankha precedes Vriddha Gautama and Laghu Parasara. Bhrigu precedes Vriddha Harita, Vriddha Gautama and Katyayana. Narada precedes Vriddha Harita, Vriddha Gautama and Katyayana. The Statement only shows the illusory character of the argument from the fact of one Smriti quoting another.

Having found that the present Smritis were all composed in post-Buddhistic or Pauranic times, we have to determine how far they represented the Hindu Law then prevailing. That Manu's Law was the Law which governed the Indians in the Buddhistic period, is proved by the fact that in Burma, where the Indian Buddhists carried their religion and law, the law of the country was known as Manu's Law. But the Burmese Manu is so garbled a version of Manu that it is difficult to recognise in it the Hindu Manu. The Buddhist Indians discarded the ritualistic portions of Manu. The laws of marriage had also to be modified and were made of a secular character. Then we find the un-Hindu custom of divorce and re-marriage recognised. The law of inheritance is also in consequence modified. But the law was still Manu's Law. This confirms the Hindu tradition that the law of Manu is the law of the Hindus, that all the other Smritis were based on it and every thing that is against it, is not good law. When however, we come to the laws on marriage, we are met with certain facts that are of a very puzzling character. Narada, Parasara, Hareeta, Yama and Katyayana allow remarriage in case of death, impotence, *patitya*, &c., and also for absence for a certain number of years. That was the old law of the Hindus. In the texts of Manu, Gautama and some other lawgivers, the provision about re-marriage for long-continued absence of the husband has, it is apparent, been omitted and the original texts mutilated. This will lead to the conclusion that Narada, Parasara, Hareeta, Yama and Katyayana were

written at a time before the version of the Manu we have got was composed. Again Vrihaspati is mentioned in the Lalita Vistara which was composed before the second century B. C. His law is supposed to have been the law of India in Buddhistic times, as the Manu of Buddhistic countries agrees to a great extent with his law. A fuller consideration of the laws of marriage and the Buddhist law than I am at present able to give, will, I hope, ultimately lead to the ascertainment of the time of the Smritis. I am at present engaged in collecting the texts of the lost Smritis from the old digests. When collected, they will, I hope, be of material help to the student of Hindu Law. I intend also to ascertain, if possible, from Buddhist records and Hindu books, what was the law of Buddhistic India and how it was afterwards modified But I cannot forget that art is long and life is short.

Now we go to the Commentators and Nibandhakaras. The earliest among known commentators is supposed to be Asahaya the commentator of Narada Smriti. After him, is supposed to come Medhathithi the commentator of Manu, who flourished about the 8th or 9th century A. D. After him, comes Viswarupa, the commentator of Yajnavalkya, who was followed by Vijaneswara, an ascetic, who wrote under the patronage of the western Chalukya king Vikramaditya VI. of Kalyanapura, who ruled over a large part of India some time between the years 1076 and 1127 A. D., (1) Bharuchi, a commentator of Manu, and Dhareswara who is supposed to be Bhoja Paramara King of Dhara (1010-1053 A.D.) and Srikara are quoted by Vijnaneswara. Their works are lost. Apararka or Aparaditya who ruled over the Konkan about the year 1187 A.D. (2), caused a commentary on the Yajnavalka Smriti to be written which was called after his name. After him comes Hemadari, the prime minister of Mahadeva, King of Daulatabad, who wrote the famous Chaturvarga Chintamani about the 13th century A. D. He quotes Apararka and is quoted in the Madan Parijata. Devandabhatta, son of Keshabadetya Bhatta was the author of the Smriti Chandrika. His authority is now considered to be paramount in Madras. He lived before the 13th century for he quotes Apararka and is quoted in the Madana Parijata and by Madhava, the celebrated prime minister of Bukka, the King of Vijayanagar, who reigned in the latter half of the 14th century. Madhava

(1) Journal Bomb. Asiatic Society, XII 334, 335.
(2) Sir Walte Elliot's Inscriptions. Indian Antiquary, V 27, VI 75.

was by far the most learned and prolific writer of India after the great Sankara. His commentary on Parasara Smriti, called the Parasara Madhava, is one of the standard works of law. Next in point of time is supposed by Dr. Jolly and other learned writers to be Hara Datta, the author of the Ujjvala commentary on the Apastamba Dharma Sutra and of the commentary on Gautama called the Gautamiya Mitakshara. But I find it difficult to believe that he was so modern. It should be borne in mind that the heritable rights of the widow were established in India by Vijnaneswara. Médhathithi denies them, and so does Haradatta. Viswarupa gives the right only to the pregnant widow. All the other commentators and digest writers have not dared to question the widow's rights. It is not unreasonable to suppose that Haradatta flourished after Medhathithi and before Vijnaneswara, for one who dared to disagree with Vijnaneswara in the sixteenth century would have been considered a very rash man.

We next come to Lukshidhara, the author of the Kalpataru. He is cited by all the Mithila and Bengal commentators. He was the prime minister of King Govind Deb of Kanauj, who flourished about 1130 A. D. Chandeswara, the author of the Vivada Ratnakara, the famous minister of King Harasinhadeva of Mithila, who performed the Tula Ceremony in 1236 Saka, *i. e.*, 1315 A. D. comes next. After him comes Vachaspati Misra, the author of the Vivada Chintamoni and the most learned and prolific writer of modern India after Madhava, who flourished during the time of Hari Narain, the great grandson of Hara Sinha Deba, about the beginning of the 15th century. Next comes Bisseswara, the author of the Madana Parijata and the Subodhini Tika of the Mitakshara, who wrote under the patronage of King Madana Pala of Kasta to whom the preservation of the commentary of Medhathithi on Manu is due. He is supposed to have flourished between the 14th and 15th century A. D. There was a famous commentary called the Parijata, which is cited in the Ratnakara and other early works. The Madana Parijata, is probably based on it.

The history of the origin and development of the Bengal School is wrapped up in impenetrable darkness. Halayudha, the Chief Judge of Lakshamana Sena, the last Hindu King of Bengal, who flourished about the end of the 12th century, wrote a book on Hindu law which was

of authority in Bengal and Mithila and is quoted by Mithila and Bengal writers with respect. His book has not yet been found but from the quotations, it appears, that during Hindu times the law of Bengal was the same as the law of Mithila. Kullukabhatta, the celebrated commentator of Manu, was a Varendra Brahmin, who is supposed to have flourished about the 15th century A. D. Though a Bengal writer, he follows the Mitakshara School and so does Shulapani, another Bengal authority, quoted by Raghunandana Both Kullaka and Shulapani do not even refer to the Dayabhaga or any of its opinions. When and how therefore, did the doctrines of Gimutavahana come to be recognized as binding in Bengal? These questions have never been answered. All that we know of Gimutavahana is that he was anterior to Raghunandana and posterior to Dikshita, whose opinion about the disability of the sonless widowed daughter to inherit he quotes, and that he was a Bengal Brahmin of the Paribhadriya class or Pari or Parihal Gai. He also quotes Govindaraja and Srikara, who was probably the same author who jointly with Raya Makuta wrote a commentary of the Amarkosha during the reign of Jalaluddin Shah, son of Raja Ganesh of Bengal in the first quarter of the fifteenth century. A copy of the Kalaviveka, another work of Gimutavahana, in the library of the Asiatic Society of Bengal bears on it the date 1417 Saka, *i. e.*, 1495 A. D. The book must have been written long before the date. It is probable therefore that Gimutavahana lived in the beginning of the 15th century. It is indeed rather hard on Gimutavahana to be degraded from the proud position of a powerful monarch of classical antiquity, which he was supposed to be, by many English and Hindu writers on Hindu Law to the level of a Bengal Srotriya Brahmin of the Sandilya Gotra of the low class called Parihala * The mystery is yet unsolved how his book

* Parihalas were originally Kulin Brahmins. They became secondary Kulins during the time of the Sena kings and Srotriyas afterwards. Since the publication of the first edition of my book, certain Pundits have in an introduction to the Kalaviveka in the Bibliotheca Indica Series tried to assign a mythological age to Gimutavahana by saying that because Gimutavahana called himself a Parihala he must have existed at a period when the Parihala, were great in the estimation of the people. But they forgot that a Parihalas Brahmin must call himself a Parihala, for that is his designation. Ancient writers sometimes put their Gotra names before their proper names, *e. g.*, Halayudha

came to supplant the Smriti of Halayudha and to create a school of law different from that of the rest of India

A probable theory is that Gimutavahana was younger than Srikara Misra and flourished with him and survived him Srikara's authority was acknowledged by his contemporary local Pundits Gimutavahana speaks of him in terms of deep reverence, mentioning his name with the plural affix. It is very unusual to find one commentator mentioning another in that manner, except when he is the former's teacher. Gimutavahana also calls Srikara simply as Acharya Ordinarily, it would mean that he was his teacher It may however, be that Acharya was his name In that case also, it is usual only to call a contemporary author by his title Nobody would call an ancient author by so ordinary a title as Acharya Gimutavahana apparently thought that by Acharya people would understand that Srikara was meant and that would only be possible, if Srikara was Gimutavahana's teacher or his contemporary. He undoubtedly refutes some not very important opinions of Srikara in terms of disrespect which only shows his anxiety to outshine one who enjoyed great reputation in his time Srikara is not mentioned by any other author of note, excepting the author of the Saraswati Vilasha, who was greatly under the influence of the early Pundits of Navadwipa and who mentions Srikara and not Gimutavahana—a fact showing that even in the early part of the sixteenth century, Gimutavahana was little known among Pundits Gimutavahana probably, first read under Srikara and then for a short time studied the Mimansa at Benares, where he became acquainted with the writings of the Dikshitas in imitation of whom, he wrote his books including a book on Kala, called the Kalabiveka * He probably came to the court of Jalaluddin Shah,

called himself Vatsa Gotriya A Koolin Bandopadhyaya would call himself a Sandilya Gotriya A Sandilya Gotriya degraded descendant of Bhattanarayana's son Batu, who obtained the village Pari and was in consequence, called a Parihala was obliged by custom to call himself Parihala The Kusaris, Gargaris or Maschatakas, who are also descendants of Bhattanarayana like the Parihalas, came to call themselves by those names, only when they fell from their high estate and would not be recognized by any other appellation Gimutavahana calls himself of the *kula* of Paribhadra It is clear that he must have flourished at a time when the Parihalas had come to be regarded as a distinct *kula* as distinguished from a mere Gai or village name

* At that period a treatise on Kala came to be regarded as an indispensable part of a Smriti Nibandha and Raghunandun also wrote a treatise on Kala. It was not a custom of the old commentators like Vijnaneswara

King of Bengal, who was originally a Hindu and who, even after his conversion to Muhammadanism, entertained Hindu Pundits in his Court, among whom was Srikara, and his reputation probably surpassed that of Srikara. Among the Hindus of the Court of Jalaluddin, Muhammadan ideas on law, as well as on religion, were fashionable. Thus the efforts of Gimutavahana for overthrowing the old ideas of joint ownership, of ownership by birth and survivorship and for establishing individual rights in ancestral property with powers of alienation and the rights of inheritance of females and sister's sons were the direct result of the prevailing Muhammadan influence. The ideas of Gimutavahana could not but find favour in the Court of Jalaluddin and among Hindus of that time. This may be a probable explanation how his book became of authority in Bengal. Srinath Acharya, son of Srikara Acharya (a person probably different from Srikara Misra), a man distinguished among Kulin Brahmins of the time, wrote a commentary on the Dayabhaga. His disciple was the great Raghunandana, who flourished in the sixteenth century and whose opinions now really rule the Bengal Pundits. In Raghunandana's time, Buri Punchanon, a collection of Vyavasthas, and not Gimutavahana's Smriti, was of authority in Navadwipa. Even after the death of Raghunandana, Buri Punchanan was of authority there. It was Gopal Nyayalankara of Navadwipa, who first taught Raghunandana's Smriti at Navadwipa and it was his two famous disciples, Devi Tarkalankara and Ramnath, who made Raghunandana's book popular and established his authority. Raghunandana was a follower of Gimutavahana, and the Dayabhaga thus became of supreme authority among the Pundits of Navadwipa and consequently among the people, who, because there were no Hindu Kings, were guided by their Pundits during that period. This seems to me to be the secret of Gimutavahana's authority. The subtles doctrines of Gimutavahana, which were popular at the time, found favour with the subtle Raghunandana (who was probably in the line of his disciples), and the acute Gopal and his learned disciples, who ruled among the Pundits of Navadwipa at the time.* Then came Srikrishna Tarkalankara, and after him,

* The above account of the development of the Smriti at Navadwipa from Srinath to Debi and Ramnath is based upon unquestioned Navadwipa tradition mentioned to me by Mahamahopadhyaya Chandra Kant Tarkalankara, one of the oldest and most learned Pundits now living.

the Pundits of Warren Hastings, who compiled the Vivadarnava Setu, the translation of which was called Halhed's Gentoo Code, the court Pundits of the old Sudder Court and the famous Jagannath Tarkapunchanon, the compiler of Colebrooke's Digest These Pundits made the law of the Navadwipa Pundits, the law of the Bengal courts It should be mentioned here that the old law books were practically not available in Bengal at the time and even now they are very little studied there

The Saraswati Vilasha which is of authority in Orissa, is said to have been written by Protap Rudra Deva, the King of Orissa, or his court Pundits He, like Raghunandana, was a contemporary of Chaitanya and reigned between the years 1503 and 1524 A D.

Of the Bombay commentators, Kamalakara, the author of the Nirnaya Sindhu and the Vivadatandava lived in the 17th century In the Nirnaya Sindhu it is mentioned that it was finished in 1612 A D Nilkantha, the author of the Vyavahara Mayukha, whose authority is supreme in Guzerat and the Island of Bombay, was a cousin of Kamalakara and was probably his contemporary Nanda Pundit who was also known as Vinayaka Pundit, son of Ram Pundit, the author of the Dattaka Mimansa and of the Keshava Vaijayanti, the famous commentary on Vishnu, also flourished in the 17th century The latter work mentions that it was written at the instance of Keshava Nayaka and was completed in 1633 A D.

Mitra Misra the author of the Viramitrodaya, which is considered of authority in the Benares School, wrote his book by order of Birsing Deo Rajah of Archa, who murdered Abul Fazul, and he thus flourished about the end of the 16th century

Lakshmi Debi, the authoress of the Balam Bhatti, Tika of the Mitakshara, lived about the end of the 17th century

Of the Bengal Pundits, Srikrishna Tarkalankara, the annotator of the Dayabhaga and the author of the Dayakrama Sangraha, lived about the end of the 17th century or the beginning of the 18th century Jagannath Tarkapanchanon, the celebrated author of the Vivada Bhangarnava, lived about the end of the 18th century.

The above is only a short and meagre account of the Rishis and the commentators For the purposes of this book, I hope it will be considered sufficient

Having regard to the scheme of the work, I did not find it possible to avail myself of the services of any Pundits,

except in helping me in translating some difficult texts. I had also to make certain that all the texts on the subjects dealt with in the book have been collected and I could not rely upon others. I had therefore to go myself through the digests and books mentioned by me. The labour it cost me, has been great but I hope, that it has not been quite thrown away and that scholars will find that the work has been conscientiously done. I hope also that Pundits who know English, and other scholars will now kindly come forward to help me, and if any texts or readings of texts have been omitted or any mistakes committed in the translations, they will kindly point out the deficiencies to me so that they may be remedied in the next edition.

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I cannot conclude without giving expression to the feeling of the great obligation, which in common with all other writers on Hindu Law, I am under to the great orientalists Sir W. Jones and Professor Max Muller, who loved India and its Rishis so well, and to Colebrooke, Buhler, Jolly, Wilson, Cowell, Monier Williams, Burnell, Foulkes, Shama Charan Sircar, Viswanath Narayan Mandlik, Raj Coomar Sarvadhicary Gooroo Das Banerjee, Jogendra Nath Siromony, Golap Chunder Sircar, Krishna Kamal Bhuttacharya and last, but not the least, to Mr. Mayne whose great book on Hindu Law is a mine of information to which writers on the subject shall always have to resort.

LIST OF BOOKS AND MANUSCRIPTS CONSULTED IN THE PREPARATION OF THIS WORK.

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Vyavahara Mayukha, Mandlik's Edition.
Yajnavalkya, Mandlik's Edition and the Calcutta Edition.

ABBREVIATIONS.

Decision of the High Court of the N W Provinces	N W P
Notes on Customary Law as administered in the Courts of the Punjab Boulnois and Rattigan	Punjab Customs
Moore's Indian Appeals	Moore
Law Reports Indian Appeals	I A
Indian Law Reports Calcutta Series	.. Cal
Indian Law Reports Bombay „	Bom
Indian Law Reports Madras „	.. Mad
Indian Law Reports Allahabad „	.. All
Bengal Law Reports	. B L R
Calcutta Law Reports	C. L R
Sutherland's Calcutta Weekly Reporter ..	W R
Calcutta Weekly Notes	C W N
Punjab Law Reporter	Punjab
Punjab Record	... Punj Rec
Punjab Weekly Reporter	Punj W R
Calcutta Law Journal	... Cal L J
Madras Law Journal	Mad L J
Madras Law Times	Mad L T
Madras Weekly Notes	Mad W N.
Patna Law Journal	Pat L J
Patna Law Weekly	Pat L W
Bombay Law Reporter	.. Bomb L R
Allahabad Weekly Notes	All W N
Allahabad Law Journal	All L J
Indian Cases	I C
Sind Law Reporter	Sind L R
Nagpore Law Reports	Nagpore L R
Oudh Cases	Oud Cas
Oudh Law Journal	Oud L J
Select Reports of the Calcutta Sudder Dewany	. Sel Rep
Sudder Dewany Reports	... S D
Bombay Select Reports of the Sudder Dewany Adalat	... Bombay S R
Borrodaile's Reports of the Bombay Sudder Adawlut	Borr
North-West Province High Court Agra Reports	Agra.
Boulnois Calcutta Supreme Court ...	. Boulnois
Bourke's Calcutta High Court Original side	.. Bourke

Morley's Digest	... Morl.
West and Buhler's Digest	... W & B.
Bombay High Court Reports ...	... Bombay H. C.
Madras Ditto	... Madras H C.
Decisions of the Madras Sudder Court ...	. Mad Dec.
Sevestre's Reports	.. Sev
Fulton's Reports	... Fulton.
Hyde's Reports of the Calcutta Original side	... Hyde.
Appellate Original Civil Jurisdiction ...	... A O. C. J
Appellate Civil Jurisdiction	.. A. C. J.

ADDENDA.

68. *Add* प्रजाभावे तु पत्नी स्यात् पत्न्यभावे तु सोदर्याः ।

स्मृतिचन्द्रिका धृत वृद्धशातातप वचनम् ।

Putrika is obsolete. Babu Reta Koer *v.* Puran, 1 Pat. L. J. 581. Thakoor Jeebnath, *v.* Court of Wards, 2 I. A. 163, Sre Raju *v.* Sre Raju, 31 Mad. 310.

P. 143, l. 29. *After* 'ceremony' *add* or 'offer what are called the undivided oblations.'

l. 30. *After* Sraddha *add* "once for all."

In Oude it has been held that in case of conflict between the different High Courts the rule of the Allahabad High Court should be followed and thus on the ground of spiritual benefit, the great-grandson of the great-grandfather should be preferred to the great-great-grandson of the grandfather, Harnandan *v.* Rachpal, 20 I. C. 32.

P. 144. Since the above was written the Bombay decision has been expressly dissented from by the Madras High Court which has held that Samanodaka relationship cannot extend beyond the 13th in degree.

P. 152. Add in the end Rama Row *v.* Kalluya, 30 Mad. L. J. 514; 34 I. C. 294.

The Patna High Court in a recent case has held that the test to discover the preferential heir is the capacity to offer oblations and thus the mother's paternal aunt's son should be preferred to the mother's sister's grandson who though he may be considered as an Atma Bandhu still is inferior to the former as he offers no Pinda. Adit Narayanan *v.* Mahabir, 35 I. C. 689.

P. 156. Father's sister has been preferred in Bombay and Nagpore as Bandhu to the maternal grandfather. Madho *v.* Janki, 36 I. C. 514. Saguna *v.* Sadashiva, 28 Bomb. 715.

P. 177. *Add* the following foot note to line 20:

The Smriti Chandrika reads अप्रतिष्ठिता for भवेत्तदा। The meaning would thus be that the unprovided daughter takes immediately after the maiden daughter. This reading if correct would make the position of the Dayabhaga absolutely untenable. It is based on a doubtful text and is opposed to all the Smritis and the commentaries.

P. 210. In Madras it has been held that a mere tumor in the nasal cavity, even if it is congenital, does not disqualify and the judges added that it was doubtful "whether all the texts as to disqualification are in force now-a-days." Subba Naidu *v.* Vencataram, 23 I. C. 528. Vencata Subba Rao *v.* Purushottam, 26 Mad. 133. *Add* to Note 2. Ram Singh *v.* Bhanu, 38 All. 117.

P. 211. Note 2. *Add* Run Bijai *v.* Jagat Pal, 18 Cal. 111 P. C.

P. 212. In Calcutta it has been held that the patricide, his chaste wife and his son are entitled to maintenance. The son was held to be excluded because he was born after the succession had opened out. Nilmadhob *v.* Jotindra, 18 I. C. 764.

P. 212, l. 8. *Add* Madras *after* Bombay and in foot note 3 *add* Kayarohana *v.* Subbaraga, 38 Mad. 250.

P. 213. In Calcutta it has been held that when a Hindu married woman during the life-time of her husband was converted to Muhammadanism and married a Muhammadan she was in the position of an unchaste wife and her children could not succeed to her Hindu husband's property. Sundari Letani *v.* Petambar Letani, 32 Cal. 871.

Living separate from the husband has been held not to be such hostility to him as to disqualify. The opinion has been expressed that the grounds which excluded a son also excluded a wife or daughter and it was assumed that malignant hostility (which was defined) disqualifies. Khettermoni *v.* Kadambini, 17 I. C. 82.

It has been held in Bombay that unchastity if condoned by the husband who continues to live with her notwithstanding, cannot exclude a wife from inheritance and in such a case outsiders should not be allowed to raise the question. Gungadhur *v.* Yella, 13 Bom. L. R. 1038, 12 I. C. 714.

P. 214. The Madras High Court has held that even degradation from caste on account of unchastity after Act 21 of 1850 could not disqualify a mother who had misconducted herself with a Muhammadan, 31 Mad. 100. The son or grandson of a disqualified heir may succeed to the share which the latter might have taken, if not disqualified, in respect of separate or self-acquired property under the Mitakshara and in every case under the Dayabhaga but under the Mitakshara the daughter of an insane coparcener cannot succeed. Ram Sing *v.* Musmut Bham, 32 I. C. 127, 14 All. L. J. 4, 38 All.

P. 215. *Add* before Bombay, Allahabad in the third line from the end.

P 216. In foot-note (1) *add* Dalsing *v.* Mussammut Dini, 32 All. 155, Baldeo Sing *v.* Mathura Koeri, 33 All. 783.

P. 216. In footnote 2 *add* Akora *v.* Borianee, 2 B. L. R 199, Lakshana *v.* Sadasiva, 28 Mad. 725. Somar *v.* Bhago, 5 C. P. L. R. 85. Kashirao *v.* Ukarda, 31 I. C. 290 (Nagpore).

P. 220, l. 13. *After* 'excluded' *add* 'except in cases where a custom is proved by which persons of lower castes are allowed to enter certain monastic orders and by which they lose they right to succeed to their own family estate and the inheritance left by them devolves according to the rules of the particular order.'

P. 220. In foot-note (3) *add* Harish *v.* Ater Mohomed, 40 Cal. 545, Lochan Bhuimali *v.* Adhar, 35 I. C. 630.

P. 220. It has been held in the Punjab that Jat Fakirs and Udasis do not necessarily lose their rights to ancestral property and they are found sometimes marrying. Lachman Das *v.* Chakuri, 29 Punj, R 1881. But the burden of proving that they have not renounced the world and thus lost their rights is on the party alleging it. Badhawa *v.* Anaukha, 7 Punj. R. 1892. Among Agarwala Banias, it has been held that a person by becoming a Suthra Fakir renounces the world and loses his right of inheritance. Luchman Das *v.* Raha, 106 Punj. L. R. 1911. 11 I. C. 378.

P. 228. *Add*

ग्रासाच्छादनमत्यन्तं देयं तद्बन्धुभिः कृतम् ॥

बन्धुनामप्यभावे तु पितृद्रव्यमवाप्नुयात् ।

अपित्र्यंशहरिं प्राप्ता दापनीया न बान्धवाः ॥

स्मृतिचन्द्रिकाधृतकात्यायनवचनम् ।

Food and raiment for lifes hould be given to him (who is a disqualified heir) for life by his kinsmen. But when there are no kinsmen he takes the paternal wealth. The kinsmen should not be compelled to give him any property acquired by them which is not derived from his ancestors. Katyayana cited in the Smriti Chandrika.

प्रतिलोम प्रसूतायाः तस्या पुत्रो न रिक्थभाक् ॥

The son born of a woman married in the inverse order is no heir. Katyayana cited in the Smriti Chandrika.

P. 261. Foot note (6), *add*—In Papparayadu *v.* Ruttaina, 37 Mad. 275 the judges refused to follow 31 Mad. 158 and held that a declaratory decree may be made declaring that the portion necessary would be a charge on the estate.

P. 261. *Add* to Note 6. Papparayudu Rathama, 37 Mad. 275. In this case judges dissented from 31 Mad. 158 and held that a decree may be made declaring the portion necessary would be a charge on the estate.

P 265. No surrender by a widow or can affect the succession unless made with the consent of all the reversioners. Rameswar Parmd *v.* Baranashi, 38 I. C. 532. 1 Pat. L. W. 38.

P. 272. The Bombay High Court has recently held that a partial alienation on favour of the next reversioner in pursuance of an award of arbitrators is invalid. Moti Raiji *v.* Lal Das, 41 Bom. 693.

The Patna High Court has upheld the validity of a transaction by which a widow surrendered her interest to one daughter's sons giving one-third of the property to a barren daughter and arranging for her own maintenance. Raghunath *v.* Kura, 38 I. C. 167.

An alienation giving effect to family settlement and compromise is good if proved to be *bonâ fide* and justifiable necessity need not be proved. A compromise is not the same as an alienation. Vencata *v.* Tulgaram, 38 I. C. 270.

Gift of a part of the estate to the next reversioner is invalid not being a complete remuneration but it may be good if it is for consideration. Khewani Sing *v.* Chetram, 39 All. 1. Pilu Appa *v.* Babaji, 34 Bom. 163, see 21 Mad. 128.

In case of partial necessity the reversioner can claim possession on payment of the amount paid for necessity but when only a small portion was not necessary, the whole sale must stand. Bunayeed Hossan *v.* Mata Sing, 36 I. C. 57 (Oude).

It is on the plaintiff to prove affirmatively that he is the reversioner and that there are no nearer heirs. Rama Row. *v.* Kutteya, 30 Mad. L. J. 14.

Reversioner sues in representative character. Vencatanarayana *v.* Subbammal, 42 I. A. 125.

P. 279. Note 2.—*Add* Janaki v. Narayun 39 Mad. 634 P. C.

P. 294. Mother is entitled to a share equal to that of a son in a suit for partition between her sons and step-sons and the possession of separate property may reduce her share *pro tanto*. Sarut Chand *v.* Pani, 19 Oud Cas. 240.

P. 307. A Hindu wife is not entitled even to bare maintenance when she is unchaste and persists in her viceous course, Debi Saram *v.* Daulata, 39 I. C. 10. 45 All. L. J. 169.

P. 311, l. 21. After 'daughter-in-law' *ædd* 'or the widow of a deceased coparcener.'

Foot note (3)—*Add* Parwati Bai *v.* Chatree Limbaji, 36 Bom. 131.

P. 312. After l. 2 *add*—The same rule applies to a widowed daughter-in-law.

Foot note (1)—Sukan Saha *v.* Musmut Gangajali, 13 I. C. 136. Subaji *v.* Rangubai, 14 I. C. 821.

P. 315. In fixing the amount of maintenance of a widow provision must be made for her reasonable wants which include charities and religious obligations and for her residence in addition to her food and raiment according to her status in life. Kewati *v.* Chandu Lal, 36 I. C. 985. 123 Punj R. 1916.

P. 317. Maintenance of widows is a charge on the estate. Raghunath *v.* Kura, 38 I. C. 167 (Patna).

P. 348. The Madras High Court has held that whether a female if acquired absolute right by adverse possession is a question of intention, the presumption being in case of a mother for instance that she held as heiress of her son. In *Re* Prattipath Seshayya, 15 I. C. 403.

Land forming the emoluments of the office of Moniegar which had been enfranchised in favour of a Hindu woman has been held to be her Stridhana. Slemma *v.* Lutchman, 21 Mad. 100.

In foot note 4.—*Add* Veeraghava *v.* Kota, 33 I. C. 532.

P. 349. It has been held by the Privy 'Council that a woman took an absolute interest in immovable property conveyed by her future husband to her, heir heirs, executors and assigns. Bai Kessarbai *v.* Hansraj, 30 Bom. 431 P. C.

P. 350. In Bombay and Berars where the Mayukha prevails, property inherited by a daughter from her father has been held to be Stridhana. Gulappa *v.* Tayawa, 31 Bom. 463, Chandrabhaga *v.* Vishwanath, 20 I. C. 560.

P. 351. Foot-note (1) *Add* Jogindra Chunder *v.* Phani Bhushun, 43 Cal. 464.

Foot-note (3)—*Add* where it was held that in case of the property of a maiden who had inherited her mother's Stridhan, her brother succeeded in preference to the father. It was pointed out in 19 Mad. 109 that the case of the maiden was the only exception to the general rule as it came under Mitakshara Ch. 2, Sec. XI 30.

In foot 3 lost but one line *omit contra.*

P. 421. Coparceners are tenants in common under the Dayabhaga and there may be a suit for account against the manager. In Oude it has been held that under the Dayabhaga there may be a suit for account against the Kurta but no money relief can be granted. Sarat Kumar *v.* Bholanath, 15 I. C. 616.

P. 422. Under the Mitakshara, no succession certificate is necessary even for a minor adopted son in respect of ancestral

property. Ramanathan *v.* Subramaniam, 28 I. C. 688, Subramaniam *v.* Rokku, 20 Mad. 232 overruling Vencataramanna *v.* Vecaya, 14 Mad. 377. See Perayya *v.* Ahmad, 27 Mad. L. J. 236.

The joint property of a Mitakshara family can be placed under the charge of the Court of Wards by the managing member. Golab Sing *v.* Raja Seth Gokul Das, 40 Cal. 78 P. C.

P. 423. Coparceners can sue to recover possession of the entire property against a trespasser let into possession by one of the coparceners, even if he be the manager, by making the latter a party defendant. Narainbhai *v.* Ranchol, 26 Bom. 141, Jainarayan *v.* Ram Kishore, 40 Cal. 966 P. C.

Foot note 5—*Add* Muhammad Sadiq *v.* Khedan, 1 Pat. L. J. 154 refusing to follow Sati Prosad *v.* Radhanath, 16 Cal. L. J. 427.

P. 424. When a bond stood in the name of three members of a joint family and one of them died before suit, the survivors alone have been held entitled to sue on it as the representative character which the family gave to them continued. Ramkishore *v.* Parmeshri, 14 All. L. J. 255. See 33 All. 272 P. C., 34 All. 567 F. B.

P. 431. *Add* the position of a manager is not that of an agent or a partner but is like that of a trustee. Annamalu *v* Arjun Sing, 30 I. A. 220. See 26 Mad. 544.

P. 436. Where father and son trade together the presumption is not that the son is a partner but the business becomes joint family business and the acquisitions of both parties become joint property. Narasunhappa *v.* Chinua, 38 I. C. 744.

There has been a difference of opinion in Madras about the rights of minor and other coparceners whose names do not appear on a partnership between the managing member and strangers. Spencer, J., held that a coparcener had no right to sue for dissolution or for an account. Phillips, J. held otherwise. Grandhi *v.* Gangayya, 38 I. C. 111.

P. 437. Foot note 4—*Add* Doraisami *v.* Nundusami, 38 Mad. 118 F. B.

P. 463, l. 14 For 'to' *read* 'of'

l. 16 *add* after 'family' 'or of his own interest in such property.'

l. 16.—*Add* a separated coparcener when he adopts thereby becomes a member of a joint family and cannot make a valid will. Vencataramayan *v.* Subbammal, 42 I. A. 125.

In Patna it has been held that a coparcener cannot alienate his own undivided interest but in execution his interest may

pass and the auction purchaser may sue for partition. Soman Koeri *v.* Ramkinker, 38 I. C. 222, 1 Pat. L. R. 16.

Foot-note (1)—*Add* Subba Reddi *v.* Darasami, 30 Mad. 69, Praglal *v.* Rameshar, 20 I. C. 921.

P. 464. L. 5—After 'consideration' *add* 'of his own share without necessity.'

In Madras it has been recently held differing from earlier cases that an alienation for consideration of a joint undivided share has effect of an equitable transfer entitling the alienee to sue and to get a decree for partition. Maharaja of Bobbili *v.* Vencataramangalu, 25 I. C. 585. *Contra* 25 Mad. 716. 35 Mad. 47, 23 Mad. L. J. 64.

Foot-note 2.—*Add* Vadevelum *v.* Natesa, 37 Mad. 435. Hira Ram *v.* Udhe Ram, 19 I. C. 861 (Nagpore).

P. 470. An unjustified alienation by a father or manager without necessity is only voidable and when the sale is set aside, the sons are entitled to mesne profits only "from the date on which they gave notice of their option to avoid it to the purchaser." Bhrigu Nath *v.* Narsing, 39 All. 61.

P. 475, l. 1—After (1) *add* 'the doctrine of necessity has been supposed in such cases to have merged in that of benefit to the estate.' Sakrabai *v.* Mangar Lal, 28 Bom. 206. South Indian Export Co. *v.* Subbier, 28 Mad. L. J. 696. Muneshar *v.* Arjun Sing, 34 I. C. 738. See 33 I. C. 60, 26 Mad. 505. 17 I. C. 609.

The Patna High Court has held that when a manager contracts a debt or makes an alienation for necessity and for the benefit of the family, it binds the other coparceners whether they are adults or minors. Mandil *v.* Megh, 1 Pat. L. J. 39.

P. 481. In Nagpore the Full Bench decision of the Allahabad High Court (31 All. 176) to the effect that a Hindu father cannot alienate ancestral property so as to bind his sons, except to pay off an antecedent debt or for legal necessity has not been followed. It has adopted the Bombay and Madras rule that such an alienations for consideration will pass the father's undivided share. Bhajrag *v.* Nathuram, 37 I. C. 498. 12 Nag. L. R. 161. See 33 I. C. 60, 26 Mad. 505, 17 I. C. 609.

P. 481. Foot-note (4)—*Add* Nandram *v.* Bhupal, 34 All. 116, Chandradeo *v.* Mata, 31 All. 176, Rao Raghunath *v.* Nazir, 19 I. C. 639.

P. 482. Foot-note (2)—*Add* Sarabjit *v.* Garbuksh, 19 Oud Cas. 152. See 19 I. C. 639.

Foot-note (3).—*Add* Tribeni Pershad *v.* Ram Narain, 20 I. C. 951.

P. 482. Rate of interest at 18 p. c. compound interest is exorbitant and the necessity for borrowing by the father at the rate must be proved. The rate was reduced to 10 p. c. simple interest though the debt was for family necessity. Lal Singh *v.* Surjan Singh, 15 All. L. J. 124, 38 I. C. 564.

P. 484. On a money decree being executed against the father joint property was attached. The sons brought a suit for a declaration that the debt was illegal and immoral and not binding on them. Pending the suit an order was passed that the right, title and interest of the judgment-debtor should be sold and the sale took place accordingly. The suit of the sons failed. The Privy Council held on the authority of Mahabir Prosad *v.* Markunda Nath, (17 I. A. 11) that in cases of this kind it is of the utmost importance that the substance and not the mere technicalities of the transaction should be regarded and that notwithstanding the observations in Simbu Nath *v.* Golap Sing, (14 I. A. 77), the entire family property passed though it was described as the right title and interest of the judgment-debtor. Sripat Singh Daga *v.* Maharaja Sir Prodyot Kumar Tagore, 21 C. W. N. 442.

P. 495. In Allahabad in the latest case on the question, it has been held that when ancestral property is sold in execution of a decree against the father, the sons can set the sale aside only by showing that the debt was illegal or immoral. Panaru Sukul *v.* Baldeo Sahai, 21 I. C 46. Pakhpal Sing *v.* Chhutta Sing, 9 All. L. J. 653, Jadunath *v* Bhabuti, 33 I. C. 785 (Punj.) Gurnarain *v.* Gulzari, 17 Oud Cas. 318 Ponnappa *v.* Pappuyyangar, 4 Mad. 1 F. B.

P. 499. Foot-note (4)—*Add* Biswanath *v.* Jagdip, 40 Cal. 342.

P. 501. Last line after 'dismissed' *add* the decision has been followed in a recent case in which it was held that when the managing member was sued alone the suit was good but otherwise all the members were necessary parties and if one of them was left out and afterwards brought on the record after the period of limitation the whole suit must be dismissed on the ground of non-joinder. Jugol Kishore *v.* Gunga Sing, 21 I. C. 712.

P. 502. Foot-note (3)—*Add* Lal Bahadur Sing *v.* Abheru Sing, 13 All. L. J. 138 F. B.

P. 508. In the Punjab it has been held that where the father at the time of the alienation was leading a licentious life beyond his means, was indulging in drunkenness and debauchery and was without any business or occupation, it is unnecessary to prove that each item of the consideration was spent on immoral purposes. Kishen Sing *v.* Bhugwan Das, 31 I. C. 476. Ramnath *v.* Bolaquee, 50 Punj. R. 1913.

Foot-note (1)—*Add* 36 Bom. 68, 17 C. W. N 250, 124.

Foot-note (3)—*Add* 39 Cal. 843.

P. 510. Foot-note (1)—*Add* Sumer Sing *v.* Liladhur, 33 All. 472.

Foot-note (2)—*Add* 37 Mad. 458.

Foot-note (4)—*Add* 14 Mad. L. J. 372, 38 I. C. 161.

P. 512. Alienation of joint family property for an antecedent time-barred debt is not binding on the sons existing at the time. But the aliance is entitled to the father's share. In Bombay an alienee without valuable consideration has no right but an alienee for a consideration acquires a right to the share of the father by partition and not to joint possession before patition and in a suit by the son's possession of the whole may be granted subject to the declaration of the above rights of the alienee. It was also held differing from 21 Bom. 797 and 14 Mad. 408 that the interest that passed to the alienee could not be deminished by the subsequent birth of other sons. Naro Gopal *v.* Paragowda, 19 Bom. L. R. 69.

P. 521. In a very recent case the Privy Council has held that in case of a void gift by the father when some of the sons were born after the alienation, they as well as the sons born before had equal rights to the share so alienated. Ramkishore *v.* Jainarayun, 40 I. A. 213.

A son in the womb can question a will by the father. Hanumaut *v.* Bhimacharya, 12 Bom. 105, Minakshi *v.* Virapi 8 Mad. 89.

A gift by a father when a son was in the womb is invalid and its invalidity cannot be cured by his subsequent death. Jogjivan *v.* Patraj, 38 I. C. 449 (Oude).

P. 523. In a mortgage suit against the father and the son, the son was excepted. The Allahabad High Court held that the creditor might afterwards bring a suit against the son for the unsatisfied portion of the decree. (Jogeshwar Rai *v.* Aurut Rai, 35 All. 302). It has also been held that the creditor may give up the sons who were brought on the record and in execution of the decree against the father alone bring the entire property to sale but the sons can come in the execution proceedings and prevent the sale by showing that the debt was not binding on them being illigal or immoral. Indu Lal *v.* Imperial Bank, 37 All. 214.

In case of a *bonâ fide* and not collusive partition between father and son the Madras High Court held that the creditor would have to bring a fresh suit against the son to enforce the decree against the family property in the son's hands. (Krishnasami *v.* Ramasami, 22 Mad. 519). The Allahabad High Court in the most recent case in the question has

differed from the Madras Court. (Indar Pal. *v.* Imperial Bank, 37 All. 214 mentioned above).

P. 566 It has been held in Madras that an agreement that only the income of the family property should be divided does not prevent partition by metes and bounds as that would be opposed to the ordinary incidents of joint property. Muthusami *v.* Muthusami, 27 I. C. 3. Subbaraya *v.* Rajaram 25 Mad. 585.

Add after l. 13 where no equitable ground is made out for not giving effect to the agreement. (Chaita Dassi *v.* Madan Chandra Das, 33 I. C. 33).

P. 567. The mother or any other proper guardian can on behalf of a minor consent to a partition or demand a partition. Pothe Naicken *v.* Najamma, 28 I. C. 628. A partition made by the adult members in which a minor was given an extra share in recognition of his rights of primogeniture was held binding and enforceable by the minor on attaining majority. Ayudha Sargu Prasad *v.* Sitaram, 29 All 37. Aumamali Chettry *v.* Muragasa 30 I. A. 220.

Foot-note I.—*Add* Bale *v.* Girja, 20 I. C. 563 (Nagpore).

Foot-note (3).—*Add* Sarabjit *v.* Indrajit, 27 All. 203

P. 580. Where a coparcener was refused partition and remained out of possession and received no profits for 12 years and was denied maintenance, his claim was held to be barred.

The burden of proof was on the purchaser of the share of a coparcener who was admittedly out of possession to show that his vendor had been excluded within 12 years of suit. Sinnasami *v.* Subana, 26 I. C. 904. Ram Lakhi *v.* Durga Charan Sen, 11 Cal. 680.

Add to foot-note (8)—Jogendra *v.* Baldeo, 35 Cal. 961. Kulada *v.* Haripada, 40 Cal. 407.

P. 610. In the Punjab it has been held that the gains of a Vakil educated at family expense was joint property. Gokul Chand *v.* Hakim, 34 I. C. 714.

P. 615. Note 3.—*Add.* Sudarsanam v. Narasinhati 25 Mad., 149 P. C.

P. 631. *Add* in the end—The Smriti Chandrika says that a partition after reunion should be made according to the property brought into the common fund by each one of the members The Mayukha lays down that notwithstanding inequality of property brought in at reunion partition must be made on the basis that each had equal shares. The Madras High Court has in a case of partition after reunion given effect to the rule of the Smriti Chandrika. (Masjanath *v.* Narayana, 5 Mad. 362). But the Bombay High Court in a recent case has differed from it and given

effect to the rule of the Mayukha. (Pranjivandas *v.* Icharam, 17 Bom. L. R. 701, 30 I. C. 918). In another recent case the Madras High Court has held that on a partition in a reunited family as in an ordinary joint family, jewels made from the common fund exclusively used by some of the female members are their separate property and are not liable to partition. After a reunion the subsequent interest of the members could not be identical with the interest of coparceners in an ordinary joint family, and each members should have interest proportionate to the property brought in by him at reunion and in a second partition the shares will be proportionate to the properties brought in by each member at reunion and reunited coparceners are merely tenants in common. Before partition property goes by survivorship. After reunion the case is one of succession though the rule of succession may be different from that of separated individuals. (Alamelumauguthayaramma *v.* Namberummal Chetty, 15 Mad. L. J. 353, 23 I. C. 824.)

The opinion has been expressed in Sastri Golap Chunder Sircar's learned book on Hindu Law that a reunited son cannot claim preference to a son who is separate. Mayne and West and Buhler are of a different opinion and the Mayukha has specially given preference to the reunited son. The rule of the Mayukha has been adopted by the Nagpore Court (Sital *v.* Khetri, 21 I. C. 597) and the judgments of other Courts also favour this position. (Fakirappa *v.* Yellappa, 22 Bom. 104, Ramasami *v.* Vencatasam, 16 Mad. 490 P. C).

P. 665. In Bombay also the Dattaka Chandrika has been considered as a work of authority. (Waman *v.* Krishnaji, 14 Bom. 257 F. B).

P. 682. Foot-note (8)—*Add* Sundiji Sundiji, 32 Mad. L. J. 47, 38 I. C. 164.

The Chief Court of Lahore has held that the Khatris of Lahore can adopt a daughter's son. Nikki *v.* Giyar Mal, 34 I. C. 478.

Foot-note (5)—*Add* Putta Lal *v.* Parvati, 42 I. A. 156.

P. 700, l. 9—After sister's son *add* 'and daughter's son.'

P. 701, l. 7—After Madras *add* and Bombay.

l. 15—*Add* 'even in the case of the twice born castes.'

l. 20—*Add* after the above was written, the Privy Council has so held (Bal Gangadhur Tilak *v.* Srinivash, 42 I. A. 135). Sir A. T. Mukerji, J., in a learned judgment has doubted the authenticity of the Dattaka Chandrika and expressed the opinion that the Datta Homa is not necessary in any case. (Katki *v.* Lakpati, 20 Cal. L. J. 319).

P. 703. In the Punjab it has been held that the strict Hindu Law about ceremonies of adoptions is rarely observed there and the giving and accepting a child in adoption is what is essential even in the case of the twice-born Khatri. Nikki *v.* Gujar Mul, 34 I. C. 478. Harsahai *v.* Bhawan, 43 Punj. R. 1869. Musamut Parmeshri *v.* Vasdeo, 35 Punj. R. 1885.

P. 704. The Privy Council recently held that Agarwala Jainas belonged to the twice-born castes governed by the Mitakshara and a custom in derogation of Hindu Law must be proved by the party alleging it. Rup Chand *v.* Jamba, 37 I. A. 101.

Foot-note (4)—*Add* Kuppasami Reddi *v.* Vencatalakshmi, 31 I. C. 865, 18 Mad. L. J 434. Asita *v.* Nerode, 20 C. W. N. 901.

P. 707. An adoption does not take away the right of alienating self-acquired property. Taj Mulah *v.* Jugmohun, 1 Punj. L. J. 529. Sriramkrishna *v.* Court of Wards, 22 Mad. 888 P. C.

P. 708. In the most recent case on the question it has been held that an agreement between the natural father and the adopting mother by which the latter retained the right of management during her life-time was not binding on the adopted son as it was not fair and reasonable. Purshottom *v.* Rukhmabai, 23 I. C. 577.

P. 713. Translation of the Dattaka Chundrika, Sec. V p. 24-25 has been found to be incorrect, 32 I. C. 401.

l. 14.—*Add* since the above was written a Full Bench of the Madras Court has set aside the decision and also the decision that the concubine must be one who could be married according to the rules of his caste and has also expressed a doubt on the decision that a dancing girl attached to a temple could not be considered as a continuous concubine Soundarayam *v.* Arunachelam, 39 Mad. 136 F. B.

P. 723. Where there no need of adoption, no books of account showing the expenses incurred at adoption, no feast, no notification to the Government and ceremonies were of briefest kind and the boy was not taken to the adoptor's house the proof of adoption failed, Diwakar *v.* Chandan Lall, 44 Cal. 201 P. C.

P. 733. Dryamushyayana as mentioned in Mitakhara is obsolete but the Nitya Dwamushyana is still recognized in the Bombay Presidency. In that a stipulation that the adopted boy is the son of both parents is necessary and must be proved even if the boy be the only son of a brother. In the kevala adoption there is an entire cessation of the connection of an adopted boy with the natural father's

family. Laxmipatirao, *v.* Vencatesh, 38 I. C. 552, 19 Bom. L. R. 23.

P. 771. In the latest case on the question it has been held that the illegitimate son is entitled to one-third of the estate when there is a daughter. (Gangabai *v.* Bandu, 32 I. C. 786, 18 Bom. L. R. 70). The judges were of opinion that according to the rule of construction adopted by the Mitakshara, the illegitimate son would be entitled to half the share of a legitimate son or daughter, if there were two legitimate sons, *i.e.*, ¼th of estate, but they adopted the rule of the ⅓rd as it had been established by a long series of cases in Bombay, Madras and Allahabad. What would be share of the illegitimate son if there were more than one daughter or son has not been decided.

P. 771. Pollution on account of birth in a family does not vitiate adoption. Asita *v.* Nerode, 20 C. W. N. 90.

773. In a recent case the Privy Council declined to decide the question whether the son of a Kshatriya female married to the illegitimate son of a Kshatriya by a Muhammadan woman was legitimate but it was held that he could take under a will in which he was described as a legitimate son. Bhya Sher Bahadoor *v.* Bhya Gunga Buksh, 36 All. 101 P. C.

P. 894. Foot-note (3)—*Add* Babu Rita Koer *v.* Puran, : Pat. L. J. 581.

P. 915. Though a Mutt is governed by its special customs, the general usage to be presumed is that the head of a Mutt has the right to nominate his successor in his lifetime. He has, however, no right to alienate any portion of the Mutt property except for proper and necessary purposes.

Rajaram *v.* Bakarta, 38 I. C. 221—see 33 Mad. 265 F. B 43 Cal. 707. P. C. 33 I. 583.

A female is not disqualified from succeeding to a hereditary religious office and getting such duties as she may be incompetent tc performed by proxy. Raja Rajeswari *v.* Subramania, 40 Mad. 105.

P. 936. Where a Hindu by will directed that certain idols should be maintained out of the income of the property, the balance to be appropriated by the heirs, the bequest was a charge and not an endowment. Gunga Kunwari *v.* Pande Har Narayun, 15 All. L. J. 182, 38 I. C. 166.

P. 947. The members of the family of Pujaris having rights to the offerings of an ancient temple cannot alienate their rights to third parties and such alienations are void being against public policy and there can be no estoppel. Pancha Thakoor *v.* Bindeswari 37 I. C. 960 (Patna).

P. 977. Foot-note (3)—*Add* Jagdamba *v.* Wazir, 38 I. C. 255 (Serampore case).

P. 980. A creditor having a money decree against the holder of an impartible estate governed by the Mitakshara though he had not attached the property could follow the property in the hands of the successor of the latter as his assets liable for his debts Shyam Lal Sing *v.* Raja Bejoy Narayan, 2 Pat. L. J. 136 F. B. 39, I. C. 36.

P. 993. Kutchi Memons are governed by the Hindu Law in matters relating to succession and kindred matters but are governed by Mahammadan Law in matters of guardianship. Siddick *v.* Mahomed Hossien, 37 I. C. 728. (1916) 2 Mad. W. N. 341.

P. 996. A Hindu marrying a Burmese Kalac and becoming a Kalac may be a Hindu, (33 Mad. 342). It is not necessary to be a Hindu by birth to be governed by Hindu Law. There may be unorthodox Hindus—37 I. C. 780.

1016. In case of urgent and imperative necessity or where a transaction from its nature must necessarily be beneficial to a minor, a *de facto* guardian who is not the guardian in law can alienate both moveable and immoveable property of a minor. Hyderaian *v.* Syed Ali, 37 Mad. 514 Abid Ali *v.* Mahomed, 38 All. 177, Abul Hossin *v.* Mohammad, 35 I. C. 248, 19 Mad. L. J. 248.

P. 1016. An unauthorized guardian who is not the guardian in law but only *de facto* guardian can assume, important responsibilities in relation to the minor's property but cannot clothe himself the legal power to sell it. Matadin *v.* Ahmad Ali, 34 All. 213 P. C.

All the members of the joint family are personally liable for a debt contracted by the manager for the purposes of the family Sita Ram Sonar *v.* Raj Kumar, (Patna) 38 I. C 691, following Chalainayya *v.* Varadavy, 22 Mad. 166.

A surety obligation of the father is binding on the son even when no money had been advanced. Deo Narain *v.* Lal Harihar, 38 I. C. 821, 20 Oud. Cas. 1. Rasik Lal *v.* Singhaswar 39 Cal. 843. Sitaramayya *v.* Vencatramanna, 11 Mad. 373. Venkitachala *v.* Chettikuram, 28 Mad. 377.

ADDENDA.

On a simple bond executed by a Mitakshara father a decree may be passed against the father personally and against the son to the extent of the coparcenary property unless the son can show that the debt was immoral there being no duty on the creditor to show that the loan was for family purposes. Nathuni Sahu *v.* Baijnath, 2 Pat. L. J. 212, Ramasami *v.* Ulaganathan, 22 Mad. 49 F. B.

The managing member of a joint Hindu family who has executed an agreement to sell immovable joint property, if the agreement cannot be executed against the joint property, is personally liable for damages for breach of contract. Adikesavan *v.* Gurunatha, 40 Mad. 338 F B.

The managing member is not entitled without the consent of the other members to spend the family funds for his own defence in a criminal charge. Nathu Rai *v.* Donyal, 2 Pat. L. J. 166.

The Patna High Court has held disagreeing with Lala Suraj Prosad *v.* Golab Chand that a minor son not made a party even with knowledge in a mortgage suit against the father cannot bring a redemption suit only on that ground notwithstanding order XXXIV, rule 1 and Sec. 85, Transfer of Property Act. "If the mortgage was a family transaction the whole family is on the record through the head of the family. All that the junior members can claim is that they ought not to be debarred from trying in a suit of their own the fact or the nature of the transaction." Raghunundun *v.* Parmeswar, 39 I. C. 779, 2 Pal. L. J. 306.

A gift of land to a widow by her husband is presumably for her life. Properties acquired by a Hindu widow out of the income of the life estate and not kept separate are accretions. Sasisnau *v.* Sibnarain, 39 I. C. 755.

A Mohunt or Manager of a temple can make only temporary arrangements and in case of the grants of a permanent lease or alienation, it is for the lessee to show necessity for the arrangement, even if it is a commutation of service rent, but it is necessary to set aside such arrangement within 6 years of the death of the Mohunt who made the alienation. Surya Dutt Doloi *v.* Ekadahea, 39 I. C. 522.

When the lender and borrower are both dead and when successive Mohunts have recognized a mortgage the Court should be more easily satisfied of its necessity than in the

case of a debt of recent date. Murgesam *v.* Gnana Sambandh, 40 Mad., 402 P. C.

It is a breach of duty on the part of a Mohant or Shebait to grant a permanent lease either of agricultural or town lands without necessity, even if the transaction be pecuniarily profitable and reasonable and prudent. Benefit was not defined but preservation of the estate from destruction, protection of it or portions of it from injury or deterioration by inundation, defence against hostile litigation and such things were held to be benefits.

The finding that for a long time permanent leases of temple lands are being granted and the alienees are in undisturbed possession is not sufficient for establishing custom. Palaneappa *v.* Sreemati, 39 I. C. 722, 21 C. W. N. 729 P. C.

When the managing members of a joint Mitakshara family mortgage the family property neither for necessity nor for antecedent debt, the mortgage is wholly invalid and no equities arise by which the shares of the mortgagors may be bound except under special circumstances. The question whether such equities would arise when there was an express or implied representation of authority to charge the property as decided in the case of Mahabeer Pershad v. Ramyad Sing (20 W. R. 192) was left undecided.

Lachhman Prasad *v.* Narain Prasad, 40 I. C. 284 P. C.

Institution of a suit for partition though the suit may be dismissed is sufficient to constitute separation.

Kawal Nain *v.* Budh Sing, 40 I. C. 286 P. C.

It is the pious duty of sons to pay debts incurred by the father for defending himself against a criminal charge.

Chuman Chaudhury *v.* Ram Sunder, 39 I. C. 861.

Usage governs succession to religious institutions.

Ram Parkash Das *v.* Anand Das, 43 Cal. 707 P. C.

It is by the ordination of the head of a Mull that a Sanyasi can be a members of it.

Narayana *v.* Ittule, 39 I. C. 893.

Art. 49 of the Limitation Act is inapplicable to a suit to declare an alienation by a natural guardian invalid.

Appana *v.* Appana, 40 I. C. 405.

It is sufficient to effect a severance of joint rights to execute a unilateral declaration of separation which does not require registration.

Sikhamani *v.* Ammani, 40 I. C. 36.

The transferee of a house from a cowidow has no right to disbursement for improvement.

Musmut Nandi *v.* Sarup Lal, 40 I. C. 71, 15 All. L. J. 509.

The father in a Mitakshara family can with the consent of the adult son and of relations interested in the minor son can make a valid disposition by will in favour of female members of his family provided it is reasonable.

Appan Patrachariar *v* Srinivashachariar, 40 I C 118, 32 Mad. L. J. 364.

After a partial partition the possession of one member of the undivided portion is on behalf of all Jagdamb *v.* Bikulal, 40 I. C. 115.

A gift by a widow of the entire estate to the next reversioner is valid in Allahabad. Sham Rathi *v.* Jaiccha Kunwas, 40 I. C. 117, 15 All. L. J. 304.

The Patna High Court has held that a son could sues for partition even when his father and grand father was living. It was also held that the existence of a minor who was not represented in the suit would not vitiate the decree if it was not prejudicial to him. Ajodhya *v.* Manohar, 40 I. C. 131.

Specific performance of a contract for sale by the manager of a Mitakshara family can be enforced even when there are minors but not unless it is shown to be for the benefit of the minors. Hari Charan *v.* Kavla Rai, 1 Pat. L. W. 587.

P. 354, l 6. In Madras the same rule has been established. Mittukarapa *v.* Sellatamal, 39 Mad. 298.

Authourity to adopt does not curtail powers of widow. Akanmal *v.* Vinkayya, 12 Mad. L. J. 1.

Widow's position is analogous to that of a tenant-in-tail. 3 C. W. N. 637.

Father's sister has been preferred in Bombay and Nagpore as Bandhu to the maternal grandfather. Madho *v.* Janki, 36 I. C. 514 ; Saguna *v.* Sadasiva, 28, Bom. 710.

दत्तानां चाप्यदत्तानां कन्यानां कुलनेपिता ।

Smriti on Sraddha cited in the Nirnaya Sigdhu.

स्वसा स्वसीयतत्पुत्रभ्रातिसञ्चिवान्धवा. ।

पुत्राभावे तु कुर्वीत सपिण्डान्तं यथाविधि ॥

Text of Vridha Manu cited in the Prithvi Chandrodaya and from it, in the Nirnaya Sinhhu.

दाये तूर्ध्वतनाख्यायान् सम्बन्धीऽधस्तन त्रिये ।

अध ऊर्ध्वक्रमात्क्षीत. पुमान् मुख्यतर क्रृत. ।

तथापि सन्निकर्षेण सम्बन्धी दायमर्हति ।

अप्रतस्थ हरेदर्थं पत्नु हैंहार्थहारिणी ।

अतः सत्वांस्तोदरायां वैमात्रेयोधनं हरेत् ।
एवं स्त्रितायां कन्यायामकृतं पुत्रवधूगतम् ।
तन्मृते स्वामिनं प्राप्य श्वशुरात्तत् सुतामियात् ।
अजीवत् पितृकः पौत्र. पितृव्यैः सह पार्वति ।
पितामहस्य द्रविणात् स्वपितुर्हांशमर्हति ।
भ्रातृहीना तथा पौत्री पितृव्यै. समभागिनी ।
सत्वां पौत्र्यां पितामह्यां पौत्रा: पितृधनस्यापि,
वित्तेपितृगते देवि पौत्री तत्राधिकारिणी ।
अतः स्नुषायां पौत्र्याश्च सत्वांदुहितरि प्रिये ।
प्रतस्य विभवं कृत्स्नं नैव गृह्णीति तत्पिता ।
मातामहगतं वित्तं मातुर्नैव सुतादिभिः
अधश्चतुर्थक्रमेणैवं सुमांसंक्रियमान्नयेत् ।

महानिर्व्वाणतन्त्रम् १२अ ।

CORRIGENDA.

P.-21 l 1 मामवा should be मानवा, l 15 मूड़: should be मूल । Omit l 16 in l 18 इच्छते should be इच्छते and काङ्क्षि should be काङ्क्षि । p 22 l. 2 पर should be परि, l. 7 कोसिम should be कौत्सीं । p 23 l 2 रा should be र. and ता. should be त । p. 25 l. 17 ङ्ि should be ङा, l 18 वरदो should be परदो । p 26 l 11 तभ्या. should be तभ्या:, p 29 l. 1 खसा should be स्वसा, l 6 क should be का, l. 30 भ should be भा । p 34 l. 21 त should be ते । p. 35 l. 5 रा should be रा । p 36 l 11 ताभि should be तानि, l. 30 धिक should be षिक । p. 38 l. 21 धर्म्म should be धर्म्मं, l. 32 after texts add are. p 41 l 20 वात should be वान, l 21 सस should be सस्ं, l 27 ने should be षे । p 53 l 24 के should be मे, l 35 omit 'the'. p. 55 l 19 न should be ण । p 57 l 9 पो should be प्रो, l 16 नाद् should be नाद्ं, l 33 दो सके should be दौ सक्ु । p 58 l 14 फ should भ, l 16 म should be म् । p. 66 l 34 तस्य् should be ततग्द, l 36 व्यां should be थ्यां । p 67 l 1 सम्य should be सम्य् । p 69 l 5 हो should be हौ । p 71 l 7 न् should be म् । p. 72 l 8 स्व should be स्य । p 73 l 13 भू should be मू । p. 75 last line व्येन should be व्येष, l 24 सग्रा should be सग्र । p 78 l 25 त्वे should be तेऽ, p 86 l 27 च should be च । p. 85 l. 4 ङं should be ङ्ं, ष्ु should be ष्ु । p 88 l 4 नं should be ना । p 89 l. 33 नं should be र्ं । p. 90 l. 18 थे should be र्थे । p. 91 l 13 ज्य should be ज्यं, l 15 रा should be वा । p 105 l. 15 and ता should be ता, l 22 य should be त and ध should be ध, l. 28 पो should be पौ । p 107 l 18 या: should be य:, l. 19 का should be सा, l. 23 पो should be पौ, ओं should

be भी। p. 108 l. 18 ख्न should be ख्न, l. 21 अ should be त and अः should be अ। p. 111 l. 20 ओ should be औ। p. 164 l. 23 ष should be त, l. 21 ख्न should be ख्ना। p. 167 l. 9 ये should be वे, l. 10 यो should be यो। p. 168 l. 12 यो should be वौ। p. 169 l. 8 'made' should be 'male', l. 18 ब्ये should be ब्येऽ, l. 21 one should be on. p. 173 l. 20 तं should be त, l. 23 तच्च should be तत्सु, l. 25 ह्न should be ह्नं, l. 27 पिच्छ should be पिच्छाः। p. 174 l. 4 आ should be आ, अ should be अू। p. 176 l. 7 स should be सं l. 9 ख्ना should be ना। p. 177 l. 1 ग्रा should be ग्र, l. 26 after 'father' add 'or the mother'. p. 191 l. 22 ङि should be पि। p. 193 l. 4 भि should be षि, l. 8 टा should be षा। p. 196 l. 4 तु should be सु। p. 200 l. VIII should be VII. p 202 l. 7 षि should be षि। p. 220 l. 21 रे should be रि, l. 26 ह्नि should be ह्नं। p. 222 l. 31 ह्नो should be ह्नौ, l. 35 ह्नि should be ह्नं। p. 223 l. 17 ख्य should be ख्या। p. 225 l. 11 ओ should be औ। p. 226 l 16 omit ऽ। p. 228 l. सु should be सू। p. 284 l. 12 क should be कु, l. 14 स्त्री should be स्त्री। p. 299 l. 12 ह्न should be ख्न। p. 300 l. 8 दत्त्वां should be दत्त्वा। p. 301 l. 21 after हरौ add ऽर्द्धहरौ, l. 22 ष should be अ। p. 302 l. 10 जैत्र should be जैत्र and न should be त्र, l. 17 ता should be ताः। p. 324 l. 14 आ should beआः। p. 326 l. 1 क्रियाच्छ should be क्रियायुक्ता, l. 4 ख should be खं। p. 371 l. 3 क should be क्। p. 374 l. 5 दुहित्रा should be दुहितृ। p. 375 l. 11 सौं should be सौ। p. 376 l. 28 धन should be धनं। p. 377 l. 2 षा should be षां। p. 380 l. 1 अ should be अ, l. 13 ख्ना should be ख्ना। p. 441 l. 4 त should be व, l. 9 च should be चे। p. 445 l. 11 ख्ना should be ख्ना। p. 446 l. 2 ह्नत should be कृतं। p. 452 l. 10 स should be अ। p. 532 l. 9 दुा should be दूा। p. 540 l. 5 द should be ह्न। p. 541 l. 12 तं should be तं। p. 589 l. 1

हि should be हिं। p. 597 ष्ठा should be ष्ठा, l. 34 म प्रचारव्यापारां should be म् प्रचारव्यापारां। p. 603 l. 32 षि should be षि। p. 604 l. 11 जा should be जां। p. 621 l. 10 omit द्, ङ्कं should be ङ्कं। p. 623 l. 31 ष्ठा should be ष्ठेऽ। p. 639 l. 4 ष्ठा should be ष्ठा, l. 5 ड should be पू, वसो should be वसौ, l. 6 नां should be रां। p. 645 l. 4 न should be ना, l. 4 त should be तः। p. 744 l. 32 ख should be खं। p. 749 वा should be वा। p. 750 l. 10 व्य should be ष्य। p. 758 l. 18 च should चे, क्ष should be क्ष, l. 25 भ्यं should be ख्यं। p. 762 l. 19 मज्जौ should be मौज्जौ। p. 783 l. 47 मत्वा should be मतां। p. 828 l. 4 भ should be सु। p. 832 l. 1 न should be त। p. 833 l. 28 रण should be रण। p. 834 l. 9 ण्या should be ख्या, l. 11 षु should be सु, l. 15 तो should be ता, ज्ञा should be ख्या। p 840 l. 10 र्व्वा should be र्व्वां, l. 14 ज्ञा should be ख्या। p. 842 last line ष should be ष्ठ। p. 847 l. 1 ज्ञ should be ज्ञ। p. 863 l. 14 ष should be ष। p. 854 l. 14 ड should be द्, p. 856 l. 23 वा should be या। p. 857 l. 8 ल् should be लि, l. 9 after धौ insert य। p. 859 l. 10 भाग should भागं। p. 867 ष should be षं, l. 16 ष्व should be ष्यु। p. 871 l. 24 ष्वे should be ष्ये। p. 873 l. 27 षि should be षिं, l. 13 ज्ञा should be ख्या। p. 874 l. 4 विद्यवते should be विद्यावते। p. 918 l. 18 omit one ष। p. 934 last line ष्यु should be ष्यूं। p. 929 l. 32 षि should be षपि। p. 972 l. 25 तत्तोप should be ततोऽ, l. 29 जोष should be जोष्ट। p. 999 l. 26 कः should be काः। p. 100 l. 3 पुरयास should be पुरयाम। p. 1005 l. 29 सा should be षा। p. 1032 l. 33 वा should be वां। p. 1035 l. 2 थ should be ष। p. 1036 l. 1 ष्म should be ख्य, l. 7 यौं should be यो। p. 1037 l. 1 षि should be षिं, l. 11 द्यु should be ष्यू। p. 1038 l. 24 नौ should be नौ, l. 26 त should be ष, l. 38 ष्ट should be ष।

P. 63 L. 26 i. e. should be 'are,' l. 32 Sradba should be Sradha. p. 64 l. 2 aecestors should be ancestors. p. 98

VI should be IV. p. 143 l. 31 except should be excepting. p. 158 l. 28 conservy should be contrary. p. 204 IX should be VIII. p. 260 l. 1 nocessity should be necessity. p. 401 l. 3 divisions should be decisions. p. 616 l. 12 lio should be liv. p. 665 l. 10 after also add in Bombay. p. 857 l. 31 girl should be girls. p. 913 l. 20 'reaching' should be 'teaching.' p. 914 l. 19 'premgeniture' should be 'primogeniture.' p. 917 l. 11 'sanayasi' should be 'sannyasi.' p. 925 in marginal note 'whether presumption' should be 'presumption whether.' p. 946 l. 19 omit 'that.' p. 975 marginal note valed should be valid. p. 996 l. 14 slokes should be Stokes. p. 1023 marginal note 'just' should be 'default.' p. XL, l. 26 omit the entire reference to Vachaspati Misra which is incorrect. p. 765, foot note (1), 7 should be 17. p. 320, foot note (3), add 12 Mad. 260, 2 All. 141. p. 280, foot note 2, add 6 W. R. 305, 18 W. R. 406. p. 728, foot note 2, 83 should be 110.

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HINDU LAW

CHAPTER I.

HINDU JURISPRUDENCE AND SOURCES OF HINDU LAW.

Definition of Law.

Law as understood by the Hindus is a branch of Dharma. There is no definition of law in the Smritis. The definition of Dharma is "what is followed by those learned in the Veda and what is approved by the conscience of the virtuous who are exempt from hatred and inordinate affections." The test of right conduct is that it leads to independence of every other being and matter, and makes one perfectly self-contained and satisfied. That which leads to dependence is not right conduct. "Men act from a desire for rewards," but "it is not laudable." Men should do their duty not from the fear of punishment nor from a desire of reward. Dharma should first be ascertained and then strictly followed. The whole course of duty is contained in what has been revealed by the Divine Being. The rules of Dharma are not founded on any worldly cause. They should be ascertained from four sources,—the Vedas, the Smritis, the conduct of the virtuous, and one's own conscience. The sanction of law is contained in itself. "Dharma destroys those that disobey it, and preserves those that follow it." It derives its sanction from no earthly power. It is the duty of the king to ascertain the law and then to promulgate and enforce it. Kings and assemblies can make no law. Their duties are strictly prescribed in the Dharma. They too should ascertain their own duties from the abovementioned four sources. If

they fail to do their duty, they shall certainly meet with the punishment, which follows from the very nature of the Karma or act. If a man commits a wrongful act, he should not avoid the punishment which the law imposes. If it is a sin not punishable by the king, he should perform the necessary expiatory act. If it is an act punishable by the king, he should go to him himself, and take the punishment. "Men who have committed crimes and been punished by the king, go to heaven, being pure like those who perform meritorious acts." This is in short how Law and its character are described in the Smritis.

Sanction of Law and Karma.

The doctrine of Karma as mentioned above, is supposed by many to be the final sanction of law and is variously explained. According to the Mimansakas, as Colebrooke says, "the action ceases, yet the consequence does not immediately arise; a virtue meantime subsists unseen but efficacious to connect the consequence with its past and remote cause, and to bring about, at a distant period or in another world, the relative effect. That unseen virtue is termed *Apurva* being a relation superinduced, *not before* possessed." In this theory, Divine power or the power of the king was not necessary to support the law, which was based merely on the texts of the Scriptures. This philosophic doctrine, whether it owed its origin to Buddha or not, was generally accepted when Buddhism became the prevailing religion and is still one of the guiding principles of the life of a Hindu. After the downfall of Buddhism in India, the doctrine of Karma still held its sway over the minds of the learned and one of the great feats of Sankara-

charya, who re-established Hinduism was the defeat of Mandana Misra, the great leader of the school of Karmabadin philosophers. The doctrine of Karma still remains as a doctrine generally accepted and glibly talked of by every Hindu but it would be a mistake to suppose that it is the true rule of Hinduism. As a matter of fact, true Hinduism bases all Dharma and all consequences of Karma on the Will of God, notwithstanding prevalent sayings that even God cannot prevail against Karma.

Foundation of Law.

Plato at the commencement of the Dialogue on Laws, lays it down as a fundamental principle, that the end of legislation is to make men virtuous. There is a great similarity between the Hindu and the Platonic ideas of law and its object.* But the Hindu idea is entirely based on a spiritual basis, and is more full and certain, and more clearly expressed. The modern schools of jurisprudence beginning with Bentham and Austin are considered as more scientific and rational. Many of the modern theories about law and its objects were, not quite unknown to Hindu-writers. But the Rishis tried to ascertain absolute truth, though their speculations very often led to no scientific results. According to them, that which does not lead to spiritual progress is not good conduct. Law is certainly not based upon the authority of Kings and Parliaments, or on the authority of the people at large. Morality, Virtue and Law are based on the idea of the Good. The

* Socrates, when advised by Crito to make his escape from prison, replied that the laws would say, "Tell us Socrates! what do you purpose doing? Do you design anything else by this proceeding in which you are engaged, than to destroy us, the laws, and the whole city as far as you are able?" Hindu Rishis when speaking of Dharma would use very similar language.

few good and wise men try to give expression to it and to realize it in life. The multitude are constrained to follow their example, for the good is in the hearts of all men, often unrecognized but still cherished and willingly obeyed above all things. All law is therefore, based not upon the four known Vedas alone, but on the Veda that is the will of the Righteous One as revealed in the universe and in the conscience of good men.

Origin of Law.

All human law had its origin in custom. But the Mahabharata like the Law-givers, would not recognize customs that are bad. It says that Dharma had its origin in good practices and that the unchangeable One is the Lord of Dharma, probably meaning thereby that the Divine Providence so regulates the customs of men that they are always tending towards the perfect Divine Law. Certain practices first came to be recognized as good by the people and the laws were afterwards made, having for their basis those practices. Notwithstanding the claim to revelation and divine origin of their laws, the Rishis by ordaining that the decision of good men should have the force of law, admitted that their law might be made more perfect, only they would recognize the authority of men that are good, for modifying existing law. The practical effect of this position is that a rule of Hindu Law can be changed only by great inspired teachers and also when a practice, like the Niyoga, comes to be universally condemned by the people at large. A long list of abrogated practices mentioned in the Aditya Purana quoted in this chapter will show how Hindu Law has been modified in course of time.

King and the Law.

The Hindu system is an ascetic system, which lays down that Shreya or final salvation is the sole object of Law and that Preya or worldly pleasure is the enemy which does not lead to it. The object of law according to modern ideas is the worldly happiness of the many. The Mahabharata also says that the object of Dharma is the prosperity of all beings, Theoretically however, the object of law according to Hindu ideas is final salvation. The sanction of Hindu Law is supposed to be contained in itself. But abstract theories cannot support order in society. Therefore Narada lays down : "When Dharma (or abstract law) is destroyed then Vyavahara (or positive law for men) comes into force." "The king who punishes (the infringement of law) is the enforcer of law." Here the Hindu law agrees with the modern English Schools of Jurisprudence that the sanction of positive law proceeds from the king.

All systems of jurisprudence quarrel about the original source and objects of law. But when we come to practical law, all are agreed that the king, who alone enforces the law, can change or modify it and in reality all law consists of commands issuing from him. According to Hindu law also, it is the king, who alone enforces the law, the only difference being that as Hindu law is for all purposes supposed to be a revealed system of law based on the Vedas and the Smritis, the king cannot change the law at pleasure and must himself obey it ; but in practice as we have seen above, laws have been changed by Hindu kings to give effect to advanced ideas of morality, acting it is supposed on the opinions of good men which alone can change the Law. Practical law consists in the

ascertainment of the rules of law, the machinery for punishment for their infringement and the worldly power which enforces obedience to them. The Smritis contain the rules of law and provide also rules for the constitution of the judicial tribunals and their procedure. The power that enforces obedience and punishes is the *Dandadhar* king.

Eighteen division of Subjects.

Hindu jurists at a very remote period laid down eighteen divisions of subjects and treated of law under what are called the eighteen topics of litigation. These eighteen divisions became stereotyped and were found sufficient for all practical purposes, till the English system was introduced. These are according to Manu :—(1) debt, (2) deposit, (3) sale, (4) partnership, (5) gift, (6) wages including the law of master and servant, (7) transgression of compact, (8) breach of the contracts of sale and purchase, (9) master and herdsman, (10) boundary dispute, (11) personal violence, (12) abuse, (13) theft and deceit, (14) violent crimes, (15) relation between man and woman, including adultery and rape, (16) marital relation, (17) partition and inheritance including the law of joint family and the law of the separate property of females and maintenance, and (18) gambling.* Later

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तेषामाद्यं ऋणादानं निक्षेपोऽस्वामि विक्रयः ।
सम्भूय च समुत्थानं दत्तस्यानपकर्म च ॥
वेतनस्य च चादानं संविदश्च व्यतिक्रमः ।
क्रयविक्रयानुशयो विवादः स्वामिपालयोः ॥
सीमाविवादधर्मश्च पारुष्ये दण्डवाचिके ।
स्तेयञ्च साहसञ्चैव स्त्रीसंग्रहणमेवच ॥
स्त्रीपुंधर्मौ विभागश्च द्यूतसाह्वयमेवच ।
पदान्यष्टादशैतानि व्यवहारस्थितावपि ॥ Manu. ch. 8 V. 4-7.

lawgivers omitted one of these, the ninth and added one called the Prakirnaka or left out, or the miscellaneous, under which came the laws of slaves and of crimes against the king. These eighteen divisions were again divided into one hundred and thirty-two sub-divisions and included every possible form of legal obligation that arose in Hindu society and also provided for exceptions, such as minority, physical incapacity, fraud, force and the like, avoiding those obligations. The juristic ideas underlying ownership of property, and the ingredients of a valid contract, sale or gift are all dealt with in the chapters dealing with them. These ideas I have described in full in the subsequent chapters. The Smritis and the commentaries also lay down rules about judicial proceedings and criminal actions, as well as limitation and prescription.

Moral and legal obligation.

It is considered by many that there is no distinction made in Hindu law between moral and legal obligations. Indeed, all legal obligations are even now considered by many great jurists to be founded on moral obligations. To the Hindu mind, moral obligations were of greater importance than legal obligations. Punishments by the king for crimes were only forms of expiation of sins. The law of *Prayaschitta* or expiation is more important than the law of punishment or compensation. Nevertheless Hindu jurists, even so early as Manu, made a clear distinction between moral and legal obligations. Partition by the son against the father's wishes is immoral and deserving of expiation but it is allowed by law. The payment of debts of ancestors is a moral obligation but it was limited to the property inherited, according to

enforcible law. There is a clear distinction made between void and voidable gifts, sales and other contracts, which are all immoral and which are classified under two heads: those that are legally of no effect and those that are legally good but morally bad. The opinion of some learned writers on ancient law about the origin of moral and legal liabilities and the priority of the former receives no support from the ancient law of Hindus. Indeed, the distinction only arises when the people strive after an ideal, which is understood not to be realizable. In archaic society, there is not much of ideals and little of moral obligations. The truth seems to be that legal liabilities of ancient times, which were incompatible with the conditions of a more advanced society, were relegated in later books to the category of moral liabilities, which were not enforcible in court. However that might be, Hindu jurists not only clearly understood the matter, but they were the first to define the distinction between moral and legal obligations and base it on rational grounds. For example, the liability to pay the debts of the father was a legal liability only, when the debt was not of the immoral character defined in the Smritis and when there was inherited or ancestral property. The subtle mind of the Hindu Lawgiver left very little undefined and difficulties have arisen mainly on account of want of sufficient knowledge of it. The law of charge on immoveable property was, it is said, little understood but that was because of the ancient rule of the inalienability of land based on the joint family system that prevailed. Most of the other modern legal ideas were sufficiently enunciated by the

ancient commentators. It is far from me to contend that the Hindu system was so scientific as the modern systems of law. Indeed, it was very imperfect. But its imperfections arose from its ideals of life and morality and the family system and not very much from ignorance of legal ideas.

The stereotyped character of the rules of Hindu Law, which are supposed to be all of divine origin, left little room for philosophic discussion of juristic principles. They had all been subjects of long discussions during the period of extraordinary literary activity described in the introductory chapter, before they were so stereotyped. But it must not be understood that juristic principles were ignored in later times. The treatises of commentators amply prove that these principles continued to be discussed with great acuteness till very recent times.

Sources of Law.

The sources of Hindu Law as mentioned above, are: the Revelation, the Smritis, the conduct of the virtuous, and the satisfaction of the Spirit. The Puranas are also said to be of authority, where the Smritis are silent. The customs prevailing in the 'holy country of Aryavarta' should also be followed as they are supposed to be in accordance with the Sacred Law.

The peculiar customs of provinces, the customs of families, castes, guilds, artisans, merchants, and agriculturists should also be enforced by the king. Some of the Lawgivers and Commentators like Vijnaneswara, say that if opposed to sacred law, custom has no authority.

The law should be ascertained by reference to virtuous men. Virtuous men are defined to be those

who are "ever exempt from hatred and inordinate affections." The opinion of the people, who are not learned and virtuous, is valueless, and the only deference that should be paid to such opinion is that one should forbear from an act which is repugnant to the people at large.

Law as contained in the Sruti or the Vedas and the Smriti, has unquestioned authority with all Hindus. The Smritis are revelations remembered. Their rules are supposed to be the rules of the Vedas. Among Smritis, Manu is of superior authority, because it "embodies the essence of the Veda." All the Smritis purport to embody or to be based on one identical traditional law, which was probably originally known as Manu's Law. The Rik Veda mentions that the ancient rules of Manu should be followed. The rules of Hindu Law have come to be regarded as of modern origin and no attempt has hitherto been made to trace them to the Vedas. The reader of these pages will however, find that the texts of the Veda cited in the subsequent chapters leave no doubt that many of the rules of inheritance, partition and marriage were settled during the time of the Vedas. The Smritis we have got, were undoubtedly composed in comparatively modern times, but they were based on older treatises. The agreement among the Smritis also is so striking that one is led to refer them to one original source. The differences among the Smritis as to certain rules are easily explained, if their history is known.

I have already stated that Manu was the original of all the Smritis. That statement however should be received with some reservation.

There are certain rules of law, which are ascribed in the Smritis, not to Manu but to other Lawgivers. For example, the rule of interest is known as Vasista's law, the rule of custom is ascribed to Gautama, the rule of impartible things to Vrihaspati, the rule of woman's right to a share of the family property, if refused maintenance, is known as Likhita's law, the prohibition of Niyoga is ascribed to Aupajandhini and the rule that in the Asura form of marriage, Stridhana goes to the father, is said to have been laid down by Yama. It thus seems probable that though the traditional law of Manu was the basis of all law, the Lawgivers mentioned above grafted upon it certain rules in very remote times and we find most of those rules embodied in later times in what is now known as Manu's Smriti.

The Commentators and Schools of Law.

We find in the Smritis of Baudhayana and Vrihaspati a discussion as to the validity of certain customs of the Dakshinatyas, of the people of Northern India, of the people of Central India and of the people of Eastern India, which are opposed to the pure law of the Rishis. But there is no indication of the existence of any divergent schools of law. We find, however, in the Commentaries, mention of certain customs based upon divergent interpretations of certain texts about rituals. The Mitakshara speaks of the opinions of the Northerners as to the necessity of the Ekoddista Sraddha after the Parvana Sraddha had been performed. About the fifteenth century, we find Sayana saying in his commentary on the text of the Satapatha Brahmana about the prohibited degrees of marriage: "we unite in the third or fourth person," that the former is the custom of the

Dakshinatyas and the latter is the custom of the Shourashtras or the people of the Surat province. We find mention, in the later commentaries, of the opinions of the Gauras, the Maithils, the Dakshinatyas and the Maharashtras, about the readings and interpretations of certain texts. In the different provinces, there were different Schools or Universities, but they all taught the Smritis, though they sometimes differed as to the correct reading or interpretation of certain texts. But an incorrect reading or an incorrect interpretation of a text prevalent in one School, might be corrected and was corrected when its incorrectness was established in that School.

There were two classes of commentaries : commentaries of texts properly so called and digests with running comments on the texts. The distinction is not generally appreciated. The Mitakshara is a commentary on the Yajnavalkya Smriti, and as such, its authority is respected not only in the Benares School but also in Bengal. The Parasara Madhava is a commentary on the Parasara Smriti and a Bengal Pundit would be considered rash, if he ventured to differ from it on a question of the interpretation of a text of Parasara. In books of the other class, namely digests or Nibandhas, such as the Dayabhaga, the Mayukha and the Smriti Chandrika, we find that the writers, quote very nearly the same texts, but in their anxiety to distinguish themselves by their learning and ingenuity, they very often express divergent opinions on them and not unfrequently abuse one another. They all draw their own conclusions, from interpretations, which are reasonable according to them and sometimes cite certain rules of the Mimansa, when

their application supports their positions. The Commentators also have made their books as good digests of texts as the Nibandhas. There is still a great difference between a commentary and a digest; but both are now called commentaries by Hindu lawyers.

The so-called interpretations, according to reason of the Commentators, which are very often fanciful, have absolutely no authority, when opposed to the clear meaning of the texts. The Privy Council have, however, held that though they may be wrong, the authority of the Commentators having been recognized in certain provinces, the law laid down by them should be enforced as sanctioned by custom.(1) The Commentators themselves would have repudiated such a position. Vijnaneswara and Gimutavahana would both have been exceedingly surprised, if told that their interpretations of the law, say, on the question, whether the father is to be preferred to the mother as heir of the son, were binding because sanctioned by custom, and that custom could in this way change or modify the true law on the subject. The Hindu is governed by the Smritis and not by the Commentaries, and erroneous interpretations of texts cannot gain validity by being followed for any length of time. According to the Smritis, it is the clear duty of the King to establish the right law, if he finds it vitiated. Indeed Commentaries can and do only purport to give the true meaning of the texts according to their tenor and not in the light of custom, and it is difficult to see how, when the

(1) See the observations of the Privy Council in the case of Collector of Madura *v.* Muthu Ramalinga Sattupatty, 12 Moore, I. A., p. 397.

interpretation of a Commentator is proved to be erroneous, that incorrect interpretation can prevail over the correct interpretation. Their Lordships of the Judicial Committee in 1870, made the following observation in this connection : "The Hindu Law contains in itself the principles of its own exposition. The Digest subordinates in more than one place the language of texts to custom and approved usage. Nothing from any foreign source should be introduced into it nor should Courts interpret the text by the application to the language of strained analogies." (1) Again in 1899 their Lordships said : "They (the Smritis) contain precepts whose authority is beyond dispute, but whose meaning is open to various interpretations and has been and is the subject of much dispute, which must be determined by ordinary processes of reason." (2) Again in another case (3) in the same year, they said : "It seems to their Lordships that to put one who asserts a rule of law, under the necessity of proving that in point of fact the community living under the system of which it forms part is acting upon it, or defeat him by assertions that it has not been universally accepted or acted on, would go far to deny the existence of any general Hindu Law, and to disregard the broad foundations which are common to all schools though divergences have grown out of them." Indeed, as their Lordships in that case say, there is a general law for all Hindus but "special customs may be pleaded by way of exception." The reader of these pages

(1) Bhyah Ram Singh *v.* Bhyah Ugur Singh, 13 Moore, p. 390.
(2) 26 I. A., 131. (3) 26 I. A., 165.

will however, find that as it at present stands according to the decisions, it is difficult to say that there is a general law applicable to all Hindus. It is I am afraid, too late now in the day to contend that there is a surprising unanimity among the Rishis and that Commentators disagreed with one another because of their imperfect knowledge and not because they had to support the customs prevailing in their time. There would have been some hope for the restoration of the law of the Rishis in its purity with advancing knowledge and scholarship which will some day solve all the intricacies and apparent contradictions of the texts, but British Courts in the ends of settled government, have given an authority to the commentators superior to that of Rishis—an authority which they never claimed for themselves. Dr. Burnell, an erudite Sanskrit scholar and lawyer, in his preface to his translation of the Varadraja, makes the following just observations in this connection : "Another principle deduced by English lawyers is the doctrine of Schools of Law. This is unnecessary and foreign to the original texts and digests." Most Hindu lawyers would agree with Dr. Burnell. As it stands at present however, works "written," in the words of their Lordships of the Privy Council, "during the Muhammadan rule" and which "cannot be the work of a Lawgiver or Judge" have come to be of greater authority than books by the Lawgivers and great Judges of Hindu times. The translation of a book into English in the beginning of the last century, gave it authority as in the case of the Dattaka Chandrika, which is now admitted on all hands to be a fabrication. The translation of the Vivada

Chintamani before the Vivada Ratnakara, made the former a book of superior authority. Similarly, the translation of the Smriti Chandrika has made it a book the authority of which is superior to that of the Parasara Madhava. But history tells us that during the time of the Hindu Kings, the Vivada Ratnakara and the Parasara Madhava had unquestioned authority in Mithila and Southern India respectively. In Bengal, under the Hindu Kings, the Smriti of Halayudha, upon which the Mithila law is to a great extent based, represented the prevailing law of Bengal. But that book not being available in Bengal, the Dayabhaga, a comparatively modern book, about the author of which very little is known, having been adopted by Raghunandana, the leading authority on Smriti among Bengal Pundits, came to be regarded as the Smriti laying down the law for all Bengal.

In the most recent case on the matter, their Lordships of the Privy Council make the following observations about the Dattaka Chandrika and the Dattaka Mimansa, which are clearly applicable to all the Commentaries now regarded as of authority (1): "Both works have had a high place in the estimation of Hindu lawyers in all parts of India, and having had the advantage of being translated into English at a comparatively early period, have increased their authority during the British rule. Their Lordships cannot concur with Knox J. in saying that their authority is open to examination, explanation, criticism, adoption, or rejection like any scientific treatises on European customs, and it

(1) 26 I. A., 132.

would probably disturb recognized law and settled arrangements. But, so far as saying that caution is required in accepting their glosses where they deviate from or add to the Smritis, their Lordships are prepared to concur with the learned judge." The relative position of the Smritis and the Commentaries has thus at last been made clear. The Calcutta High Court has in a recent case held that the text of the Dayabhaga can not of itself be authority without any regard to the fact whether a doctrine propounded by it has been accepted as a true exposition of the Law and has been sanctioned by custom (1). the Madras High Court also has in recent cases held that commentaries, like the Smriti Chandrika, can not change the true law of the Smritis. (2)

Relative position of Smritis and Commentaries

The dream and hope of Hindu lawyers and patriots that there should be one law for all Hindus, cannot be realised under present circumstances. But the laws of the different provinces of India have been of late approximating to one another with increasing knowledge of the true Hindu law. If the study of Hindu law becomes more popular with judges and lawyers, I believe, many differences in the rules of the various schools will slowly pass away.

It is now, as has been mentioned above, settled by the decisions of our Courts that Behar, all Northern India, the Mahratta country, Northern Kanara and the Ratnagiri district are

Provinces where the different Schools of Law are prevalent.

(1) Purna Chandra *v.* Gopal, 8 Cal. L. J. 369.

(2) Karuture Gopalam *v.* Abbure, 31 I C., 574. Ayyavu *v.* Niladabhi, 2 Mad. H. C. 45. Gudimetla *v.* Vencatarazu, 16 I. C., 139. 23 Mad. L. J. 233. In the case the judges cite with approval the opinion expressed in this book that customs opposed to the Sruti and the Smriti can never be good law. See Sre Balasu *v.* Garulingaswami, 26 I. A., 113 Putta Lal *v.* Revati, 37 All. 359, P. C.

governed by the Mitakshara; and Guzerat, the Island of Bombay and Northern Konkan by the Mayukha. In Poona, Ahmednagar and Khandesh, the Mayukha is considered to be of equal authority with the Mitakshara but not capable of overruling it (1). The Vivada Tandava is also a book of authority in the Maharashtra country. The law of the Mitakshara, as interpreted by the Mayukha as in Bombay, has been held to prevail in the Berars (2). The Law of Bombay is also the law of Sind (3). Madras is governed by the Smriti Chandrika; Orissa by the Saraswati Vilasa (4); and the Mithila country, *i. e.*, the country between the Coosee and the Gundak, by the Vivada Chintamani.

The Apararka, a South Indian book, is said to be of authority in Kashmir, but in the ordinary course of things, it should have been considered of authority in the Konkan and the southern provinces of the Madras Presidency, where Aparaditya the royal author ruled (5).

The main system of law as propounded by the Mitakshara has been accepted by all the com-

(1) 12 Moore 437, 11 Bom. 294, 3 Bom. 533, 14 Bom 624, 605, 4 Moore 97, 26, I. A., 161.

(2) Ramprasad *v.* Mt. Suba Bai, 4 N. L. R. 31, Manumant Chandra Bhaga *v.* Keshwanath, 20 I. C., 560

(3) Chinku Wd. Jetho *v.* Utam Chand, 2 Sind. L. R. 59.

(4) Sir Charles Grey in a paper published in the proceedings of the Madras Literary Society makes the following observations: "in forming a digest, the great part of the three works *viz.*, the Madhaviyam, the Smriti Chandrika and Saraswati Vilasam ought to be incorporated; and Patabhi Rama Sastri recommends that the Varadarajiyam should be added to the four others. He admits that the Mitakshara is the most generally prevailing authority; but says, that in the Andhra country the Smriti Chandrika and Saraswati Vilasam are chiefly esteemed, in the Dravida, the Saraswati Vilasam and Varadarajiyam, and in the Carnataka, the Madhaviyam and Saraswati Vilasam."

(5) Dr. Bhuler in the introduction to his Sanskrit edition of the Apastamba says, that the introduction of the Apararka into Kashmir, where it is the standard law book used, was probably the result of an embassy from King Aparaditya, to the court of Kashmir mentioned in the Srikantha Charita written about 1140 A. D

mentators, except those of Bengal, whose authority is recognized in the various provinces, as mentioned above.

In Bengal, the Dayabhaga is of supreme authority: The Dayatatwa and the Dayakrama Sangraha are also of authority but not where they disagree with the Dayabhaga (1).

In regard to matters of adoption, it has been held that the Dattaka Chandrika is of authority in the Bengal and Madras Presidencies and that the Dattaka Mimansa of Nanda Pundit is of authority under the Mithila and the Benares Schools. The Dattaka Mimansa by Vidyaranya was also held to be of authority in Southern India (2). In the Bombay Presidency, the Dattaka Mimansa of Nanda Pundit, the Mayukha and the Sanskara Kaustava are said to be of authority. The opinions of the Dattaka Mimansa however, cannot be "considered of so great importance, but that they may be set aside on general grounds, in case they are opposed to the doctrines of the Vyavahara Mayukha or Dharma Sindhu and Nirnaya Sindhu", in Bombay and Western India (3). In Mithila, the Dattaka Mimansa is supposed to be of authority but the Vivada Chintamani is of superior authority, and there are customs in Mithila, which are recognized by our Courts but which are not to be found in the Dattaka Mimansa.

The question arises whether a book, which is of authority in one School of law, can ever be considered as of weight in any matter in the other

(1) Hurry Mohan *v.* Sonatun, 1 Cal. 276.
(2) 12 Moore 437 ; 4 Moore 97, 26 I. A., 161.
(3) West and Buhler, 3rd Ed., p. 11., 26 I. A., 131, 132.

Schools. On principle, all the commentaries are worthy of consideration in finding out the true Hindu Law of the Rishis. The decisions of our Courts have however, given pre-eminent authority to certain books in particular provinces. But it does not follow that the other books are of no authority at all. It has been held that where the Dayabhaga is silent, a rule of the Mitakshara or of the Viramitrodaya is of authority (1). The Viramitrodaya has also been held "to be properly receivable as an exposition of what may have been left doubtful by the Mitakshara, and declaratory of the law of the Benares School" (2).

It is said, that certain practices, lawful according to the old Lawgivers, have become unlawful by custom. It is a popular error. The said practices were prohibited by the later Rishis, and the Aditya and the Vrihannaradiya Puranas say, that they were unlawful because prohibited by good men. It is not the evil custom prevailing among the people, that has abrogated the said practices, but the decision of the good. Law is based on the decision of good men, and as men improve and good men become wiser and better, the Law also changes for the better. Hindu law was not thus quite a stationary and stereotyped system. But the gradual growth of Hindu Law is impossible under the present circumstances, for our benevolent Government have rightly adopted a policy of non-interference with the laws of the Hindus, as a good king should do under the rule of Yajnavalkya, in a conquered country.

(1) Akshay Chandra *v.* Hari Das, 35 Cal. 701. Tulsi Das *v.* Luckhymony, 4 C. W. N. 742. Moniram *v.* Kerri Kolitani, 7 I. A. 115.

(2) Gridhari Lall Roy *v.* The Bengal Government, 12 Moore 448.

HINDU JURISPRUDENCE AND SOURCES OF HINDU LAW.

मा नः पथः पित्र्यान्मानवादधि दूरं नैष्ट परावतः ।

ऋग्वेदः ८ म ३० सू ३ ।

Do not take us far away from the ancient* path prescribed by Manu which have come down to us from our fathers * *

Rig Veda, 8 M. 30, S. 3.

ये विद्वांसस्ते मनवः ।

शतपथब्राह्मणम् ८, ६, १, १८ ।

Those that are learned are Manus.

Shatapatha Brahmana—8, 6, 13, 18.

मनुः—

विद्वद्भिः सेवितः सद्भिर्नित्यमद्वेषरागिभिः ।
हृदयेनाभ्यनुज्ञातो यो धर्म्मस्तन्निबोधत ॥ २।१
कामात्मता न प्रशस्ता न चैवेहास्त्यकामता ।
काम्यो हि वेदाधिगमः कर्म्मयोगश्च वैदिकः ॥ २।२
सङ्कल्पमूलः कामो वै यज्ञाः सङ्कल्पसम्भवाः ।
व्रता नियमधर्म्माश्च सर्व्वे सङ्कल्पसम्भवाः ।
व्रता नियमधर्म्माश्च सर्व्वे सङ्कल्पजाः स्मृताः ॥ २।३
अकामस्य क्रिया काचिद्दृश्यते नेह कर्हिचित् ।
यद्यद्धि कुरुते किञ्चित् तत्तत् कामस्य चेष्टितम् ॥ २।४
तेषु सम्यग्वर्त्तमानो गच्छत्यमरलोकताम् ।
यथासङ्कल्पितांश्चेह सर्व्वान् कामान् समश्नुते ॥ २।५
अर्थकामेष्वसक्तानां धर्म्मज्ञानं विधीयते ।

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* According to the gloss of Sayana, *Pitryat* qualifies *Manavat* and the meaning is "Do not take us far away from the distant path prescribed by father Manu (such as Brahmacharya, Agnihotra, etc.)." Ordinarily in Sanskrit, an adjective qualifies a noun. If Pitryat qualified Manavat, these two words would have been ordinarily joined in *Samasa*. There is not much difference in the meaning either way, except if Manu is taken to be the father of all mankind, as Sayana says. Event then, it is clear that during the time of the Rig Veda customs which regulated the life of the Hindus of those times were known as coming from Manu. Again, as Sayana says, the text refers to rule of Brahmacharya, Agnihotra &c., which are laid down in Manu's Smritis. Manu, it should also be observed here, is supposed to mean the Sun according to Nighantu 5-6-23 and the Nirukta 12-3-14-1.

धर्म्मं जिज्ञासमानानां प्रमाणं परमं श्रुतिः ॥ २।१३
यः कश्चित् कस्यचिद्धर्म्मो मनुना परकीर्त्तितः ।
स सर्व्वोऽभिहितो वेदे सर्व्वज्ञानमयोहि सः ॥ २।७
सर्व्वन्तु समवेक्ष्येदं निखिलं ज्ञानचक्षुषा ।
श्रुतिप्रामाण्यतो विद्वान् स्वधर्म्मे निविशेत वै ॥ २।८
श्रुतिस्मृत्युदितं धर्म्ममनुतिष्ठन् हि मानवः ।
इह कीर्त्तिमवाप्नोति प्रेत्य चानुत्तमं सुखम् ॥ २।९
योऽवमन्येत ते मूले हेतुशास्त्राश्रयाद्द्विजः ।
स साधुभिर्बहिष्कार्य्यो नास्तिको वेदनिन्दकः ॥ २।११
धर्म्म एव हतो हन्ति धर्म्मो रक्षति रक्षितः ।
तस्माद्धर्म्मो न हन्तव्यो मा नो धर्म्मो हतोऽवधीत् ॥ ८।१५
राजभिःकृतदण्डास्तुकृत्वा पापानि मानवाः ।*
निर्म्मलाः स्वर्गमायान्ति सन्तः सुकृतिनो यथा ॥ ८।३१८
यद्यत्परवशं कर्म्म तत्तद्यत्नेन वर्ज्जयेत् ।
यद्यदात्मवशं तु स्यात्तत्तत् सेवेत यत्नतः ॥ ४।१५९
सर्व्वं परवशं दुःखं सर्व्वमात्मवशं सुखम् ।
एतद्विद्यात् समासेन लक्षणं सुखदुःखयोः ॥ ४।१६०
यत्कर्म्म कुर्व्वतोऽस्य स्यात् परितोषोऽन्तरात्मनः ।
तत् प्रयत्नेन कुर्व्वीत विपरीतन्तु वर्ज्जयेत् ॥ ४।१६१
वेदोऽखिलो धर्म्ममूलं स्मृतिशीले च तद्विदाम् ।
आचारश्चैव साधूनामात्मनस्तुष्टिरेव च ॥ २।६
श्रुतिस्तुवेदो विज्ञेयो धर्म्मशास्त्रन्तु वै स्मृतिः ।
ते सर्व्वार्थेष्वमीमांस्ये ताभ्यां धर्म्मोहि निर्ब्बभौ ॥ २।१०
वेदः स्मृतिः सदाचारः स्वस्य च प्रियमात्मनः ।
एतच्चतुर्व्विधं प्राहुः साक्षाद्धर्म्मस्य लक्षणम् ॥ २।१२
निषेकादिश्मशानान्तो मन्त्रैर्यस्योदितो विधिः ।
तस्य शास्त्रेऽधिकारोऽस्मिन् ज्ञेयो नान्यस्य कस्यचित् ॥ २।१६
सरस्वतीदृषद्वत्योर्देवनद्योर्यदन्तरम् ।

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* This line is quoted in the Ramayana in identical works. Kulluka's reading राजनिर्द्भूत is therefore not correct.

तं देवनिर्मितं देशं ब्रह्मावर्तं प्रचक्षते ॥ २।१७
यस्मिन् देशे य आचाराः पारम्पर्यक्रमागताः ।
वर्णानां सान्तरालानां स सदाचार उच्यते ॥ २।१८
जातिजानपदान् धर्मान् श्रेणीधर्मांश्च धर्मवित् ।
समीक्ष्य कुलधर्मांश्च स्वधर्मं प्रतिपादयेत् ॥ ८।४१
सद्भिराचरितं यत् स्याद्धार्मिकैश्च द्विजातिभिः ।
तद्देशकुलजातीनामविरुद्धं प्रकल्पयेत् ॥ ८।४६
प्रमाणानि च कुर्वीत तेषां धर्म्यान् यथोदितान् ॥ ७।२०३

Manu :—

Learn that sacred law which is followed by men learned (in the Veda) and assented to in their hearts by the virtuous who are ever exempt from hatred and inordinate affection. II. 1.

To act solely from a desire for rewards is not laudable, yet an exemption from that desire is not (to be found) in this (world) ; for on (that) desire is grounded the study of the Veda and the performance of the actions, prescribed by the Veda. II. 2.

The desire (for rewards), indeed, has its root in the conception that an act can yield them, and in consequence of (that) conception sacrifices are performed ; vows and the laws prescribing restrains are all stated to be kept through the idea that they will bear fruit. II. 3.

Not a single act here (below) appears ever to be done by a man free from desire; for whatever (man) does, it is (the result of) the impulse of desire. II. 4.

He who persists in discharging these (prescribed duties) in the right manner, reaches the deathless state and even in this (life) obtains (the fulfilment of) all the desires that he may have conceived. II. 5.

The knowledge of the sacred law is prescribed for those who are not given to the acquisition of wealth and to the gratification of their desires; to those who seek the knowledge of the sacred law the supreme authority is the revelation. (Sruti). II. 13.

Whatever law has been ordained for any (person) by Manu, that has been fully declared in the Veda: for that (sage was) omniscient. II. 7.

But a learned man after fully scrutinising all this with the eye of knowledge, should, in accordance with the authority

of the revealed texts, be intent on (the performance of) his duties. II. 8.

For that man who obeys the law prescribed in the revealed texts and in the sacred tradition, gains fame in this (world) and after death unsurpassable bliss. II. 9.

Every twice-born man, who, relying on the Institutes of dialectics, treats with contempt those two sources (Sruti and Smriti) of the law, must be cast out by the virtuous, as an atheist and a scorner of the Veda. II. 11.

Dharma, being violated, destroys; Dharma, being preserved, preserves: therefore Dharma must not be violated, lest violated Dharma destroy us. VIII. 15.

But men who have committed crimes and have been punished by the king, go to heaven, being pure like those who performed meritorious deeds. VIII. 318.

Let him carefully avoid all work which depends on others, but let him eagerly pursue that which depends on himself. IV. 159.

Everything that depends on others (gives) pain, everything that depends on one's self (gives) pleasure; know that this is the short definition of pleasure and pain. IV. 160.

When the performance of an act gives satisfaction to the inner soul, perform it with diligence; but avoid the opposite. IV. 161.

The whole Veda is the (first) source of the sacred law; next the tradition and the virtuous conduct of those who know the (Veda further); also the customs of holy men; and (finally) self-satisfaction. II. 6.

But by Sruti (revelation) is meant the Veda, and by Smriti (tradition) the Institutes of the sacred law; those two must not be called into question in any matter, since from those two the sacred law shone forth. II. 10.

The Veda, the sacred tradition (Smriti), the customs of virtuous men, and one's own pleasure, they declare to be visibly the four-fold means of defining the sacred law. II. 12.

Know that he for whom (the performance of the) ceremonies beginning with the rite of impregnation (Garbhadhana) and ending with the funeral rite (Antyeshti) is prescribed, while sacred formulas are being recited, is entitled (to study) these Institutes, but no other man whatsoever. II. 16.

That land, created by the gods, which lies between the two divine rivers Sarasvati and Drishadvati, the (sages) called Brahmâvarta. II. 17.

The custom handed down in regular succession (since time immemorial) among the (four chief) castes (varna) and the mixed (races) of that country (Brahmâvarta), is called the conduct of virtuous men. II. 18.

(A king) who knows the sacred law, must inquire into the laws of castes (jati), of districts, of guilds, and of families, and (thus) settle the peculiar law of each. VIII. 41.

What may have been practised by the virtuous, by such twice-born men as are devoted to the law, that he shall establish as law, if it be not opposed to the (customs of) countries, families, and castes (jati). VIII. 46.

Let him make authoritative the lawful (customs) of the (inhabitants), just as they are stated (to be). VII. 203.

गौतमः—

वेदो धर्ममूलं तद्विदाञ्च स्मृतिशीले । १ अ, १, २

दृष्टो धर्मव्यतिक्रमः साहसञ्च महतां न तु दृष्टोऽर्थो वरदौर्बल्यात्तुल्यबलविरोधे विकल्पः । १ अ, ३—४

तस्य व्यवहारो वेदो धर्मशास्त्राण्यङ्गान्युपवेदाः पुराणं दैवजातिकुलधर्माश्चाम्नायैरविरुद्धाः । प्रमाणं कृषिवणिक्पाशुपाल्यकुसीदकारवः स्वे स्वे वर्गे । ११।१९, २०

द्वौ लोके धृतव्रतौ राजा ब्राह्मणश्च । ८ अ, १ ।

Gautama :—

The Veda is the source of the sacred law and the tradition and practices of those who know (the Veda). Ch. I. 1, 2.

Transgressions of the law and violence are observed (in the case) of (those) great (men); but both are without force (as precedents) on account of the weakness of the men of later ages. If (authorities) of equal force are conflicting, (either may be followed at) pleasure. Ch. I. 3, 4.

His administration of justice (shall be regulated by) the Veda, the Institutes of the Sacred Law, the Angas, the Upa-Vedas and the Purana. The laws of countries, castes, and families, which are not opposed to the (sacred) records, (have) also authority. Cultivators, traders, herdsmen, money-lenders, and artizans (have authority to lay down rules) for their respective classes. Ch. XI. 19, 20.

A king and a Brahmana, deeply versed in the Vedas, these two, uphold the moral order in the world. Ch. VIII. 1.

वसिष्ठः—

श्रुतिस्मृतिविहितो धर्म्मः।
तदलाभे शिष्टाचारः प्रमाणम्
शिष्टः पुनरकामात्मा। १।४-६
अदृष्टमाणकारणो धर्म्मः। १।७
देशधर्म्मान् जातिधर्म्मान् कुलधर्म्मांश्च
श्रुत्यभावादबुवीन्मनुः॥ १।१७

आर्य्यावर्त्तः प्रागदर्शात् प्रत्यक्कालकवनादुदक्पारिपात्रादृक्षिणेन हिमवतः उत्तरेण च विन्ध्यस्य। तस्मिन् देशे ये धर्म्मा ये आचारास्ते सर्व्वत्र प्रत्येतव्याः। न त्वन्ये प्रतिलोमकधर्म्मीणाम्। १।१२, १३

गङ्गायमुनयोरन्तरेऽप्येके। यावदा कृष्णसृगो विचरति तावदब्रह्मावर्त्त समित्यन्ये। १।१२, १३

वैधिद्यहङ्गा यं ब्रूयुर्धर्म्मं धर्म्मविदोजनाः।
पवने पावने चैव स धर्म्मो नात्र संशय इति॥ १।१६

Vasistha :—

The sacred law has been settled by the revealed texts and by the tradition (of the sages).

On failure of (rules given in) these (two sources), the practice of the Shista (has) authority. He whose heart is free from desire (is called) a Shista. Ch. I. 4-6.

(Acts sanctioned by) the sacred law (are those) or (which) no worldly cause is perceptible.

Manu has declared that the (peculiar laws of countries, castes, and families may be followed in the absence of) rules of the revealed texts.

The country of the Aryas lies to the east of the region where (the river Sarasvati disappears) to the west of the Black-forest; to the north of the Paripatra (mountains); to the south of the Himalaya. (According to others it lies to the south of the Himalaya) and to the north of the Vindhya range. Acts productive of spiritual merit, and customs which (are approved of) in that country, must be everywhere acknowledged (as

authoritative). But not different ones, (*i. e.* those) of (countries where) laws opposed (to those of Aryavarta prevail). Ibid 8, 11.

Some (declare the country of the Aryas to be situated) between the (rivers) Ganga and Yamuna, others (state as) an alternative, that spiritual pre-eminence (is found) as far as the black antelope grazes.

'Those religious acts which men, deeply versed in the knowledge of the three Vedas and acquainted with the sacred law, declare to be lawful (are efficient) for purifying oneself and others.' Ibid 16.

वौधायन:—

उपदिष्टो धर्म्म: प्रतिवेदम्। स्मार्त्तो द्वितीय:। तृतीय: शिष्टागम:। शिष्टा: खलु विगतमत्सरा निरहङ्कारा: कुम्भीधान्या अलोलुपा दम्भदर्पलोभमोहक्रोधविवर्जिता:। तदभावे दशावरा परिषत्।

पञ्च वा स्युस्त्रयी वा स्युरेको वा स्यादनिन्दित:।
प्रतिवक्ता तु धर्म्मस्य नेतरे तु सहस्रश:॥

प्र १, अ १, क १, सू १, ३, ४, ५, ७, ९।

तत्र तत्र देशप्रामाण्यमेव स्यात्। मिथ्यैतदिति गौतम:।
उभयं चैव नाद्रियेत शिष्टस्मृतिविरोधदर्शनात्।

प्र १, अ १, क २, सू ६-८।

Baudhâyana:—

The sacred law is taught in each Veda. (The sacred law), taught in the Tradition (Smriti, stands) second. The practice of the Shistas (stands) third. Shistas, forsooth, (are those) who are free from envy, free from pride, contented with a store of grain sufficient for ten days, free from covetousness, and free from hypocrisy, arrogance, greed, perplexity and anger. On failure of them, an assembly consisting at least of ten members (shall decide disputed points of law). There may be five, or there may be three, or there may be one blameless man, who decides (questions regarding) the sacred law. But a thousand fools (can) not (do it).' P. 1, A. 1, K. 1, S. 1, 3, 4, 5, 7, 9.

For each (of these customs) the (rule of the) country should be (considered) the authority. Gautama declares that that is false. And one should not take heed of either (set of practices) because they are opposed to the tradition of the Shistas.

P. 1, A. 1, K. 2, S. 6-8

आपस्तम्बः—

धर्मज्ञसमयः प्रमाणम् । वेदाश्च ।

प्र १, ५ १, ख १, सू २, १

स्मृतिर्हि बलीयस्यानुमानिकादाचारात् ॥ १ १।४।८

दृश्यते चापि प्रवृत्तिकारणम् । १।१।४।९

आर्य्यसमयो ह्यदृष्टमानकारणः । १।४।१२।८

एतेन देशकुलधर्म्मा व्याख्याताः । २।६।१५ १

Apastamba :—

The authority (for these duties) is the agreement of those who know the law and the Vedas. P. 1, P. 1, K. 1, S. 2, 3.

For (explicit) revealed texts have greater force than custom from which (the existence of a permissive passage of the revelon) may be inferred. P. 1, P. 1, K. 4, S. 8.

Besides (in this particular case) a (worldly) motive for the practice is apparent. Ibid 9.

For no (worldly) motive for the decision of those Aryas is perceptible; (and hence it must have a religious motive and be founded on a passage of the Veda.) P. 1. P. 4, K. 12, S. 8.

By this (discussion) the law of custom, which is observed in (particular) countries or families, has been disposed of.

P. 2, P. 6, K. 15, S. 1.

याज्ञवल्क्यः—

पुराणन्यायमीमांसा धर्म्मशास्त्राङ्गमिश्रिताः ।

वेदाः स्थानानि विद्यानां धर्म्मस्य च चतुर्दश ॥ १।३

मन्वत्रिविष्णुहारीतयाज्ञवल्क्योशनोऽङ्गिराः ।

यमापस्तम्बसम्वर्त्ताः कात्यायनबृहस्पती ॥ १।४

पराशरव्यासशङ्खलिखिता दक्षगौतमौ ।

शातातपो वसिष्ठश्च धर्म्मशास्त्रप्रयोजकाः ॥ १।५*

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* The enumeration of the Lawgivers by Yajnavalkya is not exhaustive, as is mentioned by Vijnaneswara and as is shown by the following texts :—

तेषां मन्वत्रिविष्णुहारीतयाज्ञवल्क्योशनोऽङ्गिरोयमाः ।

वसिष्ठदक्षसम्वर्त्तशातातपपराशराः ।

विश्वामित्रोपलम्भहारीताः शङ्खः कात्यायनो भृगुः ।

प्रचेता नारदो योगिवोधायन पितामहाः ।

श्रुतिः स्मृतिः सदाचारः स्वस्य च प्रियमात्मनः।
सम्यक्सङ्कल्पजः कामो धर्ममूलमिदं स्मृतम् ॥ १।७
कर्म्मणा मनसा वाचा यद्यदिच्छेत् सुखं सदा।
अस्वर्ग्यं लोकविद्विष्टं धर्म्ममप्याचरेन्न तु ॥ १।१५५

मनुः कश्यपो वभ्रुः पैठीनो व्याघ्र एव च।
सत्यव्रतो भरद्वाजो गार्ग्यः कर्णाजिनिस्तथा।
जाबालिर्जमदग्निश्च लोगाक्षिर्ब्रह्मसम्भवः।
इति धर्म्मप्रणेतारः षट्त्रिंशट्वचनस्तथा ॥
पराशरमाधवधृत पैठीनसिवचनानि।

Parasara also enumerates the Lawgivers (1-12-15).

श्रुता मे मानवाधर्म्मा वाशिष्ठाः काश्यपास्तथा।
गार्गेया गौतमीयाश्च तथा चौशनसाः स्मृताः।
अत्रेर्विष्णोश्च संवर्त्तात् दक्षादङ्गिरसस्तथा ॥
प्राचेतसाच्च हारीतात् याज्ञवल्क्यात्तथैव च।
आपस्तम्बकृता धर्म्माः शङ्खस्य लिखितस्य च।
कात्यायनकृताश्चैव तथा प्राचेत साम्मुनेः।
श्रुताश्चैते भवत्प्रोक्ता श्रुत्यर्था मम विस्मृताः।
पराशरः १।१२-१५

Madhava says that some read the following texts after श्रुता मे मानव &c., in the above text.

औशनसश्चैव नन्दि-धर्म्माश्च पावनाः।
ब्रह्मणा कथिताश्चैव कौमाराश्च श्रुता मया।
धूम्रायनकृता धर्म्माः काण्वा वैश्वानरा अपि।
भार्गवा याज्ञवल्क्याश्च मार्कण्डेयाश्च कौशिकाः।
भरद्वाजकृता ये च बृहस्पतिकृताश्च ये।
कुणेश्च कुण्डिवाड्डीश्च विश्वामित्रकृताश्च ये।
मनुजैमिनिकृताः शाकलीयास्तथैव च।
पुलस्त्यपुलहोद्गीताः पावकीयास्तथैव च।
अगस्त्यगीता मौद्गल्याः शाण्डिल्याः सौलभायनाः।
वार्षगण्यकृता ये च ये च सप्तर्षिभिः कृताः।
वैयाघ्रा व्यासगीताश्च विभण्डकृताश्च ये।
तथा विदुरवाक्यानि भृगोरङ्गिरसस्तथा।
वैशम्पायनगीताश्च ये चान्ये एवमादयः ॥

The above texts are attributed to the Mahabharata by Mandlik by mistake.

श्रुत्याचारव्यपेतेन मार्गेणाधर्षितः परैः ।
आवेदयति चेद्राज्ञे व्यवहारपदं हि तत् ॥ २।५

श्रुतौविरोधे न्यायस्तु बलवान् व्यवहारतः ।
अर्थशास्त्रात्तु बलवद्धर्मशास्त्रमिति स्थितिः ॥ २।२२

कुलानि जातीः श्रेणीश्च गणान् जानपदांस्तथा ।
स्वधर्माच्चलितान्राजा विनीय स्थापयेत् पथि ॥ १।३६१

यस्मिन् देशे य आचारो व्यवहारः कुलस्थितिः ।
तथैव परिपाल्योऽसौ यदा वशमुपागतः ॥ १।३४३

Yajnavalkya :—

The Vedas along with the Puranas, the Nyaya, the Mimansa, the Dharma Shastra, and the Angas are the fourteen sources of knowledge and Dharma. Ch. I. 3.

Manu, Atri, Vishnu, Harita, Yajnavalkya, Ushana, Angira, Yama, Apastamba, Sambarta, Katyayana, Vrihaspati, Parasara, Vyasa, Sankha, Likhita, Daksha, Gautama, Satatapa, and Vasista are authors of Dharma Shastra. Ibid 4, 5.

The sources of Dharma are described to be (1) the Vedas, (2) the Smritis, (3) the practices of good men, (4) what is acceptable one's own soul, and (5) the desire produced by a virtuous resolve. Ibid 7.

By act, mind and speech, practise *dharma* with care. But practise not that which is abhorred by the world, though it is ordained in the sacred books, for it does not secure spiritual bliss. Ibid 155.

If one aggrieved by others in a way contrary to the Smritis and the established usage, complains to the King, that subject is one of the titles of Vyavahara or a Judicial proceeding. Ch. II. 5.

When two Smritis disagree, that which follows equity as guided by the people of old should prevail. Smriti is of greater authority than dialectics. Ibid 22.

The families, castes, the Sreṇis, (classes or guilds) and peoples of provinces who swerve from their established duty, should be chastised and maintained in their duty. Ch. I. 351.

Whatever customs, practices, and family usage prevail in a country, they* should be preserved intact when it comes under subjection. Ibid 343.

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* If not opposed to the Shastras यदि शास्त्रविरुद्धो न भवति says Vijnaeswara, and that is the opinion of the majority of the Commentators.

नारदः—

नष्टे धर्म्मे मनुष्याणां व्यवहारः प्रवर्त्तते ।
द्रष्टा च व्यवहाराणां राजा दण्डधरः स्मृतः ॥ १।२

कुलानि श्रेणयश्चैव गणाश्चाधिक्रती नृपः ।
प्रतिष्ठा व्यवहाराणां गुर्व्वभ्यस्तूत्तरोत्तरम् ॥ १।७

धर्म्मशास्त्रार्थशास्त्राभ्यामविरोधेन यत्नतः ।
संपश्यमानो निपुणं व्यवहारगतिं नयेत् ॥ १।३७

यत्र विप्रतिपत्तिः स्याद्धर्म्मशास्त्रार्थशास्त्रयोः ।
अर्थशास्त्रोक्तमुत्सृज्य धर्म्मशास्त्रोक्तमाचरेत् ॥ १।३९

धर्म्मशास्त्रविरोधे तु युक्तियुक्तो* विधिः स्मृतः ।
व्यवहारो हि बलवान् धर्म्मस्तत्रावहीयते ॥ १।४०

सूक्ष्मो हि भगवान् धर्म्मः परोक्षो दुर्विचारणः ।
अतः प्रत्यक्षमार्गेण व्यवहारगतिं नयेत् ॥ १।४१

Narada :—

The practice of duty having died out among mankind law-suits have been introduced ; and the king has been appointed to decide law-suits, because he has authority to punish. I. 2.

Gatherings (kula), corporations (sreṇi), assemblies (gaṇa), one appointed (by the king), and the king (himself), are invested with the power to decide law-suits ; and of these, each succeeding one is superior to the one preceding him in order. I. 7.

Avoiding carefully the violation of either the sacred law law or the dictates of prudence, he should conduct the trial attentively and skilfully. I. 37.

Where the rules of sacred law and the dictates of prudence are at variance, he must discard the dictates of prudence, and follow the rules of sacred law. I. 39.

In case of conflict of Smritis decision should be based on reason. Custom is powerful and overrules the sacred law. I. 40.

Divine law has a subtile nature, and is occult and difficult

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* न्याययुक्तो the reading in the Vivada Tandava for युक्तियुक्तो ।

to understand. Therefore (the king) must try causes according to the visible path. I. 41.

श्रुतिस्मृतिविरुद्धं यल्लुप्तानामहितञ्च यत् ।
न तत्प्रवर्त्तयेद्राजा प्रवृत्तञ्च निवर्त्तयेत् ॥
न्यायार्पेतं यदन्येन राज्ञाज्ञानकृतं भवेत् ।
तदप्यन्यायविहितं पुनर्न्याये निवेशयेत् ॥

नारद: १८।८, ९

कात्यायन-नारद-यम-वचनमिति कल्पतरुधृतम् ।

What is opposed to revealed and traditional law, or injurious to living beings must not be practised by the king; and when it is practised (by others), he must check it.

When an act contrary to justice has been undertaken by a former king from folly, he must redress that iniquitous enactment in accordance with the principles of equity.

Narada XVIII. 8, 9, cited in the Kalpataru as a text common to Katyayana, Narada and Yama.

बृहस्पति:—

दृश्यस्थित्यानुमानेन नैगमानुमतेन च ।
क्रियते निर्णयस्तत्र व्यवहारस्तु बाध्यते ॥*
दृश्यजातिकुलानाञ्च ये धर्म्मा: प्राक्प्रवर्त्तिता: ।
तथैव ते पालनीया: प्रजा प्रक्षुभ्यतेऽन्यथा ।
जनापरक्तिर्भवति बलं कोशश्च नश्यति ॥
उदुम्बरं दाक्षिणात्यैर्मातुलस्य सुता द्विजै: ।
मध्यदेशे कर्म्मकरा: शिल्पिनश्च गवाशिन: ॥
मत्स्यादाश्च नरा: पूर्व्वे व्यभिचाररता: स्त्रिय: ।
उत्तरे मद्यपा नार्य: स्मृत्या नृणां रजस्वला: ॥
खड्गजाता: प्रगल्भन्ति भाढभार्य्यामभर्त्तृकाम् ।
अनेन कर्म्मणा नैते प्रायश्चित्तदमार्हका: ।

* The reading is what is adopted in the Viramitrodaya (p. 120) Mandlik reads the last two words as व्यवहारस्तु कथ्यते, and gives a very different meaning. The Viramitrodaya is clearly right.

कीनाशाः कारुकाः शिल्पी कुशीदिश्रेणिनर्तकाः ।
लिङ्गिनस्तस्करा: कुर्य्युः स्वेन धर्म्मेण निर्णयम् ॥
वेदार्थोपनिबन्धृत्वात् प्राधान्यं हि मनोः श्रुतम् ।
मन्वर्थविपरीता या सा स्मृति र्न प्रशस्यते ॥

Vrihaspati :—

When a decision is passed in accordance with local custom. logic, or the opinion of the traders (living in that town) the issue of the case (Vyabahara) is overruled by it.

The time-honoured institutions of each country, caste, and family should be preserved intact ; otherwise the people would rise in rebellion ; the subjects would become disaffected towards their rulers ; and the army and treasure would be derstroyed.

The maternal uncle's daughter is taken in marriage among the twice-born inhabitants of the South. In the central country (Madhya-desa), they become labourers or artizans, and eat cows.

The inhabitants of the East are fish-eaters, and their women are unchaste. In the North the women take intoxicating drinks, and in their courses can be touched.

The people of Khasa marry the widow of a brother who has died. These men are not subject to the performance of a penance or to punishment on account of any such offence.

Cultivators, artizans, artists, money-lenders, companies of tradesmen, dancers, persons wearing the token of a religious order, and robbers should adjust their disputes according to the rules of their own profession.

(However) the first rank (among legislators) belongs to Manu, because he has embodied the essence of the Veda in his work ; that Smriti (or text of law) which is opposed to the tenor of the laws of Manu is not approved.

Ch. II. 26, 28-31 ; I. 26 ; xxvii. 3.

ये चारण्यचरास्तेषामरण्ये करणं भवेत् ।
सेनायां सैनिकानान्तु सार्थेषु वणिजास्तथा ॥
व्यवहारमयूखधृतबृहस्पतिवचनम् ।

Disputes of those, those live in the forests, should be decided by assemblies of dwellers of forest ; disputes of soldiers

by assemblies of soldiers and those of companies of merchants by assemblies of merchants.

Vrihaspati cited in the Vyavahara Mayukha.

केवलं शास्त्रमाश्रित्य न कर्त्तव्यो हि निर्णयः ।
युक्तिहीने विचारे तु धर्म्महानिः प्रजायते ॥

बृहस्पतिवचनम् ।

Decision should not be based only on the Shastras. By an unreasonable judgment there is loss of Dharma.

Vrihaspati, cited by the Commentators.

मनुर्वै यत्किञ्चिदवदत्तद्भेषजं भेषजताया इति—

छान्दोग्यब्राह्मणम् ।

Whatever Manu has said is beneficial.

Chhandogya Brahmana,
cited by Kulluka Bhatta.

गोत्रस्थितिस्तु या तेषां क्रमादायाति धर्म्मतः ।
कुलधर्म्मन्तु तं प्राहुः पालयेत्तन्नथैव तु ।
यस्य देशस्य यो धर्म्मः प्रवृत्तः सार्वकालिकः ।
श्रुतिस्मृत्यविरोधेन देश धर्म्मः स उच्यते ॥
देशपत्तन गोष्ठेषु पुरग्रामेषु वादिनाम् ।
तेषां स्वसमयैर्धर्म्मः शास्त्रतोऽन्येषुतेः सह ॥
वीरमित्रोदयविवादताण्डवादिधृतकात्यायनवचनानि ।

The usage of a family transmitted successively (from father to son according to law) is called family custom. That should be followed.

The peculiar law of a country prevailing from time immemorial without conflict with the Vedas and the Smritis is called local custom.

Disputes as between the inhabitants of countries, cities, colonies of cowherds, towns and villages, should be decided by their own customs; as between them and others, they should be decided according to Law.

Katyayana, cited in the Parasara Madhava.
Viramitrodaya and Vivadatandava,

पराशरः—

न कश्चिद्वेदकर्त्ता च वेदस्मर्त्ता चतुर्मुखः ।
तथैव धर्म्मान् स्मरति मनुः कल्पान्तरेऽन्तरे ॥ १।२१
कृते तु मानवा धर्म्मास्त्रेतायां गौतमाः स्मृताः ।
द्वापरे शाङ्खलिखिताः कली पाराशराः स्मृताः ॥ १।२४

There is no author of the Veda. Brahma the four-faced is he who remembers the Veda. Likewise Manu remembers the Law during each Kalpa.

The law of Manu is authoritative in the Satya Yuga, the law of Gautama in the Treta, in the Dwapara, Sankha Likhita, and in the Kali, the law of Parasara.

Parasara, I. 21, 24.

श्रुतिस्मृतिपुराणानां विरोधो यत्र दृश्यते ।
तत्र श्रौतं प्रमाणन्तु तयोर्द्वैधे स्मृतिर्वरा ॥*

व्यासः १।४

When there is a conflict between the Veda and the Smriti and the Purana, the Veda should prevail; (as between the two latter) Smriti is superior.

Vyasa, Ch. I., v. 4.

वणिक्शिल्पिप्रभृतिषु कुशिरङ्गोपजीविषु ।
अशक्यो निर्णयो ज्ञान्यै स्तज्ज्ञैरेवतु कारयेत् ॥

व्यवहारमयूखधृतव्यासवचनम् ।

The customs of traders, artisans etc., and those who earn their livelihood by means of agriculture or the stage, are not capable of being ascertained by others. Disputes among them should be decided by those of their own class.

Vyasa cited in the Vyavahara Mayukha.

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* श्रुतेर्द्वैधे स्मृतेर्द्वैधे न्यायभेदः प्रकल्पते ।
श्रुतिस्मृतिविरोधे तु श्रुतिरेव गरीयसी ॥ जाबालः

When there were two contradictory texts of Veda or of the Smriti, it should be assumed that they apply to different cases, but if there be a conflict between a text of Veda and a text of the Smriti, the former should prevail.

The second line of this text is attributed to Jabala by Kulluka in his commentary on Manu II., 13.

यस्मिन् देशे य आचारो न्यायदृष्टस्तु कल्पितः।
स तस्मिन्नेव कर्त्तव्यो न तु देशान्तरे स्मृतः॥
यस्मिन् देशे पुरे ग्रामे त्रैविद्ये नगरेऽपि वा।
यो यत्र विहितो धर्म्मस्तं धर्म्मं न विचालयेत्॥

पराशरमाधवधृतदेवलवचनानि।

Whatever custom prevails in a country consonant to equity, that should be followed in that country, but not in another.

Whatever law prevails in a country or province, village or or town, that should not be disturbed.

Devala, cited in the Parasara-Madhava.

एतैर्यानि प्रणीतानि धर्म्मशास्त्राणि वैपरा।
तान्येवातिप्रमाणानि न हन्तव्यानि हेतुभिः॥

हेमाद्रिधृतयमवचनम्।

Those Dharma Shastras which have been in ancient times composed by those Rishis, are of supreme authority. They should not be destroyed by logic.

Yama, cited in the Hemadri.

साङ्गा वेदास्तु चत्वारो मीमांसा स्मृतयस्तथा।
एतानि धर्म्मशास्त्राणि पुराणं न्यायदर्शिनाम्॥

विवादताण्डवधृतपितामहवचनम्।

The four Vedas with their Angas, the Mimansa, the Smritis and the Puranas these are the Dharmashastras according to those who know right.

Pitamaha, cited in the Vivada-Tandava.

चोदनालक्षणोऽर्थोधर्म्मः। मीमांसादर्शनम्।

Dharma is that object of ultimate welfare which is indicated by an injunction of the Scriptures.

Mimans a Darshana.

यतोऽभ्युदयनिःश्रेयससिद्धिः स धर्म्मः

वैशेषिकदर्शनम्।

That from which arises ultimate welfare (or salvation), is Dharma

Vaisheshika Darshana.

वेदाः प्रतिष्ठिता देवि पुराणेनात्र संशयः ।
बिभेत्यल्पश्रुताद्वेदो मामयं प्रहरिष्यति ॥
इतिहासपुराणैश्च कृतोऽयं निश्चलःपुरा ।
यन्नदृष्टं हि वेदेषु तदृष्टं स्मृतिभिः किल ।
उभाभ्यां यन्न दृष्टं हि तत्पुराणेषु गीयते ॥

कैमाद्रिधृतनारदीयपुराणवचनानि ।

The Vedas have been undoubtedly established by the Puranas.* The Veda is afraid of a man of little learning that he will destroy it. It is made immoveable by Itihases and Puranas. What was not revealed in the Vedas is revealed in the Smritis. That revealed truth which is not to be found in both, is sung in the Puranas

Naradiya Purana, cited in the Hemadri.

आदौ तावद्देशधर्मान् विचिन्त्यो
देशे देशे या स्थितिः सैव कार्या ॥
लोकदिष्टं पण्डिता वर्जयन्ति
देवज्ञोऽतो लोकमार्गेण यायात् ॥
येषु देशेषु ये देवा येषु देशेषु ये द्विजाः
येषु देशेषु यज्ञौचं याश्च यत्यत्मक्तिकाः ॥
येषु देशेषु यतीयं धर्माचारश्च यादृशः ।
तत्र तान्नावमन्येत धर्मस्तत्रैव तादृशः ॥ देवल : ।

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*अष्टादश पुराणानि पुराणज्ञाः प्रचक्षते ।
ब्राह्मं पद्मं वैष्णवञ्चशैवं भागवतं तथा ॥
अथान्यं नारदीयञ्च मार्कण्डेयञ्चसप्तमम् ।
आग्नेयमष्टमञ्चैव भविष्यं नवमं तथा ॥
दशमं ब्रह्मवैवर्त्तं लैङ्गमेकादशं स्मृतम् ।
वाराहं द्वादशञ्चैव स्कान्दञ्चात्र त्रयोदशम् ॥
चतुर्दशं वामनञ्च कौर्म्मं पञ्चदशं स्मृतम् ।
मात्स्यञ्च गारुडञ्चैव ब्रह्माण्डञ्च ततः परम् ॥

विष्णुपुराणम् ३।६।२१-२४

Eighteen Puranas are mentioned by those who are versed in the Puranas. They are the following : Brahma, Padma, Vishnu, Shiva, Bhagabata, Naradiya, Markandeya, Agni, Bhavisya, Brahmabaibarta, Linga, Baraha, Skanda, Bamana, Kurma, Matsya, Garuda and Brahmanda.

Vishnu Purana, 3,6,21-24.

The usage of the country should first be attended to ; that which is observed in the country should alone be observed. Wise men abstain from what is hated by the people. A wise man should go by the path of the people (that is, follow popular usage). The Deities, the Brahmans, the (notions of) purity, the (kinds of) earth, the water, and the religious observances of a country should not be ridiculed in that country, for that is the law of the country.

Devala, cited in the Smriti-ratnakara. of Venkanath and by Mandlik.*

यत्र शास्त्रगतिर्भिन्ना सर्व्वकर्म्मसु भारत ।
उदितेऽनुदिते चैव होमे भेदो यथा भवेत् ।
तस्मात् कुलक्रमायातमाचारं त्वाचरेद्बुधः ।
स गरीयान् महाबाहो सर्व्वशास्त्रीदितादपि ॥

महाभारतम् ।

O Bharata ! Since the precepts of Shastras are conflicting in respect of all rites, as for instance a sacrifice is ordained (by some) after sun-rise, and (by others) before sun-rise, a wise man should follow the hereditary observances of his family. O (king with) great-arms ! such usage is superior to the commandments of all the Shastras taken together.

Mahabharata.

धर्म्मं जिज्ञासमानानां प्रमाणं परमं श्रुतिः ।
द्वितीयं धर्म्मशास्त्रन्तु तृतीयं लोकसंग्रहः ॥

महाभारतम् ।

For those that want to know the Dharma the authoritiy are first the Vedas, second the Dharma Shastra, third the customs of the people. Mahabharta.

जातिग्रे णधिवासानां कुलधर्म्माश्च सर्व्वतः ।
वर्ज्जयन्ति च ये धर्म्मं तेषां धर्म्मो न विद्यते ।
दश वा वेदशास्त्रज्ञास्त्रयी वा धर्म्मपाठकाः ।
यद्ब्रूयुः काश्यं उत्पन्नं सधर्म्मोधर्म्मसंशये ॥

महाभारते शान्तिपर्व्वणि ३६ अ २०, २१

* This and the following two texts are taken from Mandlik's Mayukha, (Introduction, p. XLVI). The two following texts supposed to be of the Mahabharata. I could not find them there after a diligent search.

Those that forsake the customs of tribes, classes, provinces and families, their Dharma does not exist.

What ten or even three persons versed in the Vedas or Dharma Shastras decide, in a doubtful matter that should be considered as Law.

Mahabharata, Santi Parva, 36 Ch. 20, 21.

देशधर्म्मांश्च कौन्तेय कुलधर्म्मांस्तथैव च ।

पालयन् पुरुषव्याघ्र राजा सर्व्वाश्रमी भवेत् ॥

महाभारते शान्तिपर्व्वणि, ६६ अ २९

O Chief of men, the King enforcing the customs of provinces and families should follow the rules of all the Asramas.

Mahabharata, Santi Parva, 66 Ch. 29.

सर्व्वागमानामाचारः प्रथमः परिकल्पते ।

आचारप्रभवो धर्म्मो धर्म्मस्य प्रभुरच्युतः ॥

महाभारते अनुशासनपर्व्वणि १४ अ १३७

Of all the Shastras, good practices are the first beginning Good practices are the origin of Dharma and the Unchangeable One is the Lord of Dharma.

Mahabharata, Anushashana Parva, 14 Ch. 137.

आचारसम्भवो धर्म्मो धर्म्मं वेदाः प्रतिष्ठिताः ।

महाभारते वनपर्व्वणि १५० अ २७

Dharma has its origin in good practices and the Vedas are established in Dharma.

Mahabharata, Bana Parva, 150 Ch. 27.

साधूनां पुनराचारो गरीयान् धर्म्मलक्षणः ।

महाभारते आनुशासनिके ४५ अ ५

The practices of good men are superior evidence of Dharma.

Mahabharata, Anushashanika Parva, 45 Ch. 5.

इतिहास पुराणाभ्यां वेदं समुपबृंहयेत् ।

बिभेत्यल्पश्रुताद्वेदो मामयं प्रहरिष्यति ॥

महाभरते आदिपर्व्वणि १६५

The Veda should be supplemented by tradition and the Puranas. The Veda is afraid of a man of little information lest he should injure it. Mahabharata, Adi Parva, Chap. I., 265.

प्रभवार्थाय भूतानां धर्म्मप्रवचनं कृतम् ।

यः स्यात् प्रभवसंयुक्तः स धर्म्म इति निश्चयः ।

महाभारते शान्तिपर्व्वणि २०९ अ ।

The rules of Dharma have been laid for the amelioration of all beings. Whatever is accompanied with the progress (and happiness of all) is of a certainty Dharma.

Mahabharata, Santi Parva Rajadharma Ch. 109.

पुरराष्ट्रविरुद्धश्च यश्च राज्ञा विवर्ज्जितः ।

अनादेयो भवेद्वादी धर्म्मविद्भिरुदाहृतः ॥

What is repugnant to the town or the country or what is forbidden by the king, that should not be accepted by the knowers of law.

Text cited in the Viramitrodaya.

येषां परम्पराप्राप्ताः पूर्व्वजैरप्यनुष्ठिताः ।

त एव तैर्न दुष्येयुराचारान्नेतरे पुनः* ॥

Those persons alone, who follow customs that have come down from father to son, and practised by their ancestors, should not be blamed for them, but not others.

Text cited in the Viramitrodaya

देशं देशं य आचारः पारम्पर्यक्रमागतः ।

स शास्त्रार्थबलान्नैव लङ्घनीयः कदाचन ॥

असहायधृत स्मृतिवचनम् ।

The custom of a country (or province) transmitted from father to son should not be disregarded on the strength of Shastras,

A text cited by Asahaya.

भार्गवी नारदीया च वार्हस्पत्याङ्गिरस्यपि ।

स्वायम्भुवस्य शास्त्रस्य चतस्रः संहिता मताः ॥

स्कन्दपुराणवचनम् ।

* This text is cited by Kumarila Swami in the third Pada of the first Chapter of his Tantra Vartika as the opinion of other people and he there maintains that usages in conflict with the Law are invalid.

The four versions of Manu's law are those by Bhrigu, Narada, Vrihaspati, and Angira.

Skanda Purana, cited by Mandlik.

समयश्चापि साधूनां प्रमाणं वेदवद्भवेत्* ॥

हेमाद्रिमाधवधृतादित्यपुराणवचनम् ।

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* The full text as cited in the Parasara-Madhava is as follows :—

ऊढायाः पुनरुद्वाहं ज्येष्ठांशं गोवधं तथा ।
कलौ पञ्च न कुर्व्वीत भ्रातृजायां कमण्डलुम् ॥
विधवायां प्रजोत्पत्तौ देवरस्य नियोजनम् ॥
बालिकाऽक्षतयोन्यीश्च वरेणान्येन संस्कृतिः ।
कन्यानामसवर्णानां विवाहश्च द्विजातिभिः ।
आततायिद्विजाग्र्याणां धर्म्मयुद्धे न हिंसनम् ।
द्विजस्याग्नौ तु निर्याणं शोणितस्यापि संग्रहः ।
सवदीक्षा च सर्वेषां कमण्डलुविधारणम् ।

Compare also the following texts cited in the Parasara Madhava

महाप्रस्थानगमनं गोसंज्ञकिय गोसवं ।
सौत्रामण्यामपि सुरायज्ञस्य च सग्रहः ।
अग्निहोत्रहवन्याश्च लेहीलीढापरिग्रहः ।
वातप्रस्थाश्रमस्यापि प्रवेशो विधिचोदितः ।
ब्रह्मस्वाध्याय-सापत्यमघसङ्कोचनं तथा ।
प्रायश्चित्तविधानञ्च विप्राणां मरणान्तिकम् ।
ससर्गदोषः स्त्रीनाद्यैर्महापातकनिष्कृतिः ।
वरातिथिपितृभ्यश्च पशूपाकरणक्रिया ।
दत्तौरसेतरेषान्तु पुत्रत्वे न परिग्रहः ।
सवर्णान्याङ्गना-दुष्टौ संसर्गः शोणितैरपि ।
अयोनौ संग्रहं ब्रह्मे परित्यागो गुरुस्त्रियाः ।
अस्थिसञ्चयनादूर्ध्वमङ्गस्पर्शनमेव च ।
शमित्रं चैव विप्राणां सोमविक्रयणं तथा ।
षड्भक्तानग्रहेनान्नहरणं हीनकर्म्मणः ।
शूद्रेषु दासगोपालकुलमित्रार्द्धसीरिणाम् ।
भोज्यान्नता, गृहस्थस्य तीर्थसेवातिदूरतः ।
शिष्यस्य गुरुदारेषु गुरुवद्वृत्तिरीरिता ।
आपद्वृत्तिर्द्विजाग्र्याणामश्वक्षनिकता तथा ।

The decision of good men is (on matters of law) of authority like that of the Vedas.

Aditya Purana, cited by
Hemadri and Madhava.

प्रजार्थन्तु द्विजाग्र्याणां प्रजाऽरणि परिग्रहः ।
ब्राह्मणानां प्रवासित्वं सुखाग्निधमनक्रिया ।
बलात्कारादिदुष्टस्त्रीसंग्रही विधिचोदितः ।
यतेस्तु सर्व्ववर्णेभ्यो भिक्षाचर्य्या विधानतः ।
नवोदके दशाहञ्च दक्षिणा गुरुचोदिता ।
ब्राह्मणादिषु शूद्रस्य पचनादिक्रियापि च ।
भृग्वग्निपतनाद्यैश्च ब्रह्मादिमरणं तथा ।
गोत्वभिश्रिष्टे पयसि शिष्टैराचमनक्रिया ।
पितापुत्र विरोधेषु साक्षिणां दण्डकल्पनम् ।
यत्र सायं गृहत्वञ्च सूरिभिस्तत्त्वतत्परैः ॥
एतानि लोकगम्यर्थं कलिरादौ महात्मभिः ।
निवर्त्तितानि कर्म्माणि व्यवस्थापूर्व्वकं बुधैः ।
समयश्चापि साधूनां प्रमाणं वेदवद्भवेत् ॥

Compare also the following texts cited in the Parasara Madhava :—

समुद्रयानस्वीकारः कमण्डलुविधारणम् ।
द्विजानामसवर्णासु कन्यासूपयमस्त्वथा ।
देवरेण सुतोत्पत्तिर्मधुपर्के पशोर्वधः ।
मांसदानं तथा श्राद्धे वानप्रस्थाश्रमस्तथा ।
दत्ताचतायाः कन्यायाः पुनर्दानं परस्य च ।
दीर्घकालं ब्रह्मचर्य्यं नरमेधाश्वमेधकौ ।
महाप्रस्थानगमनं गोमेधश्च तथा सुतम् ।
इमान् धर्म्मान् कलियुगे वर्ज्ज्यानाहुर्मनीषिणः ॥

बृहन्नारदीयपुराणम्, २२, १३—१६

देवराच्च सुतोत्पत्तिर्दत्ता कन्या न दीयते ।
न यज्ञे गोवधः कार्य्यः कलौ न च कमण्डलुः ॥

ऋतुः ।

दीर्घकालं ब्रह्मचर्य्यं धारणञ्च कमण्डलोः ।
गोवालम्भालसपिण्डात्तु विवाहो गोवधस्तथा ।
नराश्वमेधौ मद्यञ्च कलौ वर्ज्ज्यं द्विजातिभिः ।

ब्रह्मपुराणम् ।

CHAPTER II.

INHERITANCE

SECTION I.

The Principles of the Hindu Law of Inheritance.

THE Hindu Lawgivers speak of Dayabhaga as meaning 'partition of the paternal property,' and thus not purporting to deal with inheritance as commonly understood. The property was always in the family, and the question was, who was to take, rather, to enjoy the share of a deceased member. A clear apprehension of this fact would enable the reader to understand the principles enunciated below.

Property in the family.

The Hindu Law of inheritance is based upon the principle of consanguinity. The father is born as the son. The daughter is equal to the son. This idea is clearly enunciated in the Vedas.* When one himself exists in the shape of a son or daughter, who else can take the property? This persistence of self in the lives of children, and identity of the materials of the body, continue to the fourth generation, *i.e.*, up to the great-grandson. "Up to that the body is the same; after that, there is difference in body." † Upon this physiological idea is the theory of inheritance based by the ancient Hindu Lawgivers.

Principle of consanguinity.

As regards the daughter, however, on marriage, she left the father's *gotra*, just as among all Aryan nations, and practically became the daughter of another. The father had no control over her, as he

Position of the daughter.

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* See texts at pp. 50, 53.

† See texts at pp. 57, 58.

had over both the son and the daughter before her marriage. As long as there was any descendant in the male line up to a great-grandson, the daughter could not be an heir, for among all Aryan nations the male descendant is considered superior to the female. Among Indian Aryans from the time of the Rig-Veda, in the case of a sonless man, by a fiction of law, the daughter (made *Putrika*),* remained in the *gotra* of her father and continued as his son, and had all the rights of the son. Hence the prohibition by Yajnavalkya and other Lawgivers of marrying a girl without a brother. Such a daughter remained with the father as his son, and as hers was but the father's body, she took the inheritance. And likewise her son took like the son's son ; and probably her grandson too, for by parity of reasoning, he would be equal to a great grandson in the male line.

Now except in the case of premature death, all sons take the inheritance equally. The Rig Veda says, this is the rule laid down by Manu.† If, however, a son predeceases his father, his son takes the share which his father would have taken if living, for he is equal to his father. On this is also based the principle, that grandsons and great-grandsons take *per stirpes.*

The daughter's sons should likewise take *per stirpes*, for are they not as son's sons to one who

* A brotherless damsel was always a *Putrika.* She could be made *Putrika* by mere intention. Latterly she had to be made so by a ceremony at her marriage or by expressed desire. The texts about the righ s of the daughters are collected in section 4 of this chapter.

† This is also the opinion of the Commentators, but the Courts applying the principle of spiritual benefit have decided otherwise. The matter is discussed in detail in Section 4.

has no sons ?‡ Failing a son, a grandson, and a great-grandson, the brotherless daughter of a predeceased son, who would like the daughter herself be in the father's *gotra*, and would not pass into the *gotra* of her husband, should take the inheritance. Modern commentators have made the law cruel and unnatural by taking away the rights of the predeceased son's daughter and of her son and grandson as well as those of the daughter's grandson. The cruelty of it will be apparent, when it is remembered that there was no custom of making wills among ancient Hindus, nor mention of any right of the giving away, by way of a gift *inter vivos*, of immoveable property, except for religious purpose. It is a matter of satisfaction to find that true Hindu Law followed nature, and was not artificial, unnatural and cruel as it is represented to be, and as is the Hindu Law administered in modern courts.

There is no mention in the Smritis of the theory of spiritual benefit. The heir did not take because he offered the *Pinda*. On the contrary, the rule was, he who took the wealth had to offer the *Pinda*. The passage of Manu, 'पिण्डं दद्यात् हरेत् धनं' (IX 136,) is considered as authority for the proposition that the right of inheritance is founded on the benefit conferred by offering the *Pinda*. If the text is taken with its context, the meaning is clear that the daughter's son who had been declared as heir on natural grounds in the preceding verses, takes the wealth and offers the *Pinda*. The passages from all the Rishis beginning with Manu, collected in the present chapter, leave absolutely no room for

Spiritual benefit.

‡ See texts at pp. 51.

doubt that the theory of spiritual benefit as understood by the Bengal lawyers, was absolutely unknown to the Hindu Lawgivers.

The only benefit which all the Smritis speak of, is that the son frees the father from debts. It is fully explained by the Vedic text cited at p. 52. It says that a Brahmana is born burdened with three debts. To the gods, he owes the debt of sacrifices, to the *Pitris i. e.*, the ancestors or the *manes*, the debt to produce a son, and to the Rishis the debt of the study of the Vedas. No sooner is a son born, the father's debt to the Pitris is discharged. That is the benefit which the son confers. A Hindu of the period of the Upanishads, when about to die, would call his son, and make him promise to discharge the aforesaid three-fold debt. The Brahmanas, even the Pundits of modern India, have forgotten the old ideal of life. Two of the three debts, namely, the daily performance of the Yajnas* and the study of the Vedas are neglected by all, and indeed, forgotten are all the noble ideals which made the ancient Hindus great. However that may be, there is no doubt, that the performance of the Sraddhas was considered by the ancient Aryan as an indispensable duty and as one of the reasons why the son took the inheritance. But the

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* According to the old rule of life, a house-holder had daily to perform five Yajnas which are mentioned in the following verse :—

स्वाध्यायेनार्चयेतर्षीन् होमै र्देवान् यथाविधि।
पितॄन् श्राद्धै श्च नृनन्नै र्भूतानि बलिकर्मणा॥ मनुः ३। ८

Let him worship, according to the rule, the sages by the private recitation of the Veda, the gods by burnt oblations, the manes by funeral offerings (Sraddha), men by (gifts of) food, and all living creatures by offerings of food
Manu III., 81.

Lawgivers never based the rule of succession upon this undoubted obligation of the heir to perform the Sraddha. The Pundits of Bengal however, knew only of the Sraddha as a means of paying the debt of the father, and based all their theories of law on that alone. They forgot that Manu had laid down that by the birth of the eldest son a man is freed from his debts.* If the Bengal lawyers are right the younger sons cannot inherit at all, nor can the son of a predeceased son take when there is a son.

Again as the debt to the fathers can only be discharged by begetting a son, any heir other than a direct male descendant cannot confer the benefit contemplated by the text.

According to Vrihaspati, failing the direct descendants of a man and his brothers, a *sapinda* or a pupil who took the inheritance should not only offer him the *pinda*, but also perform the ceremony of uniting him with his ancestors, *i. e.*, *sapindikarana* ceremony. The same authority says that when there are no heirs of one's own family, the offerers of the *pinda* or the pupil or the teacher should take the inheritance.

Old rule of succession and the rule of Sraddha.

It thus appears that according to the ancient texts the principle of consanguinity governed succession among Hindus, and we find the rules of succession settled in the Smritis themselves to a great extent. The Privy Council very recently

*Of all the Commentators of Manu Nandana alone in his gloss on verse 106, Ch. 9, says, that debt means *pindas* to be offered to ancestors &c. (ऋणं पितृभ्यः प्रदेयं पिण्डादिकं). Medhatithi, Kulluka, and other Commentators have given the correct meaning according to the texts of the Yajurveda to be found at p. 52.

enunciated the true position of the law of succession in the following words: "To whatever extent rules of succession may have been founded on religious observances or may now be explained by them, it is clear that fixed rules of law for succession have been established for ages" (1). But it should not be considered that the rules of Sraddha have no bearing on the rules of succession. It is true that Vijnaneswara and other ancient commentators base the rule of succession on the principle of consanguinity but it is an undoubted fact that originally the rule regulating competence to perform the Sraddha corresponded with the rule of succession to property. Both the rules underwent modifications in course of time, as we shall see later on. At first probably, the rule of Sraddha was modified so as to correspond with the rule of succession which underwent changes with advancing ideas of the superior claims of the widow and the daughter and her descendants when compared with those of distant agnates. But later on, to meet the imperative necessity of having some body to perform the Sraddha, the daughter-in-law and many other persons who were not in the category of heirs were declared competent to perform the Sraddha. For this and other reasons, we find a divergence between the two sets of rules. The rule of succession we find settled in the Smritis, and the commentators cannot be allowed to alter it by introducing any principle however logical. It is only where the Smritis are silent, that principles of inheritance should be considered.

(1) Muthusami *v.* Kumarsami, 19 Mad. 405 P. C.

In such a case, both the principles of consanguinity and of spiritual benefit are worthy of consideration. Jimutavahana ignored altogether the principle of consanguinity and contended that inheritance was based on the principle of spiritual benefit. But his greatest follower Raghunandana, in the chapter on Sraddhas, enunciated the right principle as regards the blind &c., who, he said, were incompetent to perform the Sraddha because they were incompetent to inherit. Vijnaneswara and his followers would not let in the theory of spiritual benefit at all. But the more modern commentators of the Benares school like Mitra Misra allowed its applicability. Indeed from what has been stated above the principle of spiritual benefit, if it does not clash with the principle of consanguinity should be considered in settling the rule of succession (1). Vrihaspati says, the Sakulyas first take and after them those that offer the Pinda. The meaning is clear, namely, the direct descendants and members of the family take in their own right. The remote relations take in the order in which they are entitled to perform the Pinda and as we shall see in the next section, the right to offer the Pinda was determined by propinquity.

The theory of spiritual benefit however, it is clear from the texts cited in this Section, and as it is now admitted by the Privy Council and the majority of judges and text-writers, cannot modify the rule of succession based mainly on the principle of consanguinity, as found in the Smritis. In Bengal how-

(1) The Madras High Court have recently enunciated the true rule on the subject in the case of Balusami *v.* Narayun, 20 Mad. 342.

ever, it is a matter of regret that the Dayabhaga which was adopted by Raghunandana, for whom subtle arguments had an irresistible charm, should have been considered of sufficient authority to overrule the old Bengal law as found in the Nibandha of Halayudha and to change the true Hindu Law of succession as found in the Smritis.

English judges, trusting in the learning of the Bengal Pandits about them, to whom the original Dharma Sastras, except those of Manu and Yajnavalkya, were in those early times, unfortunately not available, gave effect to their *vyavasthas*, and thus the opinions of the dialecticians became the settled law of the country.

Thus under the Bengal school, the doctrine of spiritual benefit has come to be considered as the only principle determining succession. In a Stridhana case however, the following observations were lately made by the Calcutta High Court (1) : "The characteristic doctrine of the Bengal Law is that as far as near relatives are concerned, inheritance depends on consanguinity ; but in the case of remoter relations the law falls back on the principle of spiritual benefit." In more recent cases, the Calcutta High Court have gone further and held that mere spiritual benefit is not always the guiding principle of inheritance under the Bengal School and that propinquity has also been accepted as a principle of succession under it and in cases not contemplated by Jimutavahana, the more orthodox theory of the Benares School should be given effect to. The judges further rightly say that in many

piritua benefit under Bengal School

(1) Nagendra Nundini *v.* Benoy Krishna, 30 Cal. 527.

matters, such as in the case of female relations, in the case of maiden daughters in respect of Stridhana and in the matter of reunion, the theory of spiritual benefit altogether fails, even under the Dayabhaga. (1)

Hindu Law was modified in ancient India with advancing ideas of justice and equity, and there can be no objection if it be modified at the present day for the same reason. Indeed, there could be no cause for dissatisfaction with the result of the decisions of our Courts, if more humane rules consonant to the more advanced ideas of modern times, had supplanted the old rules. But unfortunately, in Bengal, while male children of distant relations on the paternal as well as the maternal side have come in, the sonless widowed daughter and son's daughter have been excluded and the direct descendants through females, except the daughter's son, have been postponed to distant relations. Indeed in all the provinces, the departures from the law of the Rishis have not been determined by progressive ideas but are the outcome of too strictly following certain modern writers.

Let us go back to the principle enunciated in the beginning of this section, namely—that the property was always in the family, and could never go out of it, the only question discussed by Hindu lawyers being the division of shares. Among the agnates the nearer took before the more remote. After all the members of the family had been exhausted (according to Virhat Manu, it being remembered, that the family, properly so called,

(1) Aukhoy *v* Haridas, 35 Cal. 721 ; Tulsi *v*. Lukhymony, 4 C. W. N. 743

did not extend beyond the fourteenth degree) the relations of different *gotras* took, and among them the nearer before the more remote. Among Hindus the daughter of a sonless man belonged to his family, and also the daughter's son and the pre-deceased son's brotherless daughter. This is the simple law of succession according to the law givers.

The next section deals with the question how far the rule of *Sraddha* is a guide to the rule of inheritance. In the succeeding sections the relative rights of heirs are dealt with in detail.

INHERITANCE.

Section I.

एता नो अग्ने सौभगा दिदीह्यपि क्रतुं सचेतसं वंस ।

ऋग्वेदः, म ७, सू ४, १० ।

O Agni, give us this good (wealth) that we get (a son who) would perform the sacrifice (Yajna) and be of good mind.

Rig-Veda, M. 7, S. 4, 10.

वामं पितृभ्यो य इदं समेरिरे ।

ऋग्वेदः, म १०, सू ४०, १० ।

O Aswins, those persons who having produced children employ them in performing sacrifices (Yajnas) for the Pitris &c.

Rig-Veda, M. 10, S. 40, 10.

जायमानो वै ब्राह्मणस्त्रिभिर्ऋणवा जायते ब्रह्मचर्येण ऋषिभ्यः यज्ञेन देवेभ्यः प्रजया पितृभ्य एष वा अनृणो यः पुत्री यज्वा ब्रह्मचारिवासी ।

तैत्तीरियसंहिता ६, ३, १०, ५ ।

शतपथब्राह्मणम् १, ७, २, १, २, ३ ।

वसिष्ठः ११, ४८ ।

A Brahmana is born burdened with three debts He owes the study of the Veda to the Rishis, sacrifices to the gods, and

a son to the manes. Therefore he is free from debt who has begotten a son, who has offered sacrifices, and who has lived as a student with a teacher.

Taittiriya Sanhita, VI. 3, 10, 5.
Satapatha Brahmana, I. 7, 2, 1, 2, 3.
Vasista, Ch. XI. 48 (with a slight variation of language.)

अङ्गादङ्गात् सम्भवसि हृदयादधिजायसे ।
आत्मा वै पुत्र नामासि स जीव शरदः शतम् ॥*

सामवेदीयमन्त्रब्राह्मणे १ प्रपाठके ५ खण्डे २७ मन्त्रम् ।

From the several limbs (of my body) art thou produced, from my heart art thou born; thou art "self" called a son; mayest thou live a hundred autumns.

Sama Veda, Mantra Brahmana,
P. 1, K. 5, 17.
Cited in identical words in Baudhayana,
P. 2, A. 2, S. 14.

ऋणमस्मिन् † सन्नयत्यमृतत्वञ्च गच्छति पिता पुत्रस्य जातस्य पश्येच्चेज्जीवतो मुखं यावन्तः पृथिव्यां भोगा यावन्तो जातवेदसि यावन्तो अप्सु प्राणिनां भूयान् पुत्र पितुस्ततः शश्वत्पुत्रेण पितरोऽत्यायन् बह्वलं तमः आत्मा हि जज्ञ आत्मनः स इरावत्यतितारिणी किन्नु भलं किमजिनं किमु श्मश्रूणि किं तपः पुत्रं ब्रह्माण ईक्षध्वं स वै लोकोऽवदावदः अन्नं ह प्राणं शरणं वासो रूपं हिरण्यं पशवो विवाहाः सखा ह जाया ह्रपणं ह दुहिता ज्योतिर्ह पुत्रः परमे व्योमन् पतिर्जायां प्रविशति गर्भो भूत्वा स मातरं तस्यां पुनर्नवो भूत्वा दशके मासि जायते तज्जाया जाया भवति यदस्यां जायते पुनः । * * नापुत्रस्य लोकोऽस्तीति ।

ऐतरेय ब्राह्मणम् ७ प ३ अ १ ख ।

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* Gobhila says that this Mantra should be recited by the father when blessing the son on returning home.

It was a very famous form of blessing but now forgotten. Dr. Buhler says that it is to be found in the Mahabharata. It is to be found in every Dharma-Shastra, but the original is from the Sama-Veda.

Pandit Satyabrata Samasrami gives a different reading. He reads वेदो for आत्मा in the second line, and translates it thus: "Thou art certainly well ver-ed in the Vedas. May (God) keep you alive for a hundred autumns." (See his appendix to the Sama-Veda). The text is also cited by the Yaska in his book in the fourth part of the third chapter.

† ऋणं लौकिकं वैदिकञ्च । लौकिकस्य अवस्थापनात् पुत्रपौत्रादिभिः ऋण प्रत्यर्पणीयमितिस्मृतिकारा आहुः । सायणभाष्यम् ।

When the father sees the face of the born living son, he places his debts (worldly and the three Valdic debts) on him. There is more enjoyment (of pleasures) of the father by the son, than there are in the earth, in the fire, and in the water of living beings Fathers are delivered from great darkness by the son. Self is born from self. He (the son) is a ferry in a great river. What is the good of the four Asrams, of the householder, of the Barahmachari, of the Banaprastha, and of the Paribrajaka. Desire the son, O Brahmanas. He is the happy unblamable regions. Food is the life; clothes are refuge, gold is beauty; cattle are marriage; friend is wife; grief is daughter; light is the son in the great heavens. The husband enters the wife, having become the embryo in the womb of the wife who becomes the mother. He is born again in the tenth month after being a new (being). Therefore the wife is called Jaya, because he (the husband) is born again. * * There are no heavenly regions for the sonless man.

Aitereya Brahmana, 7 p. 3 A. 1 Kh.

अथ त्रयो वाव लोकाः। मनुष्यलोकः पितृलोको देवलोक इति सोऽयं मनुष्यलोकः पुत्रेणैव जय्यो नान्येन कर्मणा पितृलोको विद्यया देवलोको देवलोको वै लोकानां श्रेष्ठस्तस्माद्विद्यां प्रशंसन्ति॥ अथातः सम्पृत्तिः। यदा प्रैष्यन्मन्यतेऽथ पुत्रमाह त्वं ब्रह्म त्वं यज्ञस्त्वं लोक इति स पुत्रः प्रत्याहाहं ब्रह्माहं यज्ञोऽहं लोक इति।

शतपथब्राह्मणम् १४ अ ४।२४।२५

There are three worlds: the world of men, the world of the fathers (pitriloka), the world of the Gods.

The world of men is conquered only by a son and not by other work. By work, the world of the fathers (pitriloka) and by learning, the world of the Gods is conquered.

The world of the Gods is the best of all the worlds. Therefore they praise learning above all.

Now about the giving of charge. When he thinks he is dying, he says to the son,—"You are Brahma, you are the Yajna, you are the Loka." The son answers—"I am Brahma (*i. e.*, I shall study the Vedas); I am the Yajna (*i.e.*, I shall perform the Yajnas); I am the Loka (*i.e.*, I shall by

* The translation is according to the commentary of Sayana.

begetting a son conquer the world of men (मनुष्यलोकः), by performing meritorious works conquer the world of the ancestors (पितृलोकः), and by learning conquer the world of the gods (देवलोकः) । Satapatha Brahmana, 14, 4, 3, 24-25.

सोऽस्यायमात्मा पुण्येभ्यः कर्मभ्यः प्रतिधीयते ।

ऐतरेय आरण्यकम्, २, ५, १० ।

He (the son) is his (father's) self. (He is) made a substitute for him for meritorious works.

Aitaraya Aranyaka 2, 5, 10.

एतत् षाट्कौशिकं शरीरं । त्रीणि पितृतस्त्रीणि मातृतः

अस्थिस्नायुर्मज्जानः पितृतः त्वङ्मांसरुधिराणि मातृतः ।

गर्भोपनिषत् .

The body is made of six materials ; three derived from the father, three from the mother : bone, sinew and marrow, from the father, and skin, flesh and blood from the mother.

Garvopanishada, cited in the Mitakshara and the Parasara-Madhava.*

मनुः—

ज्येष्ठेन जातमात्रेण पुत्री भवति मानवः ।

पितॄणामनृणश्चैव स तस्मात् सर्वमर्हति ॥ ८ । १०६

यस्मिन्नृणं सन्नयति येन चानन्त्यमश्नुते ।

स एव धर्मजः पुत्रः कामजानितरान् विदुः ॥ ९ । १०७

यथैवात्मा तथा पुत्रः पुत्रेण दुहिता समा ।

तस्यामात्मनि तिष्ठन्त्यां कथमन्यो धनं हरेत् ॥ ९ । १३०

तयोर्हि मातापितरौ सम्भूतौ तस्य देहतः । ९ । १३३

पौत्री मातामहस्तेन दद्यात्पिण्डं हरेद्धनम् ॥ ९ । १३६

गोत्ररिक्थानुगः पिण्डो व्यैति ददतः स्वधा ॥ ९ । १४२

Manu :—

Immediately on the birth of his firstborn a man is (called) the father of a son, and is freed from the debts to the manes; that (son), therefore, is worthy (to receive) the whole estate.

IX. 106.

* This text I could not find in the printed Garvopanishada.

That son alone on whom he throws his debt, and through whom he obtains immortality, is begotten for (the fulfilment of) the law ; all the rest they consider the offspring of desire.

IX. 107.

A son is even as one's self, a daughter is equal to a son ; how can another (heir) take the estate, while (such daughter who is) one's self, lives. IX. 130.

Their (son's son and daughter's son) father and mother both sprang from the body of the same (man). IX. 133.

By him (the daughter's son) the maternal grand-father has a son's son ; he shall present the funeral cake and take the estate. IX. 136.

The funeral cake follows the family name (gotra) and the estate (inheritance), the funeral offerings of him who gives (his son in adoption) cease (as far as that son is concerned). IX. 142.

ऋणमस्मिन् सन्नयति अमृतत्वञ्च गच्छति ।

वसिष्ठः १७ । १

The father throws his debt on the (son), and obtains immortality. Vasista, Ch. XVII. 1.

सप्तावरान् सप्त पूर्व्वान पङक्त्यात्मसप्तमान् ।

बौधायनः प्र २ । अ ९ । क १६ । सू ९ ।

He who obtains a virtuous son saves from the fear of sin, seven in the descending line and seven in the ascending line, (*viz.*) six others (in each), himself being the seventh.

Baudhayana, P. 2, A. 9, K. 16, S. 9.

विष्णुः—

यथार्थहरः स पिण्डदायी । १५ । ४०

पुत्रः पितृवित्तालाभेऽपि पिण्डं दद्यात् । १५ । ४३

पुन्नाम्नो नरकाद्यस्मात् पितरं त्रायते सुतः

तस्मात्पुत्र इति प्रोक्तः स्वयमेव स्वयम्भुवा ॥ १५ । ४४

ऋणमस्मिन् सन्नयति अमृतत्वञ्च गच्छति ।

पिता पुत्रस्य जातस्य पश्येच्चेज्जीवतो मुखम् ॥ १५ । ४५

And he who inherits the wealth, presents the funeral oblation (Pinda) to the deceased.

Let a son present the funeral oblations to his father, even though he inherit no property.

Because he saves his father from the hell called. Put, therefore (a male child) is called Put-tra by Svayambhu himself.

He (the father) throws his debt on him (the son) ; and the father obtains immortality, if he sees the face of a living son. Vishnu, XV. 40, 43-45.

विभागोऽर्थस्य पित्र्यस्य पर्वर्यंच प्रकल्प्यते ।
दायभाग इति प्रोक्तं तद्विवादपदं वधैः ॥

नारदः १३ । १

Where a partition of the paternal property is instituted by the sons, it is called by the learned Dayabhanga (partition or inheritance), a title of Law.

Narada, Ch. XIII. 1

तदभावे भ्रातरस्तुभ्रातृपुत्राः सनाभयः ।
सकुल्या बान्धवाः शिष्याः श्रोत्रियाय धनाहकाः ॥
बहवो ज्ञातयो यत्र सकुल्या बान्धवास्तथा ।
यो ह्यासन्नतरस्तेषां सोऽनपत्यधनं हरेत् ॥
भ्राता वा भ्रातृपुत्रो वा सपिण्डः शिष्य एव वा ।
सहपिण्डक्रियां कृत्वा कुर्यादभ्युदयं ततः ॥

बृहस्पतिः ।

In default of them, uterine brothers or brother's sons, agnates, and cognates, pupils or learned Brahmanas are entitled to the inheritance.

When there are several relatives, agnates (Sakulyas), and cognates (Bandhavas), whosoever of them is the nearest shall take the wealth of him who died leaving no issue.

(For one leaving no male issue), a brother, or brother's son, or a Sapinda, or a pupil, should first perform the ceremony of uniting him with the Sapindas, (to be worshipped at a Sraddha offering), and then offer him the funeral ceremonies customary on joyful occasions.

Brihaspati, XXV. 59, 62, 101.

निषाद एकपुत्रस्तु विप्रस्य स तृतीयभाक् ।
द्वौ सकौल्याः सपिण्डा वा स्वधादाताथ संहरेत् ॥

कुल्याभावे स्वधादाता आचार्य: शिष्य एव वा ॥
सर्व्वास्वापत्सु तानर्थान् विप्राय प्रतिपादयेत् ॥
बृहस्पति: (वा देवल:) ।

When a Sudra is the only son of a Brahmana, he gets a third; the remaining two shares shall be taken by the Sakulya or the Sapinda, or by him who is the giver of the funeral oblations: in default of the Sakulya, the giver of the Pinda takes, or the preceptor, or a pupil. On failure of heirs, the wealth should be given to Brahmanas. Brishaspati (or Devala).*

दायादविच्छेदमाप्नोति पञ्चमीवात्मवंशज: ।
पराशर: २।८

Or the separation of body accrues to the fifth person born of one's family.† Parasara, Ch 2, V. 8.

अविभक्तविफल्लानां कुल्यानां वसतांसह ।
भूयो दायविभाग: स्यादाचतुर्थादिति स्थिति: ॥
तावत्कुल्या: सपिण्डा: स्यु:पिण्डभेदस्तत: परम ।‡
समभिच्छन्ति पिण्डानां दायार्थस्य विभाजनम् ॥
अपरार्क पराशर माधवादिधृत देवलवचनम् ।

Of members of the same family divided or undivided living together, there should be partition of the heritage among the descendants of the fourth degree: this is settled. Up to that degree, the members of the family are of the same body. After that, there is difference of body. Sages desire that there should be separation in body and in wealth at the same time §

Devala cited by Aparaka. Madhava and other Commentators.

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* Vrihaspati, according to Ratnakara (page 334), and Devala, according to others.

† Madhava in his commentary on this text says दाय: (Daya) means body.

‡The Ratnakara reads स्वनन्तरम् for ततःपरम् ।

§ This text is cited by all the principal commentators except Gimutavahana. There is great difference as to the meaning of the first two lines. According to Nilkantha, the text refers to reunited brothers *i.e.*, those who having been divided again become undivided. I have followed Justice Nanabhai Haridas's interpretation (see 10 Bom. H. C. 459). Nilkantha's view is opposed to that of Madhava as well of the Apararka, who think that it refers to both divided and undivided members. The Apararka explains the third line thus: "up to that (*i.e.*, the fourth degree) the members of the same family are Sapindas after that the relationship through particles of the same body ceases."

यः पिता स च वै पुत्रस्तत्समा दुहितापि च ।
पुत्रश्च दुहिता चोभौ पितुः सन्तानकारकौ ॥

बृहत्पराशरः । ४ अ ।

He who is the father is the son; like him is also the daughter. Both son and daughter preserve the lineage of the father.

Vrihat-Parasara.

यो धनमाददीत स तस्मै श्राद्धं कुर्य्यात् ।
पिण्डञ्च त्रिपुरुषं दद्यात् । रत्नाकरधृतस्मृतिः ।

He who takes one's property shall perform his Sraddha, and shall offer the Pindas fo the three ancestors.

A text of some unknown Smriti, cited in the Ratnakara.

There are other texts of the Smritis on the subject. They are all cited in the succeeding sections.

SECTION II

Persons competent to perform the Sraddha.

In ancient times, the competence to perform the Sraddah corresponded with the right to take the inheritance. We have also seen that the rule is, that he who takes the inheritance gives the Pinda. It follows, therefore, that the rules regarding the right to offer the Pinda should be considered not only supplying the omissions, if any, in, but also as corroborative of, the rules of inheritance as found in the Smritis. To those who believe in the doctrine of spiritual benefit and hold that the competence to offer oblations determines succession, these rules, regarding which there is not much difference of opinion among Hindus of the different provinces, are the only safe guide. These rules should therefore be considered before we go to the rules of succession which the ingenuity of the

founders of the so called schools of law has made it difficult to ascertain. The following are the rules on the subject, laid down in the Smritis.

1. Son, grandson, great-grandson are entitled to perform the Sraddha before all. The Putrika, the appointed daughter of the son-less man, and her son stand in the same position as the son and the grandson. The unmarried daughter comes after them. The son's and grandson's daughters made Putrika would likewise be competent to perform the Sraddha.
2. Brother's son is equal to a son for performing the Sraddha. Subsidiary sons also are entitled to perform the Sraddha.
3. Daughter's sons are entitled to perform the Sraddha, as well as their sons.
4. The son's daughter's son and the grandson's daughter's son are entitled to perform the Sraddha.
5. Sapindas, *i. e.*, the agnatic relations of the deceased, and failing them his mother's Sapindas are also entitled to perform the Sraddha. This Sapinda relationship extends to the seventh degree in the male line. Failing the Sapindas the agnatic relations of the same village, so far as they remember the relationship, perform the Sraddha.
6. The maternal uncle is entitled to perform the Sraddha of the sister's son, and the sister's son is entitled to perform the Sraddha of the maternal uncle. Father's maternal uncle is also entitled to perform the Sraddha of the sister's grandson and the latter of the former.

7. According to some authorities, Bandhavas are entitled to perform the Sraddha.
8. Failing all relations, the pupil, the teacher, the officiating priest, and the king who take the inheritance, must perform the Sraddha.
9. The husband was originally not entitled to perform the Sraddha of the wife, nor the parents of the son, nor the elder brother of the younger brother. It was thought at a time that the right to perform the Sraddha, and the inheritance could not ascend. But the rule has been relaxed, and all these individuals can now perform the Sraddha.
10. Persons falling within the first four categories alone are entitled to perform the Parvana Sraddha.
11. No women, except the unmarried daughter and the Putrika, were originally competent to perform the Sraddha, but by later modifications of the law, the widow and the married daughter are entitled to perform the Sraddha of the husband and the father respectively, and the daughter-in-law that of the father-in-law and the mother-in-law, before the more distant Sapindas.

The most ancient rule of Sraddha seems to have been that the son, grandson, great-grandson and failing them, the daughters, the unmarried one and the Putrika, who by a fiction of law, was in the *gotra* of the sonless father, and her son as well as the son's daughter's son and grandson's daughter's son, were entitled to perform the Sraddha. The brother's son and the other subsidiary sons were afterwards introduced as occupying the place

of sons. These alone could perform the Sraddha, and even now no others can perform the Parvana, *i. e.*, the periodical Sraddhas.

Among the greeks funeral ceremonies were considered as very sacred and all important. If they were not duly performed the soul of the deceased wandered disconsolate, and could not enter heaven. It was obligatory on the heir to perform them. Both among the Greeks and the Romans, as among the Hindus, the lineal descendants were bound to perform the rites in honor of the deceased ancestor even if he left no wealth. Among the Romans every member, of the family was obliged to perform the *Sacra* or sacrifices and ceremonies in honor of the deceased ancestors, and no adoption could take place in the family unless arrangements had been made for the celebration of the *Sacra* of the family from which the adoptive son was taken.*

Indeed among all Aryan races the failure of offerings to the dead was considered as a great calamity. It was felt to be very hard, that the childless man should have no sort of Sraddha, and among Hindus it was thorefore ordained that his Sapindas, *i.e.*, the agnates should perform his Ekoddista Sraddha† on his death, and also his Sapindikarana, *i.e.*, joining him with his ancestors, so that he might participate in any offerings that might be made to them by their descendants periodically. The Yajurveda makes mention of Sraddhas to three paternal ancestors and the Gobhila Grihya Sutra of Sraddhas to the three maternal ancestors. Manu laid down that in periodical Sraddhas, Pindas should

* See Smith's Greek and Roman Antiquities.

be offered to the three ancestors, and *lepas* to three more.

At first no one excepting agnates could perform the Sraddha. Manu laid down that the Pinda followed the *gotra* and the wealth. The law was in later times relaxed, and the mother's Sapindas came in. Last of all came the wife and the cognatic relations beginning with the sister's son. The later modifications probably followed the modifications of the early law of inheritance, the rule being established, that he who should take the wealth should perform the Sraddha. Raghunandana the greatest authority after Gimutavahana of the Bengal School, forgetting his pet theory, says 'that the blind, the lame, &c., are not entitled to perform the Sraddha, because they are not heirs'; and Manu says 'that the Pinda follows the *gotra* and the wealth,' and on the same ground several persons are declared by him entitled to perform the Sraddha though they are not mentioned in Sraddha rules. He has gone so far as to settle the order of persons competent to perform the Sraddha by the well-known text of Yajnavalkya about succession.

Obsequial rites are of three kinds. The first दाहाद्या *i.e.*, those beginning with cermation and offering of water on that occasion. The second is the Ekoddista Sraddha, *i.e.*, rites in honor of, a "peculiar to the individual" to be performed after the impurity consequent on death, and also on the anniversay of the day of death. The third are the Parvana, *i.e.*, periodical Sradbhas to be performed every month, half-yearly, and yearly, and in holy places of pilgrimage. By the Sapindi-

karana ceremony to be performed a year after death the deceased is joined with his aecestors.

The following persons can perform the Sraddha on the authority of the texts cited in this section.

1. Eldest son, younger son, grandson, great-grandson.
2. Daughter, daughter's son, son's daughter's son, grandson's daughter's son, daughter's son's son, son's daughter and grandson's daughter.
3. Wife.
4. Sapindas, *i. e.*, agnatic relations.
5. Mother's father's Sapindas.
6. Sister's son.
7. Cognatic relations.
8. Daughter-in-law.
9. Teacher, pupil, friend.

Yajnavalkya mentions that the offering of the libation of water is optional on the death of a friend, married daughter, sister, sister's son and father-in-law. It seems that there is no obligation on anybody, except the agnates and the heir to perform the Sraddha.

The conclusion at which one would arrive, on a careful consideration of the matter is that the rule of Sraddha and the rule of inheritance were identical in ancient times when the nearest *gotraja* or agnate had to perform the Sraddha and took the wealth. But when the rules of inheritance were modified, and the old rule of Sraddha was departed from, the principle established was that of Manu, that the Pinda followed the inheritance, and the rules of Sraddha underwent modifications owing to the changes of the law of inheritance. But in

later times, it appears, relations and even strangers, who could not be heirs under the law of inheritance, were also allowed to perform the Sraddha, in the absence of the heirs mentioned by the Rishis, to prevent failure of the funeral obsequies.*

INHERITANCE.

SECTION II.

पितृभ्यः स्वधायिभ्यः स्वधा नमः पितामहेभ्यः स्वधायिभ्यः स्वधा नमः प्रपितामहेभ्यः स्वधायिभ्यः स्वधा नमः ।

यजुर्वेदसंहिता, वाजसनेयी १९ अ ; ३६ का ।

Food to the fathers, to whom food given in Sraddha goes. Food to the paternal grandfathers, to whom food given in Sraddha goes. Food to the paternal great-grandfathers to whom food given in Sraddha goes.

Yajurveda, Vajasaneya Sanhita, 19 A., 36 K.

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* The order of persons competent to perform the Sraddha in Bengal as laid down by Raghunundun is as follows :

(A) When the deceased was a male :—

(1) Eldest son, (2) younger son, (3) grandson, (4) great-grandson, (5) sonless widow, (6) widow having an incompetent son, (7) maiden daughter, (8) betrothed daughter, (9) married daughter, (10) daughter's son, (11) younger brother, (12) elder brother, (13) younger step brother, (14) elder step-brother, (15) son of the younger brother, (16) son of the elder brother, (17) son of the younger step-brother, (18) son of the elder step-brother, (19) father, (20) mother (and daughter-in-law), (22) son's daughter, (23) grandson's widow, (24) grandson's daughter, (25) grandfather, (26) grandmother, (27) sapindas, paternal uncle and the like, (28) samanodakas, (29) sagotras, (30) maternal grandfather, (31) maternal uncle, (32) sister's son, (33) sapindas on the maternal side, (34) samanodakas on the maternal side, (35) father-in-law, (36) son-in-law, (37) brother of the grandmother. After these come strangers like Rvtvik, Acharya &c.

(B) When the deceased was a female :—

(1) Son, (2) grandson, (3) great-grandson, (4) maiden daughter, (5) betrothed daughter, (6) married daughter, (7) daughter's son, (8) son of the rival wife, (9) husband, (10) daughter-in-law, (11) nearest sapinda, (12) nearest Samanodaka, (13) sagotra, (14) father, (15) brother, (16) sister's son, (17) husband's sister's son, (18) brother's son, (19) son-in-law, (20) hasband's maternal uncle, (21) disciple of the husband, (22) father's samanodaka, (23) father's family, (24) mother's family, (25) excellent Brahmin.

पितृभ्यः पितामहेभ्यः प्रपितामहेभ्यो मातामहेभ्यः प्रमातामहेभ्यो वृद्धप्रमातामहेभ्यश्च स्वधीयतामिति ।

गोभिलः, श्राद्धकल्पः २ का ३४ ।

Say *svadha* to father, grandfather, greatgrandfather, maternal grandfather, maternal great-grandfather, and maternal great-great-grandfather.

Gobhila, Sraddhakalpa, 2 K. 34.

सर्वे ज्ञातयोऽपीऽभ्यवयन्त्यासप्तमात् पुरुषाद्ग्रामाद्वा ।
समानग्रामवासे यावत् सब्बन्धमनुस्मरेयुः ॥
निवर्त्तेत चतुर्थः ।

पारस्करः गृह्यसूत्रम् ३ क । १० क १६ । ५१ ।

All relations (of the deceased) to the seventh or the tenth degree descend into water ; if dwelling in the same village all as far they can trace their relationship (and afterwards offer oblations of water). The fourth person ceases from offering the Pinda.

Paraskara Grihya Sutra 3, K. 10, K. 16, 51.

न्युप्य पिण्डांस्ततस्तांस्तु प्रयतो विधिपूर्व्वकम् ।
तेषु दर्भेषु तं हस्तं निमृज्यान्नेपभागिनाम् ॥
यथाशक्तुदकं कार्य्यं त्रिषु पिण्डः प्रवर्त्तते ।*

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* त्रिषु पिण्डः प्रवर्त्तते is ascribed to the Veda and not to Manu, in the ancient commentary of Karka Upadhyaya on Paraskara Grihya Sutra, 3-10-51. The other two commentators of Paraskara, Joyram and Harihara, say that it is a text of Smriti but do not ascribe it to Manu. It is also surprising that there is no commentary of Medhatithi or of Govindaraja (the two most ancient commentators of Manu) on this text. Indeed, the text is rather out of place where it is.

Apararka cites the following texts showing that the taking of wealth, which is characterised as the dirt of a man, is the reason for performing the Sraddha. Apararka says—

यदाह स्कन्दः—श्राद्धमातामहानां तु भवद्भ्यधनहारिणा ।
दौहित्रेणार्थनिष्कृत्यै कर्त्तव्यं विधिवत् सदा ॥
अत्रोपपत्तिमाह—मलमेतन्मनुष्याणांद्रविणं यत्प्रकीर्त्तितम् ।
तच्चाहुर्मलमादत्ते दुर्भिदं ज्ञानिनामपि ॥
ऋषिभिस्तस्य निर्दिष्टा निष्कृतिः पावनापरा ।
आदेहपतनात् कुर्य्यात्तस्य पिण्डोदकक्रियाम् ॥

चतुर्थः सक्थदातैषां पञ्चमो नोपपद्यते ॥
अक्षता वा क्षता वापि यं विन्देत्तदृक्थात् सुतम् ।
पौत्री मातामहस्तेन दद्यात् पिण्डं हरेद्धनम् ॥
गोत्ररिक्थानुगः पिण्डः ।

मनुः ३ ; २१६ । ९ ; १८२, १३६, १४२ ।

Having offered those cakes (to the three ancestors) according to the prescribed rules, being pure, let him wipe the same hand with the roots of those blades of *kusa* grass for the sake of the (three ancestors of great grand-father) who partake of the wipings (lepa).

To the three (ancestors) water must be offered; to three the funeral cake (*pinda*) is given; the fourth (descendant is) the giver of these (oblations), the fifth has no connection (with them).

Through that son whom (a daughter) either not appointed, or appointed may bear to a husband of equal caste, his maternal grand-father has a son's son; he shall present the funeral cake and take the estate.

The funeral cake follows the family (*gotra*) and the inheritance.

Manu, III. 216; IX. 186, 136, 142.

पुत्राभावे सपिण्डा मातृसपिण्डाः शिष्याश्च दद्युस्तदभावे ऋत्विगाचार्यौ ।

गौतमः १५ । १३, १४ ।

On failure of sons (the deceased person's) Sapindas, the Sapindas of the mother, or a pupil shall offer the (funeral oblations). On failure of these an officiating priest, or the teacher.

Gautama, XV. 13, 14.

आदिशेत् प्रथमे पिण्डे मातरं पुत्रिकासुतः ।
द्वितीये पितरं तस्यास्तृतीये च पितामहमिति ।

बौधायनः प्र २ । अ २ । १६ ।

The first Pinda should be offered by the Puttrikaputra to his mother, the second Pinda to her father, and the third to her grand-father.

Baudhayana, P.2, A.2, 16.

अपुत्रस्य स्त्रिया कार्य्यं पिण्डश्राद्धं तथोदकम् ।

मदनपारिजाते धृततत्रौधायनवचनम् ।

Of the sonless man, the Sraddha byoffering Pinda and the offering of water should be performed by the widow.

Baudhayana, cited in the Madana Par jata.

सप्तमादृषमादापि ज्ञातयोऽभ्युपयन्त्यपः ।

अपनः शोशुचदघमनेन पितृदिङ्मुखा : ॥*

एवं मातामहाचार्य्यप्रेतानामुदकक्रिया ।

कामोदकं सखिप्रत्तास्वसीयश्वशुरर्त्विजाम् ॥

याज्ञवल्क्यः २।२, ४ ।

Up to seventh or the tenth degree all the agnates (of the deceased) should go to a stream citing the hymn commencing with *apa* &c. (take away our sins), and facing the south (offer oblation of water).

Similarly water should be offered to the deceased, maternal grand father and the religious preceptor. To offer water to a deceased friend, married (daughter or sister), son of a sister, father-in-law, and a sacrificial priest is optional.

Yajnavalkya, III. 3, 4.

एतत् सपिण्डीकरणमेकोद्दिष्टं स्त्रिया अपि ।

याज्ञवल्क्यः १ अ २५३ ।

This Sapindikarana and the Ekoddista should be performed of a female (*i.e.* mother). Yagnawalkya, 1 Ch. 253.

प्रमीतस्य पितुः पुत्रैः श्राद्धं देयं प्रयत्नतः ।

ज्ञातिबन्धुसुहृच्छिष्यैर्ऋत्विग्भृत्यपुरोहितैः ॥

पौत्रोऽथ पुत्रिकापुत्रः स्वर्गप्राप्तिकरावुभौ ।

रिक्थे च पिण्डदाने च समौ तौ परिकीर्त्तितौ ॥

पराशरमाधवधृतबृहस्पतिवचनम् ।

Of the deceased Sraddha should be offered with care by the sons, by agnates, bandhus, friends, pupils, officiating priest, servants and family priest.

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* This Mantra is from the Vajshaneyi Sanhita, 35-6. Mandlika's translation of this text will be found to be incorrect on a comparison with the Sutra of Paraskara and Karka Upadhyaya's commentary.

The grandson and the Putrikaputra both make their ancestors attain heaven, and they are both equal as to inheritance and the offering of Pinda. Vrihaspati, cited by Madhava.

स्वेन भर्त्रा सह श्राद्धं माता भुङ्क्ते स्वधामयम् ।
पितामही च स्वेनैव स्वेनैव प्रपितामही ॥

अपरार्कधृतबृहस्पतिवचनम् ।

A mother tastes with her husband the funeral repast consisting of oblations to the manes, and the paternal grand-mother with hers.

Vrihaspati cited by Apararka; cited also in the Dayabhaga as a text of an unknown Smriti.

पार्व्वणेन तु कार्य्यं स्यात्पुत्रवद्भ्रातृजेन तु ।
भ्रातुर्ज्येष्ठस्य कुर्व्वीत कार्य्यं ज्येष्ठोऽनुजस्य च ॥
पितुः पुत्रेण कर्त्तव्या पिण्डदानोदकक्रिया ।
पुत्राभावे तु पुत्री च तदभावे सहोदरः ॥
जात्या जातः सुतो मातुः पिण्डदः स्यात्सुतोऽपि च ।
जनकस्य न किञ्चित्स्यादर्थात्कामप्रवर्त्तनात् ॥
शूद्रस्य दासीजः पुत्रः कामदस्तु स पिण्डदः ।
औरसाद्याः स्मृताः पुत्रा मुनिभिर्दादशैव तु ।
श्राद्धप्रदाः क्रमेण स्युः पूर्व्वाभावे परः परः ॥

बृहत्पराशरः, ५ अ ।

The brother's son should perform the Parvana Sraddha like the son. The Sraddha of the elder brother should be performed by the younger, and the elder brother should perform the Sraddha of the younger. The son should perform the ceremonies of offering the Pinda and water. On failure of the son, the daughter; on her failure the brother should perform them.

The son, begotten by one of equal caste (the illegitimate son), is the offerer of Pinda of his mother, and is (in every respect) a son to her; but he is nothing to the begetter, as he is born of lust.

The son by a slave of a Sudra is fulfiller of desire and offers the Pinda. Twelve sons are mentioned by the Rishis. They are offerers of the Pinda, one after another, in the order mentioned.

Vrihat-Parasara, Ch. V.

अपुत्रा ये मृता: कैचित् स्त्रियो वा पुरुषाश्च ये ।
तेषामपि च तैर्यं स्यादेकोद्दिष्टं न पार्व्वणम् ॥

पराशरमाधवधृत-आपस्तम्बवचनम्, बृहत्पराशर:, ५ अ ।

For those persons, whether men or women, who die without male issue, shall be performed the funeral rites peculiar to the individual, but not the periodical obsequies.

Vrihat-Parasara, Ch. V.
Cited in the Parasara-Madhava as a text of Apastamba. Cited also in the Dayabhaga without naming the author.

न योषाया: पतिर्दद्यादपुत्राया अपि क्वचित् ।
न पुत्रस्य पिता दद्यान्नानुजस्य तथाग्रज: ॥*

कात्यायन:, २४ अ ११ ।

The husband should never offer Pinda to the sonless wife, or the father to the son, or the elder brother to the younger brother.

Katyayana, XXIV. 11.
Chhandoga-Parisista, according to Raghunandana.

मातामह्यास्तथापुत्रस्य श्राद्धादि पितृवद्भवेत् ।
सम्बन्धिबान्धवादीनामेकोद्दिष्टन्तु सर्व्वदा ।

अपरार्क धृतकात्यायनवचनम् ।

The Sraddha of the sonless maternal grand-father has to be performed in the same way as that the father.

The Ekoddista Sraddha of the Bandhus should always be performed. Katyayana, cited in the Parasara-Madhava.

मातु: प्रथमत: पिण्डं निर्व्वपेत्पुत्रिकासुत: ।
द्वितीयन्तु पितुस्तस्यास्तृतीयन्तत्पितु: पितु: ॥

कात्यायनलिखितौ ।

The Putrika's son should first offer Pinda to the mother; next to her father; and thirdly to her grand-father.

Katyayana, XVI. 23; Likhita, 53; Manu according to Apararka.

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* Apararka cites this as a text of Katyayana but reads the first line thus:
अष्टकायां पदिर्दद्यादपुत्रायां ननुक्वचित् ।

नेतत् पौत्रेण कर्त्तव्यं पुत्रवांश्चेत् पितामहः।

कात्यायनः, १६ अ १७।

This (Sraddha) should not be performed by the grandson if there is a son living of the grand-father.

Katyayana, XVI. 17.

पुत्रः शिष्योऽथवा पत्नी पिता भ्राताऽनुषागुरुः।
स्त्रीहारी धनहारी च कुर्य्यात् पिण्डोदकक्रियान्॥

अपरार्कधृतकार्ष्णाजिनिवचनम्।

Son, disciple, widow, father, brother, daughter-in-law or teacher, he who takes the wife and also he who inherits the wealth should offer the Pinda and oblation of water.

Karshajini, cited by Apararka.

पितुः पुत्रेण कर्त्तव्याः पिण्डदानोदकक्रियाः।
तदभावे तु पत्नी स्यात्पत्न्यभावे सहोदरः॥

पराशरमाधवधृत शङ्खवचनम्।

The son should perform the ceremonies of giving the Pinda and water; failing him, the wife; failing her the brother.

Sankha, cited by Madhava. According to Apararka, it is a text of Vrihaspati.

दुहिता पुत्रवत् कुर्य्यान्मातापित्रोश्च संस्कृता।
भार्य्यापिण्डं पतिर्दद्याद्भर्त्रे भार्य्या तथैव च।
स्वश्रूर्दद्यात् स्नुषा चैव तदभावे सपिण्डकः॥*

रघुनन्दनधृत-शङ्खवचनम्।

The married daughter offers Pinda both to her mother and father like a son.

The wife's Pinda the husband offers. Similarly the wife (offers Pinda) to husband; the daughter-in-law offers Pinda to the mother-in-law (father-in-law also according to Raghunandana) and others; in her default the Sapinda.

Sankha, cited by Raghunandana.

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* सपिण्डकः in the last line is the reading prevalent in Mithila. Raghunandana gives another reading द्विजोत्तमः (the best of Brahmanas).

पुत्रः पौत्रश्च तत्पुत्रः पुत्रिकापुत्र एव च।
पुत्री च भ्रातरश्चैव पिण्डदाः स्युर्यथाक्रमात्॥

वृद्धहारीतः, ४ अध्यायः।

Son, grand-son, great-grandson, Putrika-putra, daughter, and brothers are the offerers of Pinda, in the order mentioned.

Vriddha Harita, Ch. IV.

मातुली भागिनेयस्य स्वस्रीयो मातुलस्य च।
श्वशुरस्य गुरोश्चैव सख्युर्मातामहस्य च॥
एतेषां चैव भार्य्याभ्यः स्वसुर्म्मातुः पितृस्वसुः।
पिण्डदानन्तु कर्त्तव्यमिति वेदविदां स्थितिः॥

अपरार्कधृतधर्म्मवचनम्।

The maternal uncle (should offer Pinda) to the nephew; the sister's son to the maternal uncle; of the father-in-law, teacher, friend, maternal grand-father, of their wives, of the mother's sister and father's sister, the offering of Pinda should be made: this is the decision of those who know the Vedas.

Dharma cited by Apararka.
It is a text of Vriddda-Satatapa according to Raghunandana.

अपुत्रस्य परेतस्य न्व कुर्य्यात्सपिण्डताम्।
अशौचमुदकं पिण्डमेकोद्दिष्टं न पार्व्वणम्॥

पराशरमाधवधृतस्मृतिवचनम्।

Of the childless man Sapindikarana should not be performed on his death; the purificatory ceremonies, the offerings of water and Pinda, and Ekoddista should be performed, but not the Parvana.

Text of a Smriti, cited by Madhava,

मातापित्रोः सुतैः कार्य्यं पिण्डदानादि किञ्चन।
पत्नी कुर्य्यात्सुताभावे पत्न्यभावे तु सोदरः॥

उशनाः, ७। २१।

The son offers the Pinda to the parents; the widow failing the son; failing the wife, the brother.

Ushana, VII. 21.

पत्याचैकेन कर्त्तव्यं सपिण्डीकरणं स्त्रिया: ।

मितक्षराधृतयमवचनम् ।

The Sapindikarana ceremony of females should be performed with their husbands.

Yama, cited in the Mitakshara.

पितु: पितामहे यद्वत् पूर्णे सम्वत्सरे सुतै: ।

मातुर्म्मातामहे तद्वदेषा कार्य्या सपिण्डता ॥

मितक्षराधृतोशनोवचनम् ।

As in the case of father's grand-father, by sons, on the expiration of a year, so in the case of mother's grand-father, the Sapindikarana ceremony should be performed.

Ushana, cited in the Mitakshara

एकभूर्त्रित्वमायाति सपिण्डीकरणेकृते ।

पत्नी पतिपितृणाञ्च तस्मादंशेन भागिनी ॥

मिताक्षराधृतशातातपवचनम् ।

One form is obtained by the wife of an ancestor, on the performance of the Sapindikarana ceremony, with the father. and other ancestors and she is thus a sharer with them (in the oblations).

Shatatapa, cited in the Mitakshara.

ये नरा: सन्ततिच्छिन्ना नास्ति तेषां सपिण्डता ।

मिताक्षराधृतस्मृतिवचनम् ।

Of those men who are childless, there is no. Sapindikarana with their ancestors.

Text of an ancient Smriti, cited in the Mitakshara.

सर्व्वाभावे स्वयं पत्न्य: स्वभर्त्तृणाममन्त्रकम् ।

सपिण्डीकरणं कुर्य्यु: तत: पार्व्वणमेव च ॥

पराशरमाधवधृतलौगाक्षिवचनम् ।

On failure of all, the widows by themselves should perform the Sapindikarana ceremony and the Parvana Sraddha of the husband without Mantras.

Laugakshi, cited in the Parasara-Madhava.

अपुत्रे प्रस्थिते कर्त्ता नास्ति चेच्छ्राद्धकर्म्मणि।
तत्र पत्न्यपि कुर्व्वीत सापिण्ड्यं पार्व्वणं तथा ॥
भ्रात्रे भगिन्यै पुत्राय स्वामिने मातुलाय च।
मित्राय गुरवे श्राद्धमैकोद्दिष्टं न पार्व्वणम् ॥

पराशरमाधवधृतसुमन्तुवचनम्।

If a man dies sonless, and there is no body entitled to perform the Sraddha, the widow should perform the Sapindikarana and the Parvana Sraddha.

To brother, sister, son, husband, mother's, brother, friend, and teacher, the Ekoddista Sraddha, but not the Parvana, should be offered.

Sumantu, cited in the Parasara-Madhava.

अपुत्रायां मृतायान्तु पतिः कुर्य्यात्सपिण्डताम्।
श्वश्वादिभिः सहैवास्याः सपिण्डीकरणं भवेत् ॥

मिताक्षराधृतपैठीनसिवचनम्।

Of a woman dying sonless the husband performs her Sapindikarana ceremony. Her Sapindikarana is made with her mother-in-law. Paitinasi, cited in the Mitakshara.

अपुत्रस्य तु या पुत्री सैव पिण्डप्रदा भवेत्।

रघुनन्दनधृत ऋष्यशृङ्गवचनम्।*

The daughter of the sonless man becomes the offerer of Pinda.

Rishyasringa, cited by Raghunandana.

मातुः पितरमारभ्य त्रयो मातामहाः स्मृताः।
तेषान्तु पिण्डवच्छ्राद्धं कुर्य्युर्दौहित्रसूनवः ॥

पराशरमाधवादिधृत पुलस्त्यवचनम्।

There are three maternal ancestors beginning with the

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* The following text of Rishyasringa is cited by Apararka showing that the re-married immature girl widow, stands on the same footing as an unmarried girl and her Sraddha has to be performed in the Gotra of her second husband, the first marriage being wholly ignored :—

स्त्रीणामाद्यस्य भर्तुर्यैर्यद्गोत्रं तेन निर्वपेत्।
यदित्वचतयोनिः स्यादन्यपत्न्य समाश्रिता ॥
तद्गोत्रेण तथा देयं पिण्डं श्राद्धं तथोदकम् ॥

mother's father. Daughter's sons should perform their Sraddha like that of the father.

Pulastya, cited in the Parasara Madhava and Sarasvati Vilasa.

पुत्री भ्राता पिता वापि मातुलो गुरुरेव च ।
एते पिण्डप्रदा ज्ञेयाः सगोत्रास्त्वेव बान्धवाः ॥ प्रचेताः ।

The son, brother, father, maternal uncle, and the Guru: these are offerers of Pinda, as well as Sagotras and Bandhavas.

Pracheta, cited by Raghnandana.

एकादशाद्याः क्रमशो ज्येष्ठस्तुविधिवत् क्रियाः ॥
प्रचेताः ।*

The eldest should perform tho ceremonies of Sraddha beginning with those to be performed on the eleventh day.

Pracheta, cited in the Apararka and Nirnaya Sindhu.

पितॄन् मातामहांश्चैव द्विजः श्राद्धेन तर्पयेत् ।
अनृणं स्यात् पितृणान्तु ब्रह्मलोकञ्च गच्छति ॥ व्यासः ।

The paternal ancestors and maternal ancestors shonld be satisfied wirh Sraddha. The debt to the ancestors is thus paid, eand one goes to the region of Brahma.

Vyasa, cited by some of the commentators.

पुत्रेणैवतु कर्त्तव्यं सपिण्डीकरणं स्त्रियाः ।
पुरुषस्य पुनस्त्वन्यै भ्रातृपुत्रादयोऽपिवा ।
भ्राता वा भ्रातृपुत्रो वा सपिण्डः शिष्य एवच ॥
रघुनन्दनधृतखण्डहारीतवचनम् ।

Of a female, the Sapindikarana can only be performed by the son; of a male, it can be performed by others, such as the nephew and the like, or by the brother, brother's son, Sapinda or disciple.

Laghuharita, cited by Raghunandana.

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* Compare--

सर्व्वैरनुमतमृत्वा जेष्ठे नैवतु यत्कृतम् ।
द्रव्येण वा विभक्तेन सर्व्वैरेव कृतम्भवेत् ॥
पारिजातधृत मरीचिवचनम् ।

पतिनैकेन कर्त्तव्यं सपिण्डीकरणं स्त्रिया: ।
सा गता हि मृतैकत्वं कुशैरन्तरयन् पितॄन् ॥

रघुनन्दनधृतगार्ग्यवचनम् ।

The Sapindikarana ceremony of a woman should be made with that of the husband alone, for she when dead becomes one with the husband after the Pindas to the fathers had been separated by the kusa grass.

Gargya, cited by Raghunardana

पितरो यत्र पूज्यन्ते तत्र मातामहा ध्रुवम् ।
अविशेषेण कर्त्तव्यं विशेषान्नरकं व्रजेत् ।

रघुनन्दनधृतवृद्धयाज्ञवल्क्यवचनम् ।

Where the paternal ancestors are worshipped, the maternal ancestors should be worshipped without any distinction being made between them. If any distinction is made, it leads to hell.

Vriddha Yajnavalkya, cited by Raghunandana

पतिपुत्र विहीनाया: स्त्रिया नास्ति सपिण्डनम् ।

There is no Sapindikarana ceremony of a female having no husband or son.* Text of an ancient Smriti.

पुत्र: पौत्र: प्रपौत्रो वा तद्वद्वा भ्रातृसन्तति: ।
सपिण्डसन्ततिर्वापि क्रियार्हा नृप जायते ॥
कुलद्वयेऽपि चोच्छन्ने स्त्रीभि: कार्य्या क्रिया नृप ॥
पितृमातृसपिण्डैस्तु समानसलिलैस्तथा ।
तत्सङ्घातगतैश्चैव राज्ञा वा धनहारिणा ॥
पूर्व्वा: क्रिया मध्यमाश्च पुत्राद्यैरेव चोत्तरा: ।
दौहित्रैर्वा नरश्रेष्ठ कार्य्यास्तत्तनयैस्तथा ॥†

विष्णुपुराणम्, ३ अ । १२ अ । ३०, ३२, ३७, ३८ ।

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* Compare the following text cited by Raghunandana :—

स्वेन भर्त्रा सदैवास्या: सपिण्डीकरणं स्त्रिया: ।

† The reading adopted is the reading of Madhava. The Bombay edition of the Vishnu Purana reads बन्धुर्वा for तद्वद्वा in the first line, and makes the verse meaningless. The sixth line reads in that edition as पूर्व्वा: क्रियास्तु कर्त्तव्या: पुत्राद्यैरेव चोत्तरा: ।

Son, grand-son, and great-grandson, like them the descendants of the brother, or the descendants of the Sapindas deserve to perform the Sraddha, O king. When both (the father's and mother's families) are extinct, widows should perform the obsequial ceremonies. (Sraddha should be performed by) the father's and mother's Sapindas or by Samanodakas, or by members of the same class, or by the king who takes the inheritance (for failure of heirs). The first (part) and the middle (part) as well as the last, should be performed by those beginning with the son, (son, grandson and great-grandson) or by the daughter's sons, as well as by their sons.

Vishnu-Purana, P. 3, A. 13, S. 30, 32, 37, 38

न कदाचित् सगोत्राय श्राद्धं कार्य्यमगोत्रजैः ।

ब्रह्मपुराणम् ।

Persons not of the same *gotra* should never be made to perform the Sraddha.*

Brahma Purana, cited by Raghunandana.

पुत्राभावे सपिण्डास् तदभावे सहोदकाः ।
मातुः सपिण्डा ये वा स्युर्ये वा मातुः सहोदकाः ।
कुर्य्युर्न्मातामहार्यैव पुत्रिकातनयस्तथा ।
सर्व्वाभावे स्त्रियः कुर्युः स्वभर्तृकामसन्त्रकम् ।
तदभावे च नृपतिः कारयेत्तस्य रिक्थतः ॥
तज्जातीयैर्नरैः सम्यदाहाद्याः सकलाः क्रियाः ।
सर्व्वेषामेव वर्णानां बान्धवो नृपतिर्यतः ।

मार्कण्डेयपुराणम्, ३०। १९—२३ ।

On failure of son, Sapindas, on their failure Samanodakas the mother's Sapindas, and mother's Samanodakas, perform the Sraddha ; the Putrikaputra performs the Sraddha of the materna, father. On failure of all, the widows perform the Sraddha of their husband without mantras. On their failure the king causes to be performed, from the wealth left by the deceased, by men of

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* This is said to refer to पाकश्राद्धः *i.e.*, Sraddha with prepared food. There is another kind of Sraddha, namely, आमश्राद्धः *i.e.*, Sraddha with uncooked food.

his caste, all ceremonies beginning with cremation, for the king is the Bandhava of all castes.

Markandeya Purana, Ch. 30, v. 19—23 *

SECTION III.

Son, Grandson, Greatgrandson.

THE subject of inheritance we find divided by the Rishis into two divisions ; first, the succession of the lineal descendants, son, grandson, great-grandson, daughter, and daughter's son, &c., and the second, succession to the estate of a childless man. This grand division of the law of inheritance is to be found among all Aryan nations.

The position of direct descendants among ancient Aryans.

Among Hindus, as among Romans and other Aryan nations, the direct lineal descendants were in the power of the Paterfamilias and were *sui heredes*. The term "sui heredes" in Roman Law means persons "who took an inheritance that was their own, who were heirs not of the Paterfamilias, but of themselves, and being, as Cujacius expresses it by a Greek equivalent αὐτοκληρονόμοι, took what thus belonged to them already, and only received possession of that over which they had even in the life-time of the parent, a kind of

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* The following texts also are cited in the connection.

जामातृ: श्वशुराश्चैव स्वेषां त्वेपि संयता:

Text cited in the Nirnaya Sindhu.

दत्तानां चाप्यदत्तानां कन्यानां कृतेपिता ।

Text cited in the Nirnaya Sindhu.

ऋणा स्वस्त्रीयतत्पुत्रज्ञातिसम्बन्धिबान्धवा: ।

पुत्राभावे तु कुर्व्वीत सपिण्डानां यथाविधि ॥

Text of Vriddha Manu cited in the Prithvi Chandrodaya and from it in the Nirnaya Sindhu.

ownership."* Indeed, the principle which governed succession among ancient Aryans, as we have seen before, was that the property belonged to the family and the interest of a deceased member only vested in the survivors. The worship of and the giving of food to the Manes, like the giving of food to the living members, was a duty which attached to the family property. It is also clear from the ancient Smritis that the direct male descendants took what was their own and not because they had to perform the Sraddha. The great distinction between male descendants and the remoter heirs was that the former were under the liability to perform the Sraddha, whether they took the inheritance or not, while the latter had to perform the Sraddha because they took the inheritance which was burdened with that duty.

The inheritance according to the twelve tables belonged to the *sui heredes*, who were as Justinian puts it, "such as a son or a daughter, a grandson or grand-daughter by a son, a great-grandson or great-grand-daughter by a grandson born of a son ; nor does it make any difference whether these children are natural or adopted."† The law of the ancient Aryans seems, therefore, to have been, as evidenced by the law prevailing among ancient Hindus, Persians, Greeks and Romans, that the direct male descendants up to the great-grandson and the daughter, son's daughter and grandson's daughter (who were in the *gotra* as Putrika) and their sons, took the inheritance. This was the ancient law of

* Sandars' Justinian, p. 216.
† Sandars' Justinian, p. 266.

the Hindus as we find in the Smritis. We are next confronted with the difficulty of reconciling this principle with the superior rights of the eldest son established in the more ancient Smritis.

It appears that in ancient Aryan society the Paterfamilias represented the family in all matters religious, social or political. He alone was clothed with legal rights, and burdened with legal liabilities. On the death of the Paterfamilias the law had to determine on whom his *persona*, *i. e.*, the aggregate of his political and social rights and duties should devolve. Latin *persona* means the same thing as Sanskrit *Atman*. We have seen how the ancient Hindu thought that the son was one's ownself only renewed. On the eldest son naturally, and by the said fiction, the duties of a man and also his rights devolved. He represented the family. He was under the liability, in consequence, to give food to the Manes and also to support the living members. This was the origin of the Law of primogeniture as found in the old Smritis. It had nothing to do with Sraddha, and it was rather late in the day for a writer in an English Law Review in 1903, to assert the contrary with the confidence which always goes with imperfect knowledge. In later times, when the position of the Paterfamilias, which was like that of a feudal lord, became less important in the body politic, with the growth of the power of the king, the rule of primogeniture fell into disuse, except in the case of principalities and feudal chiefs, and persons holding hereditary offices.

The history of the rights of the son in Hindu Law is rather curious. The most ancient custom of which we have any record, as the Sutra o

the Rig Veda cited in this section, evidences, was that the father when old, divided his wealth among his sons. It is said by some eminent European scholars that in ancient times, the custom among Teutons and some other Aryan races was that, the father when very old was "cast out or put to death" by the sons.* Those writers also say that the custom prevailed among Hindus and cite Rig Veda 1 M. 70 S. (see p. 86) in support of their position. They have given an unjustifiably incorrect meaning to the Sutra, as the reader will find. Among Hindus, there is no trace anywhere to be found of such a custom and it is a calumny on the most filial race on earth. Equal partition was the original rule, as the Veda says, and as is probable, having regard to the instincts of man. But in later times, when we come to the older Smritis, we find the rule established that the eldest son alone was entitled to the inheritance, subject to the duty of maintaining his brothers. It was probably established at the time when the clan system came into existence, which originated in the exigencies of the migration of the races and settlement in conquered countries. And it also appears that there was a very ancient idea prevalent among Aryan nations that the son was liable for the worldly debts of the father to his creditor. The *sui heredes* under the old Roman Law had to satisfy the creditors of the deceased whether the inheritance sufficed or

* See note on this matter in Chapter IV, Sec. I.

It might be said that the division by the aged father was a later modification and a consequence of the older custom. One should require much stronger authority than that of the above-mentioned scholar, for this unnatural theory about the origin of the law of inheritance.

not. The payment of debts somehow or other, was considered an urgent duty, and the ancients had an idea that debts followed a man after death, and probably dragged him to hell. By the birth of a son alone could a man be free from the danger, for he left substitute, and the debt then fastened upon him. The idea never lost its hold over the Hindu mind, and hence we find that according to the Rishis it is an obligation, legal and not moral, of the son to pay the father's debt. This liability of the son to pay the father's debts was amplified into the spiritual obligations of the Brahmin, namely, the debt to the ancestors to produce a son, the debt to the Rishis to study the Vedas, and the debt of sacrifice to the gods, and the worldly obligation to pay the father's debts. "The son is made a substitute for the father for meritorious works," say the Vedas. The Sraddha is a debt of the father devolving on the son, and also a debt of the son himself. The idea that the son was under a liability to pay the worldly debts, must have preceded the idea of his obligation to perform the Sraddha, for the latter, wherever it is mentioned in the most ancient records we have, is called a debt, by analogy to the former. The son, grandson and great-grandson, daughter's son, son's daughter's son, and grandson's daughter's sons were the only persons who were under an obligation to perform the Sraddha under the Hindu law, whether they received any property or not, as under the old Roman and Greek Law, the direct descendants were bound to perform the funeral ceremonies and to make offerings to the ancestors, and to pay their debts, whether they received any property from

them or not.* By the birth of the first son, it was supposed by the Hindus, a man was freed from all the three debts mentioned before. Therefore he alone, according to the older Smritis, was entitled to the inheritance, the others being entitled to be maintained. Probably it was a remnant of some custom of primogeniture prevailing among the original Aryan settlers. The injustice of the rule became very soon apparent to the reasonable mind and the just instincts of the Hindu race, and the law was slowly changed. At one place both Manu and Gautama give to the eldest the entire inheritance. In other texts, Manu gives to the eldest an extra share of one-twentieth. Gautama gave either two shares or one-twentieth more. Vasista gave the eldest two shares. Baudhayana gave one-tenth more or the horse or the cow. Apastamba abolished the custom of the eldest son's extra share altogether, and ordained that he should be given some particular article as a mark of honour. We find texts in the Rig Veda and the Aitereya Brahmana showing that the right of all sons to share on partition was well-established in those early times.† Here again the existence of texts in the Manu and the Gautama, to the contrary, is evidence that they recorded custom more ancient than the Rig Veda. In Buddhistic times, the eldest son's extra share was recognized, as will appear from the Burmese Manu, and was put down at one-tenth. The custom of giving an extra share to the eldest son prevailed, it

* Smith's Greek and Roman Antiquities. Sandars' Justinian, p. 217.
† See Chap. IV Sec. 3.

seems, among all the Aryan nations. It existed among the old Persians. In ancient Germany and France also, this custom of giving a preferential birth-right to the eldest son was recognized and in the latter country, it was called "le preciput." The eldest son, the eldest child got the house and a piece of furniture and a piece of land "as far as a chicken could fly" as being traditionally exempt from partition. Under the Athenian law, as Demonsthenes tells us, the house went to the eldest son. In India, the custom was reprobated by Apastamba and prohibited in rather modern times by the Aditya Purana.

The idea of the son's capacity to take upon himself the father's debts and to free him from great horrors after death was also the origin of the adoption of the twelve kinds of sons. Sonlessness was a great curse. Therefore men would get sons of any possible kind, legitimate or illegitimate, bought or adopted. All these sons were entitled to offer the pinda and to take the inheritance. The practice was so gross that it became soon repugnant to the Hindu mind. First there was an attempt to distinguish between the different kinds of sons, and to declare some of them not heirs at all. Finally the pure Rishi Apastamba declared all sons other than the legitimate as not fit to be recognized. Vrihaspati also declared them to be not allowable. It thus appears that from very ancient times the practice has been forbidden. Apastamba and Vrihaspati would not have even the adopted son ; but later custom allowed the adopted and *kritrima* sons but only as very inferior kinds of sons.

We have already seen that the son was considered as the father's body, and that it was an ancient Hindu idea that up to the great-grandson the body remained the same. After that, there was a different person. It followed from this, that the son, grandson, and great-grandson were all equal, the only distinction inconsistent with the fiction being that the grandsons took their fathers' share, and were entitled to the inheritance with the sons *per stirpes* and not *per capita*. The reason of this distinction is given in the Roman Law, according to which, grandsons, if their father was living and "had not ceased to be under the power of the grandfather either by death or some other means," could not be *sui heredes*. Grandsons could only take the place of their deceased father. It followed, that they took according to the stock or *per stirpes* and not *per capita* (1).

Grandson take per stirpes.

In a recent case, it was seriously contended that the son of a divided son has no representative right as the Mitakshara says that only unseparated brothers but the Madras High Court have rightly held that, even in such a case, the son of a predeceased son does not lose his right as the Mitakshara gives him an unobstructed right by birth even to separate property of the grandfather and separation does not convert it into an obstructed right. (2).

Grandson's right of representation.

According to the Rishis, a son born after partition with the sons, takes all the wealth of the father. Under the Mitakshara Law, the separated

The right of afterborn son.

(1) Sandars' Justinian, p. 217.

(2) Marudayi *v.* Doraisami 30 Mad. 348. Apaji *v.* Ramchandra 16 Bom. 56.

son is postponed to the associated son (1) in respect of ancestral as well as of self-acquired property and it has been held in Bombay, that the separated grandson is so postponed not only in respect of ancestral property but also in respect of the self-acquired property of the father. It has also been held that though the sons living jointly with the father may be presumed to be reunited with him(2), the separated son succeeds in preference to the widow (3).

SECTION III.

विश्वा नरः पुरुत्रा सपर्यन् पितुर्न जित्रेर्वि वेदीभरंत ।

ऋग्वेदः १ म ७० सू ५

(O Fire,) men worship you in many places of sacrifice for the gods in various ways and obtain wealth from you as sons obtain from their old father.

Rig Veda, 1 M. 70 S. 5.

मनुः पुत्रेभ्यो दायं व्यभजत् ।

तस्माज्ज्यैष्ठं पुत्रं धनेन निरवसाययन्तीति ।

तैत्तरीयसंहिता ३ । १ । ९ । ४ ; २ । ५ । २ । ७

Manu divided his wealth among his sons.

Therefore they distinguish the eldest by (an additional share of the property).

Taittriya Sanhita, III. 1, 9, 4 & II, 5, 2, 7.

मनुः—

ऊर्ध्वं पितुश्च मातुश्च समेत्य भ्रातरः समम् ।

भजेरन् पैतृकं रिक्थमनीशास्ते हि जीवतोः ॥ ९ । १०४

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(1) Nana Tawker *v.* Ram Chandra Tawker, 32 Mad. 377.

(2) Fakerappa *v.* Yellappa, 22 Bom. 101 ; Nawal *v.* Bhagban, 4 All. 427.

(3) Pitamber *v.* Harish, 15 W. R. 200 ; Ramappa *v.* Sithammal, 2 Mad. 182.

ज्येष्ठ एव तु गृह्णीयात् पित्र्यं धनमशेषतः ।
शेषास्तमुपजीवेयुर्यथैव पितरं तथा ॥ ९ । १०५
ज्येष्ठस्य विंश उद्धारः सर्व्वद्रव्याच्च यद्वरम् ।
ततोऽर्द्धं मध्यमस्य स्यात्तुरीयन्तु यवीयसः ॥ ९ । ११२
उद्धारो न दशस्वस्ति सम्यग्जानां सकर्म्मसु ।
यत्किञ्चिदेव दद्यात्तु ज्यायसे मानवर्द्धनम् ॥ ९ । १२५
एकाधिकं हरेज्ज्येष्ठः पुत्रोऽध्यर्द्धं ततोऽनुजः ।
अंशमंशं यवीयांस इति धर्म्मो व्यवस्थितः ॥ ९ । ११७
पुत्रेण लोकान् जयति पौत्रेणानन्त्यमश्नुते ।
अथ पुत्रस्य पौत्रेण ब्रह्मणाप्नोति विष्टपम् ॥ * ९ । १३७

Manu, Ch. IX.—

After the death of the father and of the mother, the brothers, being assembled, may divide among themselves in equal shares the paternal (and the maternal) estate ; for, they have no power over it while the parents live. 104.

Or the eldest alone may take the whole paternal estate, the others shall live under him just as they lived under their father. 105.

The additional share (deducted) for the eldest shall be one-twentieth (of the estate) and the best of all chattels, for the middlemost half of that, but for the youngest one-fourth. 112.

But among (brothers) equally skilled in their occupations, there is no additional share, (consisting of the best animal) among ten ; some trifle only shall be given to the eldest as a token of respect. 115.

Let the eldest son take one share in excess, the (brother) born next after him one (share) and a half, the younger ones one share each ; thus the law is settled. 117.

Through a son he conquers the worlds, through a son's son he obtains immortality, but through his son's grandson he gains the world of the sun. 137.

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* Identical with Vasista, XVII, 55. Vishnu XV. 46, and also attributed to Sankha, Likhita, Harita in the Dayabhaga and the Kalpataru.

ऊर्द्धं पितुः पुत्रा ऋक्थं भजेरन्।
सर्व्वं वा पूर्व्वजयेतरान् विभयात्।
विंशतिभागो ज्येष्ठस्य * * इंद्राग्नौ वा पूर्व्वजः।
संसृष्टविभागः प्रेतानं ज्येष्ठस्य।

गौतमः २८। १, ३, ५, २७

After the father's death let the sons divide the wealth. Or the whole (estate may go) to the firstborn. (The additional share) of the eldest (son consists of) a twentieth part (of the estate). Or let the eldest have two shares.

The heritage of reunited (brothers), deceased without male issue, goes to the eldest brother.

Gautama, XXVIII. 1, 3, 5, 27.

इंद्राग्नं ज्यैष्ठो हरेत्। वशिष्ठः; २७। ४२

The eldest takes a double share.

Vasistha, XVII. 42.

समग्रः सर्व्वेषामविशेषात्। वरं वा रूपमुद्धरेज्ज्येष्ठः।
दशानां वैकमुद्धरेज्ज्येष्ठः।
चतुर्णां वर्णानां गौश्वाजावयो ज्येष्ठांशः।

बौधायनः प्र २। अ २। क ३। ३, ४, ६, ९

A father may, therefore, divide his property equally among all, without (making any) difference. Or the eldest may receive the most excellent cattle. Or the eldest may receive in excess one part of the ten. The additional share of the eldest is, according to the order of the castes, a cow, a horse, a goat, and a sheep.

Baudhayana, P. 2, A. 2, K. 3, S. 3, 4, 6, 9.

एकधनेन ज्येष्ठं तोषयित्वा * *।
जीवन् पुत्रेभ्यो दायं विभजेत् समम।
ज्यैष्ठो दायाद इत्येके।
तच्छास्त्रैर्विप्रतिषिद्धम्।
मनुः पुत्रेभ्यो दायं व्यभजदित्यविशेषेण श्रूयते।

यद्यपि तस्माज्ज्येष्ठं पुत्रं धनेन निरवसाययन्तीत्येकवच्छ्रूयते। तथापि नित्यानुवादन्यविधिमाहुर्न्यायविदो यथा तस्मादजावयः पशूनां सह चरन्तीति।

तस्मात् स्नातकस्य मुखं रेफायतीव। तस्माद्वस्तस्य श्रोत्रियस्य स्त्रीकामत मावित्ति। सर्व्वेहि धर्म्मयुक्ता भागिनः। यस्त्वधर्म्मेण द्रव्याणि प्रतिपादयति ज्येष्ठोऽपि तमभागं कुर्व्वीत।

आपस्तम्बः प्र २। प ६। ख १३। सू १२;
प्र २। प ६। ख १४। सू १, ६, १०—१५।

After having gladdened the eldest son by some choice portion (of his) wealth. * *

He should during his life-time divide his wealth equally amongst his sons. Some declare that the eldest son alone inherits. That (preference of the eldest son) is forbidden by the Shastras. For it is declared in the Veda without (making) a difference (in the treatment of the sons); Manu divided his wealth amongst his sons. Now the Veda declares also in conformity with the rule in favour of the eldest son alone. They distinguish the eldest by (a large share of) the heritage. (But to this plea in favour of the eldest I answer.) Now those who are acquainted with the interpretation of the law declare a statement of facts not to be a rule, as for instance (the following). Therefore amongst cattle, goats and sheep walk together, or the following. "Therefore the face of a learned Brahmana (a Snataka) is as it were resplendent; or a Brahmana who has studied the Vedas (a Srotriya) and a he-goat evince the strongest texual desire." Therefore all (sons) who are virtuous inherit. But him who expends money unrighteously he shall disinherit, though he be the eldest son.

Apastamba, P. 2, P. 6, K. 13, S. 12;
P. 2, P. 6, K. 14, S. 1, 6, 10-15.

याज्ञवल्क्यः—

विभागं चेत् पिता कुर्य्यादिच्छया विभजेत् सुतान्।
ज्येष्ठं वा श्रेष्ठभागेन सर्व्वे वा सूर्य्यः समांशिनः॥ २। ११४
न्यूनाधिकविभक्तानां धर्म्मः पित्रकृतः स्मृतः॥ २। ११६
भूर्यां पितामहोपात्ता निबन्धी द्रव्यमेव वा।
तत्र स्यात् सदृशांस्वाम्यं पितुः पुत्रस्य चोभयोः॥ २। १२१
विभजेरन् सुताः पित्रोरूर्द्धमृक्थमृणं समम्॥ २। ११७
लोकानन्त्यं दिवः प्राप्तिः पुत्रपौत्रप्रपौत्रकैः। १। ७८
अनेकपितृकाणान्तु पित्र्यो भागकल्पना॥ २। १२०

A father, when making partition (of property) can divide it among his sons as he pleases, either giving to the eldest the best share or in suchwise that all share equally.

A distribution by father in smaller or larger shares (if made by the father is considered lawful).*

The ownership of the father and son is equal in the acquisitions of the grandfather whether land, any settled income, or moveables.

After the death of the parents the sons make equal division of the property and of the debts.

The worlds, eternity, heaven are attained by son, grandson, and great-grandson respectively.

The division among coparceners born of different fathers, is according to their fathers.

Yajnavalkya, Ch. II. V. 114, 116, 121, 117 ;
Ch. I. V. 78 ; Ch. II. V. 120.

पिता चेत् पुत्रान् विभजेत्तस्य स्वेच्छा स्वयमुपात्ते
अर्थे। पैतामहे त्वर्थे पितृपुत्रयोस्तुल्यं स्वामित्वम्।
अनेकपितृकाणाञ्च पितृतो भागकल्पना।

विष्णुः १७। १, २, २३

If a father makes division among his sons, he may make such division as he likes in respect to self-acquired property. In respect to wealth inherited from the grandfather, the ownership of father and son is equal. (Coparceners) descended from different fathers must adjust their shares according to the fathers.

Vishnu, XVII. 1, 2, 23.

पितैव वा स्वयं पुत्रान्विभजेद्वयसि स्थितः।
ज्येष्ठं वा श्रेष्ठभागेन यथा वास्य मतिर्भवेत्॥

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* According to the Mitakshara the meaning of the word धर्म्यः will be "if धर्म्यः" *i.e.*, "in accordance with the Shastras." Such interpretation is opposed to the clear meaning of the words, to Narada, Ch. 13, V. 15, which is in fact the same text with only a variation of language, and to Vrihaspati, Ch. 25, V. 4. The commentators of the Mitakshara school give this forced meaning to support their pet doctrines. The Mayukha goes so far as to say, that the text of Narada applied in past Yugas. The matter is discussed in the chapter on Partition where all the texts are collected.

ज्येष्ठायांशोऽधिको ज्ञेयः कनिष्ठायावरः स्मृतः।
पितर्यूर्ध्वंगते पुत्रा विभजेरन् धनं क्रमात् ॥

नारदः १३। ४, १३, २

Or let a father distribute his property among his sons himself, when he is stricken in years, either allotting a larger share to the eldest or (distributing the property in any other way) following his own inclinations.

To the eldest a larger share shall be allotted and a less share to the youngest. The father being dead, the sons shall divide the estate.

Narada, XIII. 4, 13, 2.

उद्धारं ज्यायसे दत्त्वा भजेरन्नितरे समम्।
जन्मविद्यागुणज्यष्टो द्वांशं दायादवाप्नुयात्।
समांशभागिनस्त्वन्ये तेषां पितृसमस्तु सः ॥
तत्पुत्रा विषमसमाः समभागहरा स्मृताः ॥

बृहस्पतिः।

They (the sons) shall take equal shares after giving a preferential share to the eldest.

He who is the first by birth, sacred knowledge or good qualities, shall take a couple of shares out of the partible wealth, and the rest shall take equal shares ; but he stands to them in the relation of a father, as it were.

Their sons, whether unequal or equal (in number), are declared (to be) heirs of the shares of their (respective) fathers. Vrihaspati, XXV. 8, 9, 14.

पुन्नाम्नो नरकात्पुत्रः पितरं त्रायते यतः।
मुखसन्दर्शनेनापि तदुत्पत्तौ यतेत सः ॥

कल्पतरुधृत-बृहस्पतिवचनम्।

Because by the sight of his face the son delivers the father from the hell called *Put*, therefore the father tries to beget a son. Text of Vrihaspati, cited in the Kalpataru.

नवीनात्मा यच्च क्वचन जायते तेन पिता पुत्रेण
नन्दति तेन चानृण्यतां याति पितृणां पिण्डदेन वै।

कल्पतरुधृत-सङ्खलिखितवचनम्।

When the (self as) new soul is born of one, by that (son)

the father rejoices, and is freed from debts by (him) the offerer of Pinda to the ancestors.

Text of Sankha-Likhita, cited in the Kalpataru.

ऋक्थं प्रीतिप्रदत्तन्तु दत्त्वाशेषं विभाजयेत् ।
आचतुर्थात्तु तद्दद्याच्च क्रमेणैव च तत्सुतैः ॥

रत्नाकरधृत-कात्यायनवचनम् ।

After delivering what was gift promised by the father out of affection, let the remainder be divided among the heirs; it shall be received in order by sons or other descendants of the last owner as far as the fourh degree.

Katyayana, cited in the Ratnakara.

अविभक्ते मृते पुत्रे * तत्सुतं रिक्थमागिनम् ।
कुर्वीत जीवनं येन लभ्यं नैव पितामहात् ॥
लभेतांशं स पित्र्यान्तु पितृव्यात्तस्य वा सुतात् ।
स एवांशस्तु सर्व्वेषां भ्रातृणां न्यायतो भवेत् ।
लभेत तत्सुतो वापि निवृत्तिः परतो भवेत् ॥

माधवादिधृत-कात्यायनवचनम् ।

When a son dies undivided, his son shall be made sharer of the heritage, if he has not received maintenance from the grandfather. He shall get his paternal share either from the paternal uncle or his son. But the very same share should equitably belong to all the brothers, or his son shall be entitled. After this is a cessation of right.

Katyayana, cited in the Apararka Ratnakara, Mayukha, Madhava.

पुन्नाम नरकः प्रोक्तस्त्रिन्नतन्तुरुपेति यम् ।
तत्र वै त्रायते यस्मात्तस्मात् पुत्र इति स्मृतः ॥
यस्य पुत्रः शुचिर्दक्षः पूर्व्वं वयसि धार्म्मिकः ।
नियन्ता चात्मदोषाणां सन्नावयति पूर्व्वजान् ॥

कल्पतरुधृत-हारीतवचनम् ।

The hell called *Put* where the childless go, he who delivers from that is called Putra.

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* अविभक्ते अनुजे प्रेते (on the death of the younger brother) is the reading of Madhava.

Whose son pure and active, virtuous in youth, and regulator of his own faults, benefits his ancestors.

Texts of Harita, cited in the Kalpataru.

समानी मृते पितरि विभागः

मयूखधृत-हारीतवचनम् ।

After the death of the father, the division of the wealth is equal (among sons).

Harita, cited in the Mayukha.

समत्वेनैकजातानां विभागस्तु विधीयते । उशनाः ।

Partition among sons of the same class is regulated by the rule of equal shares.

Usana, cited in the Ratnakara.

तावत्कुल्याः सपिण्डाः स्युः पिण्डभेदस्ततः परम् ।

रत्नाकरधृत देवलवचनम् ।

Up to the (third degree) the members of the family are of the same body.

Devala, cited in the Ratnakara.

ज्येष्ठस्य दशमं भागं न्याय्यवृत्तस्य दापयेत् ॥

रत्नाकरधृत-देवलवचनम् ।

The eldest if virtuous should be given one-tenth more.

Devala.

ऊढायाः पुनरूढाहं ज्येष्ठांशं गोवधं यथा ।

कलौ पञ्च न कुर्वीत भ्रातृजायां कमण्डलुम् ॥

पराशरमाधवधृत-आदिपुराणवचनम् ।

Second marriage of woman; the eldest son's special share, the killing of cows, Niyoga, the carrying of Kamandalu, these five should not be done in Kali-Yuga.

Adi-Purana, cited in the Parasara-Madhava.

SECTION VI

Daughter, son's daughter, grandson's daughter, and their male children.

I have already indicated in Section I, how the daughter of the sonless man was considered equal to the son in all respects.

Among all Aryan nations, females had no rights in their father's families. They passed by marriage to another family, and could not inherit the father's wealth. But it appears that even in times of remote antiquity, natural affection prevailed over the customs of the people. When there was no son, by some fiction, the father kept the daughter in his own family. We find traces of this ancient custom in Roman Law. In the earliest record of the Aryan people, *i. e.*, the Rig-Veda, we find the custom of regarding the daughter as a son, and the daughter's son as a son's son, prevailing. The Lawgivers all unanimously gave the father a right to bestow upon the daughter the rights of a son. According to some, this could be done by a ceremony at marriage before the fire; according to others, by mere intention. The custom that by mere intention a daughter could be made Putrika seems to have prevailed in ancient times. There is no mention of any ceremony in the Rig-Veda, and we find Yajnavalkya and the other Lawgivers laying down, that a brotherless damsel should not be married because she might have been made Putrika by unexpressed intention, and her sons would be son's son of their mother's father.

Rights of daughters in ancient times.

The Putrika, like the daughter among the Romans married without passing into the *manus* of her

husband, remained in the *gotra* of her father, and took, like the son, the inheritance. In fact, so high was her status, that if a son were born afterwards, it was doubted whether she was not entitled to the eldest son's preferential share, and the Lawgivers laid down, that being a female she was not so entitled, but was an equal sharer with the son. It would follow from the position mentioned above, that the brotherless daughter's son and grandson are entiled to the inheritance like the grandson and great-grandson.

Under the ancient Roman and Persian laws, the daughter of the son and the daughter of the grandson, when they did not pass to another family, were equal to a son. That seems to have been also the law of the ancient Hindus, for they were all Putrikas. The Burmese Manu expressly declares them to be so. Under the rule of Sraddha, the son, the grandson, the great-grandson, the daughter's son, the son's daughter's son, and the grandson's daughter's son are the only persons who are competent to perform the Parvana Sraddha. From this it may be inferred, that the law of ancient Aryans was, that up to the grandson's daughter's son the lineal descendants were preferred before others. By the rule of Putrika, and according to the rule of Sraddha, all these heirs are to be placed before the more distant heirs. According to the text of Vishnu Purana, daughter's son's son is entitled to perform the Sraddha. It has already been stated that if the Putrika is a son in all respects in the eye of Hindu Law, her grandson would be entitled to succeed. Lukshmidhara says : "The conclusion of the ancients versed in the three Vedas

is that the property goes to the daughter's son, and if the daughter's son is not alive, to his son."*

The daughter of a pre-deceased son should take the inheritance of a sonless man. It would also follow that in an undivided family the daughter of a sonless man should take her father's share, at least, if his brothers are also sonless. The Lawgivers, however, have not laid down any express rules on these matters, except in the case of the Putrika.

It appears that under the ancient Hindu Law, the daughter not made Putrika did not inherit at all. Yaska in his Nirukta says : न दुहितर इत्येके तस्मात् पुमान् दायादीऽदायादास्त्रीति विज्ञायते : "Some hold that daughters do not inherit. Therefore the Vedas say that a male is the taker of wealth and that a female is not a taker of wealth." Under the rule of Yajnavalkya, the daughter took after the widow. According to Viswarupa, the rule referred to the Putrika. The same Rishi Yajnavalkya, in another text, has declared the Putrika's son equal in all respects to the son. The daughter, who took after the widow, was thus a daughter who either was sonless or had a brother at her marriage, or expressly declared at marriage to be not made Putrika. That is the opinion accepted by the more modern Commentators and has been the law of India excepting Bengal, since the time of Vijnaneswara.

As it now stands, owing probably to the prohibition to marry a brotherless damsel, fathers were probably obliged to declare that their daughters were not Putrika, and the practice of Putrika-Putra consequently fell into disuse. There is however no

* दौहित्रगामि धनं। दौहित्राभावे तत्पुत्रगामीवेति वैविद्यव्यवहारसिद्धम्। Lukshmidhara cited in the Saraswati-Vilasa.

Smriti or Purana prohibiting a Putrika-Putra. All the subsidiary sons were prohibited by Apastamba and Vrihaspati, but not the Putrika-Putra. He was not one of the eleven subsidiary sons mentioned in Manu, Ch. IX., 197-180, who came to be prohibited afterwards. None of the Commentators have dared to ignore the rights of the Putrika. The Mitakshara and the Dayabhaga both say that the Putrika is equal to a son. The daughter of a sonless man is entitled to his property, even in a joint Hindu family where all the brothers are sonless, on the ground that she is Putrika by intention.

Rights of daughter according to the decisions.

Let us go to the law established by the decisions of our Courts. The Putrika and the Putrika-Putra are not recognized. The daughter takes after the greatgrandson and the widow according to the text of Yajnavalkya, but she is given a life-interest against the Smrities and for reasons invented by the Bengal Lawyers. Even Jagannath considers that the opinion based on inference only of Gimutavahana is clearly unfounded and says that it is unquestionable that a daughter has absolute power of disposal (1). Sir Raymond West (11 Bomb. 304), has clearly shown how this wrong opinion of Gimutavahana has by a course of decisions become the law for all India except Bombay.

Daughter takes life-interest

Relative rights of different kinds of daughters.

According to the Rishis the unmarried daughter takes first. As regards the married daughter, it appears from the text of Katyayana that, unless she was a Putrika, she did not take

(1) Colebrooke's Digest Book V. Pt. 399 Comn.

at all. That was certainly the law of ancient times as indicated by Yaska. Katyayana says that the maiden daughter takes, and he stops there. According to Gautama's text about succession to Stridhana, the only text on the subject, the unmarried daughter takes first, after her, the unprovided daughter, and last of all the provided daughter. The Mitakshara says that, though the text only mentions maternal wealth, it is also applicable to paternal wealth. This is consistent with reason and natural affection.

In all the provinces the maiden daughter takes first. After her under all the Schools, except Bengal, the unprovided daughter and after her, the provided daughter takes (1).

Who is a maiden.

An unmarried daughter or *Kanya* has the preferential right in Bombay. It has been there held that a girl above the age of ten may be regarded as *Kanya* or maiden, but not one, such as a Murli, who had been approached by a man, in which case she can only succeed in default of married and unmarried daughters, because unchastity is no bar to succession.(2)

Law in Mithila and under the Mitakshara.

The Vivada Chintamani and the Vivada Ratnakara while agreeing with the Mitakshara make no reference to the distinction between provided and unprovided daughters. The opinion has been expressed that under the Mithila Law there is no such distinction (3).

The Courts will not go minutely into questions of comparative property, but when

(1) Srimati Uma Deyi *v.* Gokoolanund 5 I. A. 40.

(2) Tara *v.* Krishna 31 Bom. 495, Sivasangu *v.* Menal, 12 Mad. 277 See the texts of Medatithi and Madhaba on the subject cited in 31 Bom. 503.

(3) 23 Bomb. 233.

one daughter is in indigent circumstances and the other is rich, the first is entitled to succeed (1). The provided daughter, it has been held, does not mean one who received some property from the father (2). It should be observed that this rule, intended for maternal wealth primarily, has been applied to paternal heritage because of its equitableness. When the paternal wealth is great, it would be inequitable to deprive a daughter, who though not poor is far from wealthy of it, because she is comparatively better off than her sister. The rule was apparently intended to apply when the property was not sufficiently large and when one daughter was in indigent circumstances.

Comparative poverty.

The founders of the Bengal School by mixing up the old opinion about Putrikas and the newer opinion about daughters other than Putrikas, ignorant of the history of the law on the subject, and regardless of every consideration of reason and natural affection have excluded the barren and the sonless widowed daughter altogether and have also rejected the distinction between indigent and well-provided daughters. Gimutavahana in support of his position, cites a text of Parasara, which is not found in the Parasara Smriti and is not cited by Madhava or any other Commentator. But the text, which only says that after the maiden daughters, married daughters take, does not support him,

Law under the Bengal School.

(1) Bakubai *v.* Manchabai, 2 Bomb. H. C. 5 (A. C. J.) Poli *v.* Narotum, 6 Bomb. H. C. 183. (A. C. J.) Audh Kumary *v.* Chandra Dai, 2 All. 561. Totawa *v.* Basawa, 23 Bomb. 229. Srimati Uma Deyi *v.* Gokulanund, 3 Cal. 587 P. C.

(2) Danno *v.* Darbo, 4 All. 243.

and he is obliged to declare on his own authority that the maiden daughter takes first, after her, the married daughter having or likely to have a son. The sonless widowed daughters and daughters, who are barren or not likely to have sons, though indigent, do not take at all. Accordingly it has been held that under the Bengal School the maiden daughter takes first and after her, the daughter, who has or is likely to have a son. It has been held that though a daughter might have had a son born to her but if at the time of the death of her mother, she has been childless for 43 years, she could not take as a person likely to have a son (1). A recent Full Bench of the Calcutta High Court have held that a daughter with an adopted son has the status of a daughter with a son under the Hindu Law (2). Logically from this it would follow that a daughter having an authority to adopt, should be regarded as having the status of a daughter likely to have a son.

Sonless widowed daughter.

Sonless widowed daughter in Madras.

The Smriti Chandrika in Ch. XI Section 2 Para 7 lays down that the sonless or barren daughter is incompetent to inherit. The rule was given effect to by the Sudder Court of Madras in 1852. But in 1882 Sir Mathusawmy Aiyyar J. upon a review of all the authorities refused to follow the Smriti Chandrika in preference to the Smritis and laid down that a barren and sonless widowed daughter is entitled to succeed and has the same advantageous

(1) Icchamoyi *v.* Nilmoni 15 I. C. 169.

(2) Radha Prasad Mullick *v.* Ram Mani, 33 Cal. 947 F. B. Affd. 35 Cal. 896 P. C.

position in Madras as she has under the Mitakshara in the other provinces of India (1). This decision was approved in a recent case (2), and the law has been finally settled in Madras. This result has been achieved because Madras possessed Judges whose familiarity with the original Smritis and commentaries enabled them to lay down just and reasonable law.

Respective rights of daughters and daughter's sons.

It has been held that in Bengal (under the Dayabhaga as well as under the Mitakshara), Behar, Mithila, Northern India, Oude, Punjab and Madras, daughters take by survivorship among themselves thus when a maiden succeeds and afterwards dies leaving sons, her married sisters take before her sons and the share of a married daughter on her death is taken by her surviving sister. After all the daughters are dead, the surviving daughters' sons take *per capita* (3).

Daughter's son take *per capita*.

Daughters take absolute estate and daughter's sons take per stirpes in Bombay.

In the Bombay Presidency, Berar and Sind, daughters, it has been held, take absolute estates in severalty and not only limited estates as joint tenants, as in the other provinces. Thus there is no right of survivorship among them and daughter's sons take the shares of their respective mothers immediately on their death. (4) The Bombay rule is the rule of the Smrities and the commentaries according to which daughter's sons, take *per stirpes* (see p. 197).

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(1) Simmani Ammal *v.* Muthammal, 3 Mad. 265.

(2) Vedammal *v.* Vedanayaga, 31 Mad. 100 at p. 108.

(3) Aumrito *v.* Rajani 2 I. A. 133, Mutta Vaduganadha *v.* Dorasinga Tevor, 8 I. A. 99, Laloo *v.* Laloo 10 I. C. 418 (All) Birj Bhukun *v.* Sheoraj, 10 Oude Cas. 159, Tinumony *v.* Nibaran 9 Cal. 154 F. B.

(4) Bhagirathi *v.* Kahnujerav 11 Bomb. 285 F. B. Vinayek. *v.* Lakshmi, 9 Moore 528 Haribhat *v.* Damodarbhat 3 Bomb. 171. See 31 Bomb. 453, 236.

Rights of son's and grandson's daughter.

The son's daughter and the grandson's daughter are entitled to perform the Sraddha, and their sons stand in the same position as daughter's sons. They could be considered as Putrikas of the son. This was the law of the ancient Aryan races, which the Rishis do not seem to have altered. They are Sapindas according to the definition of the Mitakshara. But they are no heirs according to modern Hindu lawyers. They have, however, been placed by the Judges of Madras, and Bombay in the line of distant heirs or Bandhus after the agnates up to the fourteenth degree are exhausted (1). In Bengal, Behar and Northern India, they have been held to be no heirs at all, not even as Bandhus. (2)

The rights of son's and grandson's daughter's sons.

Son's daughter's son, grandson's daughter's son, and great-grandson's daughter's son are declared, except in Bengal, to be heirs, who take, after the remotest agnates to the fourteenth degree have been exhausted. In Bengal, they take after all the Sapinda heirs mentioned by Gimutavahana and Srikrishna.

According to the Lawgivers, these last persons are in the same position as regards the performance of the Parvana Sraddha as the son, and occupy the same position as the daughter's son. Here, if at all, the Sraddha rules should have been taken into consideration in the determination of the question of inheritance and they should have come in after the male

(1) Nallana *v.* Ponual, 14 Mad. 149. Vencata Subramanya *v.* Thayramul, 21 Mad. 263. Ramaffa *v.* Arumagath, 17 Mad. 132. Venial *v.* Parjaram, 20 Bom. 173, W. & B. 137, 496.

(2) Nanhi *v.* Gauri 28 All 187. Koomad Chandra Roy *v.* Seeta Kant W. R. Sp. No. F. B 75, Giridhari Lall *v.* The Bengal Government 12 Moore, 445.

descendants, who are entitled to perform the Parvana Sraddha. But by a reasoning at which the Lawgivers would have wondered, under the Mitakshara school, they are declared Bandhavas, who take after the mother's sister's son and others, and by a strange calculation and comparison of the Pindas offered to the ancestors by the agnatic Sapindas and the son's and the grandson's daughter's sons respectively, the latter have been placed in Bengal after the former, it being quite forgotten that they alone are entitled to perform the Sraddhas properly so called, and are under the obligation of performing the Parvana Sraddha by which the ancestors are gratified every month directly, while the agnatic Sapindas excepting the lineal discendants cannot perform the Parvana Sraddhas at all.

The late Professor Sarvadhicary, without giving any reason, placed the son's daughter's son and the grandson's daughter's son before the parents. There are no cases directly deciding the question. The law on the theory of spiritual benefit should be that after the great-grandson, the daughter, the daughter's son, the son's daughter's son, and the grandson's daughter's son take the inheritance. The matter is further considered and the case law discussed at pp. 135-136.

Rights of daughter's grandson.

As regards the daughter's grandson, all the texts-writers lay down that there is no express text in his favour. The text of the Vishnu Purana cited at page 76, is an express text declaring his right to perform the Sraddha. Commenting on this text the Nirnaya Sindhu, a commentary of recognized

authority, says that it refers to the daughter's son and daughter's grandson, who succeed to the estate as heirs (दौहित्र तत्पुत्रयोर्धनहारिणोरिदम्) If the daughter was a Putrika, her grandson would take as a great-grandson, as I have already shown. He would, therefore, take in the absence of son, grandson, great-grandson, daughter, daughter's son, son's daughter's son and grandson's daughter's son. According to Bengal lawyers, he is no heir, but he has been declared to be a Bandhu in the other provinces. (1)

Act I of 1869, regulating the succession to the estates of Oude Taluqdars, lays down in Section 21, clause 4, that the daughter's son and his male lineal descendants, may succeed to such estates. This was enacted in accordance with the wishes of the Taluqdars who represented that the law of Putrika-Putra was still prevalent in their country.

INHERITANCE.

SECTION IV.

अधाजूरिव पित्रो सचा सती समानादा सदसस्यामि ये भगम् ।

ऋग्वेदः २म । १७ सू । ७ ।

(O Indra) as the daughter being with her parents, asks for share of wealth from the father's family.

Rig-Veda, 2 M. 17, S. 7.

यासदग्निर्दुहितुर्नप्त्रे गादिदा ऋतस्य दीधितिं सपर्यन् ।
न जामये तान्वो रिक्थमारैक्चकार गर्भं सनितुर्निधानं ।
वदी मातरा जनयंत वह्निमन्यः कर्ता सुकृतोरन्य ऋंधन् ॥

ऋग्वेदः २ म । ३१ सू । १२ ।

The sonless man, who has daughter fit to be a Putrika, having observed the Putrika rite, gets the son of that daughter as his son's son, knowing that this daughter's son will perform his Sraddha, having honoured with ornaments, etc., the son-in-law fit to produce a son.

(1) Krishnaya *v.* Pichama, 11 Mad. 287. Sheo Barat *v.* Bhagawat 17 All 523. See Babu Lal *v.* Nankuram, 22 Cal. 339.

The legitimate son of the body does not give the inheritance to the sister. He gets her married only and makes her bear children to the brother-in-law. If the parents produce children, the son is the performer of the good deeds *i.e.* Sraddha etc., and the daughter is decorated with clothes and ornaments.

Rig-Veda, M. 3, S. 31, S. 1, 2.

आभातेव पंस एति प्रतीची ।

ऋग्वेदः, १ म । १८ अ । १२४

As the brotherless female comes back to his father's family.

Rig-Veda, M. 1, A. 18, 124.

अभातर एव योषाक्षिष्ठन्ति कृतवल्गवः ।

अथर्ववेदीय-शौनकशाखायाः संहिताभागे १ । १६ । १

As brotherless female remains wayless.

Atharva-Veda, Saunaka-Sakha Sanhita, 1,17, 1.

दुहिता पुत्रकल्पा च पौत्रा दौहित्रकाः स्मृता ।

A daughter is like a son, daughter's son is son's son. Thus it has been remembered.

Text of the Veda, cited by Lukshmidahra.

अपुत्रोऽनेन विधिना सुतां कुर्वीत पुत्रिकाम् ।

यदपत्यं भवेदस्यां तन्मम स्यात् स्वधाकरम् ॥

यथैवात्मा तथा पुत्रः पुत्रेण दुहिता समा ।

यस्यामात्मनि तिष्ठन्त्यां कथमन्यो धनं हरेत् ॥*

दौहित्र एव च हरेदपुत्रस्याखिलं धनम् ।

पौत्रदौहित्रयोर्लोके न विशेषोऽस्ति धर्मतः ॥

पुत्रिकायां कृतायान्तु यदि पुत्रोऽनुजायते ।

समस्तत्र विभागः स्याज्ज्येष्ठता नास्ति हि स्त्रियाः ॥

अकृता वा कृता वापि यं विन्देत्सदृशात् सुतम् ।

पौत्री मातामहस्तेन दद्यात् पिण्डं हरेद्धनम् ॥ †

मनुः, ९ । १२७, १३०, १३१, १३२, १३४, १३६

He who has no son may make his daughter in the following

* Attributed to Narada by Gimutavahana, and Apararka but not found n the printed Narada Smriti. The verse is quoted in the Mahabharata. Anushashanika, Ch. 45, V. 11.

† The last verse is attributed to Devala in the Vivada Ratnakara.

manner an appointed daughter (Putrika, saying to her husband). 'The (male) child, born of her, shall perform my funeral.'

A son is even as one's self, a daughter is equal to a son; how can another (heir) take the estate, while (such daughter* who is) one's self, lives.

The daughter's son shall take the whole estate of his maternal grandfather who leaves no male issue.

Between a son's son and the son of a daughter there is no difference according to law.†

But if, after a daughter has been appointed, a son be born (to her father) the division (of the inheritance) must in that (case), be equal: for there is no right of primogeniture for a woman.

Through that son whom (a daughter), either not appointed or appointed, may bear to a husband of equal caste, his maternal grandfather has a son's son; he shall present the funeral cake and take the estate.

Manu, IX. 127, 130, 131, 133, 134, 136.

पितोत्सृजेत्पुत्रिकामनपत्योऽग्निं प्रजापतिञ्चेद्दाद्यादर्थं।
मपत्यमिति संवादाभिसन्धिमात्रात्पुत्रिकैत्येकेषाम्॥

गौतमः, २८। १८, १९

A father who has no (male) issue may appoint his daughter, (to raise up a son for him) presenting burnt offerings to Agni (fire) and to Prajapati, (the lord of creatures), and addressing (the bridegroom with these words), 'For me be (thy male) offspring.' Some declare, that (a daughter becomes) an appointed daughter solely by the intention (of the father).

Gautama, XXVIII. 18. 19.

अभ्रातृका पुंसः पितृनभ्येति प्रतीचीनं गच्छति पुत्रत्वम्॥‡

तत्र श्लोकः।

अभ्रातृकां प्रदास्यामि तुभ्यं कन्यामलङ्कृताम्।
अस्यां यो जायते पुत्रः स मे पुत्रो भवेदिति॥

वशिष्ठः, १७, १६, १७।

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* I have altered the translation as given in the S. B. E. Series which has 'appointed daughter' for daughter. The text speaks of daughters only.

† See Vishnu. Daughter here is not appointed daughter, as the translation in S. B.E. Series says. There धर्मतः has been left untranslated. I have translated it "according to the law."

‡ The Madana-Parijata reads प्रतीचीं।

It is declared in the Veda—'A maiden who has no brothers comes back to the male ancestors (of her own family), returning she becomes their son.' With reference to this (matter, there is) a verse (to be spoken by the father when appointing his daughter)—'I shall give thee a brotherless damsel decked with ornaments, the son whom she may bear shall be my son.'

Vasista, XVII. 16, 17.

अभ्युपगम्य दुहितरि जातं पुत्रिकापुत्रमन्यं दौहित्रम् ।

बौधायन: २ प्र । २ अ । १ क । सू २५

The (male child) born of a daughter after an agreement has been made (one must know to be) the son of an appointed daughter, (Putrika-putra.)

Baudhayana, P. 2, A. 2, K. 3, S. 15.

पुत्राभावे * * दुहिता वा ।

आपस्तम्ब:, प्र २ । प ६ । ख १४ । सू २-४

The daughter may take the inheritance of a sonless man.

Apastamba, P. 2, P. 6, K. 14, S. 2-4.

पुत्रिकापुत्रस्तृतीया: । यस्तस्या: पुत्र: स मे पुत्री भवतीदति या पित्रा दत्ता सा पुत्रिका ।

पुत्रिकाविधिनाप्रतिपादितापि भ्रातृविहीना पुत्रिकैव ।

पुत्रेण लोकान् जयति पौत्रेणानन्त्यमश्नुते ।

अथ पुत्रस्य पौत्रेण ब्रध्नस्याप्नोति विष्टपम् ॥

पौत्रदौहित्रयोर्लोके विशेषो नोपपद्यते ।

दौहित्रोऽपि ह्यपुत्रं तं सन्तारयति पौत्रवत् ॥

विष्णु:, १५, ४-६, ४६, ४७

The third is the son of an appointed daughter. She is called an appointed daughter, who is given away by her father with the words; The son whom she bears is mine.

A damsel who has no brothers is also (in every case considered) an appointed daughter, though she has not been given away according to the rule for making an appointed daughter.

Through a son he conquers the words, through a son's son he obtains immortality, but through his son's grandson he gains the world, of the sun.

No difference is made made in this world, between the son of a son and the son of a daughter, for even a daughter's son works the salvation of a childless man, just like a son's son.*

Vishnu, XV. 4-6, 46, 47.

तत्सम: पुत्रिकासुत: । याज्ञवल्क्य: ।

The son of Putrika is equal to him (the son).*

Yajnavalkya.

पुत्राभावे तु दुहिता तुल्यसन्तानकारणात् ।

नारद:, १३ । ५०

On failure of a son the daughter succeeds, because she continues the lineage just like a son.

Narada, XIII. 50.

पुत्राख्ययोदश प्रोक्ता मनुना यैऽनुपूर्व्वश: ।
सन्तानकारणत्वेषामौरस: पुत्रिका तथा ॥
आज्यं विना यथा तेलं सर्पि: प्रतिनिधि: स्मृत: ।
अथैकादश: पुत्रास्तु पुत्रिकौरसयोर्विना ॥
एक एवौरस: पित्र्ये धने स्वामी प्रकीर्त्तित: ।
तत्सुख्या पुत्रिका प्रोक्ता भर्त्तव्यास्त्वपरा: सुता: ॥
अग्निं प्रजापतिश्चेष्ट्वा क्रियते गीतमोऽवदत् ।
अन्ये त्वाहुरपुत्रस्य चिन्तिता पुत्रिका भवेत् ॥
अङ्गादङ्गात्सम्भवति पुत्रवद्दुहिता नृणाम् ।
तस्मात् पितृधनं त्वन्य: कथं गृह्णीत मानव: ॥†
यथा पितृधने स्वामं तस्या: सत्स्वपि बन्धुषु ।
तथैव तत्सुतोऽपीष्टे मातृमातामहे धने ॥

बृहस्पति: ।

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* The last verse is identical with Manu 9 V 137.

† After this text Apararka places the following, the translation of which appears in see 8.

सदृशी सदृशीजोढ़ा साध्वी पुत्रवती रता ।
क्षता क्षता वा पुत्रस्य पितुर्धनहरी तु सा ॥
अक्षता वा क्षता वापि यं विन्देत् सदृशात् सुतम् ।
पौत्री मातामहस्तेन दद्यात् पिण्डं हरेद्धनम् ॥

Of the thirteen sons mentioned in succession by Manu, the legitimate son of the body (Aurasa) and the appointed daughter (Putrika) continue the family.

As in default of ghee, oil is admitted by the virtuous as a substitute (at sacrifices), so are the eleven sons (admitted as substitutes), in default of a legitimate son of the body and of an appointed daughter.

No one but a legitimate son of the body is declared to be heir of his father's wealth. An appointed daughter is said to be equal to him. All the others are stated to have a claim to maintenance only.

Gautama has declared that a daughter is appointed after performing a sacrifice to Agni and Prajapati, others have said that she is an appointed daughter (Putrika) merely by the intention of the sonless father.*

A daughter like a son springs from each member of a man. How then should any other person inherit her father's property while she lives.

Through that son whom (a daughter), eighter not ap; ointed or appointed, may bear to a husband of equal caste, his maternal grandfather has a son's son; he shall present the funeral cake and take the estate.†

As her father's wealth becomes her property, though kinsmen (Sapindas)‡ be in existence, even so her son becomes the owner of his mother's and maternal grandfather's wealth.

Vrihaspati, XXV. 33, 34, 35, 38, 56, 57, 58.

पत्नी भर्त्तुर्धनहरी या स्यादव्यभिचारिणी।
तदभावे तु दुहिता यद्यनूढा भवेत्तदा॥

पारिजातधृतकात्यायनवचनम्।

The widow, if chaste, takes the wealth of the husband; failing her the daughter, if she is unmarried.

Text of Katyayan, cited in the Madana-Parijata.

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* The translation of text in the S. B. E. Series is incorrect. चिन्तिता has been translated as follows:—"Who are merely supposed to be one (before her birth)." See Gautama, xxviii. 19.

† Indentical with Manu, IX. 136.

‡ बन्धु: means Sapinda. See Vishnu, Ratnakara, Viramitrodaya.

पुत्रिका पुत्रवदिति प्रचेतसः।

शङ्खलिखितौ।

Putrika is like the son, says Pracheta.

Sankha-Likhita, cited in Ratnakara.

पुत्रिका हि पुत्रवत् अतिप्रशस्ता। सा हि अपत्यं।

पुत्रिकासुतो मातामहपितामहानां पिण्डदः।

पुत्रदौहित्रयोर्न विशेषोऽस्त्यनुग्रहे।

तस्मात् संशयान्नोपेयात् अभ्रातृकाम्।

स्त्रीधनञ्च कन्यायाः। तदपत्यस्य च द्रव्यं कन्याभाग एव। *

कल्पतरुधृतशङ्खलिखितवचनम्।

The Putrika is like the son commendable. She is certainly a child. The Putrika-putra is the giver of the Pinda to the ancestors of the father and mother. There is no difference as between son and daughter's son in regard to the spiritual benefit they confer. Therefore for doubt, the brotherless damsel should not be married. Stridhana belongs to the daughter. The property of the child of the mother of the Putrika is the share of the daughter.

Sankha-Likhita, cited in the Kalpataru.

तत्तुल्यः पुत्रिकापुत्रो दायादः सोऽंशभाग्भवेत्। †

स ऐव दद्यात् पिण्डन्तु पित्रे मातामहाय च॥

पितुर्मातामहस्यापि निरपत्यस्य पुत्रवत्॥

कल्पतरुधृतदेवलवचनम्।

Equal to the son, the son of Putrika becomes the heir and participator of share. He offers Pinda to his own father, as well as, to his sonless maternal grandfather, like a son.

Devala, cited in Kalpataru.

कन्यायस्य पितृद्रव्याद्देयं वैवाहिकं वसु।

अपुत्रकस्य कन्या सा धर्म्मजा पुत्रवद्धरेत्॥ देवलः।

To unmarried daughters a nuptial portion must be given out

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* तत् शब्देन पुत्रिकासुतः परामर्शः—लक्ष्मीधरः।

† The Ratnakara reads सोऽथवा भवेत्।

of the estate of the father. The lawfully begotten daughter of the sonless man takes (his share) like the son.

Devala, cited in Jagannatha's Vivada-Bhangarnava.

मातामह्यस्य गौत्रेण मातुः पिण्डोदकक्रियाम् ।
कुर्वीत पुत्रिकापुत्र एवमाह प्रजापतिः ॥

लौगाक्षिः ।

The Putrika-putra should perform his mother's (obsequial) ceremonies, of (the giving of) Pinda (and) oblations of water, by the *gotra* of his mother's father. It is so ordained by Prajapati.

Laugakshi, cited in the Parasara-Madhava.

पुत्रः पौत्रश्च तत्पुत्रः पुत्रिकासुत एव च ।
पत्नी च भ्रातरश्चैव पिण्डदा स्युर्यथाक्रमात् ॥

हरीतः । ४ अ ।

Son, grandson, great-grandson, Putrika-putra, daughter and brothers are givers of Pinda in the order (mentioned).

Vridha Harita, Ch. IV.

अपुत्रेण तु या कन्या मनसा पुत्रवत्कृता ।
राजाग्निबान्धवेभ्यश्च समक्षं वाथ कुत्रचित् ॥
प्राग्गर्भमथवा शुल्कमुक्त्वा दत्ता वराय या ।
मृते पितरि वा दत्ता सा विज्ञेया तु पुत्रिका ।
पित्र्यादंशात्समं भागं लभते तादृशी सुता ॥

ब्रह्मपुराणम् ।

That damsel is known as an appointed daughter, who is made like a son by her sonless father, either in his mind, or in the presence of the king, fire and relations, or anywhere else, before conception, or who is given to the bridegroom without taking the bride's price, or married after her father's death. She is known as Putrika; such a daughter receives an equal share from the paternal share.

Brahma Purana, cited in the Vivada Ratnakara.

अपुत्रस्य मृतस्य कुमारी रिक्थं गृह्णीयात् । तदभावे चोढ़ा ।

दायभागधृत-पराशरवचनम् ।

Let a maiden daughter take the heritage of one who dies

leaving no male issue, or if there be no such daughter, a married one shall inherit.

Parasara, cited in the Dayabhaga.*

SECTION V.

Succession to the Estate of the Childless man.

In ancient times after the greatgrandson and the daughter (Putrika) and her son (and probably her grandson) and the son's daughter's and the grandson's daughter's sons, the inheritance went to the agnates according to their nearness of relationship with the deceased. Women, except daughters, were no heirs. That was the ancient Aryan rule. But in India, widows were allowed a certain portion of the moveable wealth. In the Rig-Veda, we find mention of widows going to the judgment seat to claim this wealth. Vyasa lays down that this portion should never exceed 2000 *panas*, and Haradatta in the Ujjvala says, that the texts of Yajnavalkya and others about widow's rights of inheritance refer to cases where the wealth does not exceed that amount. This probably is the explanation of the rule of Vrihaspaṭi by which widows could not inherit immoveable property left by their husbands, which is us conflict with another rule about her right of inheritance.

Again, the rule against female succession was relaxed in favour of childless women in a very peculiar way. The childless widow was allowed to get a son by her husband's younger brother, by way

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* Not cited by Madhava or any ancient commentator, nor found in Parasarat Smriti. Probably, it is spurious.

of what was called *Niyoga*,* and failing him by the nearest agnate. The custom is as old as the Rig-Veda, where allusion is made to it. As long as she did not get a son, the widow was allowed to enjoy the usufruct of her husband's property. If she got no son, the property remained with the husband's younger brother or the nearest Sapinda who was her guardian. Beyond getting one son, she was not allowed to live with her male relation. Among those ancient people, this was the custom. In course of time, the custom fell into disuse for a very strange reason. It was found that the widow in order to obtain the property, got children by Niyoga, in ways not sanctioned by the Shastras, and by persons of the same *gotra*, but not the husband's younger brother. The temptation was very great, and the rule, found in Vasista Ch. XVII. 65 was laid down, that no appointment should be made through a desire to obtain the wealth. So Niyoga fell into disuse, not because it was immoral, but because it interfered with the rights of brothers and their sons. Apastamba the pure legislator of India, prohibits it on moral grounds, but it had

* This Niyoga seems to have its origin in a custom prevalent among all ancient Aryan races, by which a widow was obliged to marry or to get a son by her husband's nearest kinsman. We find one of Solon's laws to that effect. It must have had its origin in custom more ancient than Solon's laws. Plutarch speaking of it says,—

"It seems an absurd and foolish law which permits an heiress, if her lawful husband fail her, to take his nearest kinsman; yet some say, this law was well contrived against those who, conscious of their own unfitness, yet for the sake of the portion, would match with heiresses, and make use of law to put a violence upon nature; for now, since she can quit him for whom she pleases, they would either abstain from such marriages, or continue them with disgrace, and suffer for their covetousness and designed affront; it is well done, moreover, to confine her to her husband's nearest kinsman, that the children may be of the same family."

fallen into disuse long before the Christian era, for temporal quite as much as for moral reasons.

When the Niyoga came to be prohibited, the hardship of the widow's case again attracted the attention of the lawgivers. They gave her the right to enjoy her husband's property during her lifetime. The old Rishis made no distinction between joint and separate property, and even in joint family, the widow was entitled to the unsufruct of her husband's share during her lifetime. This seems clear from the texts in this Section.

In short, the course of legislation was as follows :—Manu and the more ancient among the Lawgivers ordained that the property of an undivided childless brother should vest in the father or the brother, the normal condition of the family then being jointness. Manu, Gautama, Vasista and Baudhyana, all gave the widow only the option to raise issue by Niyoga, but no rights of inheritance. Among women, the daughter as Putrika had the same rights as the son. Apastamba prohibitted Niyoga, and gave the widow no rights of inheritance at all. But the daughter's right was left untouched.

When the Niyoga was prohibited, and when daughters could not be made Putrika, because of the difficulty of getting them married, as they remained in the *gotra*, of the father, for a time there was a great confusion in the law.

Slowly the right of the widow to inherit her husband's property was established and as daughters at marrige had to be declared as not made Putrikas by intention, their superior rights also became inoperative. It was thought improper not to allow

the daughter to inherit her father's property, but it was considered at the same time not proper that she should take before the widow. To Yajnavalkya and Vishnu we owe this innovation. Narada recognizes the daughter's right but not the widow's. Vrihaspati, though there are conflicting texts, followed Yajnavalkya. Here as usual in such cases, we find very conveniently a text of Vriddha-Manu declaring the widow's right. The text of Vishnu is described by Vijnaneswara as the text of Vriddha Vishnu. But nobody describes the text of Yajnavaikya as that of Vrihat or Vriddha Yajnavalkya. It is difficut to believe that Vishnu and Yajnavalkya and Vrihaspati could have deliberately set aside the law of Manu. It is equally difficult to believe that the ancient law was not as we find now in Manu. Gautama, Vasista, Baudhayana and Apastamba. We find the mention of a great and good king, Janaka of Mithila, repeatedly in Vedic literature. We find Manu, Vasista, Baudhayana and Apastamba mentioning him in connection with the prohibition of Niyoga. While prohibiting Niyoga he might have, as a natural consequence of it, ordained that the widow should enjoy the property of her deceased husband, not until she should get a son, but until her death leading a life of chastity. This will explain the rule of chastity and enjoyment for life. He also might have ordained, that the daughter not made Putrika should take after the widow. Yajnavalkya, the Seer of the White Yajurveda, was the Rishi always associated with Janaka, and it is not unlikely that the innovation should have been made by him to suit the changed circumstances. The famous dialogue in the Vrihadaranyaka Upa-

nishada between Yajnavalkya and Maitreyi points to a division by the former of his property between his two wives when he was himself retiring from the world; and Katyayana's Srauta Sutra, the only one on the White Yajur Veda allows to women, though not to cripples, the right of sacrifice as sanctioned by the Vedas.* Vishnu and the compilers of the existing version of Vrihaspati,—the latter with some hesitation,—were all obliged to lay down the law as they found prevailing in their time. This is the only suggestion that I can offer of this want of harmony among the lawgivers in this matter.

It should, however, be remembered that ancient commentators like Medhatithi, Viswarupa and Haradatta declared that the widow was no heir, and notwithstanding the texts in her favour, her right was not fully recognized till the publication of the Mitakshara of Vijnaneswara.

The position of the daughter.

It is remarkable that Vishnu expressly says, that a brotherless damsel, even if not made so, is still a Putrika. That also seems to have been the opinion of Yajnavalkya. The daughter of a sonless man, as Putrika, according to these lawgivers takes before the widow. When, therefore, they speak of daughters talking after the widow, of a certainty, they did not mean the Putrikas. Probably daughters who had brothers living at their marriage, sonless widowed daughters, and married barren daughters were meant. It is very difficult to ascertain the true meaning of these texts. It might be said that they purported to make only an enumeration of possible heirs, but most of the commenta-

* Muller H, Sanskrit Literature 199, 349.

tors are of opinion that they lay down an inflexible order of succession. The position of the daughter in Vishnu's and Yajnavalkya's texts about inheritance, is one of the puzzles of Hindu Law.

In this section will be found certain texts which are anomalous, inasmuch as they give the brother preference over the father and thus do not agree with the other texts. Most of the commentators not being able to explain them, have in a very fantastic manner, tried to reconcile them with other texts, and some have tried to apply them to peculiar states of things such as the reunited families. The great ambition of commentators was to reconcile all conflicting texts by their ingenuity without any regard to history, and consequently, though very learned and subtle, they are very far from being true guides on such matters. Haradatta does not refer these texts to reunited brothers, and after mentioning, that according to some, the brother takes before the father, says that the words 'brothers' after 'father' in the text of Yajnavalkya refers to half-brothers. He himself, however, gives the preference to the father on the ground of 'extreme nearness.' These texts have a very interesting history. We know of a principle of law prevailing among some European Aryan races that inheritance does not ascend. In Hindu Law that seems to have been also an established principle.* We find in the ancient rule of Sraddha that parents and elder brothers could not perform the Sraddha. The rule of inheritance must have corresponded with that rule, and brothers took before the father, and the younger

* The Ratnakara and the Vivada Chintamani say that the brother takes before the father property other than ancestral.

brother before the elder. That this was the law indicated by the Burmese Manu, which was no doubt based on Manu's law as it existed in Buddhistic times.* It expressly lays down the rule that inheritance does not ascend.

The rule in Buddha's time seems to have been that son, daughter, brother, father, mother and *sagotras* took the inheritance in the order mentioned. This rule was afterwards modified when the Smritis were written, there being little doubt that most of them were composed from older materials after Asoka's time It would follow that the present version of Manu and the fragments of Sankha-Likhita and Devala were anterior to Buddha's time. Vishnu and Yajnavalkya and the other metrical Smritis, except Narada, were composed when Buddhism lost its hold of India.

The law laid down by Yajnavalkya should be read in the light of the law as found in Vishnu. *Pitarau* in Yajnavalkya means parents. The commentators of the Mitakshara school say, that as the mother is superior to the father, she should take first. The Pundits of the Dayabhaga school say, that the father is superior to the mother. Srikrishna and Varadraja say, that they both inherit together. But there is no divergence between Vishnu and Yajnavalkya, and, therefore, Vishnu's text should be considered as laying down the same law as Yajnavalkya's. The order of succession according to the later lawgivers, all of whom should be considered as laying down the same rule, is as follows :—

(1) Son, grandson, great-grandson. (2) Putrika, Putrika-putra (Putrika's grandson also, accord-

* *See* Burmese Manu, 2nd Ed., p. 277.

ing to the principle which gives the Putrika the rights of a son). (3)Subsidiary sons. (4) Widow. (5) Unmarried daughter. (6) Married daughter. (7) Daughter's son. (8) Father. (9) Mother. (10) Brother. (11) Brother's son. (12) Brother's grandson. So on, to the great-grandfather's great-grandson. (13) Sapindas of the same *gotra* to the seventh degree, the nearer taking before the more remote. (14) Members of the same family called Sakulyas or Sagotras. (15) Relations of different families,—Bandhus or Sambandhi-Bandhavas, the nearer taking before the more remote. (16) Disciple, teacher, fellow-student, king, etc.

Order of succession according to the Rishis.

This is the law laid down by Yajnavalkya, Vishnu, Vrihaspati, Vriddha-Harita, and the other modern Rishis, cited in this chapter.

According to one of these texts of Vrihat-Manu, always very conveniently found when a variation of the law of Manu has to be established, it has been held by some of the commentators, that for the purposes of the law of inheritance, agnatic relationship ceases with the 'fourteenth person.'

Now let us see what is the law according to the commentators.

According to Medhatithi the widow is no heir and is only entitled to maintenance, and he further says, that the daughter's son in Manu's text about inheritance refers to the Putrika-putra.

The rule as laid by different commentators.

According to Viswarupa, the widow in Yajnavalkya's text means a pregnant widow and daughters means *putrikas* *

* पत्नीत्यत्र गर्भीतगर्भाभिप्रेता दुहितरश्च पुत्रिका एव। Viswarupa is the earlist commentator of Yajnavalkya whom Vijnanesware professes to follow.

According to Haradatta the order of succession after the lineal descendants, is as follows: father, uterine brother, his son, half-brother, his son, paternal uncle. The females, widow, &c. receive only maintenance is the opinion of the Acharyas, says he, and adds that the text of Yajnavalkya about the widow should be read, in the light of the text of Vyasa, *i. e.*, she takes when the estate of the husband does not exceed 2000 panas. Later on, he says that the widow takes equally with the Sapindas. He makes no distinction between joint and separate property.

According to the Mitakshara, the order of succession is as follows :—

(1) Son, Grandson, Putrika-putra, secondary sons. (2) Widow. (3) Unmarried daughter. (4) Unprovided daughter, *i. e.* childless or indigent daughter. (5) Provided daughter. (6) Daughter's son. (7) Mother. (8) Father. (9) Uterine brothers. (10) Step-brothers. (11) Brother's sons. (12) Grandmother. (13) Grandfather. (14) Paternal uncle. (15) Paternal uncle's sons. (16) Great-grandmother. (17) Great-grandfather. (18) Great-grandfather's sons. (19) Great-grandfather's grandsons: so on, up to the seventh degree ; and after these Sapindas of the same Gotra, *i.e.*, agnates up to the fourteenth degree, or so far as name and relationship are known ; and after them Bandhus, *i.e.*, father's sister's son, &c. Bandhus come in as Sapindas of different *gotras.** Bandhus are then defined to be of three kinds, *i.e.*, father's sister's son, mother's sister's son and mother's

* भिन्नगोत्राणां सपिण्डानां बन्धुशब्देन ग्रहणात् इति मिताक्षरा।

brother's son (1) of one's own-self, (2) of the father and (3) of the mother. Vijnaneswara, however, has fallen into the strange error of considering that the text of Yajnavalkya lays down an inflexible order, and, therefore, after the brother's son comes the grand-father, and he cannot find a place for the brother's grandson.

The commentary of Vijnaneswara on the word Gotraja in Yajnavalkya's text runs as follows : गोत्रजा: पितामही सपिण्डा: समानोदकाश्च तत्र पितामही प्रथमधनभाक् *i. e.*, within the term Gotraja come paternal grand-mother, Sapindas and Samanodakas and among them, the paternal grandmother comes first. He then says that the paternal grandmother comes in because specifically mentioned by Manu. Further he says—पितामह्याश्चाभावे समानगोत्रजा: सपिण्डा: पितामहादयो धनभाज:, *i.e.*, in the absence of the paternal grandmother, Sapindas of the same Gotra, the paternal grand-father and the like are takers of the inheritance. From this it is clear that the paternal grandmother is not like the paternal grandfather, one of the Sapindas of the same Gotra who are meant by the words Gotraja and that she comes in only because of a special text. However it is upon the words गोत्रजा: पितामही etc. mentioned above, that the fabric of the rights of widows of collaterals have been based in Bombay. Visveswara, the author of the Subodhini Tika of the Mitakshara, says the word Gotraja may mean both males and females. Balambhatta takes the same view and places the son's widow next after the paternal grandmother.

Succession according to the Mitakshara.

The Mitakshara in trying to reconcile the conflicting texts about the widow's rights, says that the texts excluding her apply to joint families. The

distinction between joint and separate property for the purposes of inheritance is thus the result of the anxiety of commentators to reconcile conflicting texts without any regard to the history of the law.

Parasara Madhava, Saraswati Vilasa and Apararka.

The Parasara Madhava and the Saraswati Vilasa follow the Mitakshara. The Apararka agrees with the Mitakshara, excepting that it gives preference to the father before the mother, places the uterine brother and his son and grandson before the step-brother and allows great grandsons of father, etc. to succeed after the grandsons of the three ancestors on the theory of spiritual benefit, like the Dayabhaga.

The Smriti Chandrika lays down the following order :—

The Rule of Smriti Chandrika.

(1) Son, grandson, great-grandson. (2) Adopted son. (3) Chaste widow, married in an approved form, having a daughter, (if without daughter she takes only the moveable property). (4) Unmarried daughter. (5) Married but unprovided daughter. (6) Provided daughter. (7) Father. (8) Mother. (9) Grandmother. (10) Uterine brother. (11) Half-brother. (12) Full-brother's son. (13) Half-brother's son. (14) Son of the grandfather. (15) Grandson of the grandfather. (16) Son and (17) Grandson of the great-grandfather. (18) Son and (19) Grandson of the great-great-grandfather. (20) Son and (21) Grandson of the great-great-great-grandfather. (22) Son and (23) Grandson of the last Sapinda. (24) Sons, and after them (25) Grandsons of the Samanodakas. (26) Bandhavas, *i. e.*, father's sister's son, mother's sister's son, mother's brother's son, of self, of the father and then of the mother.

(27) One who may be somehow considered equal to the above. (28) Preceptor, &c.

There is no place for the grandfather and great-grandfather, &c., in the above table, except as sons of their fathers, nor for the great-grandsons of the Sapindas. Females except those that are mentioned, are expressly excluded.

The Vivada-Chintamani follows the Mitakshara. According to it, however, the daughter's son takes after the father, and in property other than ancestral, the brother takes before the father, according to the text of Paithinasi. It makes specific mention of great-grandsons as heirs, from which it follows that the father's great-grandson comes after the father's grandson. It further mentions the maternal uncle as an heir, but makes no mention of the Bhinna-gotra Sapindas, and gives the wealth, except that of a Brahmana, on failure of Bandhus, to the king.

The rule of Vivada Chintamani.

The most remarkable among these books, is the Nibandha called the Mayukha. According to it, the order of succession is as follows :—

The rule o Mayukha.

(1) Son, grandson, great-grandson. (2) Putrika-putra. (3) Adopted son. (4) Widow, if chaste. But she takes immoveable property, only when she has got a daughter, as in the Smriti-Chandrika.

(5) Daughter, (unmarried, unprovided and then the provided one). (6) Daughter's son. (7) Father. (8) Mother.

(9) Uterine brother. (10) His son.

(11) Gotraja Sapindas, among whom, the grandmother, is the first, being mentioned by Manu. After her comes the sister, for being born in the *gotra* she is *gotraja*, and because Vrihaspati has laid down,

that among Sakulyas and Bandhavas whoever is nearest takes the inheritance. After her, come the paternal grandfather and the half-brother who take equally, their propinquity being equal. In their default, the paternal great-grandfather, the father's brother and the sons of the half-brother take equally. Thus "all the Sapindas and Samanodakas take in the order of propinquity." Samanodaka relationship ceases when the agnatic relationship is forgotten, and not with the fourteenth person.

(12) Bandhus, father's sister's son, &c., enumerated above.

Kamalakara in the Vivada Tandava lays down the same rule as the Mitakshara and says that those who would bring in sisters within the term *Bhratara* (*i.e.*, Nanda Pandita and his followers) are ignorant (ते मूर्खा एव)।

Some commentators, such as Balambhatta and Nanda-Pindita, would include the sister and the daughter-in-law among heirs. Nanda-Pandita gives the inheritance to the daughter's daughters, in default of daughter's sons, and to the sister after the brother. Kamalakara in the Nirnaya Sindhu says that the sister and the daughter-in-law are entitled to perform the Sraddha but in his Vivadatandava he emphatically repudiates the rights of all females, except the widow, the daughter and paternal grand-mother.

Kamalakara, Balambhatta and Nanda Pindita.

Among the Bengal lawyers, Kullukabhatta ranks first. According to him the order of succession is as follows: son, grandson, great-grandson, the Putrika, the Putrikaputra, secondary sons, widow, daughter not Putrika, parents, uterine brother, brother's son, paternal grandmother, after her

Kullukabhatta.

the nearest Sapinda *i.e.*, on failure of the descendants of the grandfather, the descendants of the great-grandfather take. After the Sapindas come the Samanodakas.

According to the Dayabhaga the following is the order of succession :—

The rule of the Dayabhaga.

(1) Son, grandson,, great-grandson.(2)Putrika-putra (who takes equally even with an after-born son). (3) Subsidiary sons.

(4) Widow. (5) Maiden daughter, betrothed daughter, daughter having or likely to have a son, (because according to the Dayabhaga "Vrihaspati says, that the appointed or not appointed daughter, to continue the male line, takes the property").

A barren daughter or a sonless widowed daughter can not, according to the Bengal lawyers, inherit at all. This is against all the Smritis and all the commentators, and is a glaring instance of the bigotry and ignorance of the Pundits of Bengal.

(6) Daughter's son. (7) Father, mother (not the step-mother), full-brother, half-brother, full-brother's son, half-brother's son, brother's son's son, father's daughter's son, in the order mentioned.*

(8) Grandfather, grandmother grandfather's son, grandson, great grandson, and daughter's son, in the order mentioned.

(9) Great-grandfather, great, grandmother,

*A joint full-brother takes before a separated full-brother but a separated full-brother takes equally with a joint half-brother. Srikrishna in his synopsis at the end of his commentary on the Dayabhaga gives the preference to full-sister's son over half-sister's son, but in his Dayakrama-Sangraha he does not make the distinction. It is mentioned to be the opinion of Acharyya-Churamani. In the synopsis, it is possible, that the opinion of Acharyya-Churamani, an earlier commentator of the Dayabhaga, might have crept in.

great grandfather's son, grandson, great grandson, and daughter's son in the order mentioned.

(10) Maternal uncle, and the like, who offer Pinda to the maternal grandfather and who are included in the term Bandhu. The maternal grandfather is not mentioned. Gimutavahana found it difficult to give him a place, upon the theory propounded by him.

(11) Sakulyas, Samanodakas. (12) Disciple, teacher, &c. But the king never takes, except in the case of the want of a good Brahmana in the village. The king should in no case take the property of a Brahmana.

Raghunandana and Srikrishna have amplified the rule of Dayabhaga by putting in the maternal grandfather before the maternal uncle.

Raghunandana and Srikrishna.

Raghunandana says further, that the Bandhus, *i.e.*, father's sister's son, mother's sister's son, &c. enumerated by commentators of the Mitakshara school also take. Most of them, it should be remembered, do not confer any spiritual benefit.

According to Srikrishna, the full-brother's grandson takes before the half-brother's grandson. He also lays down that the maternal grandfather, maternal great-grandfather, and their sons, grandsons, great grandsons, and daughter's sons take in the same way as do the paternal Sapindas.

It will be seen that the law as laid down by the commentators, is of a contradictory and uncertain character, and has not always been followed even in the provinces where their authority is said to be supreme. The Courts have not followed them implicity, and it is a great error to give effect to their interpretation of the law as customary law.

Having regard to the texts and also the law enunciated by the commentators, the reasons given for their decison by the judges in settling the law of inheritance in India, as it now stands, may appear to the reader to be very ingenious but very often based on imperfect information.

Rule of succession according to the decisions.

I proceed to record the law as laid down by our Courts. In 1863 the Privy Council in the case of Katama Natchear *v.* The Raja of Shivagunga (9 Moore 610) enunciated the principle of the Hindu Law of Inheritance in the following words : "There are in the Hindu Law two leading rules of inheritance,—that founded on the religious duty and superior efficacy of oblation and sacrifice ; and that of survivorship. Where the latter rule can not apply the former must be restored to." It is now admitted on all hands that these propositions cannot be supported. The principles supposed to underlie the law of inheritance of the Hindus, so far as Bengal is concerned, were firmly established by the Full Bench of the Calcutta High Court in 1870 in the case of Guru Gobinda Shaha *v.* Anand Lal Ghose, (13 W. R. F. B. p. 50.) The late Justice Dwarka Nath Mitter, undoubtedly a very ingenious and eloquent judge, in delivering the judgment of the Full Bench, laid down the guiding principle in the following terms : " That the Hindu Law of Inheritance, in the widest acceptation of the term, is essentially based upon considerations relating to the spiritual welfare of the deceased proprietor, is a proposition beyond all dispute. All the ancient Rishis or Hindu sages whose texts are regarded as the fundamental source of that law, and all the commentaries on it whose

opinions are recognized as authorities in the different schools current in the country, are unanimously agreed in accepting these considertions as their chief, if not as their exclusive guide. The author of the Dayabhaga is no exception to the rule. On the contrary, he is clearly and expressly of opinion as we will presently show, that the whole theory of inheritance is founded upon the principle of spiritual benefit, and that it is by that principle, and that principle alone, that every principle relating to it must be determined." Babu Gopal Chunder Sarcar and the late Dr. Jogendra Nath Siromoni have attributed the errors of the great judge to his ignorance of Sanskrit. Indeed the imperfect knowledge of Sanskrit and Hindu Law, of our lawyers justified the judgment, and without its emphatic assurance, it would never have been accepted by European judges. Since then, all the High Courts have agreed in regarding the principles enunciated above as unfounded, except under the Dayabhaga School. The Judges of the Madras Court in a recent case say: "Though the doctrine of religious benefit has exercised very much influence upon many of the great writers on Hindu Law, yet it is now rightly recognized, that Vijnaneswara, as well as most of his followers, put their system on a radically different basis."* It has also been practically decided by two Full Benches of the Calcutta and Allahabad High Courts that the rules of inheritance under the Mitakshara are applicable only to the separate property of a deceased person, where there is no scope for the rule of

* Balusami *v.* Narayan, 20 Mad. 347. See Sp' . Sing *v.* Sarfaraz, 19 All. 215.

survivorship.* It still remains one of the curiosities of legal literature how, it could be gravely asserted, that all the Rishis and the Commentators of the different schools "are unanimously agreed in accepting these principles (*i. e.*, of spiritual benefit) as their chief, if not as their exclusive, guide," or that "there are in the Hindu Law two leading rules of inheritance,—that founded on the religious duty and superior efficacy of oblation and sacrifice; and that of survivorship. Where the latter rule cannot apply the former must be resorted to."†

The principles laid down by the late Justice Mitter, are still good law under the Dayabhagá School as administered in Bengal. In the judgment of the above-mentioned Full Bench, that learned judge, after laying down that among females none but the widow, the daughters, (except those that are barren and sonless), the mother and grandmother are heirs, proceeds to say: "As to the male heirs we may divide them in the following classes:—

1. Sapindas, strictly so called, or in other words, relatives connected through the medium of undivided oblations.

2. Sakoolas or relatives connected through the medium of divided oblations.

* Devi Prosad *v.* Thakur Dayal, 1 All. 105. Bhimul Das *v.* Choonee Lal, 2 Cal. 379.

† It should here be observed that the principle of survivorship was unknown to Hindu Lawgivers. The matter is fully dealt with in the Chapter on "Joint Family." The theory of spiritual benefit is also now thoroughly discredited as the guiding principle of the law of inheritance. See the observations of Mr. Justice Sale in 4 C. W. N., p. 746.

3. Samanodakas or relatives connected through libations of water.

4. Certain specified strangers commencing with the spiritual preceptor and ending with the learned Brahmin."

Sapindaship is next defined. The whole doctrine of Sapinda is contained in the following passage of the Dayabhaga.

'Since the father and certain other ancestors partake of three oblations as participating in the offering at obsequies, and since the son and other descendants to the number three, present oblations to the deceased (or to be shared by his manes) and he who while living presents an oblation to an ancestor, partakes when deceased of oblations presented to the same person; therefore, such being the case, the middlemost of seven who, while living offered food to the manes of ancestors, and when dead, partook of offerings made to them, became the object to which the oblations of his descendants were addressed in their lifetime, and shares with them, when they are deceased, the food which must be offered by the daughter's son (and other descendants beyond the third degree). Hence, those ancestors to whom he presented oblations, and those descendants who present oblations to him, partake of an undivided offering in the form of (Pinda) food at obsequies. Persons who partake of such offerings are Sapindas.' Colebrooke's Dayabhaga, Ch. XI., Sec. I., 38. It is clear from the above passage that if two Hindus are bound, during the respective terms of their natural life, to offer funeral oblations to a common ancestor or ancestors, either of them would be entitled after his death to participate in

the oblations offered by the survivor to that ancestor or ancestors, and hence it is that the person who offers these oblations, and the person to whom they are offered, and the person who participates in them are recognized as Sapindas of each other."

The judgment then mentions that these remarks should be read in connection with the Parvana Sraddha. It also deals with the question of the relative position of Sapindas, and lays down the following principle :

"Thus among the Sapindas those who are competent to offer funeral cakes to the paternal ancestors of the deceased proprietor are invariably preferred to those who are competent to offer such cakes to his maternal ancestors only. Similarly, those who offer a larger number of cakes of a particular description are invariably preferred to those who offer a less number of cakes of the same description; and where the number of such cakes is equal, those that are offered to nearer ancestors are always preferred to those offered to more distant ones. The same remarks are equally applicable to Sakoolas and Samanodakas."

The judgment also deals with the rights of female heirs, and after laying down that on spiritual grounds the widow, the mother, the grandmother, the great-grandmother, and the daughter (maiden or having or likely to have a son), alone are heirs, says : "and hence it is that those daughters who are barren or childless widows are carefully excluded from the line of inheritance." The sweet reasonableness of the law is next asserted in the following words : " 'Decision must not be made says Vrihaspati, 'solely by having recourse to the

letter of the written codes ; since if no decision were made according to the reason of the law there might be a failure of justice.' That this rule of construction is perfectly consistent with the dictates of good sense and natural justice is beyond all question."

It should be observed, that the passage from the Dayabhaga quoted by Mr. Justice Mitter is only the commentary of *G*imutavahana on the well-known text of Baudhayana cited in this section, on the wrong assumption that Daya means Pinda and Pinda means Sraddha offerings in that text. It is not of much moment whether the meaning of Daya given by *G*imutavahana is right or not, for it will not alter in any way the rule of Sapinda relationship among male ascendants and male descendants to the third degree spoken of there. How *G*imutavahana makes use of it, is that he makes all the seven agnates mentioned there participate in the oblations offered by the daughter's son of any one of them, and thus makes the latter an heir to all of them, as spiritual benefit is derived from him by them. But even *G*imutavahana would have stood aghast, if told that "it is clear from the above passage (cited from the Dayabhaga) that if two Hindus are bound to offer funeral oblations to a common ancestor, either of them would be entitled after his death to participate in the oblations offered by the survivor to that ancestor." According to this rule the daughter's son, if dead, would be entitled to participate in the oblations offered to his maternal grandfather by the son of the latter, as both the son and the daughter's son are under the obligation to offer oblations to the said ancestor. The

absurdity of the proposition will be apparent to anybody knowing anything of the rule of Sraddha. Even the Dayabhaga seems to be little read by our Lawyers, for the position taken by *Gimutavahana* is made clear in Ch. XI., Sec. VI., 12-14, where the reason of the succession of the maternal uncle and the like, is said to be, that they offer Pindas to the maternal grandfather to whom the propositus was bound to offer oblations. The difficulty which *Gimutavahana* felt was to place these heirs in the category of Sapindas. It is not to be wondered at, that our Lawyers are not aware of this difficulty, for the particular passage dealing with the matter was only partially and very imperfectly translated by Colebrooke in Ch. XI., Sec. VI., Para. 19. The passage runs thus : तस्मात्यीयस्तत्कुलीत्पन्नोऽतद्गोत्रोऽपि स्वदौहित्रपित्रदौहित्रादिरतत्कुलीत्पन्नो वा मातुलादिर्धनिनोस्तस्य पित्रमात्रकुलगतत्रैपुरुषिकपिण्डदात्रतया एकपिण्डसम्बन्धेन सपिण्डः—which means : "Therefore those that having sprung from the same family are of different gotra, such as, his own daughter's son, or his father's daughters's son, and the like, or those sprung from a different family as the maternal uncle and the like, are Sapindas, because having to offer the Traipurushic Pinda appertaining to the father's or the mother's family of the deceased owner, they are connected by the relationship of offering Pinda to one and the same person." Even the ingenuity of *Gimutavahana* could not invent a better reason than that. According to him, the maternal relations are Sapindas, because they offer Pindas to a person to whom the deceased also was under an obligation to offer a Pinda. *Gimutavahana*, probably anxious to advance the interests of the sister's son, wrote his famous

treatise making spiritual benefit the basis of the Law of Inheritance, and brought in the daughter's sons of father, grandfather and great-grandfather, and also the maternal uncle and his son and grandson in the category of Sapinda heirs. The niceties of modern Courts were not recognized by him. His rule was a simple one as we have already seen. We need not discuss the matter further. Let us proceed to discuss the relative rights of the heirs according to the Bengal School as decided by the Courts.

Dayabhaga succession according to the decisions.

After the daughter's son, the father takes, and then the mother (1). But a step-mother is no heir, on the doubtful ground that she does not participate in the oblations offered by the step-son (2).

After the mother, comes the whole brother, who is preferred to the half-brother, even in respect of undivided immoveable property (3). The half-brother takes along with the full-brother, when the latter is divided and the former undivided. An undivided full-brother takes before a divided full-brother (4). The son of the full-brother takes before the son of the half-brother (5).

Mr. Justice Saroda Charan Mitter expressed an opinion in a recent case that a nephew who was joint should be preferred to one who was separate under the Dayabhaga (6).

The order of succession after the brother as

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(1) Hemlatu *v.* Goluck, 7 S. D. 127.

(2) Lakhi *v.* Bhairab, 5 S. D. 315. Lal Joti *v.* Massumat Durane, B. L. R. Spl. Vol. 67 F. B.

(3) Rajkishor *v.* Gobind, 1 Cal. 27 F. B. Sheosundary *v.* Pirthee, 4 I. A. 147.

(4) Kesabram *v.* Nundkishor, 11 W. R. 308.

(5) Kylash *v.* Guru, 3 W. R. 43. See 6 W. R. 93

(6) Akhoy *v.* Hari Das, 35 Cal. 721.

recognized by our Courts, according to the Daya-bhaga School, is as follows :
brother's son, brother's grandson, sister's son ; grandfather, grandmother, grandfather's son, grandson, great grandson, and daughter's son, in the order mentioned ;
great grandfather, great grandmother, great grand-father's son, grandson, great grandson, and daughter's son, in the order mentioned.

After the above heirs, come the eight daughter's sons, *viz.*, (1) son's daughter's son, (2) grandson's daughter's son, (3) father's son's daughter's son, (4) father's grandson's daughter's son, (5) grandfather's son's daughter's son, (6) grandfather's grandson's daughter's son, (7) great-grandfather's son's daughter's son, (8) great-grand-father's grandson's daughter's son (*a*). As regards the first two, there is no case actually deciding their position. But from the opinions expressed and on the principle established by the decided cases, they would rank with the rest, among distant heirs. As regards the other six, there are very few cases deciding their relative positions. It has, however, been decided that a grandson's daughter's son of a nearer ancestor, excludes the son's daughter's son of a more distant one (*b*). If the eight daughter's sons mentioned above, are to come after the heirs mentioned in the Dayabhaga, the Dayatattwa and the Dayakrama-Sangraha, they should come after the maternal relations mentioned

(*a*) Govind Prosad *v.* Mohesh Chandra, 23 W. R. 117. See also 4 Cal. 411 ; 15 Cal. 780 ; 18 W. R. 33. Gopal Chunder *v.* Haridas, 11 Cal. 343. Dina Nath *v.* Mothoor, 6 S. D. 27.

(*b*) Prannath *v.* Suruth, 8 Cal. 460.

in them. It has however been held in a recent case (*a*), in which a father's brother's daughter's son was preferred to a mother's brother's son, that they come before the maternal relations. The theory of spiritual benefit and the principles based on it, were once again enunciated in that case in the following words. "The wealth of a deceased person, who can no longer have temporal enjoyment, should devolve on those who can confer spiritual benefit on him. Now the Sapindas on the paternal line offer oblations to the paternal ancestors which the deceased was bound to offer, and in which he participates, and the Sapindas in the maternal line offer oblations to the maternal ancestors, which the deceased was bound to offer, but in which he does not participate, so that, while they both confer spiritual benefit on the deceased. the former benefit him doubly by enabling him to participate in the oblations offered by them and discharging a duty that was incumbent on him of offering oblations to certain ancestors, and the latter benefit him only in one way, namely by offering certain oblations which he was bound to offer; and therefore while both are entitled to inherit his estate, the latter succeed only on failure of the former." Here the acute judge Dr. Banerjee, while laying down law undoubtedly correct according to Bengal ideas, has not escaped the strange but common error of considering that the maternal relations confer spiritual benefit on a person by offering oblations to his maternal ancestors to whom he was bound to offer Pindas.

(*a*) Braja Lal *v* Jibon Kristo, 26 Cal. 285.

If two persons owe two different debts to another, how one of them by discharging his own debt can benefit the other, is incomprehensible. The maternal relations, when they perform the Sraddha of their paternal ancestors, certainly do not discharge the duty of the deceased person of performing the Sraddha of his maternal ancestors. Gimutavahana felt the difficulty, and we have already seen how he attempted to solve it. According to the construction put on the Dayabhaga, these eight daughter's sons should come after the series of Sapindas specifically mentioned in the Dayabhaga, the Dayatatwa and the Dayakrama-Sangraha. But recent cases have established that a grandfather's son's daughter's son is preferred to a mother's brother's son, and a great-grandfather's son's daughter's son is preferred to a maternal uncle. (1) Thus the old position is no longer tenable. A consistent and reasonable rule has not yet been laid down. The position now given to the son's daughter's son and grandson's daughter's son is certainly not in accordance with the theory of spiritual benefit (see p. 102).

Sapindas on the mother's side.

The Sapinda heirs on the mother's side are the maternal grandfather, his son, grandson, great-grandson, and daughter's son; the maternal great-grandfather, his son, grandson, great-grandson and daughter's son; and the maternal great-great-grandfather, his son, grandson, great-grandson and daughter's son. There would also be six daughters' sons, *i.e.*

(1) Kedar Nath v. Haridas, 43, Cal. 64; Kulada v. Karuna, 18 C. W. N. 677; Haridas v. Bama Charan, 15 Cal. 780.

the maternal grandfather's son's daughter's son, and grandson's daughter's son; the maternal great-grandfather's son's daughter's son and grandson's daughter's son; and the maternal great-great-grandfather's son's daughter's son and grandson's daughter's son, as in the paternal line according to the decisions. (1) This was never contemplated either by Gimutavahana, Raghunundan, or Srikrishna.

Sukulyas and Samanodakas and after them the Crown take.

After all the above Sapinda heirs come the Sakulyas, or the agnatic relations beyond the third degree up to the sixth degree. After the Sakulyas come the Samanodakas or agnates up to the thirteenth degree. When there are no Samanodakas, the Crown takes, and not the strangers mentioned in the text-books as heirs. (2)

Brother's and sister's sons take equally per capita.

On the principle of spiritual benefit, brother's sons take equally, and they take *per capita*. (3) and so do sister's sons. (4)

Full blood preferred to half blood except in case of sister's son.

Under the Dayabhaga School, it has been held that full brother's son and other relations of the full blood are always preferred to half brother's sons and other relations of the half blood of equal degree, such as the half-brother's sons and others (5). Strangely however, in regard to the sister's son, Srikrishna says: "According to Acharya Chudamani the son of the proprietor's full-sister and the son of his

(1) Digumber *v.* Moti Lal, 9 Cal. 563. Braja Lal *v.* Jibankrishna, 26 Cal. 285. Kedar Nath Roy *v.* Amrito, 17 C. W. N 492.

(2) The Collector of Muslipatam *v.* Cavaly Vencate, 8 Moore 500.

(3) Brojo *v.* Srinath, 9 W. R. 463.

(4) Bholanath *v.* Rakhal Das, 11 Cal. 69; Dasarathi *v.* Bepin, 32, Cal. 261; Sashibhushun *v.* Rajender, 40, Cal. 82.

(5) Kylash *v.* Guru, 3, W. R., 33; Rajkrishna Lahoory *v.* Gobind Chand Lahoory, 1 Cal. 27. Ram Money Dassee *v.* Gobind Chunder Lahoory, 24 W. R. 234.

half-sister have equal rights of inheritance," and this opinion has been adopted by our Courts. (1)

Excepting those specially mentioned, *i.e.*, the widow, the daughter, the mother, the grandmother and the great grandmother, all female relations, such as the stepmother, the sister, and the sister's daughter, have been held to be no heirs. (2)

Female heirs not specially mentioned excluded.

The father's mother's sister's son, the father's mother's brother's son, the mother's mother's sister's son and the mother's mother's son, who are strictly textual Bandhus, the sister's daughter's son, the maternal grandfather's great-great-grandson and other persons, who would be heirs as Bandhus under the Mitakshara, have been held to be no heirs under the Dayabhaga as they confer no spiritual benefit. (3)

Bandhus not recognized.

Raghunandana cites the text of Baudhayana enumerating the Bandhus and declares their right to inheritance. The Dayakrama Sangraha also says that Bandhus are heirs. No Pundit of Bengal would venture to question the authority of Yajnavalkya's text or Vijnaneswara's intepretation of the word Bandhu. The silence of the Dayabhaga is clearly an omission. Again, the late Justice Dwarka Nath Mitter, who settled the law of inheritance of Bengal, rightly observed : " The authority of the Mitakshara, it should be remembered, was at one time supreme even in Bengal, and as the authority of the Dayabhaga did not intend to dispute the correctness of all the propositions in that treatise we need not be at all surprised at its silence in regard

(1) 32 Cal. 261 ; 40 Cal. 82. (2) Lakhi *v.* Bhairab, 5 S. D. 315 Kalee *v.* Bhoirabee, 2 W. R. 180. Anand *v* Teotaram, 5 W. R. 215. Rukkini *v.* Kadar, 5 B. L. R. App. 87. (3) Dinnath *v.* Chundi Koch, 16 Cal. L. J. 14. Krishnapada *v.* Secretary of State, 35 Cal. 631.

to some of them. It is for this reason that the Mitakshara is still regarded as a very high authority on all questions in respect of which there is no conflict between it and other works prevalent in that School" (19 W. R. 367). The same opinion has been expressed by the Privy Council and in recent decisions of the Calcutta High Court. (1) The Mitakhshara rule of succession on the ground of propinquity has been recognized in the case of reunion and in Stridhana (2) and it is right that the Law of Bengal should be made to conform to the law of other parts of India in regard to Bandhus also.

Succession under the Mitakshara and Schools, other than the Dayabhaga according to the decisions.

The law of succession under the Schools of Law other than that of the Dayabhaga, as settled by the decisions of our Courts, is as follows : After the widow, the daughter, the daughter's son, and the parents take in order.

Mother takes before the father in Benares, Mithila, Orissa and parts of Bombay.

The mother takes before the father in Benares, Mithila, Orissa and in parts of Bombay where the Mitakshara system prevails. (3) The adoptive mother also takes before the adoptive father. (4)

Father preferred inGuzerat, Bombay and Madras.

But in Guzerat and the Islands of Bombay, the father is preferred, on the authority of the Mayukha. (5) In Madras also according to the Smriti Chandrika the father is preferred.

A remarried mother can succeed to her son by the first husband. (6)

Step-mother.

The step-mother has been declared to be no

(1) 11 Moore 507, 35 Cal. 721, 4 C. W. N. 743. The late Babu Golap Chunder Shastri, Mr. Justice Sale and Sir Gooroo Das Banerjee expressed the same opinion. (2) 4 W. C. N. 743, 35 Cal. 721. (3) Balkrishna *v.* Lakshman, 14 Bom. 605. (4) Anandi *v.* Hari Suta, 33 Bom. 404. (5) Khodabhai *v.* Bahdar, 6 Bom. 541. (6) Chamar Haru *v.* Kashi, 26 Bom. 388. Basappa *v.* Rayava, 29 Bom. 91.

heir under the Mitakshara. (1) In Bombay, she takes after the grand-mother, and before the paternal uncle's son as a Gotraja Sapinda. (2) In Madras, the opinion was expressed that she is postponed to Sagotras. (3) But in a very recent case it has been held that she is no heir. (4)

Brothers and half-brothers.

After the parents, full-brothers take, and after them, half-brothers, in Benares, Mithila, Madras, the Punjab and those parts of the Bombay Presidency which follow the Mitakshara. (5) But in Guzerat and the Island of Bombay, which follow the Mayukha, the sons of of the full-brother take *per stirpes* and before the half-brother, (6), who comes in only after the full-brother, full-brother's son, grandmother and full-sister. (7)

Rights of nephews who take *per capita*.

In default of full and half-brothers, a full-brother's son takes, and after him, a half-brother's son. (8) Nephews take *per capita*. (9)

An uncle of the half blood succeeds in preference to the son of an uncle of the full blood. Where there is a difference of degree, the rule

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(1) Lala Joti *v.* Durani, B. L. Sup. Vol. pt. I. 67. Ramanund *v.* Surgiani, 16 All. 221. Tahaldai Kumri *v.* Gaya Pershad 37 Cal. 214, Sundar Moni *v.* Bangshidhar 16 I. C. 900. Collector of Madura *v.* Moottoo Ramahnga, 12 Moore 397. Bissendas *v.* Mansa Devi.

(2) Kessarbai *v.* Valai, 4 Bom. 188. Russoobi *v.* Zooleka, 19 Bom. 707. See 33 Bom. 462. Lullubhai *v.* Cassibai, 5 Bom. 110.

(3) Kumaravehela *v.* Viran, 5 Mad. 29. Mari *v.* Chinnamal, 8 Mad. 107. F. B. See 5 Mad. 32

(4) Sethai *v.* Nachar, 37 Mad. 286.

(5) Prithee Sing *v.* The Court of Wards, 23 W. R. 272. Nilkristo *v.* Beer Chunder, 12 Moore 523. Thakur Anant *v.* Thakur Durga, 14 Cal. W. N. 770 P. C. 37 I. A. 191.

(6) Krishnaji *v.* Pandurang, 12 Bom H. C. 65. Kesserbai *v.* Valab, 4 Bom. 188. Lakshmibai *v.* Ganpat, 5 Bom. H. C. 828. See 29 I. A. 70.

(7) Vithalrao *v.* Ramrao, 24 Bom. 338.

(8) 23 W. R. 272, 37 I. A. 191.

(9) Brojo *v.* Gouree, 15 W. R. 70. Gooroo *v.* Kylash, 6 W. R. 93. Jameyatram *v.* Bai Jamna, 2 Bom. H. C. 11. Santkumar *v.* Deosaran, 8 All. 365.

of the preference of the full blood does not apply. (1)

Relative rights of heirs of full and half blood.

The rule of law, that relations of whole blood should always be preferred to relations of half blood, does not hold good, according to the Bombay High Court, in the cases of agnates more distant than the nephew, both under the Mitakshara and the Mayukha. (2)

The Allahabad, Calcutta and Madras Courts have laid down that full blood should always be preferred to half blood. (3)

The Privy Council in the latest case on the question have approved of the above rule and held that it applied to all Sapindas of the same degree of descent from the common ancestor, but one of a higher degree, even if half-blood, excluded one of a remoter and lower degree. (4)

Great-grandsons of ancestors included.

There is no mention of great-grandsons of the father and other ascendants as heirs in the Mitakshara. In Madras it was held on the authority of the Mitakshara, the Smriti Chandrika, the Madhaviya, the Saraswati Vilasha and the Madana Parijata that the father's great-grandson can not come before the grandfather, his son and his grandson (5). The Allahabad, the Calcutta and the Bombay Courts however, held that the words 'father's *Santana*' or descendants in the text of the Mitakshara included the great-grandson, on the

(1) Gunga Sahai *v.* Kesri, 37 All. 545. See 32 All. 305 F. B.

(2) Samat *v.* Amra, 6 Bom. 394. Vithalrao *v* Ramrao, 24 Bom 338.

(3) Suba Sing *v.* Sarfraz Kunwar, 19 All. 215. Sham Sing, *v.* Kishun Sing, 6 Cal. L. J. 190 F. B. Nachiappa *v.* Ramgasami, 28 Mad. L. J. 1 F. B. Chandrika *v* Mana Kuar, 29 I. A. 70.

(4) Ganga Sahai *v.* Kesri, 37 All. 545 P. C.

(5) Suraya Bhukta, *v.* Lakshminarayan, 5 Mad. 291 Chinnaswami, *v.* Kunju, 35 Mad 152.

authority of the Apararka, the Varadraja and the Vaijayanti. (1) The Privy Council have recently settled the question by holding that the brother's grandson comes immediately after the brother's son and the word *Santana* includes the great-grandson in all the lines. Their Lordships have further held that "now it is absolutely clear that under the Mitakshara whilst the right of inheritance arises from Sapinda relationship or community of blood in judging of the nearness of blood relationship or propinquity among the Gotraja, the test to be applied to discover the preferential heir is the capacity to offer oblations."(2)

After that Sapindas take.

After the heirs mentioned above, Sagotra Sapindas, who are six descendants of the propositus and the six ascendants and their six descendants succeed "according to their nearness." (3) Opinion has been expressed in a recent Allahabad decision (34 All. 663) that after the great-grandson of the great-grandfather, the three remote ascendants and their three immediate desendants, and after them, the three remote descendants of the first three ascendants the three remote descendants of the first three descendants take. The Privy Council also was inclined to that view but declined to decide the question. All these Sapindas can not perform the Parvana Sraddha or the Sapindikaran ceremony and can only perform the Ekoddista Sraddha and as far as spiritual benefit is considered, except the lineal descendants, there is no difference between them. Beyond the great-grandson of the great-grandfather, there-

(1) Kallian Rai *v.* Ramchandra, 24 All 128. Kureem *v.* Dodung, 6 W. R. 158, Orhya Kooer *v.* Rajoo, 14 W. R. 231, Kashibai *v.* Sitabai, 35 Bomb. 389. Sumbhoo Dutt *v.* Jhotee, S. D. (1865) p. 382.

(2) Buddhu Sing, *v.* Laltu Sing, 37 All. 604 P. C.

(3) 13 Moore, 373.

fore, the rule laid down by the late Mr. Harington, which was approved by the Privy Council, (1) is more consistent and equitable and in accordance with the Mitakshara theory of Sapinda as meaning community of the bodily particles. That rule is that among these Sapindas, the six descendants of each ascendant take before the next ascendant. The late Mr. Justice Telang also was of opinion that in regard to all Gotrajas "the propinquity of a Gotraja is to be determined by lines of descent" and that the *Santanas* or descendants of an ancestor must be exhausted before the next ascendant can take. (2) This opinion was approved in a recent case in Bombay. (3)

Samanodakas

After the Sapindas the Samanodakas, or agnates up to the thirteenth descendant of the thirteen ascendants, take. (4) In a Bombay case it was held that Samanodakas are all agnates, whose common origin and common Gotra name are known, and these take before Bandhus. (5) But the rule, which was adopted very early by the Privy Council and which must be considered as settled law, is that the inheritance devolves "in default of the Sapindas to the Samanodakas or those connected by a common libation of water, viz., the more distant paternal kindred extending to the fourteenth degree and in failure of Samanodakas to those termed Bundhoos or cognates." (6)

(1) Ratcheputty, *v.* Rajender, 2 Moore 132, Bhya. Ram Sing *v.* Bhya Ugur Sing, 13 Moore 373.

(2) Rachava, *v.* Kalingaha, 16 Bomb. 716. (3) 35 Bomb 389.

(4) Kalka Pershad *v.* Mathura, 35 I. A. 166.

(5) Bai Devkore *v* Amritram, 10 Bom 363. See also Rambaran *v.* Kamla Prosad, 39 All. 594.

(6) Gungadutt Jha *v.* Sreenarain Rai, 2 S. D. A. 11 approved in Rucheputty Dutt Jha *v.* Rajendur, 2 Moore 133. 13 Moore 394, 35 I. A. 166.

Technical Bandhus.

After the Samanodakas, come the Bandhus. The technical Bandhus in order are: the three Atma Bandhus, father's sister's son, mother's sister's son and mother's brother's son; the three Pitri Bandhus, father's father's sister's son, father's mother's sister's son and father's mother's brother's son; and the Matri Bandhus mother's father's sister's son, mother's mother's sister's son and mother's mother's brother's son.

Definition of Bandhu extended.

In 1867 the Privy Council held that a current of decisions of the Courts of Calcutta, Agra and Madras since 1801 had established the rule that none, but the nine technical Bandhus were heirs and thus the sister's son was no heir. (1) In the next year however, the Privy Council held that the enumeration of Bandhus in the Mitakshara was not exhaustive and that the maternal uncle and the father's maternal uncle were heirs (2), observing that their former position "has been shaken, if not over-ruled by the decision (of Mr. Justice Dwarka Nath Mitter) recently passed by the High Court of Bengal in the case of Amritakumari *v.* Lukhynarayan Chuckerbutty."

Some Bandus according to decision.

The sister's son (3), sister's grandson (4), daughter's son's son (5), daughter's daughter's son (6), father's maternal grandfather's great-grandson (7), father's mother's sister's son (8), mother's maternal uncle's grandson (9), grandfather's sister's grandson (10), mother's sister's

(1) Thakurani Saheba *v.* Mohun Lal, 11 Moore. 386. (2) Giridhary Lal *v.* Bengal Government, 12 Moore. 448. (3) Amrita Kumary Debi *v.* Lakhi Narayan, 2 B. L. R., F. B. 28. Chelikani, *v.* Raja Suranene, 6 Mad., H. C., 278. Raghunath *v.* Munan, 20 All. 191. (4) Umaid Bahadoor *v.* Udoichand, 6 Cal. 119 F. B. (5) Krishnayya *v.* Pichamma, 11 Mad. 287. (6) Ajudhia *v.* Ram Sumar Miser, 31 All. 454, see 32 All. 640. (7) Ananda Bibi *v.* Nownit Lal, 9 Cal., 315. (8) Ram Sarup *v.* Naidar, 14 I. C. 55. (9) Ratnasubba *v.* P onuppachetty, 5 Mad. 69. (10) Sethurama *v.* Punnamub, 12 Mad. 155.

son (1), maternal grandfather (2), mother's brother's son (3), father's sister's son's daughter's son (4), and stepsister's son (5) and others mentioned later on have also been held to be Bandhus and heirs.

In the case of Umaid Bahadur *v.* Udai Chand (6 Cal. 119 F. B.), it was held that two persons to be Bandhus "must be related to each other as Bandhus directly or through their father and mother." It was held that the father's daughter's daughter's grandson was not a Bandhu, it being considered necessary that Bandhus should be "descendants of the line of the maternal grandfather of one's self or of the father or the mother." The rule has not been followed. In a later case, the Calcutta Court held that the mother's grandfather's son's daughter's son was a Bandhu. (6) In Madras, it has been held that the son of the daughter's daughter of the grandfather is a Bandhu. (7) In Allahabad it has been held that the daughter's daughter's son is a Bandhu (8). In the Patna High Court, it has been decided that the father's sister's son's son is a Bandhu (9).

Recent rule of the Privy Council.

In the latest case on the question before it, the Privy Council has settled the law and laid down the following principles: "(a) The Sapinda relationship on which the heritable right of collaterals is founded ceases in the case Bhinnagotra Sapindas with the fifth degree from the propositus; (b) in order to entitle a man to succeed to the inheritance of

(1) Mohan Das *v.* Krishnabai, 5 Bom. 297. (2) Chinnamul *v.* Venkatachilla, 15 Mad. 421. (3) Mohun Das *v.* Krishnabai, 5 Bom. 297. (4) Parot *v.* Mehta, 19 Bom. 631. (5) Subbaraga *v.* Kylasa, 15 Mad. 300. (6) Babu Lall *v.* Nanku Ram, Chandra, *v.* 22 Cal. 339. Umaid Bahadur *v.* Udai Chand, 6 Cal. 119. (7) Vencatagiri 23 Mad. 123. Mukha *v.* Qabza, 31 I. C. 553. (8) Ajuadhia *v.* Ram Sunder, 31 All. 54. Ramphul *v.* Pasi Mati, 32 All. 640. (9) Harihar Charan *v.* Jang Bahadoor, 34 I. C. 183.

another he must be so related to the latter that they are Sapindas of each other which is only a paraphrase of Manu's rule." (1) It was held that Bandhus mean Bhinnagotra Sapindas and that the limit laid down in the case of eligibility for marriage applied also to the right of inheritance, that limit being regulated by the rule enunciated in the Acharakanda of the Mitakshara relative to Sapinda relationship and the prohibited degrees in respect of marriage. It was held in the case that a grandfather's grandson's daughter's daughter's son was not a Bandhu. The Privy Council approved of the mode of calculation of degrees adopted in Babu Lal's case (22 Cal. 339), according to which the five degrees are to be calculated from and including the common ancestor.

Mode of computation.

The Allahabad High Court has in a recent case followed the Privy Council decision but has adopted the mode of calculation advocated by Professor Rajcoomar Sarvadhikary and has held that the computation should be made from the propositus up to the common ancestor and then down to the claimant. (2) This mode of calculation is opposed to all the Hindu lawyers and to the express words of the Mitakshara, where it is laid down that the computation is to be made from the common ancestor from which there was separation of the lines (**सन्तानभेदः**). Shastri Golap Chunder Sircar and Dr. Siromoni have dissented from Professor Sarvadhikary. Indeed, if his mode of computation be applied to the five degrees rule laid down by the Privy Council, all the

(1) Ramchandra Martand *v.* Vinayek Vencatesh 42 Cal. 384, 41 I. A. 290. (2) Shib Sahai *v.* Saraswati, p. 13 All. L. J. A. 716, 30 I. C. 903.

Pitri Bandhus and the Matri Bandhus expressly declared as Bandhus would be excluded.

Rules of reciprocity and mutuality.

The Full Bench in Amrita Kumari's case laid down that the definition of Bandhu may be extended by the rule of reciprocity, according to which if A is admitted to be Bandhu of B, B must be Bandhu of A. Another rule is that of mutuality, which means that if A is not a Bandhu of B, B cannot be a Bandhu of B. According to it was held in Bombay that the sister's grandson was no heir. (1) All the other Courts have held the contrary. The Law favours a rule of reasonable extension, to avoid escheat. The rule of mutuality has been based on Manu IX, 187. According to all commentators Sapindas there mean Sapindas *within* three degrees. The rule of limitation in respect of ineligibility of Sapindas for marriage is opposed to all the commentators. The Privy Council, however, have given effect to it in holding that even relations on the paternal side are Bandhus only, when within five degrees.

In the Allahabad case mentioned above it was held that a grandfather's great grandson's daughter's son was not a Bandhu not being within the seven degrees. The Privy Council have held that the limit of the relationship of Bandhu is five degrees from the common ancestor. The Allahabad Court, while following the Privy Council decision, rightly held that the Sapinda relationship, which entitles one to be regarded as a Bandhu, extends to seven degrees on the father's side and five decrees on the mother's side. If the rule of the Acharakand about eligibility for marriage be

(1) Lowji *v.* Muthabai, 2 Bom. L. R. 842, Contra. 6 Cal. 119 F. B. 12 Mad. 155, 19 Bom. 631, 23 Mad. 123, 31 All. 54.

considered as laying down the limit, it is clear that the first six descendants of the first six male ascendants on the paternal side and the first four descendants of the three male ancestors of the mother are excluded from marriage and are Bandhus.

Relative position of Bandhus.

As regards the relative position of the Bandhus early decisions favoured the idea that the text of Shatatapa about Bandhus laid down the order of succession and if any relations not mentioned in the text (who were denominated as irregular Bandhus in an Allahabad case) are admitted as Bandhus they must come in after those that are mentioned, who were denominated as regular Bandhus. That position is no longer tenable. The sister's son has been declared to have preference over the mother's sister's son (1) and the mother's brother over the mother's sister's son and the mother's brother's son (2). The father's sister's grandson has been preferred to the maternal uncle (3) on the principle laid down in a recent case that the word son as usually used in the Mitakshara includes the grandson and the great-grandson (4). In a very recent case, the Madras High Court however, adopted the old rule and held that though there may be a different rule in regard to heirs not enumerated in the text, as among the Bandhus enumerated, the order in which they have been mentioned must prevail and thus the mother's sister's son should be preferred to the mother's brother (5). The other High Courts have held the contrary (6).

(1) Gonesh Chunder Roy *v.* Nilcomul Roy, 22 W. R. 164. (2) Mohun Das *v.* Krishnabai, 5 Bomb. 597. (3) Subramania *v.* K.J. Ranganathan, 18 I. C. 505, 24 Mad. L. J. 28. (4) Budha Singh *v.* Latu Sing, 34 All. 663 P. C. (5) Appendai *v.* Bagubali, 33 Mad. 439. (6) Mohandas *v.* Krishnabai 5 Bom. 597. Ramcharan *v.* Rahim Baksh 34 I. C. 108, 14 All. L. J. 538.

The following principles concerning preference are now well-established.

Principles of preference.

(a) One's own Bandhus (आत्मबन्धु) should be peferred to father's Bandhus (पितृबन्धु), and father's Bandhus should be preferred to mother's Bandhus (मातृबन्धु) (1). Now after the well-established extension of the meaning of the word Bandhu, one's own Bandhus mean relations directly related to the propositus; father's Bandhus are those Bandhus and heirs who are related through the father; and mother's Bandhus are those that are related through the mother.

(b) Bandhus *exparte paterna*, such as the father's sister's son, should be preferred to Bandhus *exparte materna*, such as the mother's sister's son (2).

(c) Bandhus of the same class, who are nearer in degree, such as the mother's brother, should be preferred to one more distant, such as the mother's brother's son or the mother's sister's son (3).

(d) Bandhus of the whole blood, such as the mothers full-brother should be preferred to Bandhus of the half-blood, such as the mother's half-brother (4).

(e) Among Bandhus of the same class one connected through a male should be preferred to one connected through a female.

(f) A Bandhu connected through a single female, such as the son of a daughter's son should be preferred to a Bandhu connected through

(1) Muthusami *v.* Muthkumarasami, 16 Mad. 23 approved in Muthusami *v.* Simambedu, 19 Mad. 405 P. C. Sandarammal *v.* Rangasami, 18 Mad. 193. Balusami *v.* Narayana, 20 Mad. 342, Narasimma *v.* Manganmal, 13 Mad. 10, Saguna *v.* Sadashiva, 26 Bom. 710. Anandibai *v.* Kashibai, 28 Bom. 461 (mother's sister's son preferred to grandfather's sister's grandson). (2) Sundarammal *v.* Rangasami 18 Mad. 193 Balusawmi *v.* Narayana 20 Mad. 342. Narasimma *v.* Mangammal, 13 Mad. 10. Saguna *v.* Sadashiva, 26 Bom. 710 where a father's sister was preferred to a maternal uncle. (3) Mohan Das *v.* Krishna Rai, 5 Bom. 597. Gunesh Chunder Roy *v.* Nilcomol Roy, 22 W. R. 264.

(4) Muthusami Mudalyar, *v.* Simambedu, 19 Mad. 405 P. C.

two females, such as the son of a daughter's daughter (1).

(g) In Madras and Bombay, where females are admitted as Bandhus, a male Bandhu is preferred to a female, though the latter may be nearer in degree (2).

(h) After adoption nearer relationship in the natural family is no ground for preference (3).

Spiritual benefit the test of preference.

The next question is whether the doctrine of spiritual benefit can be invoked in determining who are Bandhus and their relative position. The Vivada Chintamani and the Viramitrodaya admit the applicability of the doctrine. In the case of Bhya Ram Sing (13 Moor 373), which was a case under the Mitakshara School, the Privy Council observed that " the question of preference is distinct from that of entire exclusion. When a question of preference arises, as preference is founded on superior efficacy of oblations, the principle must be applied to the solution of the difficulty." Nevertheless our Courts for a long time held that the doctrine of spiritual benefit was wholly inapplicable in matters of succession in the Mitakshara School (4). The Patna High Court however, has gone to the other extreme of holding that though the position of a Bandhu is based on consanguinity, it shall be supported by the right to offer oblations (34 I. C. 183). However that may be, the Privy Council in the most recent case on the question, have finally settled that under the Mitakshara, among heirs of the same class spiritual benefit affords the test of pre-

(1) Tirumalacharliar *v.* Anandalammal, 30 Mad. 406. (2) Raja Kukata *v.* Raja Surinani, 31 Mad. 321. (3) Rajgopal *v.* Sundara Nachiar, 12 Mad. L. J. 64. (4) Suba Sing *v.* Sarfaraz 19 All. 215. Balusami *v.* Narayan 20 Mad. 342. Umaid Bahadur, *v.* Udoy Chand 6 Cal. 119 F. B.

ference (1). Judged by this test the order of succession should be as is mentioned below. Among Atma-Bandhus should come (1) son's daughter's son, (2) grandson's daughter's son, (3) daughter's son's son, (4) sisters' son, (5) brother's daughter's son, (6) father's sisters' son, (7) father's brother's daughter's son, (8) mother's brother (9) mother's brother's son, (10) mother's brother's grandson, (11) mother's sister's son, and (12) mother's brother's daughter's son. These heirs are the heirs, who are connected through oblations offered to one's self, his father, grandfather and maternal grandfather. After them ought to come the father's Bandhus. Among them should come first those connected by funeral oblations to the great-grandfather namely, the father's father's sister's son, and the father's father's brother's daughter's son. Then come the father's mother's brother, father's mother's brother's son and the father's mother's sister's son, who are not connected with the porpositus through funeral oblations. After these, come the mother's Bandhus. Among them, the mother's grandfather's son, grandson and greatgrandson and the mothers great-grandfather's son, grandson and greatgrandson* are connected through funeral oblations, according to the rule of spiritual benefit enunciated in the Dayabhaga. Last of all come the mother's mother's brother's son and mother's mother's sister's son, who are not connected through funeral oblations. After these, come all the other Bhinnagotra Sapindas, with whom marriage is prohibited, in regard to whom propinquity is the only test.

Order according to the doctrine of spiritual benefit.

(1) Budha Singh Laltu Singh, 34 All. 663 P. C. Ramchandra v. Vinayak, 42 Cal. 384. Subramania v. K. J. Ramganatham, 18 I. C. 505.

* Son of a daughter is here included in the term grandson and son of the daughter of a grandson is included in the term great grandson.

No females, except those specifically mentioned, heirs in Northern India.

We have already seen that under the Dayabhaga and the Mitakshara, as prevailing in Behar and Northern India, no female heirs except the widow, the daughter, the mother and the grandmother are heirs. The daughter-in-law also is no heir; nor does she take by survivorship, but is only entitled to maintenance, notwithstanding passages in her favour in the Nirnaya-Sindhu, Balambhatta's Tika and the Baijayanti. Nor is a brother's widow an heir, nor a son's daughter. (1)

Sister and other females who are heirs in Madras.

In Madras, it was held that the sister was no heir, (2) but after nearly a quarter of a century, the law was changed and she was declared an heir. She takes after the sister's son. (3) It has also been decided that the son's daughter (4) father's sister (5), daughter's daughter (6) and husband's brother's daughter (7) are within the line of heirs, like the sister, as Bandhus, and Bhinna Gotra Sapindas and as such postponed to male heirs to the fourteenth degree and they take after all the male Bandhus. (8)

The Madras High Court has refused to

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(1) Tahal Ram *v.* Gaya Prasad 37 Cal. 214. Ramdyal Deb *v.* Magnee, 1 W. R. 227. Julessur *v.* Uggur Roy, 9 Cal 725. Juggut Narain *v* Sheo Das, 5 All. 311 F. B. Annud Bibi *v.* Nownit Lal, 9 Cal. 315. Puddavati *v.* Doolar Sing, 4 Moore 259. Gouri Shahi *v* 3 All. 45. Mussumut Soodeso *v.* Bissessor Sing, S. D. A., N. W. P, Vol. II., 375. Nanhi *v.* Gauri, 28 All. 187. Jagannath *v.* Champa, 28 All. 247.

(2) Nagalinga Pillai *v.* Vaidelinga Pillai, Mad. S. D. (1859) p. 247.

(3) Kutte Ammal *v.* Radha Krishna, 8 Mad H. C. 88.

(4) Nalanna *v.* Ponnal, 14 Mad. 149.

(5) Narasimma *v.* Mangammal, 13 Mad. 10.

(6) Vencatasubramanian *v.* Thayaramma, 21 Mad. 263.

(7) Ramappa Udayan *v.* Arumugatti, 17 Mad. 182.

(8) Sundermull *v.* Rungaswami, 18 Mad. 198. Lukshamanammal *v.* Tiruvengada, 5 Mad. 241, (sister's son preferred). Chinnammul *v.* Vencata, 15 Mad. 421. Kumarsvelu *v.* Virana Oundana, 5 Mad. 29. (In this case it was doubted whether the step-sister is an heir).

include the stepmother (1), the brother's widow (2) and the wives of agnates generally in the category of heirs as Bandhus. (3)

Female heirs in Bombay.

In Bombay, we find a peculiar Hindu Law administered by the Courts. The incapacity of women in ordinary cases for inheritance as pointed out in the case of Bhau Nanaji *v.* Sundrabai (11 Bom. H. C. 249) was there also at one time a generally received opinion, but case law has established a course of descent in that Presidency different from the rest of India, on the ground that it has become the customary law there. The sister and the half-sister are considered heirs by in the Nirnaya Sindhu and Balambhatta as father's daughter. We have seen that the Mayukha declared in favour of the right of the sister, but it went no further and Mr. Justice West was right when he said that "if the foundation of the rights of widows of Gotrajas was slender, under the Mayukha it may be called almost shadowy." (4) However that may be, it was decided by the Supreme Court of Bombay on 28th of March 1861, that the sister was an heir, not only in provinces where the Mayukha was of authority, but in all parts of the Presidency. (5)

It has been held that the Mayukha and the Mitakshara should be construed harmoniously as far as possible (6). Nevertheless the rule

(1) Sethai *v.* Nachiar, 37 Mad. 286. Mori *v.* Chinnammal, 8 Mad. 107 F. B.

(2) Kankammal *v.* Authamati, 37 Mad. 295.

(3) Balamma *v.* Pillaya, 18 Mad. 168. Thayammal *v.* Annamalai, 19 Mad. 85. Kamala Bai *v.* Bhagirathi, 16 I. C. 937.

(4) Lullubhai *v.* Mankuvarbai, 2 Bom. 447.

(5) Vinayeck Anandbai *v.* Luxmeebai, 1 Bom. H. C. 177, affd. 9 Moore 520.

(6) 32 Bomb. 303.

under the Mayukha as to the position of the sister is different to her position under the Mitakshara. In the Districts where the Mayukha prevails, the full sister comes after the full brother, his son (1) and probably his descendants, as the word 'son' has been held to include grandson and greatgrandson (2), and also after the paternal grandmother (3), but before the paternal grandfather (4), the step-grand-mother (5), the half-brother, the widow of the half-brother and the grand-father's grandsons (6). In Districts where the Mitakshara prevails, it has been held in Bombay that the full sister comes immediately after the grandmother and is postponed to brother, brother's son, half-brother and half-brother's son (7).

Both under the Mayukha and the Mitakshara in Bombay, the half-sister has been declared to be an heir, who takes after the half-brother's son, before the stepmother and the paternal uncle's widow (8), and a paternal uncle as being the daughter of the father in the nearer line of heirs. (9)

Balambhatta included sisters in the definition of brothers. This definition though referred to in earlier cases with approval, has been

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(1) 2 Bomb. 447. (2) 34 All. 663.

(3) Venayck *v.* Luxmeebai, 9 Moore. 520.

(4) Kessarbai *v.* Valab, 4 Bomb. 188.

(5) Sakharam *v.* Sitabai, 3 Bomb. 353, 9 Moore 520, 28 Bom. 82.

(6) Endrappa *v.* Irawn, 28 Bomb. 82, Lingangowda *v.* Tulsawa, 17 Bomb. L. R. 315, Contra Mulrao *v.* Ramrao, 24 Bomb. 317.

(7) Bhugwan Kethoba *v.* Warnibai, 32 Bomb. 300. Mulgi *v.* Carsandas, 24 Bom. 563. Hari Annaji *v.* Vasudev, 23 I. C. 944, 38 Bom. 724.

(8) Kessarbai *v.* Valab, 4 Bomb. 181, Vithalrao *v.* Ramrao, 24 Bomb. 317, Sakharam *v* Sitabai, 3 Bomb. 553.

(9) Trikam Purshottam *v.* Natha Daji, 36 Bomb. 120.

finally rejected by the later decisions of the Bombay Court. (1)

Sister's sons cannot thus have the same position as brother's sons. Sister's sons and daughters can come in only as Bandhus.

The son's daughter, (2) the father's sister (3), the brother's daughter (4) and all other daughters of the family, except the daughter and the sister, have been denied the right of Gotraja Sapindas but have been declared heirs only as Bandhus, who come after all the Sapindas and Samanodakas and their wives. It must be said here however, that daughter's of the son, father or grandfather are surely born in the Gotra and must be considered as Gotraja Sapindas and the reasoning by which the sister becomes a near heir while the predeceased son's daughter is excluded would have appeared strange to the old lawgivers.

In the Bombay Presidency, Berar and Sind where the Mitakshara or the Mayukha prevails, the rule has been established that " the widows of Gotraja Sapindas and of Samanodakas are held to be heirs who take next after their husbands subject to the right of any person whose place is specially fixed." (5) Except the female heirs mentioned in the Mitakshara, no other females are admitted as heirs in the Smritis or the principal commentaries. The Mayukha makes an exception in favour of the sister.

(1) 32 Bomb. 300, 24 Bomb. 563.

(2) Venilal *v.* Panjaram, 20 Bomb. 173.

(3) Ganesh *v.* Waghu, 27 Bom. 610.

(4) Bai Manekbai *v.* Narainji Dwarkadas, 12 Bomb. L. R. 454.

(5) Roop Chand Taluk Chand *v.* Phoolchand, 2 Bom. 616, Lakshmibai *v.* Joyram Hari, 6 Bomb. H C., A. C. J. 152, Lallubhai *v.* Mankuvarbai, 2 Bomb. 388 affd. 7 I. A. 212.

Balambhatta declares the sister and the son's widow to be heirs and no others Thus the Bombay High Court was right in holding in a recent case that the widows of agnates were recognized as heirs "in spite of the texts," and widows of heirs other than agnates, such as the daughter's son, should not be admitted by extending the scope of the rule further. (1) Even in Lallubhais case which established the rule, West J. said "that if the foundation of the right of widows under the Mitakshara is slender, under the Mayukha, it may be called almost shadowy."

The Bombay rule is supposed to be based on the following passage in the Acharakanda of the Mitakshara; "In like manner brother's wives also are (Sapinda relations to each other), because they produce one body (the son), with those (severally) who have sprung up from one body i.e. because they bring forth sons by their union with the offspring of one person and thus their husband's father is the common bond which connects them." (2) But females not born in the family cannot be Gotraja and thus these females are only. Sagotra Sapindas but can never be Gotraja Sapindas, as the Mitakshara clearly lays down while speaking of the paternal grandfather. The only Commentary which supports the Bombay rule is the Keshava Baijayanti to which no reference has been made by the Judges. The author of the Nirnaya Sindhu, upon which the Bombay lawyers rely, in his

(1) Vallabha *v.* Sakarbai, 25 Bomb. 281, (p) 2 Bomb. 447.
(2) Ram Chandra *v.* Venayeck, 16 Bomb. L. R. 863.

book Vivada Tandava expressly repudiates the right of these female heirs. The rule is thus really based upon Bombay custom and the law made by the judges there. The rule is subject to the following modifications, which also are now firmly established.

1. These heirs must come after the so-called compact series of heirs, specially named in the Mitakshara and the Mayukha i.e., the son, grandson, greatgrandson, widow, daughter, daughter's son, mother, father, brother, and brother's son.

2. Females in each line of Gotraja Sapindas are excluded by any males existing in that line within the limits to which Gotraja Sapinda relationship extends i.e., up to the sixth degree, but they are to be preferred to males of a remoter line. (1)

There is some difficulty about the position of the grandfather and the grandmother. In the most recent case before the Bombay Court, it was held that they were included in the compact series and came before the widows of the father's descendants. (2)

A married daughter, though a Bhinnagotra Sapinda, comes in before a daughter-in-law, notwithstanding a passage in the Baijayanti to the conservy. (3)

A son's widow has been preferred to a brother's widow (4) The son of a separated

(1) Rachava *v.* Kalingapa, 16 Bomb. 716. Pritam Purshottam *v.* Natha Daji, 36 Bomb. 120, Basangavda *v.* Basangavda, 39 Bomb. 87. As regards the degree, See 2 Bomb. 436.

(2) 39 Bomb. 111.

(3) Sitaram *v.* Chintamon, 24 All. 472.

(4) Roop Chand *v.* Taluk Chand, 2 Bom. 616

brother takes in preference to the widow of the son of an undivided brother. (1)

A grandson's widow has been postponed to a daughter's son. (2) The stepmother as the widow of the father has been preferred to the widow of the halfbrother. (3) She comes after the father (4).

A brothers widow has been preferred to a paternal uncle's son. (5) Under the Mitakshara in Bombay, the fifth male descendant in a particular line collateral to the propositus has been preferred to the widow of one in the third degree in the same collateral line. (6) A paternal uncle's grandson has been preferred to a paternal uncle's widow (7).

In Berar and Sind, where the Mayukha as interpreted by the Mitakshara prevails, the widows of Gotraja Sapindas and Samanodokas come in as heirs just after their husbands, subject ro the right of the heirs in the "compact series." (8)

It has been held that widows of collaterals can come in as reversioners after the death of a widow of the propositus but they all take a widow's estate. (9)

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(1) Nihal Chand *v.* Hem Chand, 9 Bomb. 131.
(2) Bomb. Select Rep. 132 first edition.
(3) Rakhmabai *v.* Tukaram, 11 Bomb. 47.
(4) Russobai *v.* Zoolekhabai, 19 Bomb. 707.
(5) 39 Bomb. 87.
(6) Ambai Das *v.* Jijibhai, 14 Bomb. L. R. 26, 14 I. C. 979.
(7) Kashibai *v.* Moreshvar, 35 Cal. 389. Runchod *v.* Ajoobaig, 9 Bomb. L. R. 1149.
(8) Mussumat Chandrabhaga *v.* Viswanath, 20 I. C. 560.
(9) Lallubhai *v.* Mankuvarbai, 7 I. A. 712.

Though the widows of collaterals are heirs, the widows of Bandhus and heirs claiming through females such as the daughter's son have not been considered as such. (1)

The rule of the Mayukha (Ch. II. sec. 8 Para 20) that the paternal grandfather and halfbrother take equally and so do the paternal greatgrandfather, the father's brother and the sons of the half brother, and such schemes of joint inheritance laid down in some early rulings, have "never been accepted as part of the prevailing law, probably because no body could understand what it would lead to." (2)

In Berar, it has been recently held that the sister's place in the order of succession is based on the Mayukha and she comes immediately after the grandmother and before the grandfather and his descendants among all Hindus of Berar, not excluding the Mahratta Brahmins. (3) The sister however, is no heir in the Central Provinces among Hindus governed by the Mitakshara. (4)

In Allahabad it was well established that the sister and other females not specially mentioned were not heirs. But in May 1900 the said Court decided that the daughter's daughter was an heir. (5) The law was thus without sufficient reason unsettled after more

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(1) Ballabhdas *v.* Sakarbai, 25 Bomb. 281.

(2) Lallubhai *v.* Mankuvarbai, 2 Bomb. 447. Rachava *v.* Kalingapa, 16 Bomb. at p. 720. See 4 Bomb. p. 208.

(3) Bhadia *v.* Mussamat Bhag, 23 I. C. 229.

(4) Girgabai *v.*Vijankatesh, 2 Ber. L. J. 135.

(5) Bunshidhar *v* Gonesh, 22 All. 338.

than a century by the judges. After the publication of the first edition however, two divisional Benches of the High Court have, following the earlier Full Bench, overruled the decision that a daughter's daughter is an heir and made the law correspond with that of Calcutta. (1) In Bengal, the last stronghold of all orthodox Hindu ideas, the doctrines of Bombay and Madras have never been recognized. It must be admitted that the Bengal High Court was right in holding, as it did in the case of Jagadamba Koer *v.* the Secretary of State (2), that a brother's widow and the other females mentioned above, have no place in the line of heirs under the Hindu Law. The Privy Council have held that the constructions of Balambhatta and Nanda Pandit are of no value. (3) The widows of collaterals may be Sapindas in a sense, but never Gotraja Sapindas. Married daughters of the family are Sapindas of their husbands' family. All of them, except the daughter, are expressly excluded by the Rishis. It is said, that their rights to succession depend on custom. If so, this custom was never recognized by the leading Commentators, and there is no evidence that such a custom was at any time in force in any part of India.

It will appear from the above that the decisions of our Courts have been constantly changing, and the Hindu Law of inheritance cannot be said to

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(1) Jagannath *v.* Champa, 3 All. J. 87. Nanhi *v.* Gowry, 2 All. L. J. 654. In Madras also Shepherd J. in Narasimma *v.* Mangamma, 13 Mad. 10 expressed the opinion that "the enumeration of Bandhus although not exhaustive includes no females."

(2) 16 Cal. 367 (3) 11 Moore 402.

have been quite settled. It is said that the differences in the law of the different provinces are owing to different customs prevailing there. If so, such customs, having been once ascertained, have been found to be otherwise after a century. That has been the case in Bengal, in Allahabad, in Madras, and also in Bombay.

Custom varies rule of inheritance.

Among Hindus also, the general rule of inheritance may be varied by custom. In the Punjab in several Districts, the rule of Pagvand and in others, the rule of Chudavand prevail. (1) It has been held that among certain castes the custom is that the widow is entitled to succeed for life to any estate which her husband, if alive at the time the succession opens out, might have taken and thus frequently daughter's-in-law and brother's widows take, who would not otherwise take. (2) But such variations of the general rule by custom must be proved. (3)

Custom and the rules of commentators.

As a matter of fact, the different commentaries, said to be binding on the different provinces, do not purport to be based on custom. The Hindu Law of Inheritance of all the provinces is the Law of the Rishis. Once that is ascertained, it should be given effect to. *Communis error facit jus* is a sound maxim, says the Privy Council. (4) But as

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(1) Ranjha *v.* Buland (Pagvand among Gujjars 1 Ind Cas 395, 14 Punj.) R. 1909. Labh Sing *v.* Narain Sing (Chudavand among Sarai Jats) 1 Ind. Cas. 394, 5 Punj. R. 1909.

(2) Satgan *v.* Bhagwan Das (Brahmins of Tehsil Shakargarh) 1 Ind. Cas. 19, 7 Punj. R. 1909. Premi *v.* Kushal, Singh, 1 Ind. Cas. 608 (Randhava Jats).

(3) Nidhu *v.* Ram Singh, 1 Ind Cas. 457, 2 Punj. R. 1909.

(4) Jagadish Bahadoor *v.* Sheo Protap, 5 Cal. W. N., p. 606.

we have seen, the maxim has been very often disregarded—sometimes in favour of more flagrant errors. When the error is productive of great injustice and iniquity, Vrihaspati and common sense say, however ancient it may be, it should be set right. Indeed, there is nothing to prevent our Courts or the legislature, having regard to the constant changes mentioned above, to rectify gross errors, such as the exclusion of the barren or the widowed daughter from the category of heirs, the inclusion of widows of collaterals and other females who are not considered heirs in any civilized country other than India, the postponing of direct lineal descendants to remote heirs and others mentioned before and to make the law conformable with the law of the Rishis.

INHERITANCE

SECTION V.

गर्तारूगिव सनये धनानां।

ऋग्वेदः, १म। सू १२४

As the childless widow goes to the place of judgment for getting wealth.

Rig-Veda, M. 1, S. 124.

लोकमजिगा॰ सन्ते सुवर्गं लोकं न प्राजानन्त एतं पावीवतमपश्यन्तमगट्टत ततो वै ते सुवर्गं लोकं प्राजानन् यत्पावीवती गट्टन्ते सुवर्गस्य लोकस्य प्रज्ञात्यै स सीमी नातिप्रत स्त्रीभ्यो गट्टमाणस्तं धृतं वज्रं कृत्वाऽघ्नन्तं निरिन्द्रियं भूतमगट्टन्तमात् स्त्रियो निरिन्द्रिया अदायादीरपि पापात् पु॰ स उपस्तितरम्।*

तैत्तिरीयसंहिता, का ६। प्र ५। अनु ८। २७

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* निरिन्द्रिया in this and other texts mentioned below, has been interpreted by Madhava as meaning 'incompetent to partake of the Soma juice in sacrifice,' and अदायादी: as meaning shareless in that.

सा पावीवतयष्टे तत्पत्न्या अंशो नास्ति इत्येवं परा।
इन्द्रियशब्दस्य इन्द्रियं वै सोमपीथ: इति सोमे प्रयोगदर्शनात्।
इति पराशरमाधवीये।

(The gods) conquered the (several) regions, but they did not know heaven. They saw this Patnivat Yajna (sacrifice with wife). They made this Patnivat sacrifice, and after that knew heaven. For knowing heaven the Soma of the sacrifice was not manifest being held by women. Then the Soma was struck with thunderbolt made of clarified butter (Then) (the Soma) becoming without strength was taken. Therefore are women without strength, and devoid of a portion. Men who are *patita* are worse situated.

Taittiriya Sanhita, K. 6, P. 5, A. 8, 27.

मनुः—

निरिन्द्रिया ह्यमन्त्राश्च स्त्रियोनृतमिति स्थितिः ॥ ९ । १८*

न भातरो न पितरः पुत्रा ऋक्थहराः पितुः ।

पिता हरेदपुत्रस्य रिक्थं भातर एव च ॥ ९ । १८५

यथाऽऽमुदकं कार्श्यं त्रिषु पिण्डेषु प्रवर्त्तते ।

चतुर्थः सम्प्रदातैषां पञ्चमो नोपपद्यते ॥ ९ । १८६

अनन्तरः सपिण्डाद्यस्तस्य तस्य धनं भवेत् ।

अत ऊर्द्धं सकुल्यः स्यादाचार्यः शिष्य एव वा ॥ ९ । १८७

सर्व्वेषामप्यभावे तु ब्राह्मणा रिक्थभागिनः ।

त्रैविद्याः शुचयो दान्तास्तथा धर्म्मा न हीयते ॥ ९ । १८८

अहार्यं ब्राह्मणद्रव्यं राज्ञा नित्यमिति स्थितिः ।

इयरेषान्तु वर्णानां सर्व्वा भावे हरेन्नृपः ॥ ९ । १८९

संस्थितस्यानपत्यस्य सगोत्रात् पुत्रमाहरेत् ।

तत्र यद्रिक्थजातं स्यात्तत्तस्मिन् प्रतिपादयेत् ॥ ९ । १९०

धनं यो विभृयाद्भ्रातुर्मृतस्य स्त्रियमेव च ।

सोऽपत्यं भ्रातुरुत्पाद्य दद्यात्तस्यैव तद्धनम् ॥ ९ । १४६

अनपत्यस्य पुत्रस्य माता दायमवाप्नुयात् ।

मातर्यपि च तत्तायां पितुर्माता हरेद्धनम् ॥ ९ । २१७

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* "निरिन्द्रिया अदायादाः स्त्रियो नित्यमिति स्थितिः ।"—is the reading of Haradatta in the Ujjvala. It has the merit of agreeing with the Vedic text upon which it is based, and is probably correct. But in favour of the prevailing reading it should be remembered that Vasista's text very nearly agrees with it. But it may be that the text of Vasista also is wrongly read.

Manu :—

Women who are destitute of strength and destitute of (the knowledge of) Vedic texts, (are as impure as) falsehood (itself); that is a fixed rule.

IX. 18.

Not brothers, nor fathers, (but) sons take the paternal estate; but the father shall take the inheritance of (a son) who leaves no male issue, and his brothers.

IX. 185.

To the three (ancestors) water (oblation) must be offered; to three the funeral cake (*pinda*) is given; the fourth (descendent) is the giver of these (oblations); the fifth has no connection (with them).

IX. 186.

Always to that (relative within three degrees) who is nearest to the (deceased) Sapinda, the estate shall belong; afterwards a Sakulya shall be (the heir, then) the spiritual teacher or the pupil.

IX. 187.

But on failure of all (heirs) Brahmans (shall) share the estate, (who are) versed in the three Vedas, pure and self-controlled; thus the law is not violated.

IX. 188.

The property of a Brahmana must never be taken by the king, that is a settled rule; but (the property of men) of other castes the king may take on failure of all (heirs).

IX. 189.

(If the widow) of (a man) who died without leaving issue, raises up to him a son by a member of the family (Sagotra), shall deliver to that (son) the whole property which belonged (to the deceased).

IX. 190.

He who takes care of his deceased brother's estate and of his widow, shall, after raising up a son for his brother, give that property even to that (son).

IX. 146.

A mother shall obtain the inheritance of a son (who dies) without leaving issue, and, if the mother be dead, the paternal grand-mother shall take the estate. IX. 227.

समानोदकभावस्तु निवर्त्तेताचतुर्दशात् ।

बृहन्मनुः ।

Samanodaka relationship ceases with the fourteenth person.
Text of Vrihat-Manu, cited by the Commentators.

अपुत्रा शयनं भर्तुः पालयन्ती व्रते स्थिता ।
पञ्च एव दद्यात्तत्पिण्डं कृत्स्नमंशं लभेत च ॥

वृद्धमनुः ।

A sonless widow who keeps the bed of her lord unsullied, and who strictly performs the austerities of widowhood, shall alone offer the cake at his obsequies and succeed to his entire share.

Vriddha-Manu, cited by all the well-known Commentators.

पिण्डगोत्र-ऋषिसम्बन्धा ऋक्थं भजेरन् ।
स्त्रीचानपत्यस्य बीजं वा लिप्सेत देवरवत्यन्यती जातमभागम् ।*

गौतमः, २८ अ । २१-२१

2[illegible]Sapindas (blood-relations within six degrees), Sagotras (relations bearing a common family name), (or) those connected by descent from the same Rishi (Vaidic gotra) and the wife shall share (*with the Sapindas*)(the estate) of a person deceased without (male) issue (or an appointed daughter). Or (the widow) may

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* The reading adopted by Vijnaneswara and Madhava is different from that found in the published texts, and also from the reading of Haradatta. The reading of Vijnaneswara, Apararka and Madhava is पिण्डगोत्रऋषिसम्बन्धा ऋक्थं भजेरन् स्त्रीवानपत्यस्य बीजं लिप्सेत । Gimutavahana stops short of भजेरन् । According to Dhareswara the text meant that the widow should take, if she desired to raise offspring by Niyoga. The interpretation given by Vijnaneswara as well as Madhava, is "or the widow of a childless man; and she my either remain chaste or raise offspring" "संयता वा भवेत् बीजं वा लिप्सेत" । According to this interpretation the widow is an heir. The words in italics in the translation are added by me to make it agree with the commentary of Haradatta who says—यदा सपिण्डा भजेरन् तदा तैः सह स्त्री एकमंशं गृह्णीयात् । The interpretation of Vijnaneswara does not seem to be correct, as a comparison with the texts of Manu and the other Rishis

seek to raise up offspring (to her deceased husband). (A son begotten on a (widow) whose husband's brother lives, by another (relative), is excluded from inheritance.

Gautama, Ch. XXVIII. 21-23.

अक्षतत्वा स्त्री पुरुषप्रधाना ।
अनग्निरनुदक्या च अनृतमिति विज्ञायते ।*
यस्य पूर्व्वेषां षण्णां न कश्चिद्दायादः स्यात्
सपिण्डाः पुत्रस्थानीया वा तस्य धनं विभजेरन् ।
तेषामलाभ आचार्य्यान्तेवासिनौ दद्येयाताम् ।
तदीरलाभे राजा हरेत् । न तु ब्राह्मणस्य राजा हरेत् ।
रिक्थं लोभान्न नियोगः

वशिष्ठः ५ अ । १ ; १७ अ । ८१-८४

A woman is not independent, she is under the tutelage of the male members of the family. It has been declared in the Vedas, that she is not fit to perform the sacrifice to the fire, is unclean and false.

Let the Sapindas (*i. e.*, agnates up to the sixth degree) or the subsidiary sons divide the heritage of him who has no heirs of the first mentioned six kinds (*i. e.*, the first six kinds of son). On the failure of them, the spiritual teacher

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cited in this Chapter will show. It is one of the many instances of interpreting the law to suit the Commentator's purpose by supposing words to exist which do not really exist. Compare Gautama, XVIII. 4-7, where it is said that the widow with the permission of the Gurus may get a son by the husband's younger brothers, a Sapinda and Sagotra, a Samanapravara or one who belongs to the same caste. In Sutra 7 we find mention of the controversy that, according to some, a son could be begotten only by the brother-in-law पिण्डगोत्र-ऋषि-सम्बन्धिभ्यो योनिमात्रादा नादेवरादित्येके । Vasista, XVII. 56, says—After the completion of six-months, she shall bathe, and offer a funeral oblation to her husband. (Then) her father or her brother shall assemble the Gurus who would sacrifice (for the deceased) and his relatives, and shall appoint her to raise issue to her deceased husband.

* The reading adopted in the edition of the Rev. Alois Fuhrer published in Bombay is अक्षतत्वा स्त्री पुरुषप्रधाना । अनग्निकानुदक्या वानृतमिति विज्ञायते । The translation in the Sacred Books of the East series based upon that by

and the pupil take. On failure of these, the king takes. But let not the king take the estate of a Brahmana.

There should be no Niyoga for the sake of wealth.

Vasista, Ch. V. 1; XVII. 81-84.

अपि च प्रपितामहः पितामहः पिता स्वयं सोदर्य्या भ्रातरः सवर्णायाः पुत्रः पौत्रः प्रपौत्रस्तत्पुत्रवर्जं तेषाञ्च पुत्रपौत्रमविभक्तदायं सपिण्डानाचक्षते। विभक्तदायानपि सकुल्यानाचक्षते। असत्स्वन्येषु* तद्गामी ऋथौं भवति। सपिण्डाभावे सकुल्यः। तदभावे पित्राचार्य्योऽन्तेवास्यृत्विग्वा हरेत्। तदभावे राजा तत्स्वं तैर्विद्यादृद्भिः संप्रयच्छेत्। न त्वेव कदाचित्स्वयं राजा ब्राह्मणस्तमाददीत।

निरिन्द्रिया ह्यदायाश्च स्त्रियो मता स्मृतिः।†

बौधायनः, प्र १ अ ५। क ११। सू ९—१५; प्र २। अ २। क ३। सू ४६।

Dr. Bühler is as follows:—"A woman is not independent, the males are her masters. It has been declared in the Vedas—A female who neither goes naked nor is temporarily unclean is paradise." The reading and the translation are both incorrect, and indeed very funny. Comparison with Manu, IX. 18, will show that the right word is अनृतम् and not असृतम्। I have adopted the reading of the texts of Vasista, published in Calcutta and Bombay.

* The reading is that of Govinda Swamin adopted by Dr. E. Hultzsch in his edition of Baudhayana printed at Leipzig, and the translation is that of Dr. Bühler in the Sacred Books of the East series. The reading as appearing in the Ratnakara and the Dayabhaga after the word प्रपौत्रः in the second line, is as follows:—एतानविभक्तदायादान् सपिण्डानाचक्षते विभक्तदायादान् सकुल्यानाचक्षते सत्स्वङ्गजेषु तद्गामी ऋथौं भवति, &c.

The translation by Dr. Bühler is wholly incorrect, as regards the first portion of the text. I have given another translation in Section VI. I have, however, given the translation here, as it follows Colebrooke and the Dayabhaga, and as it appears in the Sacred Book of the East series. But I am confident, the reasons given by me in Sec. VI., will show that my translation given there is correct.

As regards the reading असत्स्वन्येषु it is clearly incorrect. It should be सत्स्वङ्गजेषु। And the translation will run as follows:—"If there are lineal descendents the inheritance goes to them. On failure of Sapindas the Sakulays inherit," &c. This reading will show further, that my interpretation of the first portion of the text is correct.

† The Vivada-Ratnakara and the Dayabhaga read नदायं निरिन्द्रिया ह्यदायाश्च, &c. This reading will show that Madhava's interpretation is clearly wrong. नदायं निरिन्द्रियाणां ह्यदायास्त्रियोमता स्मृतिस्मृतिः is the reading of the Apararka.

Moreover, the great-grandfather, the grand-father, the father, oneself, the uterine brothers, the son by a wife of equal caste, the grandson, (and) the great grandson—these they call Sapindas, but not the (great-grandson's son), and amongst these a son and a son's son (together with their father are) sharers of an undivided oblation. The sharers of divided oblations they call Sakulyas. If no other (relations) are living, the property (of a deceased made) descends to them (the Sapindas). On failure of Sapindas, the Sakulyas (inherit). On failure of them, the teacher who (holds the place of a spiritual) father, a pupil, or an officiating priest shall take it. On failure of them, the king. Let him give that property to persons well versed in the three Vedas. But the king should never take for himself the property of a Brahmana.

The Veda declares : 'Therefore women are considered to be destitute of strength and of a portion.'

Baudhayana, P. 1, A. 5, K. 2, S. 9-15. P. 2, A. 2, K. 3, S. 64.

पुत्राभावे यः प्रत्यासन्नः सपिण्डः। तदभाव आचार्य आचार्याभाव्यन्तेवासी दृत्वा तदर्थेषु धर्म्यकृत्येषु वीपयीजयेत्। दुहिता वा। सर्व्वाभावे राजा दायं हरेत्। ज्येष्ठो दायाद इत्येके। आपस्तम्बः, प्र २। प ६। ख १४। सू २-६।

One failure of sons the nearest Sapinda (takes the inheritance). On failure of them the spiritual teacher. On failure of the spiritual teacher a pupil shall take (the wealth), and use it for religious works for the (deceased's) benefit, or (he may himself enjoy it.) Or the daughter (may take the inheritance). On failure of all (relations) let the king take the inheritance. Some declare, that the eldest son alone inherits.

Apastamba, P. 2, P. 6. K. 14, S. 2-6.

अपुत्रधनं पत्न्यभिगामि। तदभावे दुहितृगामि। तदभावे पितृगामि। तदभावे मातृगामि। तदभावे भातृगामि। तदभावे भातृपुत्रगामि। तदभावे बन्धुगामि। तदभावे सकुल्यगामि।* तदभावे सहाध्यायिगामि। तदभावे ब्राह्मणधनवर्ज्यं राजगामि। ब्राह्मणार्थो ब्राह्मणानाम्। वानप्रस्थधनमाचार्यो गृह्णीयात्। शिष्यो वा। सपिण्डता च पुरुषे सप्तमे विनिवर्त्तते।

विष्णुः, १७। ४-१६; ५२।५

* According to Nanda Pandit, Bandhu means Sapinda (agnates and cognates) बन्धवः सपिण्डाः सगोत्रा असगोत्राश्च। Sakulya means distant kinsmen beginning with the fifth in descent and ascent.

The wealth of a man who dies without male issue goes to his wife; on failure of her, to his daughter; on failure of her, to his father; on failure of him, to his mother; on failure of her, to his brother; on failure of him, to his brother's son; on failure of him, to the relations called Bandhu; * on failure of them, to the relations called Sakulya; on failure of them, to a fellow student; on failure of him, it goes to the king, with the exception of a Brahmana's property. The property of a Brahmana goes to (other) Brahmanas. The wealth of a (deceased) hermit shall be taken by his spiritual teacher; or his pupil (may take it). The relationship of Sapinda ceases with the seventh man (in descent or ascent).

Vishnu, XVII. 4-16; † XXII. 5.

अपुत्रपौत्रसन्ताने दौहित्रा धनमाप्नुयुः ।

If a man leaves neither son, nor son's son, nor issue, the daughter's sons shall take his wealth.

Vishnu, according to the Mitakshara, Chandrika, and Dayabhaga, and the Manu-Tika of Govinda Raj, but not found in the Institute of Vishnu. It is found in Vrihat-Parasara, Ch. V.

पत्नीदुहितरश्चैव पितरौ भ्रातरस्तथा ।
तत्सुता गोत्रजा‡ बन्धुशिष्यसब्रह्मचारिणः ।
एषामभावे पूर्व्वस्य धनभागुत्तरोत्तरः ।
स्वर्यातस्य ह्यपुत्रस्य सर्व्ववर्णेष्वयं विधिः ॥
वानप्रस्थयतिब्रह्मचारिणामप्यकुर्वतां भागिनः ।
क्रमेणाचार्यसच्छिष्यधर्म्मभावैकतीर्थिनः ॥

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* According to Nanda Pandit, Bandhu means Sapinda (agnates and cognates) बन्धवः सपिण्डाः सगोत्रा असगोत्राश्च । Sakulya means distant kinsmen beginning with the fifth in descent and ascent.

† Attributed to Vrihat-Vishnu by Vijnaneswara.

‡ The reading in the Dayabhaga and the Ratnakara is तत्सुतौ गोत्रजौ &c. but, coming after भ्रातरः, तत्सुताः is certainly preferable, and then *gotraja* would follow. Upon this wrong reading Jimutavahana says, that females born of the same *gotra* cannot succeed, inasmuch as the word *gotraja* is masculine. Nanda Pundit and Balambhatta, on the other hand, say, *gotraja* being in the plural includes males and females, and thus the sister is an heir, being a *gotraja*.

देशान्तरगते प्रेते द्रव्यं दायादबान्धवाः ।
ज्ञातयो वा हरेयुस्तदागतास्त्रैर्विना नृपः ॥

याज्ञवल्क्यः, २ । १३७-१३९, २६७ ।

The lawfully wedded wife and the daughters 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, leaving 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 and one 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, II. 137—139, 267.

अतृणामप्रजाः प्रेयात् कश्चिच्चेत् प्रव्रजेत्तु वा ।
विभजेरन् धनं तस्य श्रेषास्तु स्त्रीधनं विना ॥
भरणं चास्य कुर्व्वीरन् स्त्रीणामाजीवितक्षयात् ।
रक्षन्ति शय्यां भर्तुर्ये दाक्षिण्यादितराश्च ॥
क्रमाद्धरेते प्रथमोरिक्थं पितरि वा धनम् ।
ज्यायसी ज्यायसोऽलाभे कनीयान्निष्क्रियार्हति ॥
पुत्राभावे तु दुहिता तुल्यसन्तानकारणात् ।
पुत्रश्च दुहिता चोभौ पितुः सन्तानकारकौ ॥
अभावे तु दुहितॄणां सकुल्या बान्धवास्ततः ।
ततः सजातिः सर्व्वेषामभावे राजगामि तत् ॥

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* The translation is in accordance with the Mitakshara, the words of which are बन्धवो मातृपक्षा मातुलादयाः The defining of Bandhavas as maternal uncle and the like in this verse by Vijnaneswara, led the Privy Council, in the case of Gridhary Lal, to hold that the maternal uncle is a Bandhu and an heir.

अन्यत्र ब्राह्मणेभ्यः स्याद्राजा धर्मपरायणः ।
तत्स्त्रीभ्यो जीवनं दद्यादेष दायविधिः स्मृतः ॥

नारदः, १७ । २५, १६, ४९—५२

If among several brothers one childless should die or become a religious ascetic, the others shall divide his property, excepting the Stridhana.

They shall make provision for his women till they die, in case they remain faithful to the bed of their husband. Should the women not (remain chaste), they must cut off that allowance.

After their father's death, these (12 sons) shall succeed to his wealth in order. Whenever a superior son is wanting, the one next to him in rank is entitled to succession.

On failure of a son, the daughter (succeeds), because she continues the lineage just like (a son); both a son and a daughter continue the lineage of their father.

On failure of daughters, the Sakulyas * (are to succeed) and (after them) the Bandhavas*; next, a member of the same caste. In default of all, that (wealth) goes to the king.

Unless it should be the property of Brahmana.

A king devoted to duty must allot a maintenance to his women. Thus has the law of inheritance been declared.

Narada, XIII. 25, 26, 49--52.

विभक्ता भ्रातरो ये स्युः पृथग्दारक्रियाधनाः ।
यो ऋपुत्रो मृतस्तेषां तत्पत्नी तद्धनमश्नुते ॥

नारदः, १ । २५

If, among such brothers as have come to a division and are separate in wives, affairs, and wealth, one should die without leaving issue, his wife inherits his wealth.† Narada, I. 25.

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*Sakulyas means *agnates*, Bandhavas means *cognates*; *sajati*, which has been translated by Dr. Jolly as of the same caste, according to the Commentators means descended from the same Rishi.

† Dr. Jolly says of the verse that it "seems to be a marginal gloss which has somehow crept into the text by mistake." It is indeed quite out of place, being found in the chapter on debts.

ब्राह्मणस्य तु यद्देयं सान्वयश्च न चास्ति सः।
निर्वपेत्तत्सकुल्येषु तदभावेऽस्य बन्धुषु ॥
यदा तु न सकुल्याः स्युर्न च सम्बन्धिबान्धवाः।
तदा दद्याद्द्विजेभ्यस्तु तेष्वसत्स्वप्सु निक्षिपेत् ॥

मयूखधृत-नारदवचनम्।

What is due to a childless Brahmana goes to his Sakulyas. On failure of them to his Bandhus. When there are no Sakulyas and related Bandhavas, then it should be given to Brahmans. When there are no Brahmans, it should be thrown into water.

A text of Narada, cited in the Vyavahara-mayukha, but not found in the published Narada Smriti. The last verse is also quoted in the Kalpataru.

कुल्येषु विद्यमानेषु पितृस्वातृसनाभिषु।
असुतस्य प्रमीतस्य पत्नी तद्धनहारिणी ॥
पूर्वं मृता त्वग्निहोत्रं कृते भर्त्तरि तद्धनम्।
लभेत्पतिव्रता नारी धर्म्म एष सनातनः ॥*
यद्विभक्तं धनं किञ्चिदाद्यादि विविधं स्मृतम्।
तज्जाया स्थावरं मुक्त्वा लभेत् मृतभर्त्तृका ॥†
भर्त्तुर्धनहरी पत्नी तां विना दुहिता स्मृता।
यथा पितृधने स्वाम्यं तस्याः मत्स्वपि बन्धुषु।
तथैव तत्सुतोऽपीष्टे मातृमातामहे धने ॥
तदभावे भ्रातरस्तु भ्रातृपुत्राः सनाभयः।
सकुल्या बान्धवाः शिष्याः श्रोत्रियाश्च धनाहकाः ॥
मृतोऽनपत्यभार्य्यश्चेद्भ्रातृपितृमातृकः।
सर्व्वे सपिण्डसद्भावं विभजेरन् यथांशतः ॥
समुत्पन्नधनादर्द्धं तदर्द्धं स्थापयेत् पृथक्।
मास-षाण्मासिकी श्राद्धे वार्षिके वा प्रयत्नतः ॥
बहवो ज्ञातयो यत्र सकुल्या बान्धवास्तथा।

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* It is a text of Prajapati according to the Mayukha.

† गतभर्त्तृका is the reading of Madhava.

यौह्यासन्नतरस्तेषां सोऽनपत्यधनं हरेत् ॥
भार्यासुतविहीनस्य तनयस्य मृतस्य च ।
माता ऋक्थहरी ज्ञेया भ्राता वा तदनुज्ञया ॥
येऽपुत्रा ज्ञातिशूद्राः पत्नीभ्रातृविवर्जिताः
तेषां धनहरो राजा सर्व्वस्यापि पतिर्हि सः ॥
अन्यत्र ब्राह्मणात्किन्तु राजा धर्म्मपरायणः ।
तत्स्त्रीणां जीवनं दद्यादेष दायविधिः स्मृतः ॥
अन्नार्थं तण्डुलप्रस्थमपरार्द्धे तु सेन्धनम् ।
वसनं विपणक्रीतं देयमेकं विमासतः ॥
एतावदेव साध्वीनां चोदितं विधवाधनम् ॥
वसनस्याशनस्यैव तथैव रजकस्य च ।
धनं व्यपोह्य तच्छिष्टं दायादानां प्रकल्पयेत् ॥

बृहस्पतिः २५ । ४८, ४९, ५३, ५५, ५८—६२, ६३, ६७—७० ।

Although kinsmen (Sakulyas), although his father and mother, although uterine brothers be living, the wife of him who dies w thout leaving male issue shall succeed to his share.

A wife deceased before (her husband) takes away his consecrated fire (Agnihotra); but if the husband dies before the wife, she takes his property, if she has been faithful to him. This is an eternal law.

The husband being separated (in interests from his former coparceners), his wife shall take after his death a pledge and whatever else is recognised as property, excepting the immoveable wealth.

The wife is declared to succeed to her husband's property, and in her default, the daughter.

As her father's wealth becomes her property, though kinsmen be in existence, even so her son becomes the owner of his mother's and maternal grandfather's wealth.

In default of them, uterine brother as or brother's sons, agnates (Sakulyas) and cognates (Bandhavas), pupils, or learned Brahmanas are entitled to the inheritance.

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* The Mayukha and the Chandrika say, the meaning of this text is that if the widow has a daughter, she takes immoveable property also, but not otherwise.

When a man dies, leaving no issue, nor wife, nor brother, nor father, nor mother, all his Sapindas shall divide his property in due shares.

Half the entire wealth, however, shall first be set apart for the benefit of the deceased (owner), and carefully assigned for his monthly, six-monthly, and annual Sraddhas.

When there are several relatives agnates (Sakulyas), and cognates (Bandhavas), whosoever of them is the nearest shall take the wealth of him who died leaving no issue.

When a man dies without leving either wife or male issue, the mother has to be considered as her son's heiress, or a brother (may succeed) if she consents to it.

Should a Kshatriya, Vaisya, or Sudra die without leaving male issue, or wife, or brother, their property shall be taking (as escheat) by the king, for he is the lord of all.

Except in the case of a Brahmana ; but a king bent on the practice of virtue must allot a maintenance to his woman. Thus has the law of inheritance been declared.

For her food (he must assign) a prastha of rice every afternoon, together with fuel, and one dress purchased for three panas must be given to her every three months.

This much has been called the 'widow's wealth' of chaste women.*

What is left after setting apart property, sufficient for the expense of her dress, food, and for the washerman, shall be made over to the co heirs.

Vrihaspati, XXV. 48, 49, 53, 55, 58—63, 67—70.

स्वर्यातस्य ऋपुत्रस्य भ्रातृगामि द्रव्यं तदभावे पितरौ हरेताम् ।
पत्नी वा ज्येष्ठा सगोत्रशिष्यसब्रह्मचारिणः ।
अङ्गलिखितपैठीनसियमवचनम् ।

The property of a sonless deceased person goes to the

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* This paragraph is my translation of the text एतावदेव साध्वीनां, &c., the translation of this passage has been omitted by Dr. Jolly. This line appears in the place I have put it in, in Haradatta's Ujjvala and other commentaries.

brother, failing him the parents take, or the eldest wife,* sagotra, pupil, or fellow student.

Sankha, Likhita, Paithinasi and Yama, according to Gimutavahana, Paithinashi, according to Ratnakara, Sankha according to Vijnaneswara, Madhava and Haradutta.

परिषद्गामि वा श्रोत्रियद्रव्यं न राजगामि, न ह्यार्यं राज्ञा देवतागण संस्थितं न निक्षेपोपनिधि क्रिया क्रमागतं न बालस्त्रीधनान्येवं ह्याह। न ह्यार्यं स्त्रीधनं राज्ञा तथा बालधनानि च न्याय्याः षडागमं धनं बालानां पैत्रिकं धनम्।

अपरार्कधृत स्मृतिवचनम्।

The property of a Srotriya Brahmana is taken by the society of Brahmanas and not by the King. The King should not take the property dedicated to the gods nor a thing kept in deposit, nor a pledge nor the property of minors and women. Thus it is said, the King should not take the property of minors and women. The property of women is sixfold. The property of minors is the paternal. Text cited by Aparaska.

विभक्ते संस्थिते द्रव्यं पुत्राभावे पिता हरेत्।
भ्राता वा जननी वाथ माता वा ततपितुः क्रमात्॥

कात्यायनः।

If a man dies separate from his co-heirs, let his father take the property on failure of male issue ; or successively the brother, or the mother, or the father's mother.

Katyayana, cited by Vijnaneswara, Madhava, and others.

अपुत्रा शयनं भर्तुः पालयन्ती व्रते स्थिता।
भुञ्जीतामरणं चान्ता दायादा ऊर्ध्वं माप्नुयुः॥

कात्यायनहारीतवचनम्।

Let the sonless widow preserving unsullied the bed of her lord, and steadfast in her continence, enjoy with moderation the property until her death. After her let the heirs take it.

Katyayana, according to the majority of the commentators, but Harita, according to Lakshmidhara.

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* Madhava says—ज्येष्ठा संयता न तु पूर्वोढा, *i.e.* ज्येष्ठा means not eldest but chaste.

भर्तुर्धनहरी पत्नी या स्यादव्यभिचारिणी।
अपचारक्रियायुक्ता निर्लज्जा चार्थनाशिका।
व्यभिचाररता या च स्त्रीधनं सा न चार्हति।
तदभावे तु दुहिता यद्यनूढा भवेत्तदा॥

अपरार्कपारिजातधृत-कात्यायनवचनम्।

The wife, if not unchaste, takes the wealth of the husband. If guilty of improper actions, shameless, extravagant, or unchaste, she does not deserve *stridhana*. Failing her, daughter, if unmarried, takes.

Katyayana, cited in the Madana-Parijata.

स्वर्याते स्वामिनि स्त्री तु ग्रासाच्छादनभागिनी।
अविभक्तं धनांशं तु प्राप्नोति मरणान्तिकम्॥

सरस्वतीविलासधृत-कात्यायनवचनम्।

On the husband dying, the wife is entitled to maintenance. But she gets the share of the undivided wealth till her death.

Katyayana, cited in the Saraswati-Vilasa.

पत्नी पत्युर्धनहरी या स्यादव्यभिचारिणी।
तदभावे तु दुहिता यद्यनूढा भवेत्तदा॥
अपुत्रस्याथ कुलजा पत्नी दुहितरोऽपि वा।
तदभावे पिता माता भ्राता पुत्रस्य कीर्त्तितः॥

विज्ञानेश्वरधृत-कात्यायनवचनम्।

Let the widow succeed to her husband's wealth provided she be chaste; and in default of her the daughter inherits, if unmarried.

The widow, being a woman of honest family, or the daughters, or, on failure of them, the father, or the brother, or his sons are pronounced to be heirs of one who leaves no male issue.

Katyayana, cited by Vijnaneswara.

विभक्तस्यास्य पुत्रस्य पत्नी दुहितरस्तथा।
पितरौ भ्रातरश्चैव तत्सुताश्च सपिण्डिनः।
सम्बन्धिबान्धवाश्चैव क्रमादेवं रिक्थभागिनः॥

बृहद्धारीतः, ४ अ। २५४, २५५।

Of the separated sonless man, the widow, daughters, parents, brothers, sons of brothers, Sapindas, related Bandhavas take the property in the order mentioned.

Vriddha-Harita, Ch. IV., 254, 255.

दम्पत्योर्मध्यगं धनं ।

दत्तः ।

Wealth is common to the married pair.

Datta, cited by Bhavadeva.

आत्मपितृष्वसुः पुत्रा आत्ममातृष्वसुः सुताः ।
आत्ममातुलपुत्राश्च विज्ञेया ह्यात्मबान्धवाः ॥
पितुः पितृष्वसुः पुत्राः पितुर्मातृष्वसुः सुताः ।
पितुर्मातुलपुत्राश्च विज्ञेयाः पितृबान्धवाः ॥
मातुः पितृष्वसुः पुत्रा मातुर्मातृष्वसुः सुताः ।
मातुर्मातुलपुत्राश्च विज्ञेया मातृबान्धवाः ॥

पारिजातधृत-वृद्धशातातपवचनम् ।

The sons of his own father's sister, the sons of his own mother's sisters, and the sons of his own maternal uncle are known as his own Bandhavas; the sons of his father's father's sister, the sons of his father's mother's sister, and the sons of his faher's maternal uncle are known as his father's Bandhavas, the sons of the mother's father's sister, the sons of the mother's mother's sister and the sons of the mother's maternal uncle are the mother's Bandhavas.

Vriddha Satatapa, according to the Parijata, but Baudhayana according to Madhava. Other commentators only cite the text without naming the author.

ततो दायमपुत्रस्य विभजेरन् सहोदराः ।
तुल्या दुहितरो वापि म्रियमाणः पितापि वा ॥
सवर्णा मातरो माता भार्या चेति यथाक्रमम् ।
एषामभावे गृह्णीयुः कुल्यानां सहवासिनः ॥ देवलः ।

Then the uterine brothers shall divide the heritage of a sonless person, or the daughters of same caste,* or the sur-

* Colebrooke translates तुल्या दुहितरः "or daughters who have an equal claim to it." Ratnakara interprets तुल्याः as सौदर्य्याः, *i.e.*, uterine or full sisters.

viving father, half-brothers of the same caste, the mother, and the widow, according to the order mentioned; failing them those belonging to the same family, living together.

Devala, cited in the Vivada-Ratnakara, Kalpataru, Dayabhaga and Ujjvala.

द्विसाहस्रः परीदायः स्त्रियै देयो धनस्य तु।

यच्च भर्त्रा धनं दत्तं सा यथाकाममाप्नुयात् ॥ व्यासः।

Of the inheritance two thousand *panas* should be given to the widow. Whatever wealth had been given to her by the husband she gets according to her pleasure.

Vyasa, cited by Haradatta,
and other Commentators.

SECTION VI.

Certain definitions—Sapindas, Sakulyas, Samanodakas, Dayadas, Bandhus and Bandhavas.

Sapinda relationship, according to most of the Rishis, 'ceases at the seventh person.' According to Parasara it 'ceases at the fifth person.' Now, according to the original and most ancient rule of Sraddha, Pinda, as meaning funeral oblations, could be offered only to three ancestors. When most of the Risshis speak of Sapinda relationship extending to the sixth ancestor, it is clear, *Sapinda* could never have meant as connected through funeral oblations. It meant 'of equal body, सपिण्डः or 'of the same body' एकपिण्डः। It was a prevailing idea among ancient writers, that the particles of body of a person and his lineal descendants are the same in the sense that the son's body is formed out of the father's body. Probably in very ancient times it was thought, that up to the seventh descendant the identity of bodily particles continued. Latterly it became the prevailing opinion

that the body became different after the third descendent. The three ancestors and one's self became one person after death, for the purposes of Sraddha, when a ceremony called the Sapindikarana had been performed.* Gimutavahana and his followers from this, erroneously thought, that Sapinda, means persons who are thus connected for the purposes of Sraddha. The texts of Gautama, Parasara, and Devala, cited in this section, and the interpretations of the Mitakshara, the Parijata, and the other commentaries, except the Dayabhaga, leave no room for doubt that Sapinda meant connected through bodily particles. Madhava in his famous commentary on Parasara's text (Ch. V., 8,9) says, Daya means Pinda and Pinda means body. The text means, that the difference of bodily particles commences with the fourth descendant. Gautama, when he speaks of the cessation of Pinda at the seventh or the fifth person, could not have meant funeral oblations as shown above, and could only have meant the cessation of the physical affinity.

When learned European writers say, that originally Sapinda meant those 'having food in common,' and Samanodakas those 'having water in common,' they say so, misled by pre-conceived ideas without reference to facts. The text of the ancient Rishi, Satatapa, cited in this section, speaks of separated brothers of one Pinda. By Pinda, therefore, body, not food, was meant. Then the old distinction in Sapinda relationship in the case of descendants through mothers of different castes,

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* यै सपिण्डीकृताः प्रेता न तेषां स्यात् पृथक्क्रिया।

spoken of by all the Rishis, leaves no room for doubt that in ancient times Pinda meant body, and not food. These writers were misled by the word Samanodaka, 'of equal water,' coming after the word Sapinda, and so was Gimutavahana who thought Sapinda must mean 'connected through funeral oblations,' as it preceded the word Samanodaka, which meant connected through offering of water. This offering of water to remote ancestors and their male descendants, is an ancient custom of all the Aryan races, and had more to do with spirit-worship than with the enjoyment of a common reservoir of water.

The circumscribing of the relationship of Sapinda to the third descendant owed its origin, as is very often the case in such matters, to temporal, quite as much as to philosophical or spiritual reasons. Jointness was the normal condition of the Hindu family. But living together for seven generations became in time very inconvenient, if not impossible. Having regard to the fact that the ancient Hindus were a long-lived race, it was not unusual for a man to 'see the face' of son, grandson, and great-grandson. Four generations would thus live together, and very naturally consider themselves of one body and one person, for the purposes of sacrifice as well as in dealings with other men. They were in the eye of law one person, in society as well as in the body politic.

It appears, however, that for the purposes of purification and marriage, the old idea about Sapinda relationship of seven degrees continued as no inconvenience resulted therefrom. For the

purposes of the law of inheritance also the old definition held good. In a solitary text of Manu* the rule of Sraddha is applied to the law of inheritance, and the distinction made between Sapindas as meaning agnatic relations of three degrees, and Sakulyas, *i. e.*, more distant agnates, for the purposes of inheritance. After the Sapindas he placed the Sakulyas. By Sakulyas are primarily meant agnatic members of the same *Kula* or family. *G*imutavahana defined Sakulyas to mean agnatic relations after the third to the sixth degree. Sagotra means 'of the same *gotra* or *gens*.' Samanodakas are members of the same family for whom water oblations have to be offered, and they are the agnatic relations so far as relationship is remembered. But according to the well-known text of Brihat Manu, it ceases at the fourteenth degree, after which agnates are only called Sagotras.

Sapindas are, as we have seen, defined by the Rishis to be agnates within seven degrees. Wives of agnates and their unmarried daughters are also Sapindas and Sagotras. There is no warrant in the Smritis for holding, that persons of different *gotras* are Sapindas. In all the Smritis, in the chapters on purification, we find, in the case of Brahmanas, the observance of impurity for ten days is prescribed on the death of Sapindas, but on the death of the maternal grandfather for three nights, and on the death of the maternal uncle and those related through females and Bandhavas, impurity for only two days and one night is

* It is surprising that the commentary of Medhatithi on this text is wanting. Was it unknown to him ?

prescribed.* Yajnavalkya in the Chapter on purification uses the word ज्ञातय: *i. e.*, agnates in the place of Sapindas. There is no doubt, therefore, that Sapindas are agnates, and the maternal uncle and other Bandhavas are not Sapindas. In the well-known text 'Sapindas separated or unseparated are equal in respect of immoveables.' Sapindas could only mean agnates.† Then, Manu and Gautama have made a distinction between one's own Sapindas and mother's Sapindas. It is difficult to see, how Vijnaneswara, Nanda Pandita and Mitra-Misra could call the maternal relations and other Bandhavas Bhinnagotra-Sapindas. Gautama very clearly says, they are not Sapindas. There are no Bhinnagotra-Sapindas according to the Rishis. The above-named commentators apparently thought, that the identity of the particles of body continued to descend through females. But the ancient idea was that this identity continued

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* पचिण्यसपिण्डयोर्निसम्बन्धे । गौतम: १४ अ । २०

दशाहं प्राङ्नराशौचं सपिण्डेषु विधीयते ।
मातामहानां मरणे त्रिरात्रं स्यादशौचकम् ।
पत्नीषु यौनिसम्बन्धे बान्धवेषु तथैव च ।
उशनसंहिता ६ अ । १, २७, २८

आचार्ये मातामहे च व्यतीते त्रिरात्रेण ।
आचार्यपत्नीपुत्रोपाध्यायमातुलश्वशुरे-
सहाध्यायिशिष्येष्वतीतेष्वेकरात्रेण । विष्णु: २२ अ । ४२।४४

मातुले पत्नीषु रात्रिं शिष्यर्त्विग्बान्धवेषु च ।
शङ्खसंहिता १५ अ । १६

तत्सपिण्डा बान्धवा वा ये तस्या: परिपन्थिन: ।
दायभागधृत-बृहस्पतिवचनम् ।

† There is a text of Brahma Purana cited in the Nirnaya Sindhu which goes to the length of saying that only undivided members of a family are Sapindas अविभक्तधनास्ते ते सपिण्डा: परिकीर्त्तिता: ।

only in the male line, the bodily particles of the male always prevailing over those of the female, in the constitution of the body of the issue.

We next come to the term Dayada. It originally meant direct lineal descendants—son, grandson, and great-grandson. Sometimes it meant heirs. But it is difficult to say, whether it ever meant any but agnatic heirs. The text of Yajnavalkya (Ch. II., 267) makes a distinction between Dayadas, Gnatis (agnates) and Bandhavas. There is some difficulty in the interpretation of the words दायादबान्धवाः and बन्धुदायदाः in the text of the Rishis about the status of the adopted son, which is dealt with in Ch. V.

The term Bandhu is used in the sense of agnates in Gautama, Ch. IV., v. 1, Vasista, Ch. VIII. *v.* 2-3, Vishnu, Ch. XXIV., *v.* 10.* Bandhu in Yajnavalkya's text on the rule of inheritance is interpreted to mean the technical Bandhus by the Commentators. But Yajnavalkya's text is very nearly identical in its tenor with Vishnu's text on the same subject, and therefore, it would not be unreasonable to suppose that by Bandhu, Yajnavalkya also understood agnates, and the reading गोत्रजोबन्धुः as prevalent in Bengal is correct, and the word Gotraja there qualifies the word Bandhu. In Ch. II., v. 149, Yajnavalkya uses Bandhu in the sense of father's and mother's Sapindas, and Bandhava

* In the text पञ्चमी मातृबन्धुभ्यः Bandhu is erroneously interpreted by some Bengal commentators as meaning the technical Bandhus. In मातृबन्धुभ्यः had been used after मातृसपिण्डेभ्यः and a च used after it, the interpretation might be intelligible.

as meaning relations beginning with the husband. * It should be remembered, that in other places he uses the words Bandava and Sambandhi-Bandhava to signify the same relations. Again, in the text cited by the commentators as defining the technical Bandhus, they are called Bandhavas, and not Bandhus. Even Bandhavas sometimes mean agnates. †

The well-known text about Bandhavas defines them to be one's three first cousins, father's sister's son, mother's sister's son and mother's brother's son. These are one's nearest friends and relations, outside his own family. To say that the word Bandhava includes a very distant relation, *e.g.*, a mother's mother's sister's daughter's son, is to do violence to the accepted sense of the word as signifying a near and dear relation. In the text about Bandhavas, six of the technical Bandhus are father's and mother's Bandhavas. All the commentators, however, with what reason it is difficult to see, consider them to be one's own Bandhavas. The said text of Baudhayana or Satatapa probably, did not define Bandhavas for the purposes of the law of inheritance. Narada and Vrihaspati in the Chapter on Inheritance make use of the word Sambandhi-Bandhava as signifying heirs outside one's own family. The same term is used by Manu

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*The Mitakshara on this verse says : बन्धुभिः—कन्याया मातृबन्धुभिः पितृबन्धुभिश्च, which has been wrongly translated by Colebrooke as 'her kindred.'

Ch. II, Sec. XI., *v.* 6.

†बन्धूनामप्यभावे तु पित्र्यं द्रव्यं तदप्नुयात् ।
सपिण्डा तद्धनं प्राप्तं दापनीया न बान्धवाः ॥

In this text of Katyayana, Bandhu and Bandhava have been interpreted both by Mitra-Misra and Gimutavahana as meaning agnates.

in Ch. 5, *v.* 74, Yajnavalkya in Ch. I., *v.* 220, and also by Katyayana in the text cited at page 70. Now we find Asapinda-Yoni-Sambandhe in Gautama, Yoni-Sambandhe Bandhava in Ushana, and Bandhava in Sankha and other lawgivers in the texts cited at page 183, as denoting the same relations. Yoni-Sambandhis are defined by Haradatta to mean relations beginning with the maternal uncle. The Mitakshara expressly says that "Bandhus are relations on the mother's side beginning with the maternal uncle." (See p. 171). Kulluka and Raghavananda interpret Bandhavas as maternal relations मातृपक्षाः in their gloss on Manu, Ch. 3, *v.* 264. If however, we consider the texts on Sraddha and Marriage, we can with tolerable certainty ascertain the meaning of these terms. In the texts or Sraddha cited in Section II., we find, that after relations of one's own *gotra*, according to Gautama, the Vishnu-Purana, and the Markandeya-Purana, the Sapindas of the mother, (see pp. 67, 76, 77) according to Katyayana, Sambandhi-Bandhavas (p. 70), and according to Pracheta (p. 75) Bandhavas are entitled to perform the Sraddha. It is reasonable to suppose that the same relations were meant by the lawgivers in these texts, and that Bandhu, Bandhava and Sambandhi-Bandhava meant मातृपक्षाः, *i. e.*, Sapindas of the mother. Again, if we consider the texts on marriage, we find Manu prohibiting marriage only with Sagotras and mother's Sapindas. Apastamba prohibits marriage with Sagotras and Yoni-Sambandhi relations. All the commentators agree in holding that the Sapindas of the mother are relations within the fifth degree in the mother's family. It is reasonable to

suppose, that the lawgivers laid down one identical rule, and that mother's Sapindas, Yoni-Sambandhis, and relations within the fifth degree in the mother's family meant the same thing. Vasista lays down, that for married females, Sapiṇḍa relationship in regard to their father's family, is restricted to three degrees, *i. e.*, to the descendants of their great-grandfather.* The Mitakshara also says, that 'within the fifth degree on the mother's side,' means, that up to that the Sapinda relationship continues. We thus find from a consideration of all the texts, that Bandhavas or Sambandhi-Bandhavas meant the agnates of the mother's father up to 'the fifth person.' There is a great divergence of opinion among the commentators as to how the five degrees are to be counted on the mother's side. The opinion of the Mitakshara and the Parijata is, that the five degrees on the mother's side, like the seven degrees on the father's side, are to be counted, beginning with self, so that the ascending line will end with the third maternal grandfather, and thus correspond with the ancient rule of Sraddha. This is also in accordance with the text of Vasista mentioned above. We thus find ourselves restricted to the three maternal grand-father's त्रयो मातामहाः and their children in the fourth degree. These relations are undoubtedly Sambandhi-Bandhavas or Bandhavas. Again, this relationship by its very nature is mutual, *i. e.*, if *A* is Bandhava of *B*, *B* is also Bandhava of *A*. If *A* is not a Bandhu of *B*, *B* cannot be a Bandhu of *A*. We find in-

* According to some commentators Vasista's rule applies to husband's family. Rughunandana reads श्वशुरानां for प्रत्तानां. See p. 163.

dications of this in the rules of Sraddha and the principle has been to some extent recognized by our Courts (p. 151). Applying this rule of reciprocity we find, that the following relations are Bandhavas or Bandhus.

1. Maternal grand-father and (daughter's son). Maternal grand-father's son and sister's son (by the rule of reciprocity). Maternal grand-father's grandson, great-grandson, and great-great-grandson; and consequently, the daughter's sons of the paternal grandfather, great-grandfather, and great-great-grandfather.

2. Maternal great-grandfather and (son's daughter's son). Maternal great-grandfather's son, grandson, great-grandson, and great-great-grandson, and, therefore, also the daughter's sons of the brother, grandfather's son, great-grandfather's son, and great-great-grandfather's son.

3. Maternal great-great-grandfather, and (grandson's daughter's son). Maternal great-great-grandfather's son, grandson, great-grandson, and great-great-grandson, and thus, by the rule of reciprocity, also the grandson's daughter's son of the father, grandfather, great-grandfather, and great-great-grandfather.

Of these, the daughter's son, the son's daughter's son, and the grandson, daughter's son are not Bandhus, because they are heirs otherwise. It is also not quite free from doubt, whether the maternal grand-fathers themselves are Bandhus; but as their children are heirs, it would be unreasonable to hold that they are excluded.

Now, the above rule about Bandhus corresponds with the old rule of Sraddha, and is not a

fanciful invention of modern ingenuity. It would be unreasonable to hold, that those who cannot perform the Sraddha are heirs. The question of priority as among themselves, is also, therefore, determined by a well-established doctrine, namely the doctrine of spiritual benefit, and we arrive at firm ground, escaping the quicksands and shifting banks of the opinions of modern lawyers. Besides these heirs, we have the mother's sister's son called a Bandhava by Baudhayana or Satatapa. Then the father's and mother's Bandhavas are also considered Bandhavas by the commentators. Thus we get, besides the mother's sister's son, father's mother's (father, brother, and) brother's son, and also daughter's son's son, sister's son's son and father's sister's son's son, by the rule of reciprocity; father's mother's sister's son ; and thus also mother's sister's son's son. Similarly, we have mother's father's sister's son, and thus also the mother's brother's daughter's son ; and also mother's mother's (father, brother, and) brother's son ; and thus also the daughter's daughter's son, and the father's and grandfather's daughter's daughter's sons.

Mother's Sapindas extend to seven degrees according to some. In that view the number of relations will be also increased in the manner indicated above.

The relations placed within brackets are considered by the Commentators to be Bandhavas, because their sons and grandsons are considered to be such. The Commentators do not go any further, and there is thus no authority for doing so. Vijnaneswara, though he says that Bhinnagotra-Sapindas are Bandhus, does not put any, except

the technical Bandhus and the maternal uncle, in his list of heirs. Some Commentators would put in the maternal grandfather, but further nobody has gone. The practically inexhaustible number of relations put into the category of heirs by the decisions of our Courts, if they were heirs at all, could not have escaped the eyes of our subtle Commentators. However that may be, our Courts have interpreted the Commentators to say, that persons, male and female, related either through males or females up to the seventh degree on the paternal side and up to the fifth degree on the maternal line, are Bandhus. The Calcutta High Court have put certain limitations to this rule which have been fully described in the last section. How far the decisions of our Courts are in accordance with Hindu Law, the reader of these pages will judge.

INHERITANCE.

SECTION VI.

एतत् षाट्कौशिक शरीरं। तीणि पितृतस्तीणि मातृतः
अस्थिस्नायुमज्जानः पितृतः त्वङ्मांसरुधिराणि मातृतः।

गर्भोपनिषत्।

The body is made of six materials ; three derived from the father, three from the mother ; bone, sinew, and marrow from the father and skin, flesh, and blood from the mother.

Garvopanishada, cited in the Mitakshara and Parasara-Madhava.

अत ऊर्ध्वं सकुल्यः स्यादाचार्यः शिष्य एव वा ॥
सपिण्डता तु पुरुषे सप्तमे विनिवर्त्तते।
समानोदकभावस्तु जन्मनाम्नीरवेदने ॥

मनुः, ९, १८७, ५ ; ६०

* Afterwards (*i. e.*, after relatives within three degrees) a Sakulya shall be the heir, &c.

But the Sapinda relationship ceases with the seventh person (in the ascending and descending lines), the Samanodaka relationship, when the (common) origin and the (existence of a common family) name are no(longer) known.

Manu, IX 187 ; V. 60.

सपिण्डता तु पुरुषे सप्तमे विनिवर्त्तते ।
समानोदकभावस्तु निवर्त्तेताचतुर्दशात् ॥
जन्मनाम्नोः स्मृतेरेके तत् परं गोत्रमुच्यते ॥

बृहन्मनुः ।

Sapinda relationship ceases with the seventh male ; and the Samanodaka ceases with the fourteenth ; some say with the remembrance of birth and name. Beyond that, it is called Gotra. *

Vrihat-Manu, cited by all the text-writers, some of whom attribute it to Manu.

पिण्डनिवृत्तिः सप्तमे पञ्चमे वा ।

गौतमः ।

Sapinda relationship ceases with the fifth or the seventh person. Gautama IV, 13.

सपिण्डत्वं साप्तपुरुषं विज्ञायते ।
प्रकृतां † च स्त्रीणां त्रिपुरुषं विज्ञायते ॥

वशिष्ठः ४ अ । १७, १८

It has been declared in the Veda that Sapinda relationship extends to the seventh person (in the ascending or descending line). It has been declared in the Veda that for married females it extends to the third person.

Vasistha, IV. 17, 18.

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* I have adopted the translation of the Rev. T. Foulkes in the Saraswati-Vilasa. The translation of Colebrooke and Babu Golap Chandra Sircar of the last line : "This is signified by *gotra* or the relationship of family name" is clearly wrong. The genuineness of this text is very doubtful. It is clearly opposed to Manu and Ushana.

† सपुत्राणां is another reading.

सपिण्डता च पुरुषे सप्तमे विनिवर्त्तते ।

विष्णुः २२ अ । ५

The relationship ceases with the seventh man (in descent or ascent).

Vishnu, XXII. 5.

सपिण्डता त्वा सप्तमात् सपिण्डेषु ।

अपि च प्रपितामहः पितामहः पिता स्वयं सोदर्या भ्रातरः सवर्णायाः पुत्रः पौत्रः प्रपौत्रस्तत् पुत्रवर्ज्जं तेषां च पुत्रपौत्रमविभक्तदायं सपिण्डा नाचक्षते । विभक्तदायानपि सकुल्यानाचक्षते ।

बौधायनः, १ प्र । ५ अ । ११ क । २, ९, १०

But amongst Sapindas, Sapinda relationship (extends) to the seventh person.

Moreover, the great grandfather, the grandfather, the father, oneself, the uterine brothers, the son by a wife of equal caste, the grandson, and the great-grandson, excluding his son, and their son and grandson of unseparated Daya (body) are called Sapindas. Persons of separated Daya (body) are also called Sakulyas.*

Baudhayana, P. 1, A. 5, K. 11, S. 2, 9, 10.

मातृश्च योनिसम्बन्धेभ्यः पितृश्चासप्तमात् पुरुषाद् ग्रावता वा सम्बन्धो ज्ञायते तेषां प्रेतेषूदकस्पर्शनम् ।

आपस्तम्बः, प्र २, प २, क १५, सू-२-४ ।

On account of the blood relationship of his mother and (on account of those) of his father within six degrees, or as far as the relationship is traceable. He shall bathe, if they die.

Apastamba, P. 2, P. 2, K 15, P. 2, 4.

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* I have given the translation of Dr. Bühler at the page 137. It is incorrect according to Madhava's interpretation of Daya, meaning body. See Parasara-Madhava, pp. 587, 589. I have followed Madhava in preference. That I am correct will appear from other texts cited here. The Sapinda has no reference to the Sapinda relationship stated in the Sutra 2, a little before this Sutra. It has reference to the separation of body. The old writers thought, that up to the fourth generation there is affinity of body. There is very little justification for interpreting the word *Daya* as meaning Sraddha oblations.

यमदग्निर्भरद्वाजो विश्वामित्रोऽत्रिगौतमौ ।
वसिष्ठकश्यपागस्त्या मुनयो गोत्रकारिणः ॥
एतेषां चान्वपत्यानि तानि गोत्राणि मन्यते ।
गोत्राणाञ्च सहस्राणि प्रयुक्तान्यर्ब्बुदानि च ।
ऊनपञ्चाशदेतेषां प्रवरा ऋषिदर्शनात् ॥
एक एव ऋषिर्यावत् प्रवरेष्वनुवर्त्तते ।
तावत् समानगोत्रत्वमृते भृग्वङ्गिरोगणात् ॥
बह्वृच परिशिष्टे वौटायनप्रवरखण्डे ।

Yamadagni, Bharadwaja, Viswamitra, Atri, Gautama, Vasista, Kasyapa, Agastya—these Rishis are the makers of the *gotras*. Their descendants have founded *gotras*. There are thousands and hundred millions. Among them forty-nine are *pravara* or excellent, from having attained to the wisdom of Rishis and they are founders of Pravaras. As long as there is one Rishi common to several *pravaras*, so long there is relationship of the same *gotra*, excepting the children of Bhrigu and Angira.*

Baudhayana, cited in the Parasara-Madhava.†

दायादविच्छेदमाप्नोति पञ्चमो वात्मवंशजः ।

पराशरः, ३ । ८

Or the separation of body (Daya or Pinda)‡ accrues to the fifth person born of one's family.

Parasara, III., 8.

सपिण्डता तु पुरुषे सप्तमे विनिवर्त्तते ।
सजातीयेषु वर्णेषु चतुर्थं भिन्नजातिषु ॥

बृहत्पराशरः ।

Sapinda relationship ceases with the seventh person, among

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* A Rishi may have two or three descendants who are Rishis. All these together form Pravaras. Pravaras are named after two or three Rishis or more. As long as there is a Rishi common to several such combined Pravaras, they must be of the same Gotra.

† Cited in the Parijata, p. 137, also by Haradatta in the Ujjvala.

‡ Madhava says in his commentary on this text, दायः (Daya) means Pinda in the sense of body. See Parasara-Madhava.

descendants (by mothers) of the same caste, but with the fourth person (among descendants by mothers) of different caste.

Vriddha-Parasara, cited in the Parasara-Madhava.

यथैकजाता बहवः पृथक्क्षेत्राः पृथग्धनाः ।
एक पिण्डाः पृथक्शौचाः पिण्डस्त्रावर्त्ततेत्रिषु ॥

शातातपः ।

If there are persons descended from the same person, with separate fields and separate wealth, though they are of the same body, but differently purified, among them the Sapinda relationship ceases with the three persons.

Satatapa, cited in the Mitakshara and Parasara-Madhava (Sankha according to Medhathithi.)

अविभक्ताविभक्तानां कुल्यानां वसतां सह ।
भ्रथीदायविभागः स्यादाचतुर्थादिति स्थितिः ॥
तावत् कुल्याः सपिण्डाः स्युः पिण्डभेदस्त्वनन्तरम् ।

देवलः ।

Of the members of the same family divided or undivided living together, there should be partition of the heritage among the desendants of the fourth degree: this is the law. Up to that degree: the members of the family are of the same body. After that there is difference of body.

Devala, cited in the Ratnakara and Parasara-Madhava.

सपिण्डता च पुरुषे सप्तमे विनिवर्त्तते ।
समानोदकभावस्तु जन्मनाम्नोरवेदने ॥*
पिता पितामहश्चैव तथैव प्रपितामहः ।
लेपभाजस्तु यश्चात्मा सापिण्ड्यं सप्तपौरुषम् ॥
ऊर्द्धनाभ्यैव सापिण्ड्यमाह देवः प्रजापतिः ॥
ये चैकजाता बहवो भिन्नयोनय एव च ।
भिन्नवर्णास्तु सापिण्ड्यं भवेत्तेषां त्रिपौरुषम् ॥

उशनाः, ६ अः । ५२—५५ ।

The Sapinda relationship ceases with the seventh person

* Identical with Manu, *v.* 60, and Kurma-Purana, Ch. 23, *v.* 52.

the Samanodaka relationship when (the common) origin and (the existence of a common family) name are no longer known Father, grandfather, the great-grandfather, and self, these are participators of the *lepa*, the Sapinda relationship is of seven persons. The god Prajapati said, this was the Sapindaship of the dead. Those that are born of the same mother by different fathers, or of the same father by different mothers, if of different caste, of them the Sapinda relationship is of three persons.

Ushana, VI., 52, 55.

एकत्वं सा गता भर्तुः पिण्डगोत्रे च सूतके ।

लिखितः, २६ ।

She (the wife) is one with her husband in Pinda, *gotra*, and impurity.

Likhita, *v.* 26 *

(Harita according to the Ratnakara).

लेपभाजश्चतुर्थाद्या: पित्राद्या: पिण्डभागिन: ।

पिण्डद: सप्तमस्तेषां सापिण्ड्यं सप्तपौरुषम् ॥†

मत्स्यपुराणम् ।

Those beginning with the fourth are participators of *lepa* offerings, those beginning with the father are participators of the Pinda. The seventh offers the Pinda. Sapinda relationship is of seven persons.

Text of Matsya-Purana.

अप्रत्तानां तथा स्त्रीणां सापिण्ड्यं सप्तपौरुषम् ।

तासान्तु भर्तृसापिण्ड्यं प्राह देव: पितामह: ॥

कूर्मपुराणम्, २३ अ, ५५ ।

Of the unmarried girls the Sapinda relationship is of seven persons. Of the married women the Sapindaship is that of the husband. So said the god Pitamaha.

Kurma-Purana, Ch. 23, V. 55.

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* Cited by all the text-writers. It is to be found in the Likhita Smriti. It is attributed to Manu in the Parijata, and to Laghu-Harita in the Parasara-Madhava.

† सप्तम: पिण्डदातैषां is the reading of Haradatta.

पिता पितामहश्चैव तथैव प्रपितामहः ।
पिण्डसम्बन्धिनो ह्येते त्रिषु या पुरुषास्त्रयः ॥
लेपसम्बन्धिनस्त्वन्ये पितामहपितामहात् ।
प्रभृत्युक्तास्त्रयस्तेषां यजमानस्तु सप्तमः ॥
इत्येते मुनिभिः प्रोक्ताः सम्बन्धाः सप्तपौरुषाः ॥

मार्कण्डेयपुराणम्, ३१ अ । ३—५ ।

The father, grandfather, and great-grandfather—these three persons are known as connected by Pinda. The other three persons beginning with the grandfather's grandfather, mentioned before, are connected by *lepa* oblations; self is the seventh. This is the relationship of seven persons spoken of by the sages.

Markandeya-Purana, Ch. 31; 3—5.

SECTION VII.

Certain Special Rules.

1. The first rule laid down by the lawgivers is, that grandsons and brother's sons take *per stirpes*. The text of Yajnavalkya II. 123 (p. 202) is considered by the commentators of the Mitakshara school as applicable to divided as well as undivided brothers. The Dayabhaga applies it to the case of undivided brothers (see II. 23) and in as much as there is no difference in the rule of succession under that school between divided and undivided families, the rule also applies to divided nephews. Our Courts, however, have held, that brother's sons take *per capita*, except in the case of partition of joint property in a Mitakshara family. In a joint family, it may be reasonable to hold, that all the surviving members take equally. But to hold, that if joint, they take according to the stock,

and if separate, according to their number, does not seem to be reasonable. The Mithila and Bengal commentators by adopting a variation of the reading of the text of Gautama, cited in this Section, have indicated their opinion, that division is to be *per stirpes*. There is indeed no authority for the decisions of our Courts except the principle mentioned in the Dayabhaga, in a different connection, that "equality is the rule where no distinction is expressed."

2. We find next, that according to the law-givers and the commentators, daughter's sons take *per stirpes*. The Mitakshara, the Smriti Chandrika, the Parasara Madhava, the Madana Parijata and the Mayukha* citing the rule of Gautama (which is a general rule and not applicable to Stridhana only) says, that daughter's sons take *per stirpes* the Stridhana of their grandmother. There is no commentator, not even Gimutavahana, who has laid down a different rule.

It should be remembered, that daughters are like sons, and daughter's sons are equal to son's sons, to a sonless man, according to the Smritis, and they consequently take, like grandsons, *per stirpes*.

Under the Bengal school it has been thought by modern lawyers (but not by Gimutavahana or Raghunandana), that nephews and daughter's sons take *per capita*, because of the doctrine of spiritual

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* तासां भिन्नमातृकाणां विद्यमानां समवाये मातृद्वारेण भागकल्पना प्रतिमातृतो वा स्ववर्गेण भागविशेष इति गौतमस्मरणात्।

Mitakshara, Ch. II., Sec. XI. 13.

Mayukha, Ch. IV., Sec. X. 20-23.

† The reading adopted by these writers is—पितृमातृव्यस्ववर्गे भागविशेषः।

benefit. But that doctrine is used in the Dayabhaga in determining who are heirs, and has no application in the determination of the question whether the above-named heirs take *per stirpes* or not. Under the Bengal and Mithila schools, according to the reading of the text of Gautama adopted by some of the Bengal and Mithila writers, as well as by Madhava, indicating their own view on the matter, division is to be made according to father, mother, and sister, *i. e.*, grandsons, nephews, daughters' sons and sisters' sons take *per stirpes* and not *per capita.* The Hindu lawgivers favoured the rule of near heirs taking *per stirpes* as natural and reasonable, except where the property is small,* and it is difficult to see how the contrary has been established by our Courts.

3. Step-mothers are equal to mothers, and step-sons offer Pindas to them as mothers, and are their heirs.

4. The Smritis say, that full-brothers are to be preferred to half-brothers. But in respect of immoveable property in a joint family, brothers of half and full blood take equally. How it can be otherwise, it is difficult to see. But on the strength of a text of Vrihat-Manu (these texts are always open to doubt) and on the ground of spiritual benefit, it has been held, that under the Bengal school, full blood is to be preferred to half blood in respect of inheritance to immoveable property in a joint family (see p. 134). This is opposed to the Dayabhaga,

* The e is a solitary text which says, that partition should be made according to stock or equally. To make all the lawgivers agree it should be interpreted to mean, that the heirs take equally when the property is small in accordance with the text समं स्वल्पधने स्मृतम् ।

and is incorrect as has been clearly shown by the late Dr. Siromani in his valuable work on Hindu Law (p. 505).

5 When a woman remarries, the sons should take the property of their respective fathers, and not of their step-fathers. The rule is applicable to lower classes of Hindus among whom divorce and remarriage are allowable.

6. 'An estate once vested cannot be divested' is considered by our Courts to be a well-established principle of Hindu Law. The lawgivers and the commentators, however, make no mention of it. All that we find is a rule, that partition among brothers should be delayed. if the widow of a deceased brother is likely to get a son, till she gets a son. From this it may be held, that if a woman, whose son is an heir, but who herself is not an heir, be without a son when the succession opens out but gets a son afterwards, such son will be entitled to recover the estate from one who may have succeeded to the estate before his birth. The rule, that an estate once vested cannot be divested, is applicable only in cases of those unfortunate persons who are disqualified by reason of some physical deformity, and females, who are themselves not heirs, but whose sons are heirs. It is unreasonable, inequitable, and cruel. A person dies leaving a married but sonless blind son who afterwards gets a son ; or a young man dies leaving an unmarried sister, who is afterwards married and gets a son. These afterborn sons will get nothing. The property will pass to a very distant relation, or escheat to the crown. This may be a well-recognized principle of law, but the Rishis did not countenance

any unjust law, and, therefore, it finds no place in the Smritis or the Commentaries. Our Courts have laid down, that a child who is in the mother's womb at the time the succession opens out, will on his birth divest the estate of an inferior heir, who might have taken in the meantime.* An adopted son may also likewise take, but in no other case will an estate once vested be divested by the birth of a superior heir.† The matter is more fully dealt with in the chapters on Exclusion from inheritance and Adoption.

INHERITANCE.

SECTION VIII.

सर्व्वासामेकपत्नीनामेका चेत् पुत्रिणी भवेत् ।
सर्व्वास्तास्तेन पुत्रेण प्राह पुत्रवतीर्मनुः ॥‡
द्वौ तु यौ विवदेयातां द्वाभ्यां जातौ स्त्रिया धने ।
तयोर्यस्य पितृव्यः स्यात् तत् स गृह्णीत नेतरः ॥§

मनुः, ९, १८२, १९१ ।

If, among all the wives of one husband, one have a son, Manu declares them all to be mothers of male children through that son.

But if two (sons) begotten by two (different men) contend

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* In an old case Biraja *v.* Nabakrishna (Sev. Rep. 238), it was held that a sister's son in embryo at the time of the death of the maternal uncle would divest a more distant heir, who might have taken before his birth.

† Tagore *v.* Tagore, 18 W. R. 25. Lukhi *v.* Bhairab, 5 S. D. 369. Bamasundary *v.* Anund, 1 W. R. 353. Kalidas *v.* Krishna, 2 B. L. R., 103 F. B. Krishna *v.* Sami, 9 Mad. 64

‡ Step-sons and step-mothers are sons and mothers in the eye of law, *i.e.*, for the purposes of Adoption, Sraddha, &c.

§ Erroneously ascribed to Narada by Gimutavahna and Raghunandana. The passage is very incorrectly translated in the translation of the Dayatattwa, by Babu Golap Chunder Sircar, p. 109.

for the property (in the hands) of their mother, each shall take, to the exclusion of the other, what belonged to his father.

Manu, IX. 183, 191.

एकोदरे जीवति तु सापत्नो न लभेद्धनम् ।
स्थावरेऽप्येवमेव स्यात् तदभावे लभेत वै ॥

बृहन्मनुः ।

If a uterine brother be living, a step-brother does not obtain the heritage. That applies even in respect of immoveable property. Failing a full-brother, the step-brother takes.

Vrihat-Manu, cited in the Dayabhaga.

प्रतिमातृ वा स्ववर्गे भागविशेषः ।

गौतमः, २८, १७ ।

Or let the special shares (be adjusted) in each class (of sons) according to their mothers. Gautama, XXVIII. 17.*

बह्वनामेकजातानामेकश्चेत् पुत्रवान्भवेत्
सर्व्वे ते तेन पुत्रेण पुत्रवन्त इति श्रुतिः ॥
यास्वनपत्यास्वासामापुत्रलाभात् ।

वशिष्ठः, १७, १०, ३० ।

If, amongst many brothers who are begotten by one father, one have a son, they all have offspring through that son ; thus says the Veda.

(And let the partition be delayed) until those widows, who have no offspring (but are supposed to be pregnant), bear sons. Vasista, XVII. 10, 40.

अनेकपितृकाणान्तु† पितृतो भागकल्पना ।

याज्ञवल्क्यः, २, १२३ ।

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* प्रतिमातृबान्धवर्गे भागविशेषः is the reading of Ratnakara, पितृमातृष्वसृवर्गे भागविशेषः is the reading of the Parasara Madhava, the Madana Parijata and Jagannath. Vijnaneswara's reading is प्रतिमातृतो वा स्ववर्गे भागविशेषः, and he says on the strength of this that daughter's daughters take *per stirpes*.

† Visvesvara Bhatta in his Commentary Subodhini on the Mitakshara mentions a variation of the reading of this text according to his अनेक should be प्रमीत ।

Among coparceners, descended from different fathers, the allotment of shares is according to the fathers, (*i. e. per stirpes*).

Yajnavalkya. II. 123.

एकोदरासमुत्पन्नाः पुत्राः सर्व्वासां पुत्र एव ।
अनेकपितृकाणान्तु पितृतो भागकल्पना ।
यस्य यत्पैतृकं रिक्थं स तद्गृह्णीत नेतरः ॥

विष्णुः, १५, ४०, ४१, १७, २३ ।

Amongst wives of one husband also, the son of one is the son of all (and must present funeral oblations to them after their death).

(Coparceners), descended from different fathers, must adjust their shares according to the fathers. Let each take the wealth due to his father ; no other (has right to it).

Vishnu, XV. 40, 41 ; XVII. 23.

एका माता द्वयोर्यस्य पितरौ द्वौ च कुत्रचित् ।
तयोर्यद्यस्य पित्र्यं स्यात् स तद्गृह्णीत नेतरः ॥ विष्णुः ।

If there are two sons begotten by two fathers, but born of the same mother, let each of them take that which was the father's property, and not the other.

Vishnu.*

तत्पुत्रा विषमसमाः समभागहराः स्मृताः ॥
यद्येकजाता बहवः समाना जातिसंख्यया ।
सपत्न्या स्तै र्विभक्तव्यं मातृभागेन धर्म्मतः ॥
सवर्णा भिन्नसंख्या ये पुत्रभागेषु विद्यते ॥

बृहस्पतिः, २५ । १४, १५, १६ ।

Their sons, whether unequal or equal (in number), are declared (to be) heirs of the shares of their (respective) fathers.

When there are many sons sprung from one father, equal in caste and number, but born of different mothers, a legal division (of the property) may be effected by adjusting the shares accor-

* Cited by Guimutavahana and Raghunandana and Srikrishna, but not to be found in the Vishnu Smriti.

ding to the mothers. (When there are several brothers) equal in caste, but varying in number (of sons begotten with each wife) a division according to males is ordained.

Vrihaspati, XXV. 14, 15, 16.

यद्येकजाता बहवो भ्रातरस्तु सहोदराः।
एकस्यापि सुते जाते सर्व्वे ते पुत्रिणः स्मृताः॥
स्त्रीणामप्येकपत्नीनामेष एव विधिः स्मृतः।
एका चेत् पुत्रिणी तासां सर्व्वासां पिण्डदस्तु सः॥

कल्पतरुधृत बृहस्पतिवचनम्।

If there are many uterine brothers, born of the same father, on the birth of a son to one of them, they are all said to have a son. Of women having one husband, the rule is that if one of them gets a son, he is the giver of the Pinda to all of them.

Vrihaspati, cited in the Kalpataru.

अविभक्तं स्थावरं यत् सर्व्वेषामेव तद्भवेत्।
विभक्तं स्थावरं ग्राह्यं नान्योदर्य्यैः कथञ्चन॥

दायभागधृतयमवचनम्।

Undivided immoveable property belongs to all but the divided immoveable property is not taken by brothers by different mothers.

Yama, cited in the Dayabhaga.

अविभक्तपितृकाणां पितृव्याद्भागकल्पना।
दैमातृणां मातृतश्च कल्पयेद्वा समीऽपि वा॥

बृद्धहारीतः, ४। २५३, २५४।

Among persons, whose fathers were undivided, the division of shares is from paternal uncles. Among persons descended from two mothers, the division is according to the mothers or equal.

Vriddha Harita, Ch. IV. 253, 254.

समानजातिसंख्या ये जातास्त्वेकेन सूनवः।
विभिन्नमातृकास्तेषां मातृभागः प्रशस्यते॥

दायभागधृत-व्यासवचनम्।

If there be many sons of one man by different wives, but equal in number and alike by caste, a distribution according to mothers is commended.

Text of Vyasa, cited in the Dayabhaga.

SECTION IX.

Exclusion from Inheritance.

In ancient times, it appears, that the physically incapable members of a family were excluded from independent ownership of any part of the family property; but their sons, if any, were entitled to their share, and they themselves with their families were entitled to maintenance. The rule probably owed its origin to the difficulty of keeping the property from the attacks of the strong, in those troublous times, when might was right. But in the civilized and peaceful times, when Gautama and Vasishtha and Apastamba wrote their Sutras, exclusion from inheritance was the punishment for unrighteous life, for those Rishis thought that property should be spent only for virtuous works. But the old rule of exclusion on the ground of physical deformity was limited by these three ancient lawgivers to the case of the insane, and of the Kliba or one of a neuter gender, according to the interpretation of Vijnaneswara. These persons were placed in the category of minors, and others incapable of transacting legal business. They and their wives were entitled to maintenance. Their sons, even sons by Niyoga, were given the shares of their fathers, and their daughters were entitled to get their marriage expenses from the family property. This was a merci-

ful rule. In later times, however, a very peculiar rule came to be in force. The rule, older than Gautama's, of exclusion on the ground of physical deformity had been embodied in Manu. In the times, when the Hindu mind was wholly engrossed in the performance of Yajnas, it was thought that all property was intended for that purpose only. The ignorant women and men incapable of performing Yajnas were debarred from inheritance. The insane, the idiot, the impotent, the blind, the deaf, the dumb, a man devoid of an organ of sense, one afflicted with painful or long-standing diseases, and the Patita or an outcast for having committed a heinous offence, were incapable of performing the Yajnas, and were in consequence excluded. The Mimansa lays down, that the deformity of the organ of sense or the disease must be of an incurable character to disqualify one from performing the Yajnas. There was also a peculiar idea, which had got hold of the Hindu mind, that all deformities and diseases of an incurable character, like leprosy, consumption, and such as ended in the loss of an organ of sense, were the direct consequence of heinous crimes,* and such persons were in the category of outcasts, whose grave sins, committed either in this life or in a past existence, required expiation. Now, it is quite possible, that during the long centuries when Buddha's rational and merciful religion prevailed in India, all these theories fell into disrepute except the doctrine that natural deformities were the consequence of grave sins in past existences. We find that during

* See Manu, Ch. XI. *v.* 48-53; Gautama, Ch. XXII. *v.* 1.

these times and in times following them, the rule was, as is laid down by Gautama, Vasista, and Apastamba, that only the insane, the Kliba, and the Patita or outcast for grave sins only, were excluded.* But the Puranas and the later Smritis, and the commentators in their zeal for old ideas soon established the old rule, and amplified it. We find Manu's rule amplified by Yajnavalkya and other lawgivers, and made stricter by the commentators. Manu's rule is, that the Kliba (of neuter gender), the outcast for a heinous sin, one born blind or deaf, the insane, the idiot, the dumb, and those devoid of an organ of sense were excluded. To these, Yajnavalkya added those afflicted with incurable diseases, and Narada, one hostile to his father, and those afflicted with chronic and acute diseases. Sankhita Likhita, and Narada excluded those who had been driven away from society on account of grave offences. Devala excluded only the Kliba, the insane, the idiot, the blind, the Patita and his son, and the ascetic. The commentators have strangely agreed in including everyone of these unfortunate persons, and have amplified the rules of the lawgivers. According to them, the impotent, the insane, the idiot, the person born blind or deaf, the dumb, the leper, the consumptive, one devoid of an arm or leg or the power of smelling, the out-

* According to the Burmese Manu not every impotent person, but only an hermaphrodite is excluded from inheritance. That is the correct meaning of Kliba. The Burmese Manu also lays down, that if one "shall have severe disease, shall be unable to walk, shall stutter or be dumb, let the share such child is entitled to, be set aside, and let its relations support it.—If he be blind, or deaf, but perfect in his intellect, let him have his proper share. But as mad, dumb, and lame people, and those who have disease of the eyes, may be relieved by medicine, let their portion be regularly set aside for them."

Burmese Manu, pp. 285 286

cast for a heinous offence, such as the murder of a Brahmana or of the king, are excluded from inheritance. Except blindness and deafness, the other infirmities need not be congenital, but they must be incurable before there can be exclusion. A passage in the Mitakshara, allowing a disqualified heir to resume his patrimony on being cured of his physical defect, has been interpreted to mean by some that curable defects are grounds of disqualification. The Smriti Chandrika says, "persons afflicted with impotence, loss of limb, &c., that are of a curable character, are also disqualified for inheritance. Hence it must be understood, that such as appear at the time of division to have been afflicted with impotence, &c., are excluded." This, however, is not in accordance with the rules of the Smritis, and of the Mimansa or with reason. One devoid of an organ of sense has been interpreted to mean one who has lost an organ on account of disease. The loss of an organ by an accident, or in battle for one's country, would thus not disentitle one from inheriting, as a learned text-writer thought. One devoid of an organ of sense from birth was excluded. But the loss of the organ must be total and incurable before there can be exclusion. According to the Dayakrama-Sangraha, only congenital diseases and defects cause exclusion.

Viswarupa the earliest commentator of Yajnavalkya, whom Vijnaneswara professes to follow, says in this connection : "According to some the words lame &c., indicate all those incompetent to perform the Agnihotra but that is not a proper construction for wealth is an object of human endeavour, when especially we find that the un-

learned who are so incompetent are still entitled to shares." He further says that in grand-paternal property, except in the case of *patitya*, there can be no disinherision according to custom. पितामहद्रव्यसम्बन्ध स्वपतितात्मादीनामप्यविशेषेति सम्प्रदायः।

According to the lawgivers, these unfortunate persons do not cease to be members of the family, and are entitled with their wives and children to be maintained out of the family property. Except in the case of the son of the outcast, born during the continuance of his Patita condition, the son of these disqualified persons, if free from any deformity entailing exclusion, are entitled to take that share of the family property, which their fathers would have taken, if not disqualified. Even their Kshetraja sons by Niyoga are entitled to take their share. From this and from the very nature of the rights of these persons, it would follow, that those heirs who take the inheritance of these qualified persons, take a qualified interest in it, and are under the obligation to make it over to them, if their defects are subsequently removed, or to their sons, if any are subsequently born to them. This is clear from what has been stated above, and from Manu, Ch. IX. *v.* 190, and the Mitakshara and other commentaries. The Burmese Manu says, that the shares of the disqualified heirs should be set apart for their support, and if the insane, the dumb and the diseased be cured, they are entitled to resume their shares.* Our Courts, wrongly advised by lawyers of imperfect information, have applied to these cases the rule, that a person cannot be divested of the

* See Burmese Manu, pp. 285-286.

inheritance, which has once vested in him. If there are daughters, the heirs are under an obligation to defray their marriage expenses upon a proper scale, such expenses including the giving of a marriage portion (see Chapter on marriage). Several commentators, such as Medhatithi and Vachaspati-Misra, have laid down, that persons excluded from inheritance are those who are excluded from Vedic as well as Smarta ceremonies, and are thus incapable of marrying. The Saraswati-Vilasa says in this connection, "the inner meaning is, that deformed persons, if they are eligible for marriage, are share-takers."† This appears to be inconsistent with Manu, Ch. IX. *n* 203. But the reasonable construction of that verse seems to be, that if a person becomes impotent after marriage, or marries in ignorance of his infirmity, his sons, natural born or Kshetraja, are entitled to his share. This is how some of the commentators have explained that difficult passage. It would be very unreasonable to allow a person to marry, and to exclude him from inheritance. The Rishis, I am reluctant to believe, were guilty of such absurdity. In fact, the true meaning must have been as the Saraswati-Vilasa indicates it to have been. Therefore, the proper way to determine, whether a person is excluded from inheriance, is to ascertain whether he is debarred from marrying. The matter is fully dealt with in the chapter on marriage. It would indeed be very reasonable, and conducive to the good of man, to lay down, that persons, incurably insane and im-

† तथाशब्दप्रयोगेण पङ्ग्वादयो विवाहसंस्कारार्हा येऽंशहराः पीडायेति रहस्यम्।
Saraswt -Vilasa, p. 32.

potent, born blind or deaf-mute, idiots and those born with such deformities or afflicted with such incurable diseases as may be transmitted to their children, are debarred from marriage. To enforce that rule, it is indispensable to lay down that such persons are also excluded from inheritance. This seems to have been the intention of the Rishis, and our Courts would be justified in giving effect to it.

Blind, deaf or dumb excluded if defect congenital and incurable.

Our Courts have held, that before a person can be excluded on the ground that he is blind, deaf or dumb, it must be shown that his defect is incurable and congenital (1).

Insanity how far a disqualification.

Insanity, it has been held by the Calcutta and Allahabad High Courts, need not be congenital, and that it was sufficient to disqualify a person, if he was insane at the time the inheritance opened out. Such a person, if afterwards cured, cannot resume his patrimony, for it is argued that if a person was insane at the time the inheritance opened out, he could not offer the funeral oblations (2). This is another instance, how the doctrine of spiritual benefit has made the law cruel and unreasonable, in a manner never contemplated by the Rishis.

The High Court of Bombay seems to be of opinion, that insanity must be shown to have existed from birth (3). In two cases before the Privy

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(1) Mohesh *v.* Chunder, 23 W. R. 78. Umabai *v.* Bhavu, 1 Bom. 557. Hira Sing *v.* Ganga, 6 All. 322. P. C. Charu Chunder *v.* Nobo Sundari 18 Cal. 327 Vallabhram *v.* Bai Harigunga, 4 Bom. H. C. 135. A. C. J. Murarji *v.* Pavatibai, 1 Bom. 177.

(2) Brija Bhukhun *v.* Bichan, 14 W. R. 329. Dwarka Nath *v.* Mohendra Nath, 9 B. L. R. 198. Woma Porsad *v.* Grish Chunder, 10 Cal. 639. Deo Kissen *v.* Budh Perkash, 5 All. 509. F. B. Purna Chandra *v.* Gopal Lal, 8 Cal, L. J. 369. (3) Murraji *v.* Parvatibai, 1 Bom 177.

Council, however, it seems to have been assumed, that insanity need not be congenital (1).

Insanity of a coparcener how far disqualifies.

It was for sometime considered that a coparcener in a joint Mitakshara family loses his right, and the property vests in the other coparceners on his becoming insane, but in the latest case on the point it has been decided that subsequent insanity does not entail forfeiture (2). It has also been recently held that if a person after succeeding to an estate becomes afflicted with an incurable disease, he does not thereby become devested (3).

Idiocy how far disqualifies.

With respect to idiocy it has been held, that only absolute imbecility and not mere want of sound or even ordinary intelligence can be a bar (4).

The Privy Council have held, in a case of alleged insanity, that weakness of intellect and incapacity for speech were no grounds for exclusion (5).

Loss of organ of sense how far disqualifies.

There have been few cases about exclusion on the ground of the loss of an organ of sense. The question is referred to in some cases (6). I am inclined to think, that the word Nirindriya in Manu means that class of men, who are called Pangus by Narada and Yajnavalkya. Therefore, it is reasonable to suppose, that only helpless cripples or monstrosities without nose and tongue, were meant. That is the opinion expressed in a Calcutta case (7)

(1) Bodhnarain *v.* Omrao, 13 Moore, 519. Kooer Goolab *v.* Rao Kurun, 14 Moore 176.

(2) Tribeni Saha *v.* Muhammad, 28 All 247. Abilakh *v.* Dekhi, 22 Cal. 864 Contra. Ram Sahye *v.* Lalla Laljee, 8 Cal. 149.

(3) Murli Singh *v.* Jai Sing 5, All L. J. 115.

(4) Surti *v.* Narain Das, 12 All. 530. Tirumamagal *v.* Ramasvami, 1 Mad. H. C. 214.

(5) Ranbijai *v.* Jagut Pal, 18 Cal. 111.

(6) Muraji *v.* Parvatibai, 1 Bom. 177. Dadji *v.* Witul, Bom. Sel. Reports, 151.

(7) Futtik *v.* Juggut, 22 W. R. 348.

and approved in a recent case in Madras, where it was further held that lameness, unless it is congenital is no bar to inheritance (1). But from what has been stated above, it appears that one born lame is not excluded, unless he is a helpless cripple.

Leprosy, when does it disqualify.

Leprosy, only when it is of a type that is virulent and incurable, is a ground for exclusion (2). The Bombay High Court have held that leprosy to disqualify must be of of such a character that the society of his fellowmen is refused to him and an æsthetic or nerve type of leprosy is not of such a character (3).

Incurable diseases, when do they disqualify.

About incurables diseases, Mr. Mayne very properly says : " It is probable, however, that the Courts would be slow to disinherit a man merely because he was suffering from cancer or consumption, and in any case the strictest proof would be required, that the disease was in fact incurable" (4).

Hostility to father and unrighteous conduct, are they disqualifications.

As regards the grounds of exclusion; namely, hostility to father or unrighteous conduct, they are understood by our Courts to have become obsolete (5). But there are some old cases in which it was held that hostility to father was a ground for exclusion (6). And in a recent case, the Calcutta High Court cited the rule of the Smriti on the subject with approval (7). It has been held that a murderer is not entitled to succeed to the estate of the

(1) Vencat *v.* Purushottum, 26 Mad. 133.

(2) Bhagaban *v.* Rampraparna, 22 Cal. 843 P. C. Janardhan *v.* Gopal, 5 Bom. H. C. A. C. 145. Ananta *v.* Rama, 1 Bom 554. Muttuvilaya *v.* Parasakti, Mad. 1 S. D. A. Rep. 239. Murli *v.* Jai Singh, 5 All. L. J. 115.

(3) Ranchod *v.* Ajoobai, 9 Bom. L. R. 1149.

(4) Issur Ch inder *v.* Ranee Dossee, 2 W. R. 125.

(5) Kalka *v.* Budree, 3. N. W. P. 267.

(6) Jye Koonwar *v.* Bhikari, S. D. of 1848, p. 320. Bholanath *v.* Sabitra, 6 S. D. 62.

(7) Dharma Das Kundu *v.* Amulya 33 Cal, 1131.

murdered (1). But his wife however, may succeed in Bombay (2).

We have already seen that Patita meant one guilty of a heinous offence. Heinous offences have been defined to be murder of a Brahmana, theft, drinking of wine and incest. Perjury and murder of women and friends are equally heinous(3). Expiation, short of death, is prescribed for all these offences, except the murder of a Brahmana and incest. Those offences that are expiable cannot strictly be said to entail exclusion. and that is the view of the Courts. The Penal Code has prescribed forfeiture in cases of murder and rebellion. But there has been no cases in which the question came for decision, whether the murder of Brahmanas and women and grave incest exclude a man from inheritance. Under the Hindu Law they do. It has however, been recently held that illicit intercourse of a woman with a man of an inferior caste and aggravated unchastity which may entail degradation, does not affect her right to inheritance, since the passing of the Act 21 of1850 (4).

How far a Patita or outcast is excluded.

Change of religion is not a heinous offence. There is a solitary text which prescribes the exclusion of *Pashandas i.e.,* atheists and irreligious persons. An atheist is a Patita according to Gautama also. There is very satisfactory evidence from the Buddhistic records of ancient times, that change of religion, say to Buddhism, never, as a matter of fact, excluded a man from inheritance. In Muhammadan

Change of religion how far a ground of disinheriSion.

(1) Vedammal *v.* Vedanayaga 31 Mad. 100.

(2) 32 Bomb 275.

(3) See Manu, Ch. XI. 55, 59, 89.

(4) Vedawwal *v.* Vedanayaga 31 Mad. 100.

times, the antagonism of races was very bitter, and conversion to Muhammadanism was considered as a ground for exclusion. There is a text which lays down, that a person who follows professions not prescribed for his caste, say service by a Brahmana, is excluded from inheritance. This rule must be considered as obsolete. Similarly atheism, irreligion and the like should not be considered as grounds of exclusion, in these days. Change of religion is not mentioned in the Smritis as a ground of exclusion. Nevertheless on account of prevailing ideas on the matter, the Government thought it advisable to pass Act 21 of 1850 to safeguard the rights of converts.

It has been held, that by virtue of Act 21 of 1850, degradation or exlusion from caste, from whatever cause it may arise, will not exclude a man from inheritance. (1) Before the passing of the Act, the Madras Sudder Court held, that conversion to Muhammadanism excluded a man from inheritance. (2) After the passing of the Act, the Allahabad High Court has gone to the length of holding, that the Muhammadan son of a convert to Muhammadanism is entitled to succeed to the estate of his Hindu uncle after the death of his widow.(3) Notwithstanding the adverse criticism of Mr. Mayne and Babu Golap Chander Sircar, this decision does not seem to be based on any erroneous principle of law.

The right of the son of a convert to Muhammadanism.

(1) The words of the Act are: "So much of any law or usage now in force within the territories subject to the Government of E. I. Co., as inflicts on any person forfeiture of rights or property or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing, or having been excluded, from the communion of any religion or being deprived of caste shall cease to be enforced as law."

(2) Naugamah *v.* Kareebhasappa, Mad. Dec. of 1858, p. 250.

(3) Bhagwant *v.* Kallu, 11 All. 100.

It has been laid down by commentators, as well as by our Courts, that the rules of exclusion applied to males and females alike.

Unchastity of widows.

In the case of a widow, unchastity before the death of the husband disqualifies but not when it was condoned by him. (1) Subsequent unchastity, however, it has been held, cannot divest her of property once vested in her. (2) The latter rule is clearly against the express provisions of the Smritis. It has been held that re-marriage of a widow in the Brahmo form divests her of her husband's property. (3) As in the case of the son, the wife is disqualified by malignant hostility and not by merely living separate. (4)

Unchastity of mothers and daughters.

It has also been held by the Calcutta High Court, that unchastity of daughters and mothers excludes them from inheritance. (5) Incest of an inexpiable kind may be a ground for exclusion in the case of males, as well as of females, but not expiable unchastity except in the case of widows. The High Courts of Allahabad, Bombay and Madras have rightly held that unchastity in the case of daughters and mothers and other female heirs, excepting widows, even before the death of their husbands, is no ground for exclusion. (6) An erroneous reading adopted in the Dayabhaga, against all the other commentators, (see pp. 225, 226), of a solitary text is relied upon by the Calcutta High Court. In the case of mothers even such a doubtful text is wanting.

(1) Gangadhar *v.* Yellu Veraswami, 13 Bomb. L. R. 1038. 12 I. C. 714. (2) Moniram *v.* Kerry Kolitany, 7 I. A. 115. (3) Matangini Gupta *v.* Ram Rattun Roy, 19 Cal. 289. (4) Khettirmoni *v.* Kadambini, 17 I. C. 82. (5) Ram Nath *v.* Durga, 4 Cal. 550; Ramananda *v.* Raikishore, 22 Cal. 347. Sundari Letani *v.* Pitambare Letani, 32 Cal. 871.

(6) Dalsing *v.* Musammut Dun, 32 All. 155; Baldeo Sing *v.* Mathura Koeri, 33 All. 783. Advyapa *v.* Rudrava, 4 Bom. 104; Kojiyadu *v.* Lakshmi, 5 Mad. 149. See Mussmut Ganga *v.* Ghasita, 6 All. 46. Vedammal *v.* Vedanayaga, 31 Mad. 100.

Effect of embracing Islam and marrying.

It has been held in Calcutta that when a Hindu woman during the lifetime of her husband embraced Muhammadanism and married a Muhammadan, her Muhammadan sons were illegitimate according to Hindu Law and could not succeed to her Hindu father. (1)

Remarried mother succeeds.

A remarried mother has been held entitled to succeed to her son by her first husband. (2)

Right of a prostitute daughter.

The Bombay High Court has held that a prostitute daughter is not a *kanya* and must be postponed to maiden and married daughters. (3)

Subsequent disability does not divest.

If the disability arises after the property had vested exclusively in a person, male or female, by inheritance or partition, it cannot have the effect of divesting. (4)

Rights of heirs of disqualified persons.

The son, grandson or great-grandson of a disqualified heir, if free from defect, has the interest by birth under the Mitakshara and he also takes the share or the inheritance, which the said heir might have taken, if not disqualified, both under the Mitakshara and the Dayabhaga, but his female heirs or persons claiming through them cannot succeed. (5) Mothers, wives and daughters of such disqualified heirs are, like those heirs themselves, entitled to maintenance (6), and the daughters are entitled to get the expenses of their marriage from the ancestral estate. In Bombay it has been held that their widows may succeed. (7) The Smritis say that they are only entitled to main-

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(1) 32 Cal. 871. (2) Akora *v.* Boreanee, 2 B. L. R. 199, Lakshman *v.* Sadasiva, 28 Mad. 925, Kashirao *v.* Ukarda, 31 I. C 290 (Nagpore). Somar *v.* Bago, 5 C. P. L. R. 85, Chamar *v.* Kashi, 26 Bomb. 388, Basappa *v.* Rayava, 29 Bomb 91. (3) Tara Hari Shinde *v.* Krishna Bondu, 31 Bomb. 495. (4) Deokissen *v.* Budh Prakash, 5 All. 509; Moniram *v.* Kerry Kolitany, 7 I. A. 15. Abilakh Bhagat *v.* Bhikh Mahto, 22 Cal. 864. Murli Sing *v.* Jai Sing, 5 All. L. J. 115. (5) Ram Sing *v.* Musmut Bhani, 14 All. L. J. 11, 32 I. C. 127. (6) Nilmadhub *v.* Jotindra, 18 I. C. 764. (7) Ganga *v.* Chandrabhaga Bai, 32 Bomb. 275.

tenance. The decision of the Bombay Court may be supported on the ground that in Bombay the wife may succeed in her own right as Gotraja Sapinda. That reasoning cannot apply to other Provinces.

Whether the afterborn son of a disqualified heir is excluded.

Mr. Mayne is of opinion, that "where the defect which produces exclusion is subsequently removed, the right to inheritance revives in the same manner as, or upon the analogy of a son born after partition." (Mitakshara, Ch. II., Sec. X. 7; Mayukha, Ch. IV., Sec. XI. 2). This would be quite correct. But Mr. Mayne immediately after nullifies his opinion by laying down "but the revival of this right will not necessarily place the previously disqualified heir in the same position as if the incapacity never existed. The Hindu Law never allows the inheritance to be in abeyance." &c. The second position is bad according to Hindu Law as shown above, but the question does not arise in the view that a curable infirmity is no ground for exclusion. A Full Bench of the Allahabad High Court held, that according to the Mitakshara and the Vira-Mitrodaya* if the defect be removed after partition, the right to participation revives, but on the principle of Hindu Law that property once vested cannot be divested, an insane person cured of his malady after partition cannot get back his share.†

* The Mitakshara, Ch. II., Sec. X. lays down "if the defect be removed by medicaments and other means (as penance and atonement) at a period subsequent to partition, the right of participation takes effect." The Vira-Mitrodays, Ch. VIII. *v.* 4. says, "If subsequently (to partition or succession) their defects are cured by medication or the like, they become entitled to obtain their shares, and this is reasonable, because it is by reason of the defects that they become disqualified to share."

† 5 All. 509.

A Full Bench of the Calcutta High Court have held, that the son of a blind son, born after the death of the original owner, his grandfather, will not divest the nephew to whom the estate had passed in the meantime, as the latter was a male and a full owner, who could not be divested under the Hindu Law. (1) The Allahabad High Court has followed this ruling in a Mitakshara case. (2)

In Bombay, the High Court has gone further, and held, that even in a joint Mistakshara family consisting of two brothers, if one of the brothers died, leaving a deaf and dumb son, who after the death of his father got a son, while living joint with his uncle's son, such after-born son was not entitled to a share of the family property on the ground that by survivorship the entire property had vested in a male, and it could not be divested. (3)

The Madras High Court, however, has refused to follow the Bombay Court and has held on facts identical with those of the Bombay case, that the after-born son of a deaf and dumb person is entitled to take his proper share of the family property. (4)

The Mitakshara (Ch. 2. Sec. 10) directs divesting of heirs and allows a disqualified heir cured of his disqualification after the estate had vested in other heirs, to take his share of which he had been deprived, on the analogy of the

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(1) Kalidas *v.* Krishna, 2 B. L. R. (F. B.) 103. See Pareshmani *v*, Dinanath, 1 B. L. R. 177.

(2) Deo Kishen *v.* Budh Prokash, 5 All. 509 F. B.

(3) Bapuji *v.* Pandurang, 6 Bom. 616. Pawadewa V Venkatish 32 Bomb. 455.

(4) Krishna *v.* Sami, 9 Mad. 64.

after-born son. The same analogy was clearly intended to apply to the case of the after-born son of a disqualified heir. The Bombay High Court did not consider the passage of the Mitakshara, when they held that the after-born son having been in the womb should be considered as already in existence and the analogy therefore did not apply.

Recent Privy Council decisions have established the rule that in a joint Mitakshara family of two members, if one of them dies leaving a power to his widow to adopt, a son adopted after his death will divest the surviving member in whom the property had vested by survivorship. (1) It is difficult to see why the principle of these cases should not be applied to after-born sons of disqualified members and a distinction made between them and adopted sons. It is hoped that the rule of the Madras High Court will find favour with the other Courts as more consonant with humanity and with the Smritis.

There can be no doubt upon the Smrities and the commentaries, that the Madras High Court was right. The so-called principle, that property once vested cannot be divested, has prevented modern lawyers from a right apprehension of the nature of the rights of excluded persons and their sons, as well as the interest taken by those members of the family, who take the property because of such exlusion.

According to the Smritis, a person, who has

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(1) Bachoo *v.* Moukoerbai 31 Bom. 673 P. C.
Sri Virada *v.* Sri Brozokishoro 1. Mad. 69. F. B.

How far Sanyasis are excluded.

entered a religious order is debarred from inheritance, even if he returns to the world again. On renouncing the world all property then vested in a man passes to his heirs. But if the renunciation is not of a quite complete character, he will not be divested of his property or be excluded from inheritance. It has been held, that the mere fact that a person calls himself a Byragi or religious mendicant, or even if he is such, does not exclude him from inheritance, (1) It has also been held, that a Sudra connot enter the order of Yati or Sanyasi, and, therefore, he cannot be excluded.(2) But it probably escaped the notice of the Judges, that a *lingee*, or a hypocrite, who has assumed the characteristic garb or sign of a religious order, is debarred from inheritance. (See the texts cited in this Section).

INHERITANCE.

SECTION VIII.

अनंशौ क्लीबपतितौ जात्यन्धबधिरौ तथा।
उन्मत्तजडमूकाश्च ये च केचिन्निरिन्द्रियाः॥
सर्व्वेषामपि तु न्याय्यं दातुं शक्त्या मनीषिणा।
यास्याच्छादनमन्नं पतितो वाददीत॥
यद्यर्थिता तु दारैः स्यात् क्लीबादीनां कथञ्चन।
तेषामुत्पन्नतन्तूनामपत्यं दायमर्हति॥
सर्व्व एव विकर्म्मस्था नार्हन्ति भातरो धनम्।

मनुः ९। २०१—३, २१४।

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(1) Khoodeeram *v.* Rookhine, 15 W. R. 197.
Teeluck Chunder *v.* Shama Charn, 1 W. R. 209.
(3) Dharmapuram *v.* Virapandiyam, 22 Mad. 302.

Eunuchs and outcastes (because of grave sins) born blind or deaf, the insane, idiots, and the dumb as well as those deficient in any organ of (action or sensation) receive no share.*

But it is just that (a man) who knows (the law) should give even to all of them food and raiment according to ability, without stint (for life);† he who does not give it becomes an outcast.

If the eunuch and the rest should somehow or other desire to (take) wives, the offspring of such among them as have children is worthy of a share.

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*क्लीबः means नपुंसकः according to Kulluka; according to the Mitakshara it means तृतीया प्रकृतिः, *i.e.*, a hermaphrodite; according to Sarvajna-Narayana it means अचिकित्स्यः क्लीबः, *i.e.*, incurable impotent; according to Katyayana a क्लीबः is one—

न मूत्रं फेनिलं यस्य विष्ठा चाप्सु निमज्जति।
मेढ्रक्षीन्मादशुक्राश्मां हीनं क्लीबः स उच्यते॥

जड़ः means निर्विवेकः, *i.e.*, idiot, according to Vachaspati-Misra, and अस्ववशकर्मेन्द्रियः, *i.e.*, one having no control over his senses, according to Sarvajna-Narayana.

According to the latter Commentator, पतितो महापातकी प्रायश्चित्ता तपूर्व्वम्, *i.e.*, outcast means one guilty of a grave sin before atonement, and निरिन्द्रियाः means स्वार्थग्रहणादिरहिताः।

निरिन्द्रियग्रहणेन पङ्गादय श्रौतस्मार्त्तक्रियानधिकारिणो गृह्यन्ते इति विवाद-रत्नाकरे।

According to the Vivada-Ratnakara, by the word *nirindria* are meant cripples and the like who are incompetent to perform the Srauta and Smatra ceremonies.

Vachaspati-Misra says—"Nirindriya signifies those who have been deprived of a hand, a leg, or any other member of the body; such persons are not competent to perform ceremonies enjoined by the Vedas and the Smritis."

The Parasara-Madhava says, निरिन्द्रियाः means व्याधिना विकलेन्द्रियाः, *i.e.*, deprived of an organ of sense by disease.

† Madhava and Kulluka say अत्यन्त' means 'for life' (यावज्जीवम्)

All brothers who habitually commit forbidden acts, are unworthy of the share of the property.*

Manu, IX. 201—203, 214.

ब्रह्महसुरापः गुरुतल्पगमाद्यपिद्यधीनिसम्बन्धगस्तेननास्तिक निन्दितकर्म्माभ्यासिपतिता-त्याग्यपतितत्यागिनः पतिताः।

सवर्णापुत्रोऽप्यन्यायवर्त्ती न खभेतैकेषाम्।

जड़क्लीबौ तु भर्त्तव्यावपत्यं जड़स्य भागार्हम्।

गौतमः, २१। १; २८। ४३, ४४।

The murderer of a Brahmana, he who drinks spirituous liquor, the violator of a Guru's bed, he who has connection with the female relatives of his mother and of his father (within six degrees), he who steals (the gold of a Brahmana), an atheist, he who constantly repeats blamable acts, he who does not cast off persons guilty of a crime causing loss of caste, and he who forsakes blameless (relatives), become outcasts.

According to some the son of a woman of equal caste even does not inherit, if he be living unrighteously.

An idiot a eunuch must be supported. The (male) offspring of an idiot receives his father's share.

Gautama, XXI. 1; XXVIII. 43, 44

अर्वाक्शाखाश्रमान्तरगताः क्लीबोन्मत्तपतिताश्च।

भरणं क्लीबोन्मत्तानाम्।

पतितोत्पन्नःपतितोभवतिआहुरन्यवस्त्रियासाहि परगामिनी।

वशिष्ठः, १७। ५२, ५४।

But those who have entered a different order receive no share; nor (those who are) eunuchs, madmen, or outcasts. Eunuchs and madmen (have a claim to) maintenance.

The issue of an outcast are also outcast, except a female, for she goes to another family.

Vasista, XVII. 52-54.

अतीतव्यवहारान् यासाच्छादनैर्विभृयुः। अन्धजड़क्लीबव्यसनिव्याधितादीश्च। अकर्म्मिणः। पतिततज्ञातवर्ज्यम्।

बौधायनः, प्र २। अ २। क ३। सू ३७-४०।

* In the Mahabharata Anushashanika Prava, Ch. 105 *v.* 10 we find the following text सर्व्वेचापि विकर्म्मस्था भागं नार्हन्ति सोदराः। Probably that was the reading of Manu IX. 214 at the time the Mahabharata was composed.

Granting food, clothes, (and shelter), they shall support those who are incapable of transacting legal business, (*viz*)., the blind, idiots, eunuchs,* those immersed in vice, the incurably diseased, and so forth, and those who neglect their duties and occupations ; but not the outcast, nor his offspring.

Baudhayana, P. 2, A 2, K. 3, S. 37-40.

सर्वे हि धर्म्मयुक्ता भागिनः। यस्त्वधर्म्मेण द्रव्याणि प्रतिपादयति ज्येष्ठोऽपि तमभागं कुर्व्वीत।

जीवन् पुत्रेभ्यो दायं विभजेत् समं क्लीबमुन्मत्तं पतितञ्च परिहाप्य।

आपस्तम्बः, प्र २। प ६। ख १४। सू १४, १५, १।

Therefore all (sons) who are virtuous inherit. But him who expends money unrighteously, he shall disinherit, though he be the eldest son.

He should, during his lifetime, divide his wealth equally amongst his sons, excepting the eunuch, the madman, and the outcast.

Apastamba, P. 2, P. 6, K. 14, 15, 1.

पतितक्लीबाचिकित्स्यरोगविकलास्त्वभागहारिणः। रिक्थग्राहिभिस्ते भर्त्तव्याः। तेषां चौरसाः पुत्रा भागहारिणः। न तु पतितस्य। पतनीये कर्म्मणि कृते त्वनन्तरोत्पन्नाः। प्रतिलोमासु स्त्रीषु चोत्पन्ना अभागिनः। तत्पुत्राः पैतामहेऽप्यर्थे। अंशग्राहिभिस्ते भरणीयाः।

विष्णुः, १५ अ। ३२—३९।

Outcasts, eunuchs, persons incurably diseased, or deficient (in organs of sense or actions, such as blind, deaf, dumb, or insane persons, or lepers) do not receive a share. They should be maintained by those who take the inheritance. And their legitimate sons receive a share. But not the children of an outcast; provided they were born after (the commission of) the act on account of which the parents were outcasted.

Neither do children begotten (by husbands of an inferior caste) on women of a higher caste receive a share. Their sons

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* Eunuchs have been left out apparently by an oversight in the translation in the Sacred Books of the East series.

do not even receive a share of the wealth of their paternal grandfathers. They should be supported by the heirs.

Vishnu, XV. 32-39.

क्लीबोऽथ पतितस्तज्जः पङ्गुरुन्मत्तकोऽन्धः।
अचिकित्स्यरोगाद्या भर्त्तव्याः स्युर्निरंशकाः॥
औरसाः सवर्णाक्षेषां निर्द्दोषा भागहारिणः।
सुताश्चेषां प्रभर्त्तव्या यावद्धै भर्त्तृसात्कृताः॥
अपुत्रा योषितश्चैषां भर्त्तव्याः साधुवृत्तयः।
निर्व्वास्या व्यभिचारिण्यः प्रतिकूलास्तथैव च॥

याज्ञवल्क्यः, २ अ। १४०—१४२।

An impotent person, an outcast, (because of a grave sin like the murder of a Brahmana, &c.) and his issue, one lame, a madman, an idiot, a blind man, and a person afflicted with an incurable disease, as well as others (similarly disqualified) must be maintained, being excluded from participation. But their sons, legitimate or Kshetraja, are entitled to allotments, if free from similar defects. Their daughters must be maintained likewise, until they are made over to husbands. And their sonless wives conducting themselves aright, must be supported; but such as are unchaste should be expelled, and so indeed those who are perverse.* Yajnavalkya, II. 140142.

पिढहिट् पतितः षण्ढो यश्च स्यादपपात्रितः।
औरसा अपि नैतेऽंशं लभेरन् चेचजाः कुतः॥
दीर्घतीव्रामयग्रस्ता जड़ोन्मत्तान्धपङ्गवः।
भर्त्तव्याः स्युः कुलं चैते तत्सुतास्त्वंशभागिनः॥

नारदः, १३ अ। २१, २२।

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* According to the Mitakshara, Kliba means a hermaphrodite—क्लीव तृतीया प्रकृतिः। Nirindria, according to the Mitakahara, means one who has lost an organ of sense on account of disease, &c. निरिन्द्रियः निर्गतमिन्द्रियं यस्माद्व्याध्यादिना। पतिती ब्रह्महादिः is the commentary of the Mitakshara, *i.e.*, Patita means murderers of Brahmanas and the like; Colebrooke's translation of it is 'one guilty of sacrilege or other heinous crime'

The translation by Colebrooke of the Mitakshara on these texts is very defective, as a cursory reading of the original and the translation will show.

One hostile to his father, or expelled from caste, or impotent, or excommunicated for grave offence, shall not even take a share (of the inheritance), if he is a legitimate son ; much less so, if he is a (Kshetraja) son of the wife (only). Persons afflicted with a chronic or acute disease, or idiotic, or mad, or blind, or lame, (are also incapable of inheriting). They shall be maintained by the family ; but their sons shall receive their respective shares (of the inheritance).*

Narada, XIII. 21, 22.

सवर्णाजोऽप्यगुणवान्नार्हः स्यात् पैतृके धने ।
तत्पिण्डदाः श्रोत्रिया ये तेषां तदभिधीयते ॥
सदृशी सदृशेनोढा साध्वी शुश्रूषणे रता ।
कृताकृता वा पुत्रस्य पितर्धनहरी तु सा ॥

बृहस्पतिः, २५ अ । ४२, ५७ ।

Though born of a wife of the same caste, a son destitute of good qualities is unworthy to obtain the paternal wealth ;

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* अपपातितः is the reading of the Kalpataru, the Ratnakara, and the Parijata. It means excommunicated because of a grave offence like the murder of the King.

अवपातितः is the reading of Saraswati-Vilasa. It is interpreted as meaning guilty of a grave offence, and driven away by kinsmen in consequence.

The reading adopted by Dr. Jolly, following the Dayabhaga, is औपपातिक for अपपातितः which has been translated 'as guilty of a minor offence.' It is against the weight of authority, and also against reason. One guilty of a minor offence certainly does not deserve to be excluded from inheritance.

The Ratnakara says, 'hostile to his father' means one who attempts the life of his father, or commits other hostile acts against him, and who does not offer funeral oblations to him after death. According to the Saraswati-Vilasa it means one who says 'he is not my father.' The Dayakrama-Sangraha says, 'it means one who beats his father.' The exclusion of the hostile son from the family property shows, that against the father's wish a son could never obtain partition.

The Ratnakara says, दीर्घं राजयक्ष्मादि, तीव्रं कुष्ठादि, *i.e.*, 'chronic' means consumption and the like ; 'acute' leprosy, and the like.

Jagannath includes atrophy among chronic disease.

कुलस्थैः (in the last line) is the reading in the Ratnakara.

it shall go to those learned (kinsmen) who offer the funeral ball of meal (*pinda*) for the father.

Equal in caste (to her father) and married to a man of the same caste as her own, virtuous, habitually submissive, she shall inherit her father's property, whether she may have been (expressly) appointed or not.*

Vrihaspati, XXV. 42, 57.

अपपात्रितस्य ऋक्थपिण्डोदकानि निवर्त्तन्ते । †

शङ्ख-लिखितौ ।

Of one who is excommunicated, the heritage, the oblation of food and libations of water cease.

Sankha-Likhita, cited in the Ratnakara and Parijata.

मृते पितरि न क्लीवकुष्ठ्युन्मत्तजडान्धकाः ।
पतितः पतितापत्यं लिङ्गी दायांशभागिनः ॥
तेषां पतितवर्ज्जेऽर्थो भक्तवस्त्रं प्रदीयते ।
तत्सुचाः पितृदायांशं लभेरन् दोषवर्ज्जिताः ॥ देवलः ।

When the father is dead, an impotent person, a leper, a madman, an idiot, a blind man, an outcast, the offspring of an outcast and a hypocrite wearing the token of a religious mendicant are not entitled to a share of the heritage. Food and raiment should be given to them excepting the outcast. The sons of such persons being free from similar defect shall obtain their father's share of the heritage.

Devala, cited in the Ratnakara, Saraswati Vilasa, Madhava, and other books.

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*The Dayabhaga reads भर्त्तृ for साध्वी । But it is opposed to Apararka and all the other Commentators. That being so, the position of the Calcutta High Court, basing its decision on the incorrect reading of भर्त्तृ for साध्वी, that an unchaste daughter cannot succeed, is wholly untenable.

† अपपात्रितः—राजवधादिदोषेण कृतघटापवर्ज्जनः । इति असहायः ।
One excommunicated for offences like killing the king.—Asahaya.

अक्रमोढ़ासुतश्चैव सगोत्रोद्वास्य जायते ।
प्रव्रज्यावसितश्चैव न ऋक्थं तेषु कर्हिचित् ॥

अपरार्ककल्पतरुधृतकात्यायनवचनम् ।

Thus also the son of a woman married in an irregular order, and one born of a wife of the same *gotra* as well as an apostate from a religious order are unworthy of the inheritance.

Katyayana, cited in the Kalpataru, the Ratnakara and the Dayabhaga.

यज्ञार्थं द्रव्यमुत्पन्नं तद्ब्राह्म्यं नियोजयेत् ।
स्थानेषु धर्म्ययुक्तेषु न स्त्री मूर्खविधर्म्मिषु ॥

रत्नाकरधृतकात्यायनवचनम् ।

Wealth is made for sacrifice. Therefore it should be appropriated to fit and virtuous persons, and not to women, ignorant and irreligious men, or infidels.

Katyayana, cited by Ratnakara and Apararka.

नैव भागं वनस्थानां यतीनां ब्रह्मचारिणाम् ।
पाषण्डपतितानाञ्च न चावैदिककर्म्मणाम् ॥

वृद्धहारीत,, ४ अ । १५२ ।

There is no share for the hermit, the ascetic, the life-long student in theology, the heretic, the outcast, and one who does not perform the Vedic ceremonies.

Vriddha-Harita, IV. 152.

अङ्गहीनश्च तद्वर्म्मा ।

मीमांसादर्शनम्, अ ६ । प १ । ४१ ।

Those destitute of limb are like persons without wealth necessary for sacrifices, (that is, as the destitute person after getting wealth becomes entitled to perform sacrifices, so the person whose limbs are unfit for action, becomes entitled to

perform the *kamya* sacrifices after getting his infirmity cured by medicine, &c.)*

Mimansa Darshana, A. 6, P. 1, S. 41.

यज्ञार्थं द्रव्यमुत्पन्नं तत्रानधिकृतास्तु ये ।
ऋत्विक्पथभाज स्ते सर्व्वे ग्रासाच्छादनभाजना: ।
यज्ञार्थं विहितं वित्तं तस्मात्तदविनियोजयेत् ।
स्थानेषु धर्म्मजुष्टेषु न स्त्रीमुर्खविधर्म्मिषु ॥

Wealth is made for sacrifices. Those shat are incompetent to perform them are not entitled to inherit property. They are only entitled to maintenance. Wealth is for sacrifice. Therefore it should go to a proper person and virtuous, and not to a woman, ignorant man, or an apostate.

A text of some Smriti, cited by Vijnaneswara and Madhavacharya without naming the author. Apararka cites it with texts of Katyayana.

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* The translation is according to the Bhasya of Shabara-Swami and the Nyayamala of Madhava. Both of them say, that the meaning is, that a person incurably and permanently deprived of the use of an organ of action is incompeten to perform sacrificcs which are *kamya*, *i.e.*, which are performed out of a desire for reward, but he is competent to perform the *nitya* sacrifices, *i. e.*, sacrifices like Agnistoma and the five great *yajnas* for which there is no reward (except the desireless condition of salvation), but the nonperformance of which is sinful and injurious.

† According to Madhava, it refers only to property appointed for sacrifices.

CHAPTER III.

THE RIGHTS OF FEMALES.*

SECTION I.

Rights of Widows and other Female Heirs.*

IN the Smritis and the commentaries the rights of widows and daughters are dealt with in greater detail than those of other heirs. The commentaries are full of lengthy and learned discussion on this, what seemed to these writers the only difficult part of the law of inheritance. Mr. Mayne is not therefore, right when he says, that 'it is singular how little is to be found on the subject in the Hindu writings. So late as last year, Babu Golap Chunder Sicar, a very learned and acute Hindu lawyer, wrote, that the text of Katyayana, "is the only authority for curtailing women's rights in property inherited by them," and that text also only refers to Stridhana. The late Dr. Siromani also relied only on that text for the position that women's rights were limited. The texts cited in this and the last chapters were apparently not considered by these eminent lawyers. Imperfect knowledge of the history of this branch of Hindu law has been a fruitful source of errors.

Widow's right according to the Smritis and the Commentaries.

The commentators of the Mitakshara school unable to reconcile the conflicting texts about the rights of widows, invented the doctrine of survivorship, and laid down, that the texts allowing the widow to inherit, applied to separated members of a

* The right of inheritance is fully dealt with in the last chapter. In this chapter, other rights and the character of those rights are described.

family, and the texts denying her rights were appplicable to a joint family. As a matter of fact, as we have already seen, originally, the widow had no heritable rights, being entitled to a certain portion of the movable wealth of her husband which was not to exceed two thousand *panas* and which was called *Bhartridaya.* This was the widow's portion, even so late as the time of the Mahabharata. But if the widow desired to get a son by Niyoga, she was entitled to enjoy her husband's share of the family whether he was joint or separate, till she could get a son. The Niyoga being prohibited, later law-givers laid down, that she was entitled to enjoy the usufruct of that share, if she was chaste, and as long as she remained chaste. But she was under an obligation to remain with the husband's family and to spend it for the purpose of the family, as her husband would have done, as well as for the purposes of Sraddhas and other pious works. She had no right to make any waste or any diminution of the property. There are two contradictory texts, both ascribed to Vrihaspati, one laying down, that the widow could not take immovable property, and the other allowing her to take immovables as well as movables. The first was probably more ancient than the second, and it is very difficult to say whether both are authentic. Medhatithi, Viswarupa and Haradatta* could not find any authority for holding, that beyond the 2000 *panas* which was the husband's *daya*, the widow took anything. It was the authority of Vijnaneswara which finally

* For the opinion of these commentators on the subject the reader is referred to pp. 112-127.

established the widow's right to inherit her husband's property, but unfortunately he made a distinction between joint and separate property—a distinction unfounded in the Smritis, as was afterwards abundantly proved dy Gimutavahana. The texts cited in this section leave no room for doubt, that the widow was entitled to enjoy the usufruct of her husband's share in joint family property, subject to the limitations mentioned above.*

The widow is not entitled to sell, mortgage or make a gift of immovable property inherited from her husband, or received from him by gift. The lawgivers mention how he should spend the income. She is entitled to sell, mortgage, or make a gift for reasons for which her husband would have been entitled to make such alienations, if he were a member of a joint Hindu family, *i. e.*, for the maintenance of herself and the family of her husband, for marriage expenses (including the marriage portion) of the daughters of the family, and for the purposes of the Sraddha. It is expressly laid down in the Smritis, and in fact it follows from the very nature of the right given to the widow, that after her death the husband's family or heirs should resume the inheritance. It appears that since the Rishis gave the widow the right only 'to enjoy till her death,' such heirs of her husband, as but for her

* I may mention that my position giving the right to the widow to the usufruct of her husband's share in joint family, while under the rulings, she is only entitled to maintenance in such case in all parts of India, except Bengal has been pointed out by some critics as proving how reactionary is the character of my book. I wish Hindu females had all the rights given to them which I contend they are entitled to under the Smritis and of which they have been deprived in recent times on account of the imperfect knowledge of gentlemen like my critics.

would be heirs at his death, would take the inheritance after her. She was not a mere life-tenant, as she had the right to alienate in case of necessity. She held the property as a trustee and manager for the family, who could not be removed except for unchastity and imbecility, and for committing waste, and who, though enjoined to spend the income for the family, had full right to spend it in a legitimate manner according to her pleasure. As regards the movables up to 2000 *panas*, that she had the absolute right of disposal of them at her pleasure, is undoubted. Further than this, the Smritis make no mention of any absolute right of the widow over movables. This was the position of the widow according to the lawgivers.

Daughter's right.

The peculiar circumstances under which the widow's right came to be recognised and limited did not exist in the case of the daughter and the mother. The daughter as Putrika was recognised as heir of the sonless man from the time of the Vedas. She was like a son, when she took her father's inheritance, and there is no justification for limiting her rights in any way, or holding that in her case, but not in the case of the son, virtuous life was a condition precedent to her taking. Virtuous life was a condition precedent to inheriting paternal property according to the lawgivers in the case of both the son and the daughter. If in the case of the former the rule is considered obsolete, it is not reasonable to hold, that it still applies in the case of the daughter.* In the case of the

* Indeed the position taken by the Calcutta High Court is based on a doubtful reading of the text of Vrihaspati. See p. 231.

mother, there is no text laying down chastity as a condition precedent to her taking, or any text in any way limiting her interest.

Gimutavahana laid down, that all females, who take as heirs to males, take only a limited estate, and on their death the property passes to the heirs of the last male holder. Some of the commentators of the Dayabhaga were of opinion that a maiden daughter, who after inheriting had a son, took an absolute estate. This opinion was controverted by later commentators and is mentioned here as showing that even in Bengal the rule that the daughter took only a life-estate was not generally accepted at one time.

The Mitakshara includes property inherited by females within the definition of Stridhana. Originally, as Sankha-Likhita laid down, the modes of acquiring property by females were sixfold, *i.e.*, by way of Stridhana strictly so called. Vijnaneswara, when he established the rule of widows taking their husband's estate by way of inheritance, included such property within Stridhana. But he never contemplated, that the widow should have absolute interest, as was contended in some cases before the Privy Council, (1) and as the High Court of Calcutta thought in the case of Jullessur Koer. (2)

Under the Dayabhaga widow takes both divided and joint property.

Under the Dayabhaga School, it was very early established by decisions that the widow succeeded both to the undivided and divided

(1) Thakoor *v.* Rai Balukram, 11 Moore 139. Bhugwandeen *v.* Myna Baee, 11 Moore 487. Collector of Muslipatam *v.* Cavaly Vencata, 8 Moore 529. Keerut *v.* Koolahul, 2 Moore 331.

(2) 9 Cal. 729.

property of her sonless husband, and took only a limited estate. (1)

Under the Mitakshara widow takes only separate property and takes limited estate.

Under the Mitakshara School, it was held by the Privy Council, as early as 1839 in two cases about separate Rajes, that the widow succeeded to the whole of her deceased sonless husband's estate but she took only a limited estate. (2) But as late as 1860, the rule does not seem to have been accepted by the Pundits, as appears from the Vyavastha of the Shastris of Madras in the Shivagunga case. The Privy Council, however, in that case in 1863, refused to follow the opinion of the Pundits and finally established the rule that a widow succeeds not only to the whole property of her husband when he was separate from the rest of his agnates but also to his separate property when he was an undivided member of a joint-family. The Privy Council in that case, considered the question whether the widow was not entitled to succeed to undivided property and held that though she was so entitled according to the doctrine of spiritual benefit and also under the rule of survivorship of some ancient Smritis, especially that of Vrihaspati, she could not take undivided property only because of the rule of survivorship as understood in the Mitakshara School. (3) It is now well-established that when the husband dies leaving only undivided property the widow is only entitled

Widow entitled only to maintenance when there is only joint-estate.

(1) Mohun Lal Khan *v.* Rani Sirnomunnee, 2 Beng. S. D. R. 32; Cossinath Bysack *v.* Harrosundery Morton, 86.

(2) Rajender *v.* Bejai, 2 Moore 191; Keerut *v.* Koolahul, 2 Moore 331.

(3) Katama Natchiar *v.* The Raja of Shivagunga, 9 Moore 611.

to maintenance in all arts of India, except Bengal.

Widow takes absolute estate in Pondichery.

According to Hindu Law as administered in the French territories in Madras, a widow succeeding to the property of her husband takes an absolute estate. (1)

Widow takes absolute estate in certain Jaina communities.

According to the custom of the Jaina community of Mangrole and Uplata in Bombay, it has been held that the widow takes an absolute estate to the estate of her deceased husband, but it has not been decided whether after her death, the heirs of her Stridhana or the heirs of her husband take. (2)

Law in the Punjab.

The widow's interest by the customary law of the Punjab is similar to that of the widow in other parts of Northern India. (3) It is there considered to be a life-interest being a continuation of her husband's estate.

Daughter, mother, grand mother's interest.

The daughter, the mother and the grandmother take a limited estate like that of the widow, (4) with a right of survivorship when more than one, (5) and the person that would be the heir of the person whom they succeeded, at the time of their death inherit after them. This is the law established (6) under the

(1) Milathai Amir *v.* Subbaraya, 24 Mad. 460.

(2) Madanji Deochand *v.* Tribhawan, 13 Bom. L. R. 1121.

(3) Musmut Bhambal Devi *v.* Norava Sing, 29 I. C 572, 39 Punj. R. 572.

(4) Hemlata *v.* Goluk, 7 S. D. 108. Punchanund *v.* Lalshun, 3 W. R. 140 Deo Pershad *v.* Lujoory, 20 W. R. 102. Jiban Krishna *v.* Brojo, 30 I. A. 81. Roy Radha Kissen *v.* Nauratan, 6 Cal. L. J. 490. Nitasappa *v.* Sakharam, 2 Bom. H. C., A. C. J. 215 (mother's interest), Vira Sangappa *v.* Rudrappa, 19 Mad. 109, Jana Kisetti *v* Meriyala, 32 Mad. 529 (Setting aside an earlier decision Venkatarama *v.* Bhujanga, 19 Mad. 109, in which it was held that a maiden daughter took an absolute estate.)

(5) Raja Chelikani *v.* Raja Chelikani, 29 I. A 150.

(6) Chotay *v.* Chunnu, 23 W. R. 406 Affd. 6 I. A., 15, Muthervaduganadha *v.* Dora Sing, 8 I. A. 99. Amrito *v.* Rajani, 2 I. A. 133. See 30 I. A, 81, 6 Cal. L. J. 490.

Dayabhaga, the Mitakshara, the Vivada Chintamani and the Smriti Chandrika in all the Provinces, except Bombay. Under the Dayabhaga, it has been held that a daughter can take by survivorship even if she be a childless widow at the death of the co-tenant her sister (1).

Law in Bombay, Berar and Sind.

In Bombay, Berar and Sind, it has been held that both under the Mitakshara and the Mayukha, the widow, the mother, the grandmother and other widows of agnates, who succeed, take only a limited estate (2). But the daughter the sister and other female heirs born in the family take the estate absolutely and in severalty and their own heirs take it, after their death. (3)

In a recent case in Madras, (4) Sadasiva Aiyyar, J., in a very learned judgment, has shown how the power of disposal over property inherited by widows and daughters have been curtailed without sufficient authority and expressed his concurrence with the opinion expressed in this book that in the case of the daughter such curtailment is opposed to the true law of the Smritis. It is too late now to give to the daughter the rights given to her in the Smritis, but surely it is not too late to

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(1) Amrito *v.* Rajani, 2 I. A. 113. Kedar Gai *v.* Ramani, 7 I. C. 884.

(2) Harilal *v.* Pravalut Dass, 16 Bomb. 229, Vrijbhukhun *v.* Bai Parvati, 32 Bomb 26, Madanji *v* Tribhubun, 13 Bomb. L. R. 1121 Dhondi *v.* Radhabai 36 Bomb. 546 Lullubhai *v.* Mankuvurbhai 2 Bomb. 388 off. 7 I. A. 222. See 21 Bomb. 730, 30 Bomb. 229.

(3) Vithapa *v.* Savitri, 12 Bomb. L R. 487, Rainda *v.* Anacharya 15 Bom. 206, Haribhat *v.* Damodar 13 Bomb. 671, Gulappa *v.* Tayawa 31 Bomb. 453, Mussumut Chandrabhaga *v.* Biswanath, 20 I. C. 56, Dawlut Rao *v.* Govind 5 Nag. L. R. 13, 1 I. C. 243. See 2 Sind L. R. 59.

(4) Gudemetla *v.* Bolluzu, 23 Mad. L. J. 233, 16 I. C. 139.

recognize that the requirements of a married daughter with children are greater than those of a widow and the daughter should certainly have greater powers of disposal than the widow. (1)

Whether inherited property is Stridhana in Bombay.

When females take an absolute interest, whether the property inherited by them becomes their Stridhana strictly so-called, is a question which has much exercised the Bombay lawyers. In some of the earlier Bombay decisions, it was held that the property taken by such females passes on their death to the heirs of their Stridhanas. (2) But in a later case, it was held that such property did not become their Stridhana, and such heirs took, as would inherit the property if the female heir were a male. Thus in the absence of children, the property would go to their parents, &c., as laid down by Yajnavalkya. (3) In a recent case, the late Mr. Justice Telang reviewed the law on the subject, and rejected the view of Mr. Justice West in the case mentioned above, and held that the words 'as if she was a male' were interpolated into the Mayukha, and the view of Nilkantha was that the female owner was considered as a fresh stock of descent, and that in respect of property not strictly Stridhana, 'the son and the rest' took precedence over

(1) The daughter, is excluded by custom among agricultural Jats of the Punjab (Bara Mal *v.* Narain Das 107 Punj. R. 1907), in the N. W. Provinces, in Oude and the Punjab among certain tribes of Chhatris, and among certain Girasea and Utpal families in the Bombay, Presidency and in certain villages in Broach called the Bhagdari villages. The Khattris of Rawlpindi and Aroras of Amritsar have, however, adopted the ordinary rule of law It has been held that the burden of proving a custom excluding the widow is on the agnate setting it up (Radha *v.* Harnamun 99 Punj. R. 1907. Bara Mal *v.* Narain Das, 107 Punj. R. 1907.

(2) Nevalram *v.* Nankishore, 1 Bom. H. C. 229.

(3) Vijiarangam *v.* Lakshman, 8 Bom. H. C. 224.

the daughters and the rest. (1) It should be remembered, that the daughter originally took as Putrika, and therefore, her son, and not her daughter, is her heir, and there is also a special rule of inheritance in Manu about the Putrika dying without a son, according to which it goes to her husband, but according to the texts of Paitinashi and Sankha-Likhita cited in the Dayabhaga, it goes to her sisters. The Dayabhaga, says, that the text of Manu applies only when she had a son who had predeceased her. But the interpretation of Madhava seems to be the correct one. Madhava says that the text of Manu refers to the case where there is no afterborn brother and the text of Paithinasi refers to the case where there is an afterborn brother.

Rights on remarriage.

The text of Manu, Ch. IX *v.* 191, seems to indicate that by remarriage, where it is allowed, a widow is not divested of property inherited by her from her husband. By Act 15 of 1856 it has, however, been enacted that a widow by remarriage is so divested. The Allahabad High Court has, however, held that where remarriage of widows is allowed by the custom of caste, irrespective of the Widow Marriage Act, a widow by marrying again does not lose her first husband's property or her maintenance charged on her first husband's property during his lifetime. (3) The Calcutta, Bombay and Madras High Courts have, however, held that a widow or a mother loses her interest and is

(1) Mani Lal Rewadat *v.* Bai Rewa, 17 Bom. 758.

(2) Cossynath Bysock *v.* Horrosunderi, Clarke's Rules 91 (P. C.) Bhugwandeen *v.* Myna Baee, 11 Moore 487. Narasimma *v* Vencatadri, 8 Mad. 290. Gadadhar *v.* Chandra, 17 Bom. 690.

(3) Harsaran Das *v.* Nandi, 11 All. 330. Kausella *v.* Gajadhar, 31 All. 161. Mula *v.* Partab, 32 All. 489.

divested of property inherited from her husband or son, on remarriage, even where remarriage is allowed by custom. (1) In Bengal, in an early case, it was held that when a widow after becoming a Muhammadan remarried. She did not lose the property. But it has been recently held, that a widow remarrying after becoming a Brahmo, was divested by virtue of the Act. (2) This question and the question how far unchastity affects the rights of female heirs are fully dealt with in Ch. II, Sec. 8.

A question which once troubled the Bengal lawyers, and is still considered doubtful by learned text-writers, is whether the widow forfeits her right, if she does not reside in her husband's family. Here again the difficulty is a creation of ignorance. A text of Katyayana cited in this section is assumed by modern writers to lay down that rule. But the correct reading of that text according to the majority of ancient commentators is not, गुरौस्थिता, *i.e.*, residing with her father-in-law, but व्रतेस्थिता, *i.e.*, leading a chaste life. The Privy Council in the case of Kasi Nath Bysak *v.* Harosundary (3) laid down the correct law, by holding that "if a widow from any other cause than for unchaste purposes, ceased to reside in her husband's family, her right would not be forfeited thereby."

Residence husband's family house necessary or not.

It is now settled that by non-residence in

(1) Morugao *v.* Viramakali, 1 Mad. 226 In Re Doraisawmy Thevan, 15 I C. 602 Rasul Jehan Begum *v.* Ram Sarun Sing, 22 Cal. 589. Vittin *v.* Govinda, 22 Bomb. 321, F. B. Panchappa *v.* Sangan-baswa, 24 Bomb. 89.

(2) Matangini *v.* Ram Ruttun, 19 Cal. 289.

(3) Morley's Dig., p. 198.

the husband's family a widow does not forfeit her right. (1)

Waste—does not forfeit by.

The widow's interest has been held not to be a life-estate (2), and is called a widow's estate, defined not by the texts, but by the decisions of Courts. As a natural consequence, it has been held that by committing waste the widow does not forfeit her interest. (3) It was held in some old cases that where the acts of the widow were utterly subversive of the rights of the heirs, and would lead to loss of the property, she might be deprived of its management which should be placed in the hands of the reversioners as receivers with direction to pay to her the whole of the net profits. (4) In a recent case the Madras High Court appointed a receiver because the widow appointed two persons to supervise the family business with full powers and thus proved her incapacity and because the accounts were not properly kept. (5) The Calcutta High Court has in a later case held that an alienation by a widow of her life interest or an ekrarnama to that effect by her is not waste. (6) The reversionary heir is entitled to an injunction restraining the widow from working destruction of the

(1) Cosynath *v.* Hara Sundary, Clarke's Rules 91 (P. C.). Hari Das Dutt *v.* Srimati Uparna, 9 Moore 433 Biswanath *v.* Khantomony, 6 B. L. R. 747. Muteeram *v.* Gopal, 20 W. R. 187.

(2) Golukmony Davee *v.* Digamber, 2 Boul. 193. Jugal Kisore *v.* Jotindra, 10 Cal. 958. Kattama Natcheer *v.* Raja of Shivagunga, 9 Moore 593.

(3) Prag Das *v.* Harikissen, 1 All. 503.

(4) Nunda Lal *v.* Bolakee Bibi, S. D. for 1854, p. 351. Golukmony *v.* Krishna Prosad, S. D. for 1859, p. 210. Pranputti *v.* Fateh Bahadur, 2 Hay 608. Doorga Dayee *v.* Poran Dayee, 5 W. R. 141. Shama Sundary *v.* Jamoona, 24 W. R. 86. Bindu Basinee *v.* Boly, 6 W. R. 115. Haridas Dutt *v.* Upendra, 6 Moore 433. Gross *v.* Amritomoyi, 12 W.R., 13. A. C. J.

(5) Vainkachala Madaliar *v.* Alamelu Amuel 25 I. C. 153.

(6) Sarabjit Protap Sahi *v.* Bhagwat 30 I. C. 577 See Debi Prosad *v.* Golap Bhaguti 40 Cal. 721.

property but it has been held that the English cases about trustees and life-tenants are not applicable to widows and that the English cases "most nearly in point are those in which a Court of Equity has restrained tenants not impeachable for waste from doing acts which amount to a spoliation or destruction of the estate." (1)

Appointment of receiver.

Recently the Privy Council thus defined a Hindu widow's interest: it "is of the nature of a right of property; her position is that of owner; her powers in that character are however limited, but as long as she is alive no one has any vested interest in the succession." (2) Sir R. C. Mitter, J. defined it in greater detail. (3) 'The estate of a Hindu widow is very different from a mere life-estate,' (4) and is something higher than it, (5) that 'it is not an absolute estate for all purposes, and is not merely an estate for life,' (6) that 'the whole estate would for the time vest in her absolutely for some purposes, though in some respects for a qualified interest' and until her death it could not be ascertained who would be entitled to succeed,' that the 'same principle which has prevailed' in the Courts of England as to tenants-in-tail representing the inheritance would seem to apply to the case of the Hindu widow, and it is obvious that there would be the greatest

Nature of widow's interest.

(1) Subbareddi *v.* Chengalamma, 22 Mad. 126. Hurrydass *v.* Rungamoney, Sev. 657. Gobindmany *v.* Shamlal, B L. R. F. B. 53. See Notes to Garth *v.* Cotton Tudor's L. C. on Real property, p. 115.

(2) Janaki Ammal *v.* Narayan Sami, 39 Mad. 634. P. C.

(3) Mohadeay Kooer *v.* Haruk Narain, 9 Cal 244. (4) Jadomoney *v* Saroda Prosono, Boulnois 120. (5) Coshinath *v.* Huro Sundary, Clarker's Rules and Orders, Ap. 91. (6) Phoolchand *v* Raghubuns, 9 W. R. 108.

inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow,' (1) and that 'she completely represented the estate but whatever she purchased out of the profits would be an increment to her husband's estate, but on the other hand she would have certain rights as a Hindu widow, for example, she would have the right under certain circumstances if the estate were insufficient to defray the funeral expenses or her maintenance, to alienate it altogether,' and would 'certainly have the power of selling her own estate.' (2)

Widow not liable to account.

A Hindu widow is not liable to account and is at liberty to do what she pleases with the property during her life-time, provided only that she does not injure the reversion (Benka *v.* Bholanath, 37 All. 177).

Interest in moveables.

It has been held, that both under the Bengal and the Benares schools, as well as under the Madras school, the widow's interest in movables is limited as in immovables. (3) But under the Mithila law and the law in Western India and Sind, under the Mayukha, the widow has absolute power over movables. (4) It has been recently held that a mortgage may be considered as movable property and a widow under the Mithila Law has an absolute

(1) Kattama Natchair *v.* The Raja of Shivaganga, 9 Moore 539.
(2) Musmut Bhagbutti *v.* Chowdhury Bholanath, 2 I. A. 256.
(3) Thakur Deyee *v.* Rai Balukram, 11 Moore 175 Bhagwande Dobey *v.* Myna Baee, 11 Moore 497. Narasinha *v.* Venkatadri, 8 Mad. 290 Durga Nath *v.* Chinamoni 31 Cal. 214. Durga *v.* Ram 12 I. C. 591. (4) Vivada-Chintamoney, pp. 261-263. Doorga Dye *v.* Poorun, 5 W. R. 141. Birajan *v.* Lukshinarain, 10 Cal. 392 Damodar *v.* Parmanund, 7 Bomb. 155. Pranjivandas *v.* Dewkoe Bai, 1 Bom. H. C. 150. Mussumat Thakoor Deghee *v.* Balakram, 11 Moore 175. Motilal *v.* Ratilal, 21 Bom. 170. Sakrabi *v.* Maganlal, 26 Bom. 220 F. B. Halima *v.* Asibai, 8 I. C. 211, Ratanu *v.* Umerbai 9 I. C. 997, (Sind) Pandharenath *v.* Govind 32 Bom. 59. Sec. 10 Bom. L. R. 210.

estate in it. (1) But in Bombay, the movables, like the immovables, pass to the next heirs of the husband on her death, both under the Mayukha and the Mitakshara, and cannot be seized by her creditors. (2) In a recent case in Bombay, it has been held that as regards movables (the property in that case being life insurance money) bequeathed by the husband without express words making them over to her absolutely, it is to be presumed, as in the case of other property, that his intention was to give to her merely a widow's estate and that thus the husband's heirs take at her death. (3) It has also been held that, under the Mayukha, as well as under the Mitakshara that the widow has no testamentary power of disposition over movables. (4) In Bombay, in districts where the Mitakshara prevails, it has been held that the widow has only a limited interest in movables. (5)

Who take the estate at the widow's death

From the nature of the peculiar estate called the widow's estate created by the decisions of our Courts, it follows and it has been held that those persons, who would be heirs of her husband at her death, inherit both the moveable and the immovable property after her, under all the Schools of law. (6) These persons are called reversioners.

(1) Suressur Misser *v.* Mohesh Ram, 31 I A. 983 20 C. W. N. 142.

(2) Harilal *v.* Pranvalavdas, 16 Bom. 229. Bai Jamna *v.* Bhai Sankara, 16 Bom. 233. Gadhadar Nath *v.* Chandra Bhagabai, 17 Bom. 690 F. B.

(3) Bhikaji Suryaji *v.* Dattatraya, 2 Bom L. R. 888

(4) Chaman Lal *v.* Gonesh, 28 Bomb. 457.

(5) Paddhwanath *v.* Govind 32 Bomb. 59.

(6) Bhugwandeen *v.* Myna Baee, 11 Moore 487. Gadadhar *v.* Chandrabhaga, 17 Bom. 690.

Rights of Co-widows.

It has also been held, that when there are several widows or daughters, they inherit jointly, with a right of survivorship among themselves, and though a partition as among themselves does not affect their right of survivorship,* (1) they can make a partition among themselves, subject to that limitation. (2) One of two widows, it has been held, can alienate her own share and the purchaser can enforce partition against the other widow, but such alienation cannot bind the surviving widow, and the partition should be effected in such a way as would not be detrimental to the future interests of the reversioner. (3) It has been held in Madras that by an agreement co-widows may put an end to their rights of survivorship, so that a surviving widow may have no right to recover property alienated by her deceased co-widow. (4) It is difficult however, to reconcile this decision with the

* In this connection should be considered the following passage of the Mitakshara which was not translated by Colebrooke, **एकवचनञ्च जातिभिप्रायेण अतश्चवक्ष्येत् सजातीया विजातीयाश्च यथांशं विभज्य धनंगृह्णन्ति**

The passage has been translated by Babu Golap Chandra Sircar thus: The singular number (or the true lawfully wedded wife) has been used to imply the class, hence if there be more wives than one whether of the same caste or different castes, they shall take the property dividing the same according to their shares. I have translated the passage slight differently. See Vol. 2, p. 148.

(1) Kattama Natchiar *v.* The Raja of Shivagunga, 9 Moore 539. Horinarayan Jog *v.* Vitai Naru Bhosle, 31 Bom. 560. Bhugwandeen Dabey *v.* Myna Baee, 11 Moore 487. Amrito Lal Bose *v.* Rajani Kant, 2 I. A. 113. *Contra* Kathaparumal *v.* Venkabai, 2 Mad 194

(2) Durga Dat *v.* Gita, 33 All. 443. See 31 Bomb 560, 2 I. A. 113, 9 Mon. 539, Subbammal, *v* Krishna 22 I. C. 399.

(3) Janaki Nath *v.* Mathura, 9 Cal. 580 F. B Dalkoer *v* Pambaskoe, 8 C. W N. Gajapati Nilmoni *v* Gajpati, 4 I. A. 212. Ram Piyari Villalchand 7 All. 114.–See 12 All. 51 P C., 16 Mad. 1 P. C. Kola Naikeni *v* Muthyammal, 11 I. C. 76. Muthu Pillay *v.* Chakrapani, 16 I. C. 205.

(4) Ramakkal *v.* Ramasami, 9 Mad. L. J. 101.

rule that rights to property cannot be in abeyance. The question remains to whom does the inheritance go on the death of the widow who has not got more than a life-interest. In a recent case the Calcutta High Court sustained a mortgage of her share for necessity by a widow, who had partitioned with her co-widow, as against the reversioners and expressed their approval of a decision of the Madras High Court (1) that there may be a valid partition not only of the right to possession but also of title. (2)

Mortgage or sale by one widow.

The Privy Council held that a mortgage by one of two co-widows without the consent of the other, though the debt was contracted for the benefit of the estate, could not bind the other widow after the death of the mortgagor. (3) It has been held in Madras that a widow can dispose of her own life interest in the share of her husband's property without the consent of her co-widow. (4)

Partition among daughters.

It has been held in some cases that daughters may by agreement sever their joint interest and alienate and may partition their interest like widows and also avoid the right of survivorship *inter se.* (5) But a mere definition of shares

(1) Thakurmani Sing *v.* Dai Rani Koeri, 33 Cal. 1079. See Ramakkal *v.* Ramasami, 22 Mad 522. See however, Sree Gojapathi *v.* Maharani, 16 Mad 1. P. C.

(2) Kalleyan Sundram Pellai *v.* Subba Moopanar, 14 Mad. I. J. 139. See Sundar *v.* Parbati, 12 All. 51 P. C.

(3) See Gajapati Radhamani *v.* Maharam, 16 Mad. 1.

(4) Vadali Mamedigadu *v* Kotepalle, 26 Mad. 334.

(5) Rammakkal *v.* Rama Sami, 22 Mad. 522. Gomathi *v.* Kupputhayi, 14 Mad. L. J. 175. Kailash Chunder Chuckerberty *v.* Kashi Chunder, 24 Cal. 339. Sudalai Ammal *v.* Gomati, 16 I. C., 428 22 Mad. L. J. 355 Subbammal *v* Krishna Aiyar, 22 I. C. 399, Balil Bai *v.* Tanu Bai, 24 I. C. 809 (Nagpore).

obviously cannot have such effect and an express agreement between the sisters renouncing the right of survivorship can alone avoid the effect of the law. (1) In the latest case on the question the Allahabad High Court has held that when three sisters made an arrangement by which their sons, instead of themselves, were recorded as owners of their respective shares and the share of one of them was sold up, the surviving sisters or their sons who were parties to the arrangement could not set aside the sale though possibly other reversioners might. (2)

Oral partition allowable.

There may be oral partition between widows but when it is intended to operate as a release of the life-interest of each there must be a registered deed. (3)

Powers of management and granting leases.

The widow has full power of dealing with property as a prudent manager and further has absolute right of disposing of the income. (4) She has the right of incurring expenses for repairs of buildings (5) and effectual cultivation of lands, (6) of giving ordinary leases to tenants, of entering into contracts (7) and of doing other things necessary for the management and preservation of the property. (8) It has been held that she can give a quarrying lease and that there is no authority for holding that "she cannot open new mines or cut down timber or that if she

(1) Kedar Nath *v.* Ramani Dasi, 7 I. C. 884.
(2) Baldeo Prasad *v.* Bhajwanti, 33 I. C. 259.
(3) Lachummal *v.* Gengammal, 7 I. C. 858.
(4) Govind Moni *v.* Sham Lal Basak Suth, F. B. Rep. 164.
(5) Hurry Mohun *v.* Gonesh, 10 Cal. 823 F. B.
(6) Koer Oodey Sing *v.* Phool Chand, 5 N. W. R. 179.
(7) Hurry Mohun *v.* Gonesh, 10 Cal. 823 F. B.
(8) Sankar Nath. *v.* Bejoy Gopal, 13 C. W. N. 201.

does so, she must account for the proceeds." (1) It has also been held that she can grant a permanent lease, if it is for the benefit of the estate. (2) But the decision is open to doubt having regard to a recent Privy Council decision. (3)

The doctrine of necessity has been held in some cases to be merged in that of benefit. (4) But it has been held that a limited owner is not entitled to incur debts for an object, such as the building of a house, which may be beneficial but which in its character is risky or speculative. (5)

A widow can carry on an ancestral business and reversioners are liable for debts properly incurred by her in connection with the business and an alienation made by her for the purpose, if dictated by necessity, is binding on the reversioners as her position is analogous to that of the manager of a joint family. (6)

A widow can recover debts due to the estate of her husband and can redeem a mortgage, without the consent of the next reversioner. (7)

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(1) Subbareddi *v.* Chengalamma, 22 Mad. 126.

(2) Dayamani *v.* Srinibash, 33 Cal. 842

(3) Abhiram *v.* Shyama, 39 Cal 100. Harikissen Bhagut *v.* Bajrang Sahai, 13 C. W. N. 544. Krista Chandra *v.* Ratan, 20 C. W. N., 645

(4) South Indian Export Co. *v.* V. G. Subbeer 29 I. C. 457, Vemba *v.* Srinibash, 17 I. C. 60.

(5) Bhojaraja *v.* Adatalli, 10 Mad. L. T. 179 12 I. C. 123. Sec. 20, C. W. N.

(6) Sakrabai *v.* Magan Lal, 26 Bomb. 206. H E. Stevens *v.* Janki Balhab, 22 I. C. 304, Brojonath *v* Jogeswar, 9 Cal. L. J 353 The South Indian Export Co *v.* T N. Viswina, 15 Mad L. J. 323 24 I. C. 394, Radhakissen *v.* Janki, All. W. N. (1907) 155.

(7) Dalsing *v.* Bakshesh, 19 I. C. 8.

Payment of decrees &c. how far valid necessity.

The payment of a rent decree is a valid necessity, when it will affect the interest of the reversioners (1), but not when co-sharers are suing the tenant-for-life. (2) It has been held that even where a Hindu widow failed to pay her share of the Government revenue, the reversionary heirs could not be made liable after her death in a contribution suit. (3)

It has been recently held that the expenses of a suit for recovering property, sold for arrears of Roadcess are not legal necessity though it was observed, it would be otherwise if the money was used for stopping the sale (4). It is difficult to appreciate the difference. Money spent for defending the widow's title or recovering property lost, even on account of negligence, is money spent for legal necessity. (5)

Expenses for litigation.

Expenses incurred in litigation for protecting the estate or for defending the widow's own life-estate in her husband's property or for defending herself against a criminal charge may constitute a valid charge on it. (6) But a widow or a daughter has the power of borrowing only a moderate sum necessary for such litigation. (7) A decree for costs in a suit brought for recovering property belonging

(1) Srimohan Jha *v.* Brij Behary, 36 Cal. 753.

(2) Broja Lal *v.* Jiban Krishna, 26 Cal 285.

(3) Upendra Lal Mukerjee *v.* Girindra Nath Mukerjee, 25 Cal. 565.

(4) Srimohun *v* Brij Behary, 36 Cal. 753. Shekait Hossin *v* Nasi Koer, 19 Cal. 788, Mahanund *v.* Bani, 24 Cal. 27. Rupram *v.* Iswar, 6 C. W. N. 302.

(5) 26 Bom 206 F. B., 10 Cal. 830 F. B., 31 All. 497 P. C.

(6) Karimuddin *v.* Gobind, 31 All. 497 P. C. Amjad Ali *v.* Moniram, 12 Cal. 52. Grose *v* Amritamoyee Dasi, 12 W. R., A. O. J. 13. Nobin *v.* Khirode, 6 C. W. N. 648. Debi Dayal *v.* Bhai Pertab, 31 Cal. 441.

(7) 6 Cal. L. J. 490.

to her husband's estate could be executed after her death against the reversioners. (1) The Allahabad High Court has held, that "it does not lie within her province to enter upon speculative litigation, however much the motive may be to benefit the estate." (2) A widow cannot also give her husband's property as security for the costs of an appeal to the Privy Council in a suit brought by her husband. (3)

The widow can pay barred debts of her husband and even make an alienation for the purpose but she cannot pay debts repudiated by him in his lifetime. (4) She can even sell property to pay the debts of her husband and an actual demand by the creditor is not necessary to justify her action. (5) But she can do so only in the *bonâ fide* discharge of her duty of paying her husband's debts and not by making such payment an excuse for getting money. (6)

It has been held in Allahabad that an acknowledgment of a debt by a widow does not save limitation as against the reversioners. (7) It is however, difficult to see why an acknowledgment of a valid debt by the widow, who represents the estate and who can renew it, will not be good against the reversioners.

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(1) Ram Kishore *v.* Kalikant, 6 Cal. 479.

(2) Indar Kur *v.* Lalta Prosad, 4 All. 542

(3) Phoolkoer *v.* Dabee Prosad, 12 W. R. 187

(4) Bhagabat *v.* Nevratty, 39 Bomb. 113. Chimanji Govind *v.* Dinkar, 11 Bomb. 320.

(5) Kondappa *v.* Subba, 13 Mad. 189, Muthukrishna *v.* Amma 9 I. C. 803, 9 Mad. L. J. 313.

(6) Muddusami *v.* Bhaskara, 30 I. C. 353, 29 Mad. L. J. 357.

(7) Shib Shankar *v.* Somi Rao, 31 All. 33.

Widow's powers of alienation.

Now let us proceed to the law about the powers of the widow and other female owners having limited interest to alienate the estate. She is entitled to do so for legal necessity.

What is legal necessity.

Let us proceed to consider what has been considered legal necessity. She is entitled to sell or mortgage the property for her own maintenance, even if she be a married daughter, except where the next reversioner is willing to maintain her. (1) The debts of the husband or of the father or the son, as it may be, from whom she inherited, even if they be time-barred may constitute valid legal necessity. (2) She can make alienations for defraying the funeral ceremonies of her husband (3) and for the marriage of her daughter and granddaughter and other "girls who are members of the family" (4) and for giving a marriage portion to them and also for expenses of betrothal. (5) The Patna High Court has held that the expenses of the marriage of a daughter's daughter are not legal necessity. (6) The High Court of Calcutta have gone the length of holding that where an unchaste widow lives under the protection of another

Valid necessity.

(1) Gudimetta *v.* Bollozu, 16 I. C. 139. Sadashiv *v.* Dhakubai, 8 Bomb. 450. Bawa Tekchand *v.* Musmut Gopal Devi, 13 I. C. 482 (future, maintenance is good necessity).

(2) Bhagwant Sing *v.* Daulat Sing, 21 I.C. 757. See 11 Bomb. 320 13 Mad. 189.

(3) Bhugwandeen Dobey *v.* Myna Baee, 11 Moore 487. The Collector of Masulipatam *v.* Cavely Vencata, 1 P. C. R. 476. Narasinha *v.* Vencatadri, 8 Mad. 290.

(4) Chumun Lal *v.* Lalla Gunput, 16 W. R. 52. Muteeram *v.* Gopal, 20 W. R. 187.

(5) Preagnarain *v.* Ajudhia, 7 Sel. Rep. 602. Ram Coomar *v.* Ichamoyee, 6 Cal. 36. Debidyal *v.* Bhanpertap, 31 Cal. 442. See 22 Mad. 113. Ganpati *v.* Tulsiram, 36 Bom. 88. Bawa Tekchand *v.* Musmut Gopal Devi, 13 I. C. 482 (Punj.).

(6) Musammut Narambati *v.* Ramdhari, 34 I. C. 27. See 28 Cal. 288,

man, she is still entitled to alienate her husband's estate for her own maintenance. (1) There is no case whether the maintenance of the husband's family is a legal necessity. It would be so under the law of the Rishis. The Vivada Tandava says it is.

Sraddha.

As regards Sraddha, it has been held that an alienation by a widow for defraying the expense of the husband's mother's Sraddha was good. (2) The expenses of the Sraddha of the mother by a daughter, who takes after her death, is a valid necessity. (3)

Pilgrimages.

The expenses of a pilgrimage to Gya for Gya-Sraddha constitute a valid necessity (4), but not those of a pilgrimage to Benares (5), or other place, unless it is indispensable for the spiritual benefit of the husband, such as carrying his ashes to the Ganges. (6) In Bombay and Madras, it has been held that the expenses of pilgrimage to places like Pandharpore may constitute legal necessity as oblations to the deceased husband are offered in those sacred places. (7) But expenses of feasting Brahmins on returing from pilgrimage, except from Gya, are not legal necessity. (8)

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(1) Amjad Ali *v.* Moniram, 12 Cal. 52.

(2) Chowdhury Junmejoy *v.* Rasmoyee, 10 W. R. 309.

(3) Srimohun *v.* Brij Behary, 36 Cal. 753. Contra 7. W. R. 146.

(4) Muteeram *v.* Gopal, 20 W. R. 189. Muhamad Ashruff *v.* Brijessary, 19 W. R. 426. The Collector of Masulipatam *v.* Cavaly Vencata, 8 Moore 529. Denonath Ghosh *v.* Hreshikesh, 24 I. C. 670. Rukhma *v.* Kumanrao, (1889) 3 C. P. L. R. 74.

(5) Haro Mohun *v.* Sreemutty Alokmony, 1 W. R. 252. Rama *v.* Ranga, 8 Mad. 552. Shambu *v.* Shankar Das, 76 Punj. R. 1885, Deno *v.* Hrishekesh, 24 I. C. 670.

(6) Nanak Sing *v.* Sant Sing, 19 Punjab W. R. 1907.

(7) Ganpat *v.* Tulsiram, 36 Bomb. 88. See 34 Mad. 288.

(8) Makhal Lal *v.* Gayan Sing, 33 All. 255, Deno Nath *v.* Hrishikesh, 24 I. C., 670.

Power of making gifts and alienations.

It has been held that a widow or a daughter can make an alienation of a small portion of the property for the spiritual welfare of her husband or father. (1) But she has no power to make any alienation for religious or charitable acts, such as building of temples or digging of tanks, for her own spiritual benefit. (2)

The Smriti Chandrika, on the authority of Vrihaspati, says that the wife has a right to the husband's property of a dependent character, which becomes independent ownership on his death and she can therefore perform religious and charitable works, like digging of tanks, not only for the spiritual benefit of her husband but also of her own self. This view has recently found favour in the Bombay High Court as being consistent with the observations of the Privy Council that a widow has to lead the life of ascetic privation and hence the law gives her a power of disposition for religious or charitable purposes, which is denied to her for other purposes. (3) It is to be hoped that this reasonable rule will be adopted in the other provinces. In the most recent cases on the question in Calcutta, it has been held that the widow's powers of disposition for religious and charitable purposes are greater than those for temporal purposes, as such acts benefit the deceased husband

(1) Lakshminarayan *v.* Dasu, 11 Mad. 238, Ram Kawal Sing *v.* Ram Kishore, 22 Cal. 506. Collector of Muslipatam *v.* Cavaly Vencata, 8 Moore 550. See 34 Mad. 288 7. W. R. 146.

(2) Rama *v.* Ranga, 8 Mad. 552, Ranjit *v.* Mahomed, 21 W. R. 49. Puran Bai *v.* Jainarayan, 4 All. 482. See 34 Mad. 288, 34 I. C. 277.

(3) Ganpat *v.* Tulsi, 36 Bomb. 88. Collector of Muslipatam *v.* Cavaly, 8 Moore 529.

also, and small alienations in gifts to Brahmins or gods and for digging of tanks and building temples have been upheld. (1)

It has been held that a widow can make a valid gift of immovable property, not unreasonable in extent, to a daughter or son-in-law on the occasion of marriage, (2) but not after the consumnation ceremony. (3) A widow can also make a valid gift of a reasonable portion of the immovable property of her husband to the daughter on the occasion of her Gowna or Dwiragamun ceremony. Such a gift may be regarded as dowry deferred and its extent should be determined with reference to what would be the unmarried daughter's share under Mitakshara, Ch. I, sec. 7. (4)

A daughter's position is different from that of a widow, inasmuch as she is not bound to lead an ascetic life and to use the profits for the benefit of the family of her father. Her children are entitled to the benefit of the estate. (5) It has been held that she can make an alienation for her own maintenance (6) and also to meet the expenses of the marriage of her own daughter. (7)

The Allahabad Court (8) differing from the Calcutta High Court (9) and agreeing with the

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(1) Lachmi *v.* Jugmohun, 18 Cal. L. J. 632, Khub Lal *v.* Ajodhya, 22 Cal. L J. 433, 31 I. C. 433, Ram Chandra *v* Gunga Govind, 4 Moore. See Select Rep. 147 (1816), 1 Borr. 394 (1812), 405, 559.

(2) Ramasami *v.* Vengidusami, 22 Mad. 113.

(3) Kalavagunta *v.* Sreeman Gudimalla, 29 I. C. 269.

(4) Churamun Sahu *v.* Gopi Sahu, 37 Cal. 1.

(5) Gudimetla *v.* Bollaza, 23 Mad. L. J. 233

(6) Sadasiva *v.* Dhakubai, 5 Bomb. 450.

(7) Rustom *v.* Moti, 18 All. 474.

(8) Dhiraj Singh *v.* Mangaram, 19. All. 300. See 18 All. 471.

(9) Ram Coomar *v.* Ichamoyee, 6 Cal. 36.

Simple debts by the widow whether a charge.

Madras Court has held that a creditor cannot follow the property after the death of the widow, where there is no charge, even when the debt was incurred for legal necessity. (1) It has also been held that a simple debt by a widow for legal necessity can only bind her life-interest. (2) It is necessary that all the High Courts should come to an agreement on this matter. A debt for legal necessity is certainly binding on the reversioner and a sale in execution of a decree for such debt should have the same effect as a sale in execution of a decree for a simple debt for necessity against the manager of a joint family. The Privy Council have held that in such matters the position of the widow and the manager of the joint family are analogous. (3)

Power over income, accumulations and in increments.

In an early case the Privy Council held that all accumulations were the absolute property of the widow. (4) Later cases of the same tribunal have however, modified the rule and it has been held that accumulations, if the widow does not dispose of them during her lifetime, cannot be considerd as her Stridhana, and must follow the parent state, and any gift or disposition of them by will, is not good, nor any alienation, except for the need or the personal benefit of the widow. (5)

(1) Ramasami *v.* Selattammal, 4 Mad. 375.

(2) Kullu *v.* Faiaz Ali, 30 All. 394. Giribala *v.* Srinath, 12 Cal. W. N. 769. (3) 6 Cal. 843, P. C.

(4) Soorjeemony *v.* Denobundho, 9 Moore 123.

(5) Mitta Kanth *v.* Neerunjun, 22 W. R. 437 P. C. Bagbutti *v.* Bholanath, 2 I. A 256. Isridutt Koer *v.* Hansbutti, 10 Cal. 324, P. C. Anunda Chundra *v.* Nilmony, 9 Cal 758 Chandrabali *v.* Brodie, 9 W. R. 584. Grose *v.* Amritomoyee, 4 B. L. R. 1. Musmut Gonda Koer *v.* Kooer Oodey Sing, 14 B. L. R. 159. Nihal Khan *v.* Hurcharan Lal, 1 Agra H. C. 219. Poddomony *v.* Dwarka Nath, 25 W. R. 335. Bhagabati Koer *v.* Sohodra Koer, 13 I. C. 691. Kulachandra *v.* Bama Sundari, 41 Cal. 870.

In a recent case, (1) the Privy Council made the following observations: "*prima-facie*, it is the intention of the widow to keep the estate of the husband as an entire estate, and that property purchased would, *prima-facie*, be intended to be accretions to that estate. There may be, no doubt, circumstances which would show that the widow had no such intention, and she intended to appropriate the savings in another way." But they affirmed the principles laid down in the case of Isri Dutt, which are certainly in accordance with the Smritis, but are inconsistent with the position given to the widow by the decisions of our Courts. It does seem strange that, though the widow's interest is greater than a life-interest, and though she has absolute right of disposal of income, if she purchases any property with the savings and makes a gift of it or disposes of it by will, such disposition may be bad.

In a recent case, Sir Comer Petheram, C.J., held, that the case of Sheolochun Sing *v* Saheb Sing would indicate, that if there is no presumption of the savings having been accumulated by the widow for the benefit of the next heirs, "then you must look to the facts of the case to ascertain what the intention of the parties was, with regard to the fund." (2) In another case the Calcutta High Court has held that a purchaser from a widow must show that the property was acquired from savings and the

(1) Sheolochun Sing *v.* Saheb Sing, 14 Cal. 387. P. C. See 20 Cal. 433.

(2) Sowdaminy Dassi *v.* Broughton, 16 Cal. 574.

widow intended to treat it separately and distinctly from inherited property, the presumption being that all lands so acquired are accretions. (1) But when a widow leaves debts, it has been held by the Bombay High Court, that the creditors can seize the unexpended balance of the income and her unrealized outstandings, as there is "an entire absence of any outward sign of an intention, and points to the conclusion that the balace was held in suspense by the widow at the time of her death." (2)

When does a widow take absolute estate accretions.

In Madras, Allahabad and Oude, it has been recently held that in the "absence of an indication of her intention to the contrary, the widow must be presumed to retain" absolute control over the investment of the income of her deceased husband's property and the burden of disproving the contrary cannot be placed on a purchaser from her. (3) Acquisitions from savings of maintenance have been held to be the widow's Stridhana. (4) An assignment of a decree for mesne profits by the widow has been upheld on the ground that there was nothing to show that it was regarded as an accretion to the husband's estate. (5) Arrears of rent have however been held to be not her Stridhan. (6)

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(1) Ramanund *v.* Ramsaran, 7 I. C. 27. See 20 Cal. 433, 41 Cal. 870.

(2) Rivet Carnac *v.* Jivi Bibi, 10 Bom. 478.

(3) Akanna *v.* Vinkayya, 25 Mad. 351. App. 28 Mad. See 31 Mad. 34 15 I. C. 22 Kasinath *v.* Uthumana, 12 Mad. L. J. I. Jokha Sing *v.* Musammat Dulari, 11 Oude C. 310. K. S. Wahib Abkhar *v.* Tori Ram, 35 All. 551. Lal Bahadur *v.* Sheo Narain, 22 I. C. 702.

(4) Pethasari *v.* Sendamarai, 8 I. C. 385.

(5) Saminatha *v.* Manikkasami, 22 Mad. 356.

(6) Hurry Mohan *v.* Gonesh, 10 Cal. 830, See 13 I C. 691, 41 Cal. 870.

Alienations when binding and burden of proof.

What is legal necessity has already been discussed. Now the question is when does a charge or a conveyance by a widow bind the reversion. The Privy Council in the latest case on the matter says: "One who claims under a conveyance from a woman with the usual limited interest which a woman takes and who seeks to enforce that title against reversioners, is always subject to the burden of proving not only the genuineness of his conveyance but the full comprehension by the limited owner of the nature of the alienation she was making, and also that the alienation was justified by necessity, or at least that the alienee did all that was reasonable to satisfy himself of the existence of such necessity." (1) In case of a Purdanashin lady the strongest proof will be required that she fully understood the nature of the transaction and that no advantage was taken of her. (2) The same rule applies when the estate consists of a business. (3)

Position of the creditor and his duty.

The position of the widow in respect to creditors is similar to that of the manager of a joint Mitakshara family and the guardian of a minor (4), and "the lender is bound to inquire into the necessities for the loan, and to satisfy himself, as well as he can, with reference to the

(1) Bhagwat Dayal Singh *v.* Debi Dayal Sahu, 34 Cal. 428. Lala Amarnath *v.* Ram Achan Kuer, 19 I. A. 196. Srimohun *v.* Brij Behary, 36 Cal. 753.

(2) Grose *v.* Amritomoyee, 12 W. R. O. 13 192, Sudisht Lall *v.* Musmut Sheobarat, 7 Cal. 245 P. C Sadasu *v.* Dhaku Bai, 5 Bom. 470. Tikaram *v.* The Deputy Commissioner of Barabankai, 26 Cal 707 P. C.

(3) Sham Sunder *v.* Achan Kumar, 21 All. 72 P. C.

(4) Kameswar *v.* Run Bahadur, 6 Cal. 843, P. C. Sankar Nath *v.* Bejoy Gopal, 13 C. W. N. 201. In a recent case however, the Privy Council made a distinction and held that the position of a wife or widow is not quite analogous to that of a manager of a joint family (21 All. 72.)

parties with whom he is dealing, that she is acting in the particular instance for the benefit of the estate; but if he does so inquire and acts honestly, the real existence of an alleged and reasonably credited necessity is not a condition precedent to the validity of his charge, and under such circumstances he is not bound to see to the application of the money." (1)

These principles have been held applicable to the case of widows and modified to the extent that only when the creditor had the control and application of the money, he was bound to see that it was properly applied. (2) There has however, been no case in which it has been held that where as a matter of fact there was no necessity and the lender was misled, he could bind the reversion, because he made proper inquiries. Such a case can hardly arise. In case of proper inquiry, there will be a strong presumption in favour of the existence of necessity, which it would be for the reversioner conclusively to disprove. (3) Indeed, it has been held that when the reversioner brought a suit to set aside a sale 50 years after the conveyance and 9 years after the death of the widow, considering the unreasonableness of expecting direct evidence of legal necessity after so great a lapse of time, the adequacy of the consideration given by the purchasers, the due registration and publication of deeds containing a recital of legal necessity,

(1) Hanooman Prosad Pandey *v.* Babooe Munraj Kumaree, 6 Moore, 393, 18 W. R. 81.

(2) Hurro Nath Rai Chowdhury and Randher Sing, 18 Cal. 311 P. C. Amarnath *v.* Achan Kuar, 14 All. 420.

(3) Chowdhury Herasutollah *v.* Brojo Soondur Roy, 18 W. R 77.

the proved knowledge of the alienations at the time by the reversioner at the time and his conduct and silence for so long a period, entitled the purchaser to a strong presumption in his favour that he purchased the estate after due inquiry and after satisfying himself in good faith of the existence of legal necessity and in such a case the recitals in the deed as to necessity might be acted upon. (1).

But mere lapse of time or the death of the original mortgage which may in some cases prove acquiescence and thus the validity of the transaction does not always relieve the successor of the mortgagee of the burden of proving that the money was advanced for legal necessity. Mere general proof that the husband died deeply indebted, without precise evidence connecting the mortgage with any one of them is not sufficient and the court cannot infer from such facts that the money was borrowed for a legitimate purpose and there can be no presumption against the reversioner, if he does not prove that the income was sufficient to meet the liabilities on it, for he is not bound to do so. (2)

Necessity for unusual interest to be proved.

It has also been held that, even if there be necessity for a loan, the creditor must prove the necessity for interest at an unusual rate or for compound interest and when the rate is unconscionable, it will always be reduced. (3)

(1) 18 W. R. 177. Ram Chad *v.* Ali Akbar, 35 I. C. 534, 90 Punj. W. R. 1916. P. Kanthu *v.* Dasa Upadhaya, 26 I. C. 376.

(2) Maheshar Baksh Singh *v.* Ratan Sing, 23 Cal. 766. P. C. Maharaja Sir Raveneswar Prosad Singh *v.* Tekait Chundi Prosad, 38 Cal. 721. Manokarani Debi *v.* Haripado Mitter, 18 C. W. N. 780 P. C.

(3) Hurro Nath Rai *v.* Randhir Sing, 18 Cal. 311 P. C. See 35 Cal. 428, 6 C. L. J. 490.

Mere recital of the existence of nocessity in a mortgage bond is not sufficient and is not evidence by itself of the fact and in order to substantiate the allegation there must some evidence *aliunde*. (1) The burden of proof to show necessity is on the alienee (2), but the amount of proof varies according to the circumstances of cases. The existence of a debt justifying an alienation once proved will be presumed to continue until it is shown to have been satisfied. (3)

When the income is large and the widow unnecessarily incurs a debt or when it is proved that the widow had sufficient funds to pay the debts and to meet all necessary expenses, the reversioner cannot be bound. (4)

Fair price.

In the case of a purchaser, he is bound to show, that he paid a fair price for the property. (5)

Sale of larger portion than necessary.

When the sale is of a larger portion of the property than is necessary, the transaction is not necessarily void, and the amount that was necessary would be charged on the estate. (6) Where a sale is partially void on account of want of legal necessity, the whole sale has been set aside, the purchaser accounting for the

(1) Ajudhia *v.* Ram Sumer, 31 All. 454. Amar Nath *v.* Achan, 14 All 482. Lala Brij *v* Musmut, Indra Kunwar, 18 C. W. N. 694 P. C.

(2) Srimohun Jha *v.* Brj Behary Misser, 36 Cal. 753; see 23 I. C. 715 P. C.

(3) Lala Amar Nath *v.* Achan Kunwar, 14 All. 420 P. C. Sham Sunder *v.* Achan Kunwar, 21 All. 71 P. C.

(4) Lal Byjnath *v.* Bishun, 19 W. R. 80. Srinivasha *v.* Panchanatha, 3 Mad. L. J. 323. Roy Makhun Lal *v.* Stewart, 18 W R. 121. See 6 Cal. L. J. 490, 3 Mad. L. J. 323.

(5) Jadu Nath Sircar *v.* Sonamony Dossi, Wyman's Rep. 70.

(6) Tekait Doorga Prosad *v.* Tekaitin Doorga Koonwar, 4 Cal. 190 P. C. Maulavi Mahomed Shumsool *v.* Sewukram, 2 I. A. 7. Phoolchand *v.* Raghubans, 9 W. R. 105. Moteeram *v.* Gopal Sahu, 11 B. L. R. 416,

mesne profits and the sums expended for legal necessity being set off against them. (1) It has been held in certain cases, that the reversioner can recover the property by paying to the purchaser with interest the amount that was actually necessary. (2) Indeed where a person seeks to avoid an alienation by a qualified owner, he can only do so on reimbursement of any advantage of which he had the benefit. (3)

Reimbursement.

When the purchaser paid off a prior valid mortgage, the reversioner can get possession only on reimbursement of the amount. (4) In recent cases it has been held that when the purchaser acted honestly and paid a fair price and that the major portion of the consideration was for legal necessity and it was not shown that it was feasible to meet the necessity by selling a smaller portion of the property, the sale must stand good. (5)

There is a difference of opinion whether a declaratory can be made at the instance of a reversioner that an alienation is partly for necessity and partly without necessity (6). Such

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(1) Harikissen Bhagat *v.* Bajrang Sahu, 13 Cal. W. N. 549. Affd. 42 Cal. 876. Nalasawmy *v.* Ramaswami, 13 I. C. 450.

(2) Subramanya *v.* Pounn Sami, 8 Mad. 92 Baldeo Sing *v.* Janki, W. N. All. 1903, p. 57. Roy Radha Kissen *v.* Nauratan, 6 Cal. L. J. 490. Nathasawmi *v.* Ramaswami, 13 I. C. 450. Gayadin *v.* Triloke Nath 22 I. C. 261 (Oude).

(3) Roy Radhakissen *v.* Nauratan, 6 Cal. L. J. 490. See also 6 Cal. L. J. 462.

(4) Mahomed Shamsool *v.* Sewakram, 22 W. R. 409 P. C. See however, Ghansami *v.* Teg Bahadur, 13 I. C. 191.

(5) Avasarala *v.* Ravu 33 I. C. 833, (1916). Mad. W. N. 163, Kalagoira Ramanna *v.* Kalagora, 23 I. C. 776. Felaram Roy *v.* Bagallanund, 14 C. W. N. 895, Kannu Chetty *v.* Amirthammal, 26 I. C. 418, I. Mad. L. W. 877.

(6) Phoolchand *v.* Raghubans, 9 W. R. 107, Muttaram *v.* Gopaul, 20 W. R. 187, Gobind *v.* Baldeo, 25 All. 630. Sangam *v.* Draupadi, 31 Mad. 158 (suit dismissed) Contra Garekepati *v* Garekepati, 24 Mad. L. J. 62, 17 I. C. 508. Vettin *v.* Mendu, 4 I. C. 792.

a declaration is discretionary and should not be ordinarily made, (1) especially when the plaint makes no offer of reimbursement.

Extent of the interest sold in sales against the widow.

A very difficult case often arises as to the nature of the interest sold by the widow by private conveyance or sold in execution of decree against her. In regard to private alienations, when there is no mention of legal necessity, the proper construction of the conveyance would be that the life-interest of the widow was sold. But when the widow sells for legal necessity even though she purports to convey her own existing right the absolute interest may pass (2). In regard to sales in execution, it has sometimes been held that when the sale proclamation specially mentions that only the interest of the widow is to be sold and that 'besides the right and interest of the judgment-debtor, the right and interest of no other person will be sold, nothing more than the widow's interest passes by the sale. (3) It has been pointed out that under the Civil Procedure Code the sale proclamation and the sale certificate must be in respect of the interest of the debtor only. The proper test therefore is that the character of the debt determines the character of the interest sold. (4) If the debt is binding on the reversion, the sale also would be binding on it. But even when the debt is for legal necessity,

(1) Denonath *v.* Hrishikesh, 24 I. C. 67.

(2) Thakur Vajanji *v.* Chandra Bibi, 19 C. W. N. 893 P. C.

(3) Baijun Dobey *v.* Brij Bhukhun Avasti, 2 I. A. 275 1, Cal. 134.

(4) Roy Radhakissen *v.* Nawratan, 6 Cal. L. J. 510.

Harikrissen Bhagut *v.* Bajrang Sahai, 13 C. W. N. 545. Maharaja Sir Ravaneswar *v.* Tekait Chandi, 38 Cal. 721. Khogendra *v.* Santi, 22 I. C. 669.

the nature of the suit and the sale proclamation may be such as to exclude the reversionary interest from sale. It is therefore necessary to consider the plaint (1) and the sale proclamation, as well as the bond, to determine what was intended to be sold. If the bond and the plaint mention legal necessity for the debt, the extent of the interest sold will depend on the character of the necessity and its sufficiency.(2)

Plaint and decree, what should they contain.

In a recent case, the Calcutta High Court laid down that when it is intended to bind the estate the plaint should clearly indicate it and the reversioners may be made parties, though that is not essential. (3) It has also been laid down that it is the duty of a judge in passing a decree against a widow to state specially whether it is against her personally or as representing the estate. (4)

When the decree is against the widow in her representive character, the entire property will pass. (5) In regard to debts of her husband, she must be regarded as "a substantial representative of the inheritance by analogy to the position of the tenant-in-tail under the English System." In respect of debts incurred by her, it must be shown that they were for necessity and "that the estate was affected

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(1) Jotindra Mohun Tagore *v.* Jugul Kishore, 7 Cal. 357.

(2) General Manager of the Raj Durbhanga *v.* Ramaput Sing, 14 Moore 605. Baijun Dobey *v.* Brij Bhukhun, 2 I. A. 275 Nogendra Chunder Ghose *v.* Kaminee Dassee, 11 Moore 240. Partab Narayan *v.* Triloke, 11 I. A. 197. Abdul Aziz *v* Appayasami, 31 I. A. 1. Ishan Chunder *v.* Buksh Ali Marshall, 614 Bisto Behary *v.* Byjnath, 16 W. R. 49. Aukhoy Kumar *v.* Bejoy Chand, 29 Cal. 118.

(3) Punit Narayun *v.* Raj Kumari, 22 Cal. L. J. 400.

(4) Kiranbala *v.* Kalicharan, 32 I. C. 587. Ram Kishore Chuckerbutty *v.* Kally Kant, 6 Cal. 479.

(5) Jotindra Mohun Tagore *v.* Jugol Kishore, 10 Cal. 985.

by the decree and what in reality was sold was the entire inheritance." (1)

When does personal decree against widow bind the estate.

It was broadly held in certain cases that a personal decree against the widow can never bind the reversioner, even though the transaction be for legal necessity. (2) But more recent cases have established that the rule is not always good. It has been held that even when a decree for mesne profits is passed personally against a widow, it might bind the reversioner, if the widow acted in good faith and for the benefit of the estate in the belief that the property in dispute belonged to the estate. (3) But when her action was not such as a prudent manager would be justified in taking, the reversioner cannot be bound. (4) The rule enunciated in the decisions mentioned in the preceding paragraph is clear and a reasonable one and should be applied in such cases. (5)

Decrees for rent maintenance and mesne profits.

It has been held that a sale in execution of a decree for arrears of maintenance payable after the husband's death cannot bind the reversioner. (6)

The sale even of a part of the estate for arrears of revenue, or of a tenure in execution

(1) Srinath Das *v.* Haripado Mitter, 3 C. W. N. 637. Nogendra Chandra *v.* Sreemutty Kamini, 11 Moore 267. Roy Radhakissen *v.* Nawratan, 6 Cal. L J. 490.

(2) Giribala *v.* Srinath, 12 C. W. N. 769. Kallu *v.* Faigaz Ali, 30 All. 394.

(3) Lalji Sahu *v.* Kurki Jha, 35 Cal. 691. Kiran Bala *v.* Kali Charan, 32 I. C. 588. Ram Kishore *v.* Kali Kant, 6 Cal. 479. Premomoye *v.* Preonath, 23 Cal. 636. Marudaga *v.* Savadi, 21 Mad. L. J. 320.

(4) Harmanoji *v.* Ram Prosad, 6. Cal. L. J. 462. Brojo Nath *v.* Jogeswar, 6 Cal. L. J. 346. Sadasiva *v.* Ram Gobind, 11 I. C. 90.

(5) Trilochun Hazra *v.* Bakkeswar, 15 Cal. L. J. 423, distinguishing Prosonno Kumar Nundi *v.* Umedar Raja, 13 C. W. N. 353.

(6) Mohima *v.* Ram Kishore, 23 W. R. 474. Baijan Dobey *v.* Brij Bhookhun, 1 Cal. 133. Jiban Krishna *v.* Brojo Lal Sen, 30 I. A. 81.

of a decree for its own rent against the widow will bind the reversion. (1) It has been held that sales in execution of decrees for rent not under Sec. 165 of the Tenancy Act (2) or for contribution (3) pass only the life-estate, but it is difficult to see why if the debt is binding on the estate, the reversion would not be bound.

Alienation without necessity—its consequences.

An alienation without necessity passes the life-interest of the widow and ceases to be binding on the reversioner on her death or on her re-marriage. (4) A subsequent surrender however by her of her interest in favour of the reversioners will not affect the alienation previously made. (5) Even a subsequent adoption it has been held in Madras will not defeat the rights of such alienee. (6) In Bombay it has been held that an adopted son can during the life time of the widow recover property alienated by her even though she did so 12 years before adoption. (7) The Madras rule seems more consistent with equity and justice. When a widow made a gift in favour of her daughter, who predeceased her mother, her heir was entitled to hold the property during the life-time of the widow. (8)

(1) Sreenath Roy *v.* Rutun Mala, S. D A (1859), p 421. Gopal *v.* Gour, 6 W. R 52. Anundmoyee *v.* Mohendra, 15 W. R. 264. Teluck *v.* Muddan, 15 B. L. R. 143 (Note). Jiban Krishna *v.* Brojo Lal, 30 Cal. 550 P. C. Ashutosh *v.* Aukhoy, 34 I. C. 581 Sakrabhai *v.* Madan Lal, 26 Bomb. 206. Contra Bireswar *v.* Kamal, 17 C. W N. 337.

(2) Mohima Chandra *v.* Ramkisore, 23 W. R. 174. Krishna Govind *v.* Hem Chandra, 16 Cal. 511. Anundmoyee *v.* Mohendra, 15 W. R. 264. (3) Mahomed Sadut Ali *v.* Hara Sundari, 16 C. W. N. 1070.

(4) Mussumut Govinda *v.* Sham Lal Suth, F B. R. 165. Muttu Naiken *v.* Srinivasha, 8 I. C. 269. Netai *v.* Srinath, 8 Cal. L. J. 542. Rama *v.* Tripura, 33 Bomb. 688.

(5) Kottapalle *v.* Jatavallabhulla, 32 I. C. 813 30 Mad. L. J. 260. Segu *v.* Sareddi, I. C. 101. Surgaram *v* Kalyanasundaram, 26 I. C. 130

(6) Sreeramulu *v.* Kristamma, 26 Mad. 143. App. 32 I. C. 813. Narayun *v.* Bajee, 19 Bomb. 889.

(7) Ramkrishna *v.* Tripurabai, 33 Bomb 88. Lakshman *v.* Radhabai, 11 Bomb. 609. Moro *v.* Baloji, 19 Bomb. 809.

(8) Rupram *v.* Rewati, 32 All. 582. See 25 I. C. 502.

Compensation for improvement whether allowable.

As a rule an alienee or mortgagee without necessity from the widow cannot claim compensation for improvements or repair, or remove buildings erected by him against the reversioner. (1) In a recent case, the Privy Council while affirming the general rule allowed some compensation on the ground that the improvements had raised the value of the properties. (2) But to such compensation, the alienee cannot be entitled to, when he did not act *bonâ fide* within the meaning of Section 51 of the Transfer of Property Act. (3)

Alienation without necessity voidable.

An alienation without necessity is not void but only voidable at the instance of the next reversioner, and the Crown can be such next reversioner. (4) A lease without necessity is also only voidable and acceptance by the reversioner of rent deposited by the holder of a permanent lease by the widow has been held by the Privy Council to be confirmation by him of the permanent lease. (5) A suit to set aside a lease granted by a widow is barred unless brought within 3 years of her death. (6)

Acceptance of rent.

Limitation.

But a suit for the recovery of immovable property sold or made a gift of without justifying cause may be brought within 12 years after the death of the widow. (7)

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(1) Vybhukbun *v.* Dayaram, 9 Bomb. L. R. 1181. Nangappa Gounden *v.* Perama, 32 Mad. 330.

(2) Kedar Nath *v.* Mathumal, 40 Cal 555 P. C.

(3) Muddusami *v.* Bhaskara, 30 I. C. 853, 29 Mad. L. J. 357.

(4) Durga Kunwar *v.* Matrumal, 11 All. L. J. 317, F. B. Vushun *v.* Shekh, 3 I. C. 78. Bejay Gopal *v.* Krishna, 34 Cal. 329 P. C. Deo *v.* Udit, 23 I. C. 298.

(5) Madhuscdun Sing *v.* Rooke, 24 I. A. 164, 25 Cal. 1. Sadai Naik *v.* Serai Naik, 28 Cal. 532.

(6) Bejoy Gopal Mukerji *v.* Nilratan Mukerji, 30 Cal. 990.

(7) Harihar *v.* Dasrathi, 33 Cal. 257. Rukmabai *v.* Keshab, 31 Bomb. 1.

Alienation with consent of reversioners—decisions of the High Courts.

Early in the last century the Supreme Court of Calcutta and the Sudder Dewany Adalut decided that a widow can relinquish her interest and accelerate the interest of the next reversioner. (1) The logical consequence of this position that a widow with the consent of the next reversioner can convey an absolute title to a stranger has since then been accepted as good law in India, (2) and so considered by the Privy Council. (3) In consequence of a doubt cast on this rule, (4) the matter was considered by a Full Bench of the Calcutta High Court in 1886 and on the ground that "it would be unjust to disturb a rule of law settled by a long course of decisions" it was held that an alienation by a widow with or without necessity, with the consent of the next reversioners at the time will pass an absolute estate as against those who may be, the reversionary heirs at the widow's death. (5) It was also held in later cases that the rule would apply to gifts, mortgages and other partial alienations. (6)

Calcutta decisions.

However, recently a Full Bench of the Calcutta High Court reviewed the matter, and laid down the following principles: An alienation by a widow is binding on the reversioners in the following cases: (1) when it is shown

(1) Jadomoney Dabee *v* Saroda Prosonno Mookerji, 1 Boul. 120. Beer Inder Narain Chowdree *v*. Sutbhoma Debbea 6 Sel. Rep. 36.

(2) Mohunt Kissen Geer *v*. Busgeet Roy, 14 W. R. 399. Rajbullubh Sen *v*. Oomesh, 5 Cal 44. Trelochun *v*. Umesh, 7 Cal L. R 571.

(3) Srimati Rani Debea *v*. Gokul, 13 Moore. 228. Kooer Golab Sing *v*. Rao Kurun, 10 B. L. R. 1.

(4) Ram Chunder Poddar *v*. Hari Das Sen, 9 Cal. 463.

(5) Nobokishore Sarma *v*. Hari Nath Sarma, 10 Cal. 1102.

(6) Pulin *v*. Bolai, 35 Cal. 938. Hem Chunder *v*. Surnomoyee, 22 Cal. 354. See 12 C. W. N. 9.

that "there was legal necessity"; (2) when it is shown that "the alienee, after reasonable enquiry as to the necessity, acted honestly in the belief that it existed." (3) "Where there is such consent of the next heirs as would raise a presumption, either of the existence of necessity, or reasonable enquiry and honest belief as to its existence," which may be rebutted by more cogent proof. (4) These principles would apply to partial alienations and mortgages. (5) But in case of the alienation of the entire estate, the consent of the entire body of reversioners would make it valid without proof of any of the circumstances mentioned above on the ground of relinquishment. (1)

In Calcutta there has been great reluctance in giving full effect to the decision. A Divisional Bench of that Court has interpreted the Full Bench decision and held that a mortgage of the entire estate with the consent of all the next reversioners was binding as raising a presumption of legal necessity which could only be rebutted by good proof. (2) Another Divisional Bench has held that an alienation of the entire estate with the consent of the next reversioner was good and a relinquishment by a widow of her estate to the next reversioner by an agreement by which she received some lands for life, the remainder vesting partly in the reversioner and partly in her daughters absolutely was a valid transaction. (3) It has also been held that

(1) Debi Prosad Chowdhury *v.* Golap Bhagat, 40 Cal. 721. Goperswar *v.* Gopini, 21 I. C. 200

(2) Shiba Sundari *v.* Ram Gobind, 25 I. C. 90, following Pulin *v.* Bolai, 35 Cal. 939

(3) Suressur Messer *v.* Mohesh Ram, 20 C. W. N. 142. Contra Rajkishore *v.* Durga, 29 All. 71.

when a mortgage had been executed by the widow and the next reversioner and property sold in execution of the decree obtained on it, and the consenting reversioner predeceased the widow, the sale was binding on the next reversioner irrespective of the question of necessity. (1)

It has been held in Calcutta that a widow cannot dispose of the estate by will with the concurrence of the next reversioner. (2)

It is supposed that the consent of the next reversioner would validate an alienation of the entire estate on the ground of surrender or relinquishment of the widow's interest and acceleration of the reversioner's interest. Mr. Justice Kumara Swami Sastri in his judgment in the Full Bench case mentioned below, observes that this principle "finds no express support from the Smritis," but has been evolved by the decisions of the Calcutta High Court. Another principle relied upon in the recent Calcutta decision is that the reversioners at the death of the husband have no vested interest and their heirs may not be reversioners, if they die before the widow. This principle also "finds no support from the Smritis." The following passage of the Dayabhaga was cited as supporting it: "Therefore those persons who are exhibited in a passage above cited as the next heirs on failure of prior claimants, shall, in like manner as they would have succeeded, if the widow's right had never taken effect, equally

(1) Ganga Narayun Dutt *v.* Indra Narayun Saha, 35 I. C. 48. Bhagirathi *v.* Baleswar, 41 Cal. 69, Rameswar Mandal *v.* Probhabati 19 Cal. L J. 313. Contra Mohima Chunder *v.* Gouri Nath, 2 C. W N. 162.

(2) Durga *v.* Ram, 21 I. C. 591, Chaman Lal *v.* Gonesh, 28 Bom. 457. See 21 I. C. 714.

succeed to the residue of the estate remaining after her use of it upon the death of the widow" (Ch. XI, Sec 1, p. 59). This passage of the Dayabhaga is clear authority for the proposition that those persons would succeed, who would have been heirs at the husband's death, if there were no widow. The law on the subject is thus entirely based on the decisions of our courts, and long established clear definite rules should not be disturbed or made uncertain on the strength of supposed principles of Hindu Law not to be found in the Smritis or the commentaries.

Madras decisions.

A Full Bench of the Madras High Court reviewed the question in 1914 (1) The Chief Justice Sir Edward Wallis agreeing with the judgment of Sadasiva Aiyar J., which was under appeal, held that even in case of a gift or of partial alienation, the effect of the consent of the next reversioner was conclusive and not merely evidence of propriety. The other two Judges however, agreed with the principles laid down in the recent Calcutta Full Bench, but agreed with the Chief Justice in the result, on the ground that the reversioners were estopped. It is immaterial whether an alienation is upheld on the broader ground or on the ground of estoppel.

In Madras, a transfer by a widow of her estate to the next reversioner subject to his maintaining her has been held to be ineffectual as being onerous. (2) In a later case it was

(1) Nacheappa Gounden v. Rangasami Gounden, 26 I. C. 757, 28 Mad. L. J. 1. See Malla Suriyah v Suran Naidu, 32 I C. 993. Marudamathu v. Srinivasha, 21 Mad. 128. Rangappa v. Kamti, 31 Mad. 366 F. B. Muthu Vera v. Vethelunga, 32 Mad. 206.

(2) Seeramalu v. Andalammal, 30 Mad. 145.

held that when the widow conveyed the whole of the estate to the next reversioner on condition that the latter would transfer a large portion to her own brother, the transaction was good. (1) All these decisions were considered by the recent Full Bench in 1914. In a later case on the question, the Full Bench decision was construed and it was held that a partial alienation, if assented to by the next reversioner, was valid, the latter being estopped. (2)

Allahabad decisions.

In Allahabad, a Full Bench laid down that a gift by a widow with the consent of the next reversioner did not pass an absolute estate. (3) The decision was expressly overruled by the Privy Council. (4) Since then the Allahabad High Court has followed the old Calcutta rule. It has been held that a sale to three out of four reversioners assented to by the fourth passed the entire estate. (5) In a later case, it has been held that a gift concurred in by the next reversioners passed an absolute estate. (6)

Bombay decisions.

In Bombay a consistent rule has always been followed. It is well-established there that an alienation even of a portion of the estate with the concurrence of the next male reversioner passes an absolute estate. (7) In the latest case on the questions there, it has been

(1) Challa Subbiah *v.* Palure, 31 Mad. 446. Karetti *v.* Kareti, 24 Mad. L. J. 533, 17 I. C. 487

(2) Venca̅tasubber *v.* Muttusami 31 I. C. 487, 18 Mad. L. J. 521. Vencatanarayun *v.* Subbamnmal, 38 Mad. 406. Krishna Ayyar *v.* Samba Siva, 24 I. C. 477.

(3) Ram Phul *v.* Tulakumary, 6 All. 116 F. B. Duli Sing *v.* Sunder Sing, 14 All. 377. (4) Bajrangi Sing *v.* Munokarnika, 30 All 1 P. C.

(5) Surajbale Sing *v* Birthu, 24 I. C. 482.

(6) Jamna Kunwari *v* Ramhit Sing, 28 I. C. 496. Contra Bakhtwar *v.* Bhagwana, 32 All. 176. Umrao *v.* Sheo, 24 I. C. 435.

(7) Venayek Vithal *v.* Govind, 25 Bom. 129, Pelu Appa *v.* Babaji, 34 Bomb. 105.

held that a subsequent ratification by the next reversion would have the same effect. (1)

Punjab, Sind & Oude decisions.

In the Punjab, the rule was well established that an alienation with the consent of the next reversioner was valid. (2) Recently however, the courts of the Punjab, Oude and Sind have followed the recent Calcutta Full Bench decision. (3)

Much ingenuity has been displayed in numerous decisions. In some, it has been held that in a partial alienation, including a mortgage and a gift, the consent of the next reversioner is not enough. (4) Again in some cases it has been held that alienations for consideration are good, but alienations conditional upon maintenance and the like are invalid against the reversioners, though made with their consent. (5) We have also seen that in a larger number of cases such distinctions have not been made and they are not supported by the consistent rule laid down by the Privy Council in cases mentioned below.

Decisions of the Privy Council on the question.

In 1847 the Privy Council laid down the rule that a gift by a widow with the concurrence of the next reversioner passed the entire estate. (6) In a later case it was held that "according to Hindu Law the widow can accelerate the estate of the law by conveying absolutely and destroying her life-interest." (7) In a more recent case, it was held by the same tribunal that an alienation without necessity by

(1) Mallik Sahib *v.* Mallikarjunappa, 38 Bomb. 228.

(2) Tekchand *v.* Mussumut Gopal Devi, 46 Punj. R. 1912, 13 I. C. 482 (3) Devidas *v* Raja Khan, 9 Punj R 1914. 24 I. C. 417. Raja Indra *v.* Babu Chandrika, 11 I. C. 676. Jiwat Mal *v.* Musummat Jianbai, 35 I C. 681, 10 Sind., L. R. 49. (4) 31 Mad. 366, 32 All. 176, 16 I. C. 493

(5) 30 Mad. 145, 29 All. 71.

(6) Sremati Rani Debea *v.* Rani Koodlata, 4 Moore. 292.

(7) Behary Lall *v.* Madho Lall, 19 Cal., 236 P. C.

the widow passed the entire estate, even if the next reversioner consent to it subsequently. (1) It was a case of partial alienation, as pointed out by C. J. Wallis in the Full Bench decision mentioned before. It further expressly overruled the Full Bench decision of the Allahabad Court, in which it was held that the consent of the next reversioner would be ineffectual in case of a gift. (2) In the most recent cases before it, subsequent to the Calcutta and Madras Full Bench decisions, the Privy Council have again laid down the law in unmistakable terms. Their Lordships have made no distinction between partial and complete alienations, between mortgages and sales, and observed that the law was well-settled that "to be valid as against the reversioners, a charge created by a Hindu widow or an alienation effected by her can be supported by proof that such debt was contracted or such alienation was made for valid and legal necessity," and went on further to lay down that "the requirements of the law however, may be fulfilled by proving the consent or concurrence of the reversioners to or in the transaction." (3) The law is thus well-settled and it is hoped that it will not again be made uncertain by nice distinctions.

Law well-settled.

We have already seen that the consent of one of several reversioners cannot have the effect of conferring an absolute estate. (4) But he himself may be estopped from questioning the alienation, especially if he relinquished

Consent of some reversioners.

(1) Bajrangi Sing v. Manokarnika Baksh Sing, 30 All. 1, 35 I. A. 1.
(2) Ram Phul v. Tulakumary, 6 All., 116 F. B.
(3) Harekissen Bhagat v. Kashi Parshad, 42 Cal. 876.
(4) Radha Syam v. Joyram, 17 Cal. 899. Rajlakhee v. Gokul, 13 Moore 228.

his interest in favour of the widow. (1) When some of the reversioners consent, it is strong evidence of the existence of necessity and if *bonâ fide* and given for just reasons may have the same effect as the consent of all. (2)

Consent of female reversioners.

The consent of the next reversioner, if she is a female with a limited interest, cannot have the effect of conveying an absolute interest. (3) But it may pass the joint-interest of the widow and of such female reversioner. (4)

Whether son of the person consenting estopped.

It has been held that when the next reversioner consents, not only he but his son also is estopped. (5) But it has also been held that when the son claims under a title different from that of the father, he is not estopped. (6)

Effect of attestation by reversioner.

Attestation by the next reversioner has been held in some cases to raise a strong presumption of consent, which unless rebutted may have the effect of passing the entire estate. (7) But it is not always sufficient to raise such a presumption, (8) the question of assent being a question of fact to be determined with reference to the circumstances of each case. (9) Even acting as Ammoktear for the widow in

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(1) Kalikisore *v.* Abdul Karim, 2 Cal. W.N. 132. Kuttamoody *v.* Kuttamoody, 16 J. C. 710. Harikissen *v.* Bajrung, 13 C. W. N. 544.

(2) Bajrangi Sing *v.* Manokarnika, 30 All. 35 Gengappa Naidu *v.* Subba, 6 Mad. L. J. 260.

(3) Bepin Behary *v.* Durga, 35 Cal. 1086. Varjiram *v.* Ghelji, 5 Bom. 563. (4) Ramdhun *v.* Mathura, 10 All. 407. Bhupal *v.* Luchman, 11 All. 253. (5) Venayek Vithal *v.* Govind, 25 Bomb 129.

(6) Lala Rup Narain *v.* Gopal Devi, 36 Cal. 780 P. C. Bahadur *v.* Mohim, 24 All. 94. Mussumut Gowri *v.* Gopal, 25 I. C. 503.

(7) Ismail Jolaha *v.* Jagannath, 19 I. C. 255. Mohur Misser *v.* Bishumbhar, All. W. N. (1888) 294.

(8) Chunder *v.* Bhagwat, 3 C. W. N. 207. Ram Chunder *v.* Hari Das, 9 Cal. 463. Harkissen *v.* Brijrung, 42 Cal. 876 P. C. Ram Chunder *v.* Ataronani, 13 C. W. N 931.

(9) Laxtipati *v.* Rambodhi, 13 All. L. J. 681. Deno Nath *v.* Koteswar, 21 I. C. 267. Mewa *v* Bhogobutty, 5 I. C.

executing a sale has not been held in one case to be sufficient. (1)

Reversionary interest inalienable.

The widow as we have seen before can surrender her interest in favour of the next male reversioners. The interest of a reversioner however cannot be alienated under section 6 of the Transfer of Property Act nor can it be attached in execution, (2) and by conveying his own interest to the widow, it has been held, the reversioner cannot confer upon her an absolute estate. (3)

Whether reversioner can give the widow absolute estate.

Decree against widow how far binding on reversioner.

A decree fairly obtained against a widow binds the reversioners. (4) But such a decree operates as *res judicata* only in respect of questions tried in the suit. (5)

Exparte, compromise and consent decrees against widow how far binding.

It has been held that a decree against a widow to bind the reversioner must have been passed after full contest and a compromise decree or a decree upon an arbitration award can have no higher footing than an alienation by a widow, (6) or a contract by her. (7) Indeed it has been broadly laid down that a compromise decree or a consent decree is never binding on the reversioner. (8) It is

(1) Jewan Sing *v.* Misri Lal, 18 All. 146 P. C.

(2) Sham Sunder *v.* Achan Koer, 25 I. A. 183. Nundkishore *v.* Kaneeram, 29 Cal 355. Kakarlapudi *v.* Raja, 28 Mad. L. J. 650.

(3) Narasama *v.* Madhava, 13 Mad. L. J. 323. Meenatchee *v.* Rajam, 11 Mad. L. J. 335.

(4) Shivagunga Case, 9 Moore. 608. Parbat *v.* Triloki, 11 I. A. 207. Hari Nath *v.* Mathura, 21 Cal. 8 P. C. Govind *v.* Mohiney, 23 I. C. 931. Shyam Lal *v.* Rameswari, 23 Cal. L. J. 62.

(5) Roy Radha Kissen *v.* Nauratan, 6 Cal. L. J. 462, Banseram *v.* Secretary, 20 C. W. N. 338.

(6) Jeeram *v.* Veerbai, 5 Bomb. L. R. 885. Brammoyee *v.* Kristo Mohun, 2 Cal. 224. Nagendra *v.* Sreemutty, 11 Moore. 267. Ram Sarup *v.* Ram Deo, 29 All. 239. Mahadeo *v.* Baldeo, 30 All. 75. Imrit *v.* Roop, 6 Cal L. R. 76 P. C.

(7) Bhogoraju *v.* Adappalli, 35. Mad. 560. Kambinayani *v.* Kambinayani, 35 Mad. 473.

(8) Rajlakshmi *v.* Katyayani 38 Cal. 639.

difficult to see why a widow should not be competent to enter into a compromise or to refer a dispute to arbitration. In the case of the manager of a joint family, it has been held that he has such right and there is no reason why the widow who represents the estate fully should not have such right, as it is settled that she has all the powers of a prudent manager. (1) The Madras and Allahabad High Courts have held that a decree against the widow without fraud or collusion, but without contest or *exparte* may be binding on the reversioners. (2) There is no reason why a widow should be under an obligation to contest a just claim. But in case of an uncontested decree the reversioners should have the right to avoid liability by proving that it was fraudulently obtained and the claim was such as would not be binding against them. The Allahabad Court has held that an arbitration award is binding on the reversioners. (3) It is difficult to appreciate the decisions to the contrary.

Arbitration award binding.

In the most recent case on the question the Madras High Court has held that a compromise does not stand on the same footing as an alienation and it is a *bonâ fide* transaction, no one can re-open it and necessity need not be proved for it. A reversioner can re-open it only by proving that it was not arrived at with due care and caution and was such as showed negligence on the part of the widow. (4)

(1) Dayamani *v.* Srinibash, 33 Cal. 842.

(2) Subrammal *v.* Avudaiyammal, 30 Mad. 3. Lakshminarayan *v.* Kenkayya, 17 Mad. L. J. 160. Gur Nanak *v.* Jar Narayun, 34 All. 385. Rangaswami *v.* Vaidylinga, 33 I. C. 446.

(3) Balukdhari *v.* Ramanund, 14 I. C. 125.

(4) Muthukumarsamy *v.* Subramanier, 33 I. C. 687.

Family settlement by the widow binding.

The Privy Council have held that a compromise by way of a settlement between the several members of the family of their disputes is good and the true test to apply to a transaction as to an alienation is whether the alienee derives his title from the holder of the limited estate, in which case it may or may not be binding, but it is binding when such "compromise is based on the assumption that there was an antecedent title of some kind in the parties and the agreement acknowledges and defines what that title is." (1) In a recent case the Privy Council upheld a compromise between the widow of an adopted son and a daughter of the adoptive father, who questioned the adoption, by which each party got half the property, against the daughters of the adopted son, as a family settlement. (2)

A family arrangement is binding on the reversioner. (3) A family settlement of existing dispute is binding and when by a compromise decree against a widow, her mother-in-law obtained a portion of the property as maintenance, it was held binding on the reversioners. (4) A compromise may be binding on the reversioners, when it is a family settlement in which each party takes a share of the family property by virtue of independent title which is to that extent and by way of compromise admitted by the other parties, even though there

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(1) Khunni Lal *v.* Gobind, 38 I. A. 87, 33 All. 356.

(2) Musammat Hiran Bibi *v.* Mussamat Sahal Bibi, 24 I. C. 309 18 C. W. N., 929. (3) Sankar Nath *v.* Bejoy Gopal, 13 C. W. N. 207.

(4) Anandi *v.* Mahadei, 35 All. 240. See 28 All. 241. Mohendra *v.* Shumsunnisa, 19 C. W. N. 1280 P. C. Contra Rangappa *v.* Kamti, 31 Mad. 166. Sambasiva *v.* Viswam 30 Mad. 336.

were no rights in dispute. (1) When however a party knowing that he had not the right set up by him gets a benefit fraudulently under a family settlement putting an end to disputes, the reversioners it has been held, are not bound. (2)

Decree may be executed against reversioner and its binding character may be tried in execution proceedings.

A decree against a widow may be executed against the reversioners who may be brought on the record after her death in the execution proceedings and the question whether the decree is binding on them may be tried in those proceedings. (3)

Reversioner may continue suit.

A suit brought by a widow may be continued and a decree obtained by her may be executed, after her death, by the reversioner. (4)

Powers of widow having Letters of Administration.

A Hindu widow to whom Letters of Administration are granted by the District Court has still only the powers of a Hindu widow or of the manager of a joint family. (5)

Court can't annex special conditions in decrees obtained by widow.

When a widow obtains a decree declaring her right, the Court has no power to annex to it conditions, such as, that she should not spend the money otherwise than for her maintenance. (6)

When can a reversioner bring a declaratory suit.

Now we go to suits by reversioners. The next reversioner can bring a suit for a declaration that an adoption by the widow is invalid or that an alienation made by her is not binding on him. (7) But he has no cause of action when it is a mere testamentary disposition or when it conveys only the widow's

(1) Upendra Nath *v.* Bindeshri, 22 Cal. L. J. 452. Behari Lal *v.* Dud Husaid, 35 All. 240. Subbamal *v.* Avadiyammal, 30 Mad. 3. Govind *v.* Mohim, 23 I. C. 931. (2) Asharam *v.* Chandicharan, 13 C. W. N. 147.

(3) Lachmi Narayan *v.* Ram Chandra, 4 All. L. J. 117.

(4) Jadubansi Koer *v.* Mahapal, 32 I. C. 104, (distiguishing Balak *v.* Durga, 3 All. 49). Mahadeo *v.* Sheo Karan, 35 All. 481. Rekhai *v.* Sheo, 33 All. 15. (5) Vinayekrao *v.* Vedyashamkar, 9 Bomb. L. R. 407.

(6) Muli *v.* Nanigram, 4 All. L. J. 186.

(7) Isridutt *v.* Hansbatti, 10 Cal. 324 P. C. Prog Dass *v.* Har kissen, 1 All. 503. Lala Rup Narain *v.* Gopal Devi, 36 Cal. 780 P. C. Ihandu *v.* Tarif, 37 All. 45 P. C.

life-interest. (1) A suit merely for a declaration of reversionary right or that a power of adoption is not genuine is not maintainable. (2) But a reversioner has the right to contest the genuineness of a will. (3)

A remote reversioner has no right to bring a declaratory suit, except when the nearer reversioners are in collusion with the widow or by their acts have precluded themselves from interfering. (4) But he may join in the action brought by the next presumptive reversioner. (5) But when the next heir is a female, the nearest presumptive male heir but for her may bring such a suit without proof of collusion. (6)

It has been held that a suit to declare an alienation or an adoption void is not always maintainable, and the granting of the relief being discretionary with the Court, it will not be afforded, unless it appears that lapse of time will render it difficult for the next heir to establish his right. (7) It has also been held that it is no sufficient ground for refusing a declaration that the plaintiff may not succeed for many years or that the property is of a perishable nature. (8)

The question of want of necessity, can only

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(1) Thakurani Jaipal *v.* Bhanga, 8 C. W. N. 465 P. C. Panda Vencamma *v.* Panda 8 I. C. 298.

(2) Sreepada *v.* Sreepado, 2 Mad. W. N. 149, 12 I. C. 176.

(3) Brindabun *v.* Sureswar, 10 Cal. L. J, 203.

(4) Jhanda *v.* Tarif, 37 All. 45 P. C. Rani Anund Kunwar *v.* The Court of Wards, 6 Cal 764 P. C. Bhikaji *v.* Jagannath 10 Bomb. H. C. 35 I. A. 1. Meghram *v.* Rani Khelwan, 33 All. 326.

(5) Venkatanarayun *v.* Subbammal, 38 Mad. 412 P. C.

(6) Balgobind *v* Ramkumar, 6 All 431. Raghupati *v.* Terumalai, 15 Mad. 422. Chedambaram *v.* Nalammal, 33 Mad 410. Lakhipati *v.* Rambodh, 13 All. L. J 816 Tekchand *v.* Goman Sing, 34 I. C. 831 F. B. (Punjab). (7) Srinarayan Mitter *v.* Sreemottee Krishna Sundari, 11 B. L. R. 171 P. C. Tekait Durga Prosad *v* Tekaitni Doorga Kumari, 4 Cal. 190 P. C. Behary Lal *v.* Madho Lal, 21 W. R. 430.

(8) Upendra Narayan *v.* Gopinath, 9 Cal. 817.

be raised by a reversioner and not by a creditor or a superior landlord. (1)

Limitation.

A declaratory suit may be brought within six years from the date of alienation (2) or from the time of collusion. (3)

When the next reversioner after bringing a declaratory suit dies, the reversioner next to him may continue the suit as the suit was brought by the deceased plantiff as representing in his reversionary right the estate of the last male owner. (4) It would follow that a judgment fairly arrived at between the next reversioner and the widow should bind the more remote reversioner. (5)

When a suit for declaring an alienation by a widow as invalid is withdrawn, a subsequent suit for possession is maintainable. (6)

Limitation in case of next reversioners.

It has been held that if one of several joint reversioners is barred, the rest are also barred. (7) The Calcutta and Allahabad Courts have held the contrary, it seems with greater reason. (8) It has been held in Calcutta, Madras and Allahabad that if the next reversioner be barred under Art. 125 from bringing a declaratory suit, his son can bring such a suit after his death. (9) The Bombay High Court however has held that the remoter reversioner

(1) Lala Rup Narain *v* Gopal, 36 Cal. 780 P. C. Krishna *v.* Lakhan, 18 Mad. L. J 275.

(2) Guntupalli *v.* Guntupalli, 18 I. C. 710. Ram Chunder *v.* Kullu, 30 All. 497. Cherivelu *v.* Cherivelu, 29 Mad. 389.

(3) Rani Anund *v.* Court of Wards, 6 Cal. 764 P. C.

(4) Vencatanarayana *v* Sibbammal, 38 Mad. 406 P. C. See 29 Mad. 305, 30 All. 491, 33 Mad 342.

(5) Arunachelam *v.* Vellaya, 15 I. C. 461. (6) Pandillapalli *v.* Yeddula, 31 Mad. L. J. 48, 35 I C. 185. (7) Krishna *v.* Lakshan, 18 Mad. L. J. 275. It cannot be reconciled with 36 Cal. 780 P. C.

(8) Abinash *v.* Harinath, 32 Cal. 71. Bhagwanta *v.* Sukhi, 22 All. 33 F. B. (9) Gazzala *v.* Gazzala, 16 I. C. 839. Govind *v.* Thayamal, 28 Mad 57. Chiruvolu *v.* Chiruvolu, 29 Mad. 309. Abinash *v.* Harinath, 32 Cal 62 Bhagwanta *v.* Suki, 22 All. 33.

must be taken to claim through the immediate reversioner and must be barred in such a case. (1)

The reversioner may sue the widow and a third party, who has dispossessed her for restoration of the property to the widow. (2)

Limitation in suits by reversioner.

In case of dispossession of the widow, formerly it was held that that which bars the widow bars the reversioner, but under the present law that rule is not applicable. A daughter's son or other male reversioner has 12 years from the death of the last of all the female heirs with limited interests, who might have intervened, to sue for possession against an alienee from any of them or against a trespasser. (3) An adopted son has 12 years from the date of his adoption. (4) But the rule will not apply when the dispossession commenced in the lifetime of the last male owner. (5) A reversioner has, under Art. 125, 12 years bring a suit to declare an alienation by a widow invalid but a remote reversioner has only 6 years. (6)

The reversioner has 6 years time under Art. 120 from the death of the widow to recover moveable property. (7)

Adverse title of the widow.

When a widow sets up a title hostile or adverse to and independent of her right as widow,

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(1) Chhaganarain *v.* Bai Motigair, 14 Bom. 512. See 38 Mad. 412 P. C.

(2) Radha Mohun *v.* Ram Dass, 24 W. R. 86.

(3) Srinath *v.* Prosonno, 9 Cal. 934 F. B. Neelkanta *v.* Narayun, 37 I. C. 733, 31 Mad. L. J. 847. Mohima *v.* Gourinath, 2 C. W. N. 162. Amritdhar *v.* Bindesri, 23 All. 448. Runchordas *v.* Parbati, 23 Bom. 251. Teka *v* Shama, 20 All. 42. Bejoy Gopal *v.* Krishna, 24 Cal. 322. Roy Radha Kissen *v.* Nauratan, 6 Cal. L. J. 490. Ramsing *v.* Bhani, 32 I. C. 126. (4) Kancharla *v.* Koganti, 25 I. C. 692, 27 Mad. L. J. 569.

(5) Kumar *v.* Deo, 8 All. 365. Mussumut Indro *v.* Shaikh, 14 W. R. 146. Radha Mohun *v.* Ramdas, 3 B. L. R. 362. Adedeo *v.* Dakharam, 5 All. 532. See 29 All. 239, 5 Bom. L. R. 885, 6 C. L. R. 490. (6) Vencata *v.* Puljaram, 38 I. C. 270. See 38 Mad. 396.

(7) Runchordas *v.* Parbatibai, 3 C. W. N. 621, 23 Bom. 725 P. C. Syed Nuruddin *v.* Syed, 34 Mad. 74.

limitation will run from the time she sets up such title (1) or when she remarries. (2) A mother and a daughter-in-law have been held to be capable of acquiring an absolute title by adverse possession for 12 years (3), but not when they held the property in lieu of maintenance. (4)

The Rights of Female Heirs.

SECTION I.

अर्द्धं वा एष आत्मनो यज्जायेत ।

She (the wife) is born as half of the self.
A text of Veda cited in the Smriti Chandrika.

अपुत्रा शयनं भर्तुः प्रारुयन्ती व्रते स्थिता ।
पत्येव दद्यात्तत्पिण्डं कृत्स्नमंशं लभेत च ॥ बृहस्पतिः ।

A widow who has no male issue, who keeps the bed of her lord unsullied, and who strictly performs the duties of widowhood,* shall alone offer the cake at his obsequies, and succeed to his entire share. Vriddha-Manu.

[विभक्ता भ्रातरो ये स्युः पृथग्दारक्रियाधनाः ।
ते चापुत्रा मृतास्तेषां तत्पत्नी तद्धनमश्नुते ॥]
स्त्रीकृतान्यप्रमाणानि कार्य्याण्यासुर्मनीषिणः ।
विशेषतो गृहक्षेत्रदानाधमनविक्रयाः ॥
नाधिकारी भवेत् स्त्रीणां दानविक्रयकर्मसु ।
यावत् संजीवमाना स्यात्तावद्भोगस्य सा प्रभुः ॥
एतान्येव प्रमाणानि भर्त्रा यद्यनुमन्यते ।
पुत्रः पत्युरभावे च राजा च पतिपुत्रयोः ॥
भर्त्रा प्रीतेन तद्दत्तं स्त्रिये तस्मिन्मृतेऽपि तत् ।
सा यथाकाममश्नीयाद्दद्याद्वा स्थावराद्ऋते ॥

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(1) Kedarnath *v.* Jatindra Nath, 9 Cal. L. J. 236. See 33 All. 312; 24 I. C. 888, 9 Mad. L. J. 233. (2) Nathu *v.* Mussumut Nani, 29 I. C. 612. See 11 Cal. 1108, 22 Cal. 361, 8 I. A 210.

(3) Lucchun Kunwar *v.* Manorath, 22 Cal. 445 P. C. Sham Koer *v.* Dalkoeer, 29 I. A. 132, Gajadhur *v.* Parbati, 9 I. A. 450.

(4) Buramal *v.* Narain Das, 102 Punj. R. 1907.

* These duties are thus specified

व्रतोपवासादिरता ब्रह्मचर्य्ये व्यवस्थिता ।
धर्म्मदानरतानित्यमपुत्रापि दिवं व्रजेत् ॥ बृहस्पतिः ।

Performing religious ceremonies and observing fasts, chaste, virtuous and always making gifts, even a childless widow goes to heaven. Vrihaspati cited in the Smriti Chandrika.

तथा दासकृतं कार्य्यमकृतं परिचक्षते ।
अन्यत्र स्वामिसन्देशान्न दासः प्रभुरात्मनः ॥
पुत्रेष्वपि कृतं कार्य्यं यत्स्यादच्छन्दतः पितुः ।
तदप्यकृतमेवाहुर्दासः पुत्रश्च तत्समौ ॥

नारदः, १।२५-२०

If (1) among such brothers as have come to a division, and are separate in wives, affairs and wealth, one should die without leaving a son, (2) his wife enjoys (3) his wealth.

The sages declare that the transactions of a wife have no validity, especially the gift, hypothecation, or sale of a house or field.

Women (4) are not entitled to bestow gifts or to sell property. It is only while she is living together with her husband's family, that a woman may enjoy (the family property).

Such transactions are valid when they are sanctioned by the husband ; or on failure of husband and son, by the king.

What has been given to a wife by her loving husband, that she may spend or give away as she likes after his death, excepting immovables.

In the same way the transactions of a slave are declared invalid unless they have been sanctioned by his master. A slave is not his own master.

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(1) This verse is not to be found in the Narada Smriti, as published by Dr. Jolly. It does seem out of place where it is, and may be spurious. I have, however, not rejected it as spurious, but placed it where it is placed in the Minor Narada, *i.e.*, after verse 26 (see Narada Smriti, p. 56 and Sacred Books of the East, vol. 33, p. 264). Dr. Jolly says, it is a marginal gloss.

(2) Dr. Jolly has got 'without issue.' It should be 'without son.'

(3) Dr. Jolly has translated भुञ्जीत as 'inherits.' It should be 'enjoys.' She is allowed to enjoy the property till her death, but the property is in the family. See the next text.

(4) Dr. Jolly, following the commentators including Gimutavahana, has translated स्त्रीणां as meaning 'of females generally' including daughters. It is upon this interpretation that the entire law curtailing the rights of females is based. I have printed the verses following and preceding it to show that it cannot mean females generally. The next verse will show that it cannot refer to childless widowed daughters. It refers to wives and widows. It clearly refers to verse 41 Ch. 5, अधनास्त्रय एवैते भार्य्या दास तथा सुतः, *i.e.*, 'the wife, slave and son can have no property ; and thus are not independent.'

If a son has transactioned any business without authorization from his father, it is also declared an invalid transaction. A slave and a son are equal in that respect.

Narada, I. 25 to 30.

आम्नाये स्मृतितन्त्रे च लोकाचारे च सूरिभिः ।
शरीरार्द्धं स्मृता जाया पुण्यापुण्यफले समा ॥
यस्य नोपरता भार्य्या दैहार्द्धं तस्य जीवति ।
जीवत्यर्द्धशरीरेऽर्थं कथमन्यः समाप्नुयात् ॥
सकुल्यैर्विद्यमानैस्तु पितृमातृसनाभिभिः ।
असुतस्य प्रमीतस्य पत्नी तद्भागहारिणी ॥
पूर्व्वं प्रमीताग्निहोत्रं मृते भर्त्तरि तज्जनम् ।
विन्देत् पतिव्रता नारी धर्म्म एष सनातनः ॥
जङ्गमं स्थावरं हैमरूप्यधान्यरसाम्बरम्* ।
आदाय दापयेत् श्राद्धं मासषाण्मासिकादिकम् ॥
पितृव्यगुरुदौहित्रान् भर्त्तुः स्वस्रीयमातुलान् ।
पूजयेत् काव्यपूर्त्ताभ्यां ब्रह्मदानातिथीन्स्त्रियः ॥
यद्विभक्तं धनं किञ्चिदाध्यादिविधिसंस्मृतम् ।
तज्जाया स्थावरं मुक्त्वा लभेत गतभर्त्तृका ॥
दत्तस्यापि कृतेऽप्यंशे न स्त्री स्थावरमर्हति ।
प्रदद्यादेवभरे पिण्डं चेच्छां वा यदृच्छया ॥

बृहस्पतिः, २५ । ४६-५५

In the revealed texts (of the Veda) by the traditional law (of the Smritis) and on popular usage, the wife is declared to be half the body (of her husband), equally sharing the outcome of good and evil acts.

Of him whose wife is not dead, half his body survives. How should any one else take the property, while half (his) body lives?

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* रथाम्बरम् is the reading in the Ratnakara. It seems to be the correct reading. This is a text of Prajapati, according to the Saraswati-Vilasa.

Although kinsmen (Sakulyas), although his father and mother, although uterine brothers be living, the wife of him who dies without leaving male issue shall succeed to his share.

A wife deceased before (her husband) takes away his consecrated fire (Agnihotra ;) but if the husband dies before the wife, she takes his property, if she is faithful to him. This is an eternal law.

After having received all the movable and immovable property, the gold, base metals and grain, liquids and wearing apparel, she shall cause his monthly, six monthly and annual Sraddhas to be performed.

Let her propitiate with funeral oblations and pious liberality, her husband's paternal uncles, *gurus*, * daughter's sons, sister's sons, and maternal uncles ; also aged or helpless persons, guests and women (belonging to the family).

The husband being separated (in interests from his former coparceners) his wife shall take after his death a pledge and whatever else is recognised as property, excepting the immovable wealth.†

A wife though preserving her character and though partition have been made, is unworthy to obtain immovable property. Food or a portion of the arable land shall be given to her at will (for her support).

Vrihaspati, XXV. 46-55.

भर्तृदायं ऋते पत्नी विन्यसेत् स्त्री यथेष्टतः ।
विद्यमाने तु संरक्षेत् चपयेत्तत्कुक्षिऽन्यथा ॥
अपुत्रा शयनं भर्तुः पालयन्ती व्रते स्थिता ।
भुञ्जीतामरणात् क्षान्ता दायादाऊर्ध्वमाप्नुयुः ॥

कात्यायनहारीतवचनम् ।

The husband's *daya* (heritage or gift), on the husband's death, the wife may dispose of, according to her pleasure, but

* Guru probably means father-in-law and persons standing in the position of parents to the husband. See the interpretation of the Dayabhaga of the word Guru.

† The Mayukha and the Chandrika say that this applies when she has got no daughters. If she has got any daughter, she takes the immoveable property also.

when he is living, she shall preserve it. When there is no wealth derived from the husband, she should pass her time in her husband's family.

Let the sonless widow preserving unsullied the bed of her lord, and steadfast in her continence * enjoy with moderation the property until her death. After her let the heirs take it.

Katyayana, cited by Madhava and other commentators, but Lukshmidhara attributes the text to Harita.

स्वर्याते स्वामिनि स्त्री तु ग्रासाच्छादनभागिनी ।
अविभक्तं धनांशं तु प्राप्नोति मरणान्तिकम् ॥

स्मृतिचन्द्रिकासरस्वतीविलासधृत कात्यायनवचनम् ।

On the husband dying the wife is entitled to food and raiment. But † she gets (enjoys) the share of the undivided wealth till her death.‡

Text of Katyayana, cited in the Smriti-Chandrika and the Saraswati-Vilasa.

भोक्तुमर्हति क्लृप्तांशं गुरुश्वश्रूरता ।
न कुर्याद्यदि शुश्रूषां चेलपिण्डे नियोजयेत् ॥

सरस्वतीविलासधृत कात्यायनवचनम् ।

She who is delighted in the service of her father-in-law and the like, is entitled to enjoy her appointed share ; if she will not do them service, raiment and food only shall be appointed.

Katyana, cited in the Saraswati Vilasa.

मृते भर्तरि भर्तुर्यं लभते कुलपालिका ।
यावज्जीवन्नहि स्वाम्यं दानाधमनविक्रये ॥

प्रजापति कात्यायनौ ।

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* The Dayabhaga reads गुरौस्थिता which means according to it "abiding with her father-in-law and others of the husband's family." Colebrooke translates it as "abiding with her venerable protectors." See the analogous text of Vriddha-Manu, p. 282.

† According to the Smriti-Chandrika, 'but' should be 'or,' and says that the first hemistich refers to those who are not Patnis but purchased wives.

‡ The Rev. Mr. Foulkes translates it as follows : 'But when her lord has gone to heaven a woman is partaker of food and raiments ; but she receives the undivided man's share of the property up to the time of her death.'

When her husband is dead, she, who maintains the family,* shall receive her husband's share ; her proprietorship is for her lifetime, in gift, mortgage, and sale. †

Prajapati, cited in the Saraswati-Vilasa, but according to the Vira-Mitrodaya, it is a text of Katyayana.

पत्नी भर्त्तुर्धनहरी या स्यादव्यभिचारिणी ।

मदनपारिजातधृतकात्यायनवचनम् ।

The widow, if chaste, takes the wealth of the husband.

Katyayana, cited in the Madana-Parijata.

प्रेतायां पुत्रिकायान्तु न भर्त्ता द्रव्यमर्हति ।

अपुत्रायां कुमार्य्यां वा स्वस्रा यार्द्धं तदन्वया ॥

पैठीनसिः ।

On the death of an appointed daughter, her husband does not inherit her property. If she leaves no issue, it shall be taken by an unmarried sister (or by another).‡

Paithinasi, cited in the Dayabhaga.

प्रेतायाः पुत्रिकायास्तु न भर्त्ता द्रव्यमर्हत्यपुत्रायाः ।

दायभागधृतशङ्खलिखितवचनम् ।

On the Putrika dying sonless, her husband does not succeed to her wealth.

Sankha-Likhita, cited in the Dayabhaga)

द्विसाहस्रः परीदायः स्त्रियै देयो धनस्य तु ।

यच्च भर्त्ता धनं दत्तं सा यथाकाममाप्नुयात् ॥

व्यासः ।

Of the inheritance, up to two thousand *panas* (of gold should be given to the widow. Whatever wealth had been

* According to some authorities कुलपालिका means chaste.

† According to the Saraswati-Vilasa this refers to a widow without a daughter.

‡ There are various readings of this text. The Vivada-Ratnakara reads after कुमार्य्यां स्वस्रा वा तद्धनम् and interprets it to mean that "failing the maiden daughter it is taken by the sister." There is also a variation of this reading too, which runs अपुत्रायाः कुमार्य्याः &c. This text and the following text are probably one text.

given to her by the husband that also she gets according to her pleasure.

Vyasa, cited by Haradatta and other Commentators.

लोकान्तरस्थं भर्त्तारमात्मानञ्च वरानने ।
तारयत्युभयं नारी नित्यं धर्म्मपरायणा ॥

रघुनन्दनधृतव्यासवचनम् ।

The woman always leading a virtuous life, saves both herself and her deceased husband, O, beautiful lady.

Vyasa, cited by Raghunandana.

द्विसाहस्री परीदायः स्त्रियै देयोधनस्यवै
भर्त्ता तस्य धनं दत्तं यथार्हं भोक्तुमर्हति
स्त्रीणां स्वपतिदायस्तु उपभोगफलः स्मृतः ।
नापहारं स्त्रियः कुर्युः पतिदायात् कथञ्चन ॥

महाभारते अनुशासनिके ४७ अ, २३, २४ ।

Of the wealth up to 2000 *panas* of gold should be given to the wife. That is given by the husband and she is entitled to enjoy it.

For women the heritage of their husbands is pronounced applicable to use. Let not women on any account make waste of their husband's wealth.

Mahabharata Anushashnika 47 Ch. 23, 24.

यद् यदिष्टतमं लोके यच्चात्पत्युः समीहितम् ।
तत्तद्गुणवते देयं पतिप्रीणनकाम्यया ॥*

पारिजातधृतव्यासवचनम् ।

Whatever is most desired by men, whatever was desired by the husband, should be given to qualified persons, with the object of pleasing the husband.

A text cited in the Parijata.

* यदयदिष्टतमं लोके यदस्य दयितंगृहे
तत्तद्गुणवते देयं तदेवाक्षयमिच्छता ॥

महाभारते अनुशासनिके ५७ अ ।

*The text cited in the Pariata is probably based on the above.

SECTION II

Rights of Sisters, Mothers, Step-mothers and Grandmothers.

A married daughter had no rights to property, except when she was a Putrika, in her father's family. A daughter on marriage was entitled to receive ornaments and other Stridhana, as well as some property as her portion, according to the means of the members of the family. If, however, there was a partition before her marriage, the lawgivers enacted that a share should be set apart for her. In more ancient times, among Aryan races, the unmarried daughter was considered in every respect equal to a son and hence we find that she was entitled to a share equal to that of a son. In later times, it was laid down that "she was entitled to one-fourth share but when the estate was inconsiderable, she was entitled to share equally with the son." The Smriti Chandrika, the Dayabhaga, the Mithila writers and most of the modern Nibandhas, which have attained an authority superior to the Rishis and to the more ancient and learned commentators, have, ignorant of the history of the law and of the text mentioned above, laid down that an unmarried sister is to be given only so much as is sufficient for her marriage, and the full fourth is to be given 'only when the estate is inconsiderable.' This view has found favour with our Courts.* But it is

Sister's share.

* Damoodar *v.* Senabati, 8 Cal. 537. The decision was under the Mithila Law. It was admitted that the law under the Mitakshara was different.

clearly wrong. It is opposed to all the lawgivers, to Vijnaneswara, Medhatithi and other ancient commentators, and all Hindus should remember the injunction of Manu that if they do not give a fourth share to their unmarried sisters, they become *patita* or outcast. It has been clearly forgotten that not only should a daughter's marriage expenses be paid but she should be provided with a portion which is to be her Stridhana. It is indeed very strange that the law laid down by Vijnaneswara should be set aside, on account of the opinion of less-informed writers. It is to be hoped, that the Courts of India will yet declare the law to be, as is laid down in the Smritis.

Step-sister's share.

A step-sister is also entitled to a fourth share according to Medhatithi and Kulluka. But where there are uterine brothers, a sister should take a fourth share from them only.

The Smritis are clear that the sister is to get one share and the brother three shares, *i. e.*, the sons are to get each, thrice as much, as a daughter. This is also the view of Medhatithi.* But modern commentators have put palpably erroneous and unreasonable interpretations on the text of Manu, quietly ignoring the text of Katyayana cited in this Section. Depriving females of their just rights, has been the guiding principle of modern writers.

Vijnaneswara says, that when there are two sons and one daughter, the property is to be divided into 3 shares, and the daughter is to got a fourth of one such share, *i. e.*, one-twelfth. But according to the clear meaning of the Smritis, a daughter

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* तीनंशान् पुत्र आदद्यात चतुर्थं कन्येति। मेधातिथिः।

should get one-third of the share of a son. The Dayabhaga says so. The Vivada Tandava says that one fourth means one fourth of the share of each son (तुरायपदं दत्तांशं तु तुरीयकमिति तत् पुत्रांशतुर्य्यांशपरम् ।). The Apararka, the Vivada Chintamani, the Vivada Ratnakara and the Viramitrodaya are of the same opinion. Their opinion is more reasonable and, as it is a question of calculation, it should have been adopted in preference to the erroneous method of Vijnaneswara, which has been adopted in several cases. But it should be mentioned here that the Bombay, Madras and Allahabad Courts have refused to follow this method of Vijnaneswara in the case of the share of the illegitimate son (18 Bom. L. R. 70, 34 Mad. 277, 5 N. W. P. H. C. R. 94).

Following the erroneous method of calculation prescribed by Vijnaneswara, in the case of Damooder *v.* Senabatty, (8 Cal. 537) where there were 3 sons, 2 widows and 2 maiden daughters, it was held by the judges, that the unmarried daughter's portion would be, at the most, one-fourth of a share, dividing the property into six shares.

According to the Dayabhaga, the unmarried sister is entitled not to a quarter share, on partition, but only to maintenance, until her marriage, and to the expenses of her marriage, which are not to exceed a quarter share, where the property is small. That is also the opinion of the Smriti Chandrika and the Saraswati Vilasha. This view has been affirmed by the Courts as good law for Bengal and Madras. History of the law of the maiden daughter's

rights, was not known to these commentators. She enjoyed in the old Aryan family, as long as she did not pass into another family, all the rights of a son of the family. Her rights were afterwards curtailed as we have seen. Our Courts would have done well in giving effect to the true Hindu law on the subject, uninfluenced by the ignorance and the bigotry of the Pundits, which have deprived females of the just rights given to them by the Rishis. It is some satisfaction that the opinion of Vijnaneswara in regard to the absolute right of the unmarried sister to a share has been adopted by the courts of Northern India and Bombay.(1)

The married sister's right.

As regards the married sister, she belonged to another family, and had no rights to property belonging to her father's family. This was the law of the Aryans. The unmarried sister took a share, because she was a member of the family, as Medhathithi says. The Bombay School of commentators give the married sister rights of inheritance after the agnates. Nearness of relationship is certainly a test of heirship. The nearest male Bandhu is certainly the sister's son. But as he claims through the sister, it stands to reason that she should take first and then her son. As it is, except in Bombay, she is entitled to maintenance, only when her husband's family is extinct or incapable of maintaining her.

Among the Dogars in the Amritsar District in the Punjab, it has been held that by custom sisters inherit in preference to collaterals of the sixth degree. (2)

(1) Damoder v. Senabutty, 8 Cal. 537. Damoder v. Uttam, 17 Bomb. 271. (2) Bholi v. Kahna, 1 Ind. Cas. 695, 35 P. R. 1909.

When there is male issue, the mother is entitled to a share equal to that of the son on partition, and so is the grand-mother. The step-mother is also entitled to a share, like the mother in all the provinces, except Bengal and Madras (1). Gimutavahana says that the step-mother is not entitled to a share on partition by step-sons. The Dayabhaga at one place says that the term mother does not include step-mother. But later on it says that the sonless step-mothers are equal sharers with the sons. Srikrishna and Achyuta interpret this to mean that sonless step-mothers are not entitled to shares. Halayudha and Shulapani allowed the step-mother a share and the Dayabhaga allows it when speaking of her specifically. But the opinion of Srikrishna as interpreting the Dayabhaga has been accepted as good law in our Courts. In Madras, neither the mother nor the step-mother is entitled to a share, notwithstanding the clear rule of the Madhaviya to the contrary. (2) The Smriti Chandrika says she is entitled to such portion of the estate as is sufficient for her maintenance and religious duties. (3) In a matter like this at least, the Courts should have ascertained the true law of the Hindus and prescribed one rule for all India.

Mother's share.

In Madras not entitled to a share.

According to Yajnavalkya, on partition during the lifetime of the father, the mother, as well as the step-mother, is entitled to a share equal to that of the sons, minus what she

Mother, step-mother entitled to share under Mitakshara.

(1) Hemangini *v.* Kedar, 16 Cal. 758 P. C.

(2) Vencantamal *v.* Andyappa, 6 Mad. 130. Mari *v.* Chinnammal, 8 Mad. 123. It should be observed that the decisions are of an inconclusive character. See Dayabhaga, Sec. 22; Smriti Chandrika, Ch. II., Secs. 2-17. (3) See 6 Mad. 130, 8 Mad. 123.

might have received as Stridhana from her husband or her father-in-law, either by gift or by devise. The rule has been given effect to by the Courts, though the Mitakshara would give only a half share in such a case. (1) The Calcutta High Court in a Dayabhaga case have also held that there should be such deduction even on partition after the death of the father. (2) In the same case, it has been held that when the mother inherits the share of a deceased son that cannot be deducted from her share on partition.

According to the decisions of our Courts, on partition, whether during the lifetime of the father or after his death, a mother and a step-mother are each of them entitled to a share equal to that of a son, in the ancestral property as well as in accretions, under the Benares, Bombay and Mithila schools and to have that share separately allotted and to enjoy it herself separately even from her husband. (3) Mothers and step-mothers share equally with their own sons only, under the Dayabhaga.

They have however no right to compel a partition under all the Schools. (4) But when the share of a son has been sold in execution, it has been held that that is tantament to a partition

(1) Jayram *v.* Nath, 31 Bom. 54. Jodoo *v.* Brojo, 12 B. L. R. 385. Kishori *v.* Moni, 12 Cal. 165 Laljeet Sing *v.* Raj Coomar, 20 W. R. 337. (2) Poorendra Nath Sen *v.* Srimati Hemangni Dasi, 12 C. W. N. 1002. Jadoonath *v.* Brojonath, 12. B. L. R. 385. Kishon *v.* Moni, 12 Cal. 168. (3) Sumrun *v.* Chunder, 8 Cal. 17. Damoodar *v.* Senabutti, 8 Cal. 537. Badri *v.* Bhugwat, 8 Cal. 649. Dular Koeri *v.* Dwarka Nath Misser, 32 Cal. 234. Chowdhuri Thakur *v.* Musst Bhagbati, 1 Cal. L. J. 142. Damoor *v.* Uttamram, 17 Bom. 271. Haritaram *v.* Bishambhar, 31 I. C. 807. 13 All. L. J. 1129. Damodar *v.* Uttamram, 17 Bom. 27. Lakshman *v.* Satyabhama, 2 Bom. 504. Damoodur *v.* Senabatty, 8 Cal. 539. Chowdhury Thakur Prosad Sahi *v.* Musammat Bhagabah Koer, 1 Cal. L. J. 142. (4) Bilaso *v.* Dinnath, 3 All. 88. Isri *v.* Nasib, 10 Cal. 1017. See 5 Cal. 845.

and in such a case the mother can sue for her share. (1)

It has been held, that if the share of a son is purchased by a stranger, the mother is not entitled to a share, if the main estate remains undivided. (2) It is difficult to reconcile the decision with the rights of the mother given by the Smirits. The Privy Council have recently held that though the mother is not entitled to demand a partition, she is entitled, if a partition takes place among her sons, whether at their own instance or at the instance of purchasers of their interest, to receive the share of a son in property which is ancestral or acquired by the employment of ancestral wealth. She may however, acquiesce in the division of the property between her sons without claiming a share for herself. (3)

Rights of the mother against alienees of the son.

It has been held in Allahabad, that the mother is entitled to a share, not only as against the sons but also as against an auction-purchaser of the share of one of the sons. (4) In Bengal, however, it has been held, that though a purchaser before partition will take such share as a son would take if there was no mother, a purchaser after the institution of the suit for partition, would only take such share as his vendor would be entitled to, after giving the mother a share. (5)

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(1) Bilaso *v.* Dinanath, 3 All. 88.

(2) Barahi Dobi *v.* Debkamini, 20 Cal. 682. See 31 I. A. 10.

(3) Chowdhury Ganesh *v.* Mussmut Jewach, 31 I. A. 10. Amrita Lal *v.* Manick Lall, 27 Cal. 552. Juggernath *v.* Odhiranee, 20 W. R. 126. See 15 Cal. 922.

(4) Bilaso *v.* Dina Nath, 3 All. 88.

(5) Jogendra *v.* Fulkumary, 27 Cal. 77, 20 Cal.

It has been held in Calcutta that under the Dyabhaga, the father can defeat the right of the mother to a share on partition by will though he cannot in this way deprive her of her right of maintenance. (1)

Law under the Bengal school.

Under the Bengal school, it has been held, that when there is one son, the mother is not entitled to a share, nor can a sonless step-mother demand a share. On partition among sons by different mothers, each mother is entitled to a share equal to that of each of her own sons, minus what she might have received as Stridhana by gift or devise, and if one of them has got only one son, she is not entitled to a share.(2) She gets such a share, even if she had inherited before the share of a deceased son. (3) The share thus obtained on partition by a mother is not her Stridhana, and after her death, it is taken by the heirs of the sons, by partition among whom she got the property (4), such share being considered as in lieu of or by way of providing for the maintenance to which she is entitled as against them. (5)

Whether mother's share Stridhana.

Under the Mitakshara school also, it has been held that the shares allotted to widows

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(1) Poorendra Nath Sen *v.* Sreemati Hemangini, 12. C. W. N. 1002. Debendra Kumar Roy Chowdhu y *v.* Brojendra Kumar Roy Chowdhury, 17 Cal. 886.

(2) Cally Churn Mullick *v.* Janova Dassee. 1 Ind. Jur. N. S. 284. Jodoonath *v.* Brojonath, 12 B. L. R. 385. Torit *v.* Taraprosonno, 4 Cal. 756. Kisory *v.* Moni, 12 Cal. 105 Hemangini *v.* Kedar, 16 Cal. 758 P. C. Jeeomony *v.* Attaram, Macn. 64.

(3) Jugomohan *v.* Sarodamoyee, 3 Cal. 149.

(4) Hemangini *v.* Kedar Nath, 16 Cal. 758 P. C. Barahi Debi *v.* Debi Kamini, 20 Cal. 682. Jodoo *v.* Bishnath, 9W. R. 61. Beni *v.* Puran, 22Cal. 292.

(5) Sorolah Dassee *v.* Bhooban Mohon Neoghy, 15 Cal. 292. Hridoy *v.* Berary, C. W. N. 239.

and mothers are allotted to them "in lieu of maintenance," "the proprietary right" remaining "vested in the sons, subject to the widows retaining possession and enjoying the profits during their respective lives." (1) The Mitakshara calls such share, as also all inherited property, Stridhana but it did not intend it to be governed wholly by the law of Stridhana. In Allahabad a contrary view was taken. (2) The Privy Council, however, have recently decided that such share is not Stridhana but is like property coming to her by way of inheritance and on her death is taken by the heirs of her husband. (3) The Calcutta High Court has held that the sons or the representatives of the sons by partition among whom she got the property, would get the property, after her death. (4) This is a reasonable and equitable rule.

In property acquired from ancestral property or in property acquired by the grandfather before the birth of her son, the mother can get a share on partition. (5) But an observation has been thrown out in certain judgments and text books that the mother has no share in property acquired by her husband or by her sons living jointly, (6) There is no justification in the Smritis or the commentaries for the position.

(1) Damoodar *v.* S. Senabutty, 8 Cal. 137. Tripura Sundari *v.* Dakshina Mohon Roy, 11 Cal. W. N. 698. Doubted, 32 Cal. 234.

(2) Chhiddu *v.* Naubat, 24 All. 67. Sri Pal *v.* Suraj Bali, 24 All. 82. See Bhugwandeen *v.* Myna Baee, 11 Moore 487. Thakoor Deyhee *v.* Rai Baluk, 11 Moore 139. Chotay *v* Chunno, 6 I. A. 15. Mutto Vaduganadha *v.* Dore Singha, 3 Mad. 290. Gambhir Singh *v.* Makraddhy, 4 A. L. J. 673.

(3) Debe Mangal *v.* Mahadeo, 34 All. 234 P. C.

(4) Sarola Dassi *v.* Bhoobun Mohun, 15 Cal 292.

(5) Sudanund *v.* Soorjoomoney, 11 W. R. 436. Isree Pershad *v.* Nasib Kooer, 10 Cal. 1017. Contra, Gunga Pershad *v.* Sheodyal, 9 C. L. R. 417.

(6) Purno Chunder *v.* Sorojinee, 8 C. W. N. 765, Mayne's Hindu Law, Sec. 481, Macnaghten's Considerations on the Hindu Law, p. 51.

Grand-mother's right to a share.

A grandmother is entitled to a share equal to that of the grandsons on a partition under the Mitakshara and also the Dayabhaga, (1) even when the father makes the partition of his own choice. In Allahabad, however, the grandmother has been allowed a share only on a partition before but not after the death of the father. (2) There seems to be little justification for this divergence of opinion. When there are sons and grandsons, the grandmother is entitled to a share equal to the share of a son. (3) It has been recently held by the Calcutta and Bombay High Courts that where there is a grand-mother, a step-grand-mother, as well as a mother, both are entitled to equal shares with the grandson. (4) If however, there are no sons, but only grandsons by different fathers, the estate will be first divided into as many shares as there are grandsons and grand-mothers, and the grandmothers will be entitled each to one share, the grandsons dividing the remaining shares according to the stock as usual and giving their mothers, shares equal to theirs, as they would have done if there were no grand-mothers. (5) Great-grand-mothers, as grand-mothers of the uncle of a person partitioning, would get the share of grandmothers.(6)

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(1) Sibbosundray *v.* Bussomutty, 7 Cal. 191. Budri *v.* Bhagwat, 8 Cal. 649. Purnachundra *v.* Sarojini, 8 C. W. N. 763. Sheo Dyal Tewaree *v.* Judoonath Tewaree, 9 W. R. 61. (2) Sheo Baran *v.* Janki, 34 All. 505 F B. Radhakishenman *v.* Bachaman, 3 All. 118. (3) Prawn Kissen *v.* Muttoo Soondory, Fulton 389. (4) 8 C. W. N. 763 Chummun Prosad *v.* Pranpat, 29 I. A. 166. Vitbal Ramkrishna *v.* Prahlad Ramkrishna, 39 Bomb. 373. (5) Purna *v.* Sarojini, 8 C. W. N. 183. Sreemotee Jeemoney *v.* Attaram F. Mac. N. 64, Cally Churn *v.* Jonava, I. Ind. Jur. N. S. 284. Jugomohun *v.* Sarodamoyee, 3 Cal. 149, Torit *v.* Tara Prosonno, 4 Cal. 756. Kristo Bhabinee *v.* Ashu Tosh, 13 Cal. 39.

(6) 8 C. W. N. 763.

SECTION II.

स्वेभ्योऽंशेभ्यस्तु कन्याभ्यः प्रदद्युर्भ्रातरः पृथक् ।
स्वात् स्वादंशाच्चतुर्भागं पतिताः स्युरदित्सवः ॥
सोदर्या विभजेरं स्त्र समेत्य सहिताः समम् ।
भ्रातरो ये च संसृष्टा भगिन्यश्च समाभयः ॥

मनुः ९।११८, २१२ ।

But to the maiden (sisters) the brothers shall severally give (portions) out of their shares, each out of his share one-fourth part; those who refuse to give (it) will become outcasts,

His uterine brothers having assembled together shall equally divide it, and those brothers who are reunited and the uterine sisters.

Maun, IX. 118, 212.

दुमातुरवङ्कारं दुहितरः सात्मदायिकं लभेरन्नन्यद्वा ।

बौधायनः, प २ । ख २ । ख ३ । ४३ ।

The daughters shall obtain the ornaments of * their mother (as many as are) presented according to the custom (of the caste) or any thing else (that may be given according to custom.

Baudhayana, P. 2, A. 2, K, 3, 43.

विभज्यमाने दायेभ्यः स्वकन्यालङ्कारं वैवाहिकं स्त्रीधनञ्च कन्या लभेत ।

शङ्खलिखितौ ।

When partition takes place, the unmarried daughter gets from all the property, mother's ornaments of maidenhood and nuptial Stridhana.†

Sankha-Likhita, cited in the Ratnakara, Madhavya, &c.

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* सात्मदायिकं has been interpreted by Govinda Swami to mean what is given to their mother by the maternal grand'ather and grandmother.

† Babu Golap Chundra Sircar translates the latter part of this passage as follows "Nuptial Stridhana consisting of the mother's ornament in maidenhood." This is clearly erroneons. He had lost sight of the word च which means *and*.

मातरः पुत्रभागानुसारेण भागङ्कारिण्यः अनूढाश्च दुहितरः ।

विष्णुः १८ । ३५ ।

Mothers shall receive shares proportionate to their son's share. And so shall unmarried sisters

Vishnu, XVIII. 35.

पितुरूर्द्धं विभजतां माताप्यंशं समंहरेत् ॥
असंस्कृतास्तु संस्कार्या भ्रातरः पूर्वसंस्कृतैः ।
भगिन्यश्च निजादंशाद्दत्त्वांशन्तु तुरीयकम् ॥

याज्ञवल्क्यः, २ । १२५-१२७ ।

If partition be made after the fathers' death, the mother shall also have an equal share.

Uninitiated brothers should be initiated by those for whom the ceremonies have already been completed. But sisters should be disposed of in marriage giving them as an allotment, the fourth share.

Yajnavalkya, II. 126, 127.

द्वावंशौ प्रतिपद्येत विभजन्नात्मन: पिता ।
समांशभागिनी माता पुत्राणां स्यान्मृते पतौ ॥
ज्येष्ठायांशोऽधिको ज्ञेयः कनिष्ठायावरः स्मृतः ।
समांशभाजः शेषाः स्युरप्रत्ता भगिनी तथा ॥

नारदः १३, अ २ २, १३ ।

The shares let the father keep for himself, when he distributes his property. The mother shall receive the same share as a son (when the sons divide the property) after her husband's death.

To the eldest son a larger share shall be allotted and a less share is assigned to the youngest son, the rest shall take equal shares and so shall an unmarried sister.

Narada, XIII. 2, 13.

ज्येष्ठस्यांशोऽधिको देयः कनिष्ठस्यावरः स्मृतः
समांशभाजः शेषाः स्युरप्रत्ता भगिनी तथा ॥

वशिष्ठवचनम् ।

This text is attributed to Vasista in the Viramitrodaya and the Baijayanti. It is all but identical with Narada, Ch. 13, *v.* 2, and the meaning is the same.

तदभावे तु जननी तनयांशसमांशिनी ।*
समांशा मातरस्तेषां चतुर्थांशाश्च कन्यकाः ॥
या तस्य भगिनी सा तु ततोऽर्धं लब्धुमर्हति ।
अनपत्यस्य धर्म्योऽयमभार्य्यपितृकस्य च ॥

बृहस्पतिः २५ । ६३, ६४ ।

But on his death, the mother shall take a son's share The mothers shall share equally with the sons, the maidens shall take fourth part shares.

If there be a sister she is entitled to a share of his property, this is the law regarding (the wealth of) one destitute of issue and who has no wife or father.

Vrihaspati, XXV. 63, 64.

कन्यकानाल्वदत्तानां चतुर्थी भाग इष्यते ।
पुत्राणाञ्च त्रयो भागाः साम्यं स्वल्पधने स्मृतम् ॥ †

रत्नाकरधृतकात्यायनवचनम् ।

But a fourth share is ordained for daughters not given in marriage, and three shares for sons ; but when the property is small, equality (of shares) is ordained.

Katyayana cited in the Ratnakara and other commentaries.

द्व्यंशहरो वा पुत्रवित्तार्ज्जनात् पिता ।
मातापि पितरि प्रेते पुत्र तुल्यांशभागिनी ॥

दायभाग विवादताण्डवधृतकात्यायनवचनम् ।

A father takes either a double share or a moiety of his son's acquisition of wealth ; and the mother also, if the father be deceased, is entitled to an equal portion with the son.

Katyayana cited in the Dayabhaga and the Vivada Tandava.

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* तनया वा समांशिनी is the reading of Mitra Misra. It means 'or the daughter shall take an equal share.' It corresponds to some extent with Devala, Narada, and Katyayana.

† Babu Golap Chundra Sircar reads it as स्वाम्य and translates it has 'her ownership is ordained.' It is meaningless and therefore incorrect. (See the text of Vasista and Narada). Medhatithi also apparently reads this verse as I have put it, in his commentary on verse 118, Ch. IX of Manu. The Viramitrodaya reads साम्यं त्वल्पधने स्मृतम्. It says that when the paternal wealth is not sufficient for the expenses of marriage, the daughter take equally with the son.

कन्याभ्यश्च पितृद्रव्यं देयं वैवाहिकं वसु।
अपुत्रस्य च कन्या स्वं धर्म्मेजा पुत्रवद्धरेत्॥

पराशरमाधवधृत देवलवचनम्।

To maiden daughters also should be given property sufficient for marriage out of their paternal estate ; and the legitimate daughter of a man without male issue, shall take his wealth like a son.

Devala, cited in the Ratnakara, Madhavya, &c.

असंस्कृतास्तु ये तत्र पैतृकादेव तद्धनात्।
संस्कार्य्या भ्रातृभिर्ज्येष्ठैः कनकाश्च यथाविधि॥

व्यासः।

But amongst them those that are uninitiated should be initiated by the elder brothers from their paternal wealth ; as also the unmarried daughters according to law.

Vyasa, cited in the Ratnakara, Parijata, &c.

असुतास्तु पितुः पत्न्यः समानांशाः प्रकीर्त्तिताः।
पितामह्यश्च सर्व्वास्ता मातृकल्पाः प्रकीर्त्तिता॥

कल्पतरुधृतव्यासवचनम्।

The sonless wives of the father are declared equal sharers. Grandmothers are also declared equal to mothers.

Vyasa, cited in the Kalpataru and other commentaries.

आसंस्काराद्धरेत्भागं परतो विभृयात् पतिः।

मेधातिथिधृतस्मृतिवचनम्।

Up to her marriage, a daughter (or sister) takes a share After that the husband supports her.

Text cited by Medhatithi.

जननी त्वधना पुत्रैर्विभागेऽशं समं हरेत्।

मयूखधृतस्मृतिवचनम्।

The mother, if without wealth, takes an equal share with her sons on partition.

Text cited in the Mayukha without naming the author.

SECTION III.

The maintenance of females and their right to residence in the family dwelling house.

Women are declared in the Smritis as 'not deserving of independence.' "In childhood they are to live under the guardianship of and are to be protected by their fathers, after marriage, by their husbands, in their old age, by their sons ; in the absence of them (*i. e.*, father, husband and sons), by their agnatic kinsmen." "When the husband's family is extinct or destitute, they are to live under the guardianship of their father's family." Those persons who 'have dominion over a woman,' 'have dominion over her,' as Narada puts it, 'in respect of her maintenance also.' Indeed the liability to perpetual pupilage carries with it as a matter of course, the right to maintenance, from persons who are declared to be guardians. This is the simple principle of the law of maintenance, which has been completely lost sight of, by text-writers and modern lawyers in the bewildering maze of discussions about moral and legal liability in our Courts. There were no poor laws, workhouses or orphanages in ancient India. There was no custom of women working for their own bread. The rule of their guardianship and the obligation to maintain them, was a legal and binding rule, upon the peculiar constitution of Hindu society. As long as a woman is unmarried, the liability to maintain her, to defray her marriage expenses and to provide her with a marriage portion, according to means, is cast first on the father, and failing him on the nearest agnatic relation.

The old law and the principle on which it is based.

After marriage the guardianship of women and the liability to maintain them rest with the husband and sons, and failing them, on the nearest agnatic member of their family. When the husband, the father or the brother is a disqualified heir, the liability to maintain the wife of such person and also to maintain his unmarried sister and daughter, as well as to provide for their marriage expenses and marriage portion, devolves on the person, who takes his share of the property. Even when there is no ancestral property, the family have to maintain its women and incapable members. A woman was under the dominion of the agnates. It would be absurd to suppose that the agnates could always exercise dominion over a woman, if they liked, but were liable to maintain her only if her husband left property. That was not the law of the Rishis.

A widow had to live with her husband's family, leading a chaste life, in order to be able to claim the right of maintenance. But if ill, she could go to her father's family, if she liked, without losing her rights. But if she left her husband's family, without sufficient reason, or became unchaste, she forfeited her right to maintenance. But an unchaste woman, if she did not leave her husband's house and was under the control of his family, was still entitled to a starving maintenance "deprived of all rights."

In case of wives of disqualified heirs and widows of deceased coparceners, when there is ancestral family property, if they are denied proper maintenance, they are entitled to resume the share to which their husbands were entitled. Therefore the amount of separate maintenance to which a

woman is entitled, when she is without proper reason refused maintenance, can never be less than the annual income of the share to which her husband was entitled.

A female is entitled to be maintained by her father's family, if her husband's family is extinct or incapable on account of extreme poverty, to support her.

As between the husband and the wife, during coverture, both are equally entitled to the property of either. It would therefore follow, that the wife is entitled to alienate the husband's property during his absence, or to pledge his credit, for the necessaries of life for herself and the family, if he refuses to maintain them. If the husband, without any of the justifying causes mentioned in the Smritis, marries a second time, the wife is entitled to receive a third of the entire property of the husband. If the husband has got no property, he is still under the obligation to maintain the wife.

This is the simple law of maintenance prescribed by the Rishis for the guidance of the simple household of ancient Hindus to whom refusing food to an *Atithi* even, was a sin, and to whom accumulation of wealth was not proper. The ancestral immoveable property was inalienable, because the family had to be supported by it. However, the old state of things has passed away and the old law is obsolete. Let us see what is the present law according to the decisions of our Courts.

Under the Hindu Law of the Rishis, a right to maintenance is founded on relation, and not on the possession of property. Some of the commentators and certain decisions of our Courts favour a

Right of mother and step-mother—whether a charge on property.

contrary view. The Privy Council, however, in a recent case held in the case of a step-mother that "the right of a widow to maintenance is founded on relationship, and differs from debts" and therefore it was not 'a charge on the estate' and need not "be provided for previous to partition." (1) A mother is entitled to maintenance, even if the son is not in possession of the paternal property. (2) A step-mother is also entitled to be supported by the step-son (3), but it has been held, that a step-mother has no legal right to maintenance independently of the existence of family-property. (4) Nor is she entitled to maintenance (unlike the mother) if she is unchaste. (5) "Where there are several groups of sons, the maintenance of their mothers must, so long as the estate remains joint, be a charge upon the whole estate; but when a partition is made, the law appears to be that their maintenance is distributed according to relationship, the sons of each mother being bound to maintain her."(6)

Right of the wife—when is she entitled to live apart.

A wife is always entitled to be maintained by the husband and her right is not dependent on the possession of property, as in the case of the widow and other females.(7) When she is immature she may claim maintenance, even though living with her parents. (8) Otherwise, she cannot demand separate

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(1) Hemangini Dasi *v.* Kedarnath Kundu, 16 Cal. 758, P. C.

(2) Subbarayana *v.* Subbakka, 8 Mad. 236.

(3) Narayan Rao *v.* Ramabai, 9 Bom. 415. Raja Pirthee Sing *v.* Rani Raj Kower, 20 W. R. 21.

(4) Baidya Nath *v.* Govind Lal, 9 Bom. 279.

(5) Rani Basant Kumari *v.* Rani Kamal Kumary, 7 Sel. Rep. 144.

(6) Hemangini *v.* Kedar Nath, 16 Cal. 758, P. C.

(7) Surampalli *v.* Surampalli, 31 Mad. 338.

(8) Ramien *v.* Condamami, S. D, Mad. Dec. 1865, p. 154.

maintenance, while refusing to live with her husband, except for a justifying cause. (1) She is justified in leaving her husband's protection and is entitled to separate maintenance from his income, when he habitually treats her with cruelty and such violence as to create the most serious apprehension for her personal safety (2), or when he changes his religion (3), or when he keeps a Muhammadan concubine or mistresses in his own house (4), but not if he takes a second wife. (5) It is not necessary under the Hindu Law to entitle a wife to separate maintenance to prove cruelty, if there has been abandonment of the wife. (6)

A wife, who without sufficient cause but without corrupt motive, lives, apart from her husband, it has been held, does not forfeit her right of maintenance after his death, though it may be open to the Court to have regard to her conduct in fixing the amount of maintenance. (7)

The unchaste wife.

It is not settled whether an unchaste wife can be turned out without any maintenance ; but if she leaves the husband's protection for immoral purposes, she is not entitled to be supported by him or to be taken back. (8) But if a chaste wife, after leaving her husband's house desires afterwards to return, she is entitled to maintenance. (9)

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(1) Sidlingapa *v.* Sidava, 2 Bom. 634. Kullyanessuri *v.* Dwarka Nath, 6 W. R. 115.

(2) Matangini *v.* Jogendra, 19 Cal. 84.

(3) Mansha *v.* Jiwan, 6 All. 617.

(4) Lalla Govind *v.* Dowlutbutee, 14 W. R. 451.

(5) Reg *v.* Mannatha, 17 Mad. 260.

(6) Sitabai *v.* Ramchandrarao, 12 Bom. L. R. 373.

(7) Surampalli *v.* Surampalli, 31 Mad. 338.

(8) Illata *v.* Narayan, 1 Mad. H. C. 372.

(9) Nityae Laha *v.* Soondaree, 9 W. R. 475.

Right of the unmarried daughter.

An unmarried daughter is entitled to maintenance, and also to have her marriage expenses paid and to get suitable ornaments and marriage portion. The decree in such a case should contain a declaration that the allowance should cease upon marriage. (1) The widow of a deceased coparcener can recover from the family property money expended by her on the celebration of her daughter's marriage. (2)

Right of the married daughter.

It is a difficult question whether married daughters can ever claim to be maintained by the father's family. The law of Narada is clear, that when the husband's family is in destitute circumstances, the father's family has to maintain a female. It is difficult to see, how it is only a moral duty on the part of the father's family, when the legal right to keep a woman in subjection under such circumstances vests in them by law. It should be observed that according to the texts of Vrihaspati cited at this section, the king should provide maintenance to the females of the family of a deceased person, and make over the remainder to the heirs. It should also be remembered, that according to the law of the Rishis, a girl on marriage had to be given Stridhana, besides ornaments, by the father's family, which was considered as given for her maintenance. When the father's family fail in their clear duty in this respect and marry a girl to a poor man—say to a Koolin Brahmana, who looks upon the father-in-law as liable to maintain his wife by custom—how

(1) Tulsa *v.* Gopal Rai, 6 All. 632.

(2) Vaikuntam *v.* Kallapiram, 23 Mad. 512.

can it be said, that when she becomes helpless on account of poverty, the father's family can turn her out without a maintenance? It has been held that a son-in-law, who had been kept in the house and supported by the father-in-law, can after his death obtain by a suit a decree for maintenace against his heir. (1) The son-in-law's right is doubtful but the daughter is clearly entitled to maintenance under such circumstances. Mr. Mayne, Mr. Macnaghten and Babu Gopal Chunder Sircar are of opinion that indigent married daughters are entitled to maintenance. Our Courts have held, that no person, who has not taken her husband's wealth, is liable to maintain a married woman, and it has also been very definitely laid down in Bombay, that the father's family are not liable, under any circumstances, to maintain a married woman. (2) In Madras, this decision has been expressly dissented from and Mr. Justice Sadasiva Aiyar in a very learned judgment has shown how the rights of females have been curtailed on account of ignorance of the law and its history and expressed his concurrence with the opinion expressed in this book. (3) The Calcutta High Court has in a recent case declined to go further than that a daughter "cannot be regarded as entitled to demand successfully maintenance from her father's heir, who has succeeded to his estate, unless and until it can be satisfactorily shown, that she is unable to obtain maintenance from the family into which she has married." (4) Under the Dayabhaga,

(1) Govind Rani Dasi *v.* Radha Ballabh Das, 15 C. W. N. 205.
(2) Bai Mangal *v.* Bai Rukhmini, 23 Bom. 291.
(3) Gudimetta *v.* Bellozu, 16 I. C. 139, 23 Mad. L. J. 233.
(4) Mokhada Dassee *v.* Nundo Lal Halder, 28 Cal. 278.

the sonless widowed daughter is no heir to her father, and it would be cruel to deprive her of maintenance also. The sonless widowed daughter and grand-daughter and sister come back to the family of the father according to Medhatithi. The Vivada Tandava and the Keshava Vaijayanti clearly lay down that all these females are entitled to be maintained.

Right of the daughter-in-law.

Under the Mitakshara law the widowed daughter-in-law and the widow of a deceased co-parcener are entitled to maintenance, if there is ancestral property, (1) or where the self-acquired property has been treated as joint-family property. (2) When there is no such property, there is a moral and not a legal obligation to support her, (3) but this moral obligation becomes a legal obligation of the heirs of the father, when they get this self-acquired property by inheritance. (4) Under special circumstances, such as when the son was a minor and made to marry by the father, the latter is in equity liable to maintain the widowed daughter-in-law, even when there is no ancestral property. (5)

There is a divergence of opinion whether a devisee is under the legal obligation mentioned above. The Bombay High Court held that he is not. (6) The Madras and Calcutta High Courts, it seems to me more correctly, have held the contrary. (7) In a recent case, the

(1) Devi Prosad *v.* Gunwanti, 22 Cal. 410. Parvati *v.* Chatru, 36 Bomb. 131. Massmut Hema Kooeree *v.* Ajoodkya Pershad, 24 W. R. 474. Kastu Bai *v.* Shivjiram, 3 Bom. 372. Gokibai *v.* Lakhmidas. 14 Bom. 490. Visalachi *v.* Annasami *v.* 5 Mad. H. C. 150. Surampalli *v.* Surampalli, 31 Mad. 338. (2) Appathusai *v.* Nanu Pattar, 32 I. C. 955. (3) Savitribai *v.* Lukmibai, 2 Bom. 573 F. B. (4) Janki *v.* Nandram, 11 All. 194. Adhi Bai *v.* Curson Das, 11 Bom. 199. Yamunabai *v.* Monubai, 23 Bom. 508. Rangammal *v.* Echammal 22 Mad. 305. This case overruled Ammakana *v.* Appu, 11 Mad. 91. (5) Meenakshi *v.* Rama Ayyar, 37 Mad. 396. (6) Bai Parvati *v.* Tarwadi, 25 Bom. 263. (7) Rangammal *v.* Echammal, 22 Mad. 305, Indubala *v.* Panchanani, 21 Cal. L. J. 292.

Allahabad Court have held that ancestral property can never be alienated so as to defeat a widow's right to maintenance. (1)

Under the Bengal school, it has been held, in a case where there was no allegation of the existence of ancestral property, that "the widow of a son who has died leaving nothing, cannot compel her deceased husband's father to make a pecuniary allowance by way of maintenance, if she refuses to live with him as a member of his family." (2) In a recent case, it has been held that under the Bengal law also, the moral obligation of a person became the legal obligation of his heir, who took his property "not for his own benefit, but for the benefit of the late proprietor," and who "ought to perform the obligation of maintaining the widow" and that there was no difference between the Bengal and Mitakshara schools on this point and further that non-residence with the family of the deceased husband, except for unchaste or immoral purposes, did not disentitle the daughter-in-law to maintenance. (3)

Right of wives of disqualified predeceased coparceners.

Wives of disqualified members of a family and the widows of deceased coparceners when chaste are always entitled to maintenance from persons, male or female, in possession of the family property. (4)

In the Punjab among Randhava Jats in the Amritsar District, it has been held that there is a

(1) Becha *v.* Mothena, 23 All. 86.

(2) Khetramani *v.* Kashinath, 10 W. R. F. B. 89.

(3) Kamini *v.* Chandra Pode, 17 Cal. 373. Siddesary Dassee *v.* Janardan Sarkar, 29 Cal. 557.

(4) Savitri Bai *v.* Lukmi Bai, 2 Bom. 573. Kalu *v.* Kasbi Bai, 2 Bom. 127. Cai Kanku *v.* Bai Jadav, 8 Bom. 15.

custom by which the widow of a predeceased son is entitled to inherit in preference to his brother.

Custom in the Punjab allowing widows of coparceners to succeed.

There is also a custom among Brahmans of Tehsil Shakargarh in Gurdaspore District by which the widow (1) is entitled to succeed as a life-tenant to any property which her husband might have taken, if alive. (2)

It has been held, that by subsequent unchastity a widow forfeits her right to maintenance. (3) While laying down the above rule, the High Court of Calcutta made the following observations: "If the widow had taken one false step during her widowhood and had been leading a chaste life at the date of suit, we should have felt inclined to take the view that the Bombay High Court took in the earlier case, (4) and declared her entitled to bare food and maintenance." An agreement to allow maintenance may be avoided on account of subsequent unchastity. (5) But in a recent case, it has been held in Allahabad that when the agreement fixes the amount and security and states that the maintenance was to be payable to the widow during her lifetime, unchastity is no defence to her claim. (6) But it must be mentioned here that according to the Smritis and the Commentators, even an unchaste woman is not deprived of bare maintenance on account of unchastity. Even a

Subsequent unchastity and forfeiture of maitenance.

(1) Premi *v.* Kushal Sing, 1 Ind. Case 608, 30 Punj. R. 1909.

(2) Satgun *v.* Bhagwan Das, 1 Ind. Case 91, 7 Punj. R. 1909.

(3) Romanath *v.* Rajoni Moni, 17 Cal. 674. Valu *v.* Ganga, 7 Bom. 8. Daulta *v.* Maghu, 15 All. 382. Vishnu Shambhog *v.* Manjamma, 9 Bom. 108.

(4) Honama *v.* Timanabhat, 1 Bom. 559.

(5) Nagamma *v.* Virabhadra, 17 Mad. 392.

(6) Lachman *v.* Bhup Sing, N.-W.P. Weekly Notes for 1903, p. 226.

decree for maintenance may be set aside, or its execution resisted by proof of subsequent unchastity. (1) It has been held in the Punjab, where by an agreement a widow is entitled to maintenance 'as long as she continues as the widow of her late husband', by subsequent unchastity she forfeits her right. (2)

Whether remarriage Causes for future.

The ordinary rule is that a widow forfeits her right to maintenance by unchastity, but it has been held in Allahabad that she does not do so by re-marriage. (3) A contrary view has been taken by the Calcutta High Court. (4) A distinction has been made between cases where the remarriage is allowed by custom and where it takes place under the Act. It is difficult to appreciate the distinction. The right to maintenance out of the husband's estate depends on the continuance of the relationship. When a woman remarries, she can have no claim to maintenance from her husband's relations and as that is the real test under the Hindu Law, she cannot claim it from her husband's estate.

Maintenance and residence in husband's house.

"The case of the widow is very different from the case of the wife" as regards her obligation to reside in her husband's house. "All that is required of her is that she is not to leave her husband's house for improper or unchaste purposes, and she is entitled to retain her maintenance,

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(1) Shanbhog *v* Manjamma, 6 Bom. 108. Nubogopal *v.* Sreemutty Amritomoyee, 24 W. R. 428.

(2) Tika Ram *v.* Wasandi Bai, 9 I. C. 926.

(3) Gajadhar *v.* Kaunsilla, 31 All. 164. See 11 All. 330, 20 All. 476.

(4) Matungini *v.* Ram, 19 Cal. 289. Rasul Jehal *v.* Ramsarun, 22 Cal. 389 Vitten *v.* Govinda, 22 Bom. 321. Binchappa *v.* Sangarbaswa, 24 Bom. 87. Marugayi *v.* Veramakali, 1. Mad. 22.

unless she is guilty of unchastity or other disreputable practices after she leaves that residence." (1) But where, by the will of the husband, she is enjoined to reside in the family dwelling house, non-compliance with such direction may disentitle her to maintenance, except when there is just and sufficient cause for her conduct. (2) It has been held that a condition in the will of the father-in-law providing for maintenance, that such maintenance should not be enjoyed by the widowed daughter-in-law in her father's or brother's house is not unreasonable. (3) But here also the limitation of the Bombay rule should apply and if the widowed girl has just and sufficient cause for non-compliance, she should not be deprived of her maintenance. Conditions about residence and the like should always be considered as subject to the aforesaid limitation.

Right of the concubine.

A concubine is not entitled to maintenance under the Hindu Law. (4) In Bombay and Madras, it is considered that a concubine continuously kept till death is entitled to maintenance from the estate. (5)

Right to maintenance inalienable.

A right to maintenance cannot be relinquished, alienated in any way, or attached or sold in execution of a decree. (6) But arrears of maintenance are saleable. (7)

(1) Raja Pirthee Sing *v.* Rani Rajkower, 20 W. R. 2; P. C.

(2) Girianna *v.* Honama, 15 Bom. 236.

(3) Bidhumukhi *v.* Satish, 9 I.C. 534.

(4) Ramanarasu *v.* Buchamma, 23 Mad. 282.

(5) Ningareddi *v.* Lakshmowa, 26 Bom. 163. Ramanarasa *v.* Buchamma, 23 Mad. 282. Contra, Rahi *v.* Govinda, 3 All. 787.

(6) Narbada Bai *v.* Mahadev, 5 Bom. 99. Haridas Acharya *v.* Baroda Kishore, 27 Cal. 39.

(7) Hoymobuttee *v.* Koroona, 8 W. R. 41. A. B. Rajia Rao *v.* Nana Rav, 11 Bom. 528.

Right in maintenance grant.

Property granted to a widow in lieu of maintenance as a general rule reverts after her death to the grantor (1) but there is nothing to preclude one to make an absolute grant. (2) A widow has absolute interest in property purchased with money given to her in lieu of maintenance. (3)

Decree for maintenance.

A decree for maintenance may and should contain an order directing payment of future maintenance, (4) and future maintenance can be realized by execution of such decree. (5)

Amount of maintenance.

The Madras High Court has laid down that "the wives of male coparceners are not entitled to equal shares with the males in the family estate nor do they take their husband's shares on their death but in place thereof they are entitled to a portion of their estate for their enjoyment during their life-time sufficient to maintain them in comfort according to the means of the family." (6)

The amount of maintenance to be allowed to a widow depends on the income of the family property at the time when it is claimed and "the position and status of the deceased husband and of the widow," and should include "not only the ordinary expenses of living, but that which she might reasonably expend for religious or other duties incident to the station of life she might occupy." (7)

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(1) Ganpat Rao *v.* Ram Chandra, 11 All. 296. Nunnmea *v.* Krishnasami, 14 Mad. 274. (2) Raja Nursing Deb *v.* Roy Kailash, 9 Moore 55 (3) 1 Mad 166, 6 B. L. R. 303 P. C. (4) Vishnu Shambhog *v.* Manjamma, 9 Bom. 108. (5) Ashutosh *v.* Lukhimoney, 19 Cal. 139. F. B. Sinthayee *v.* Thanakepudigur, 4 Mad. H C. 183. But see 9 Bom. 108. (6) Darbha Lingayya *v* Darbha Kanakamina, 38 Mad. 153. (7) Nitto Kissoree *v.* Jogendra Nath, 5 I A. 55. Baisni *v* Rup Sing, 12 All. 558. Sukim Sahee *v.* Mussamat Gangajali 13 I. C. 136. Devi Prosad *v.* Gunwanti, 22 Cal. 410. 11 Bom. 199, 2 All. 407. In 13 Cal. 336, Rs. 150 a month was allowed when the income was Rs. 23,000 a year.

A man forsaking his wife without fault is bound to give her at least one-third of his property, (1) according to the law of Yajnavalkya. A widow is in no case entitled to more than the income of the share of her husband in the property. (2)

Reduction of maintenance.

The amount of maintenance may be reduced on a change of circumstances, such as a permanent deterioration of the family property not due to the negligence of the male members (3).

Effect of possession of Stridhana or other property on widow's right to maintenance

It was held in Calcutta that the gift of sufficient Stridhana did not take away the right to maintenance (4). In a later case it was held that if a widow has independent means of her own, she is not entitled to maintenance. (5) In Bombay it has been held that the widow has the right "to be maintained and so far as she is already maintained out of her own property that right is satisfied." (6) The Privy Council has held that under the Buddhist law a wife who has sufficient means of her own cannot demand maintenance. (7) In the latest case on the question the Madras High Court has expressly dissented from the decison in the case of Ramawati Koer and held that the possession of independent means does not take away the widow's right to maintenance out of her husband's family property but that fact should be taken into consideration in determining the amount. (8) This appears to be reasonable.

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(1) Ramabai *v.* Trimbuk, 9 Bom. H. C. 283. (2) Madharav *v.* Gangabai, 2 Bom. 639. See 11 Bom. 199. (3) Gopikabai *v.* Dattaraya, 24 Bom. 386. See 18 W. R. 474, 1 All. 594. (4) Joytara *v.* Ramhari, 10 Cal. 636. (5) Ramawati Koer *v.* Manjhari Koer, 61. Cal. L. J. 74. (6) Savitribai *v.* Luiabai, 2 Bom. 573 F. B. Gokibai *v.* Lakhmidas, 14 Bomb 490. (7) Moung H. Moon *v.* Male, 10 Cal 1077 P. C Rangubai *v.* Seebaji, 14 I. C. 221. (8) Durbha Linguyya *v* Durbha, 38 Mad. 153. Utharakanal *v.* Utherakanal, 30 I. C. 897.

Right of the unchaste widow.

An unchaste widow is entitled only to a starving allowance, if she leads a reformed life.(1)

Whether demand necessary.

A formal demand by a widow of maintenance is not necessary (2) and the defendant in a suit by her has to show that she led him to believe as a reasonable man that she would not claim arrears of maintenance before such arrears can be refused. (3) But the Court may not allow arrears as the same rate as future maintenance. (4)

Limitation.

Suits for maintenance may be brought within 12 years, from the time when the right is denied. Arrears of maintenance are recoverable within 12 years from the time when they become payable, *i.e.*, when they are withheld, under circumstances which amount to refusal, and not from the date of demand and refusal.(5)

Remedy under the Criminal law

Under Sec. 488 of the C. P. C. the Magistrate also has power to grant maintenance to a wife and a child on proof of neglect or refusal to maintain them. (6)

Maintenance how far a charge.

The right to maintenance of a female against persons other than her husband or son rests upon their possessions of the family property in which her husband had a share. (7) The Mitakshara and some other commentaries have laid down that the wife is co-owner of the husband's property. The nature of the widow's interest in her husband's property is very

(1) Sathyabhama *v.* Vesavacharya, 29 I. C 397. Parumai *v.* Mahadei, 34 Bom 278, Ramanath *v* Rajonemoyee, 17 Cal. 678.

(2) Siddheswari *v* Janardun, 29 Cal. 557. Rangubai *v.* Subaje, 14 I. C. 21. (3) Subramonia *v.* Muthammal, 9 I C. 614. Raja Yorlagadda *v.* Raja Yarlagadda, 2 Mad. 147. Rangubai *v.* Subaji, 14 I. C. 821.

(4) Raghubun *v.* Bhagwant, 21 All. 183 (5) Narayan Rao *v.* Ram Chandra, 3 Bom. 415. P. C. Jivi *v* Ramji, 3 Bom. 207. Boinda *v.* Kausilla, 13 All. 126. Siddessury *v.* Janardun, 29 Cal. 557. (6) Gonda *v.* Pyari, 13 W. R. 19. See 22 W. R. 30, 24 W. R. 72, 20 W. R. 58, 10 Mad. 13, 19 Mad. 461, 18 Mad. 17, 19 Cal. 535, 16 Bom. 269, 14 Mad. 398, 7 Mad. 187. (7) Mongala *v.* Dinanath 12 W. R. O. C. 35 Mama *v.* Bacchi, 28 All. 655. Gokuldas *v.* Puranand, 13 Cal. 1035 P. C. Kulada *v.* Jogeshar, 27 Cal. 194. Krishna *v.* Ramasami, 25 I. C. 759.

carefully considered in a judgment of Mr. Justice West (5 Bom. 99). The Privy Council in one case expressed the opinion that there was no charge. (1) In Calcutta it has been held that Sec. 39 of the Transfer of Property Act has no application and a mortgagee without notice, is bound by a decree charging maintenance on the property after the mortgage. (2) The Allahabad, Bombay and Madras Courts have held that the maintenance of a Hindu widow is not a charge upon the estate of her deceased husband, until it is fixed and charged upon it by a decree or by agreement, and a transferee without notice is not bound unless the transfer is gratuitous and Sec. 39, is applicable. (3) Where property was attached before but actually sold after the maintenance decree, the widow's right was not defeated, (4) the property being liable for a widow's maintenance. (5)

By a will or by a disposition *intervivos* a wife cannot be deprived of her right to maintenance, which remains as a charge on the ancestral as well as separate poperty, both under the Mitakshara and the Dayabhaga. (6)

Wife cannot be deprived of maintenance by will.

A Full Bench of the Madras High Court held that when the widow of an undivided family obtained a decree for maintenance against her

(1) 16 Cal. 731. See Lakshman *v.* Satyabhama, 2 Bom. 494. Adhiranee Narayun Kumari *v.* Shonamalee, I Cal. 365. Barahi Debi *v.* Debkaminy, 20 Cal. 682. Belash *v.* Dina Nath, 3 All. 88. Sheodyal *v.* Jadoo Nath, 9 W. R. 61. Jogendra *v.* Fulkumary 27 Cal. 77.

(2) Kulada Prosad *v* Jogeswar, 27 Cal. 194

(3) Ram Kunwar *v.* Ram Lal, 22 All 326 Bhurtpore State *v.* Gopal Dei, 24 All. 160. Sham Lal. *v* Banna, 4 All. 296, F. B. Bihari Lalji *v.* Bai Raj Bai, 23 Bom 342. Joganti *v* Villangamm i 12 Mad. L. J. 270 Punna Bibi *v.* Radhakissen, 31 Cal. 478.

(4) S. Krishna Paths *v* Ramasami, 25 I C. 759. Soobul Chandra Law *v.* Russick Lal Mitter, 15 Cal. 202. Monlal *v* Kurrabulden 25. Cal. 179 P. C. (5) Subrayalu *v.* Kamalavalli, 35 Mad. 147

(6) Ramanandam *v.* Rangamla, 12 Mad. 260. Bhikum *v.* Pisru, 2 All. 141. Nihal Devi *v.* Shib Dial, 36 Punj. R. 1907. Becha *v*, Mothena, 23 All. 86.

husband's brother but not as representing the family, the family estate was not liable and the son of the said brother was only liable as the legal representative of his father. (1) The rule was further considered in a later case where the judges held that where the managing members are sued for maintenance, though not in such capacity, and a charge is created by the decree, the family property, is liable even though a minor member had not been made a party. (2) In the most recent case on the question, the judges observe that a decree for maintenance obtained against a member of an undivided family may be executed against joint property in the hands of other members, if he had been sued as representing the family or when a charge is created by the decree, and they further say that when the managing member is sued, he must be considered as being sued in his representative capacity. (3) This seems a consistent and equitable rule. The family is certainly bound by a maintenance decree against one of its undivided members sued as representing the family, whatever may be the rights of third parties without notice.

Decree for maintenance when binding on the family.

A Hindu widow is entitled to live in her husband's dwelling house, and neither the male heir nor any purchaser from him can turn her out. The family dwelling house can never be alienated, according to the text of Katyayana cited in the chapter on joint family. (4) Sir Barnes Peacock, C. J., held,

Widow's right of residence.

(1) Mutia *v* Viramma, 10.Mad. 283.

(2) Minakshi *v.* Chinappa, 24 Mad. 689.

(3) Subranna. *v.* Subranna, 30 Mad. 324.

(4) The text of Katyayana usually cited in this connection is सुव्यक्त गृहवर्ज्यन्तु कुटुम्बभरणाधिकं। यद्व्यं तत् स्वकं दद्यमिति।

that the rule was legally binding and expressed his opinion that "a son adopted or natural-born is not entitled to turn his father's widow and the other females of the family, who are entitled to maintenance, out of the dwelling selected by the father for his own residence, and in which he left the females of his family at his death," "at least until some other proper place has been provided for them". (1) This decision has since been followed in several cases, and the Bombay High Court have held, that the widow of a deceased coparcener cannot be made to quit the family dwelling house, even by offering her suitable accommodation elsewhere. (2) It has, however, been held that where the debt is binding on the female as a member of the family, the creditor can sell up the house freed of her right of living in it. (3) The Bombay High Court have, in a recent case, expressed an opinion that where the debt of the husband is not for the benefit of the family or is in fraud of the wife, the latter's right of residence is not affected by it. (4) The Madras High Court have differed from that view. (5) They have held that the wife has no such rights during the lifetime of her husband which may entitle her to prevent on alienation by him, though she has such a right against the

(1) Mungala Dabee *v.* Dinanath Bose, 12 W. R., A. C J. 35.

(2) Gouri *v.* Chundramonee, 1 All. 262. Jogendra *v.* Fulkumary, 27 Cal. 77. Bai Devokri *v.* Sanmukhram, 13 Bom. 101. Dalsukhram *v.* Lulluphan. 7 Bom. 282. Mahalakshamma *v.* Vencata, 6 Mad. 83. Talemand *v.* Rukimna, 3 All. 353. Kissendas *v.* Ramgabai, 9 Bom. L. R 382.

(3) Act 21 of 1870, Sec. 3. Kamalmani *v.* Ramnath, 1 Mor Dig. 44. Jamna *v.* Machud, 2 All. 315. Krishnarao *v.* Bhagwantra, 2 Bom. L. R. 1082.

(4) Mani Lal *v.* Bai Tara, 17 Bom. 398.

(5) Jayanti *v.* Mangamma, 12 Mad. L. J. 270.

coparceners of her deceased husband. (1) The Madras Court rightly held that the text of Katyayana : "Except his whole estate and his dwelling house, what remains after the food and clothing of his family, a man may give away"—cannot be invoked for the decision of this question, as it is a general rule applicable to all cases, whether a man may have a wife or not and as such obsolete now. But apart from the text of Katyayana, the wife has some rights. It is clear that when the house is ancestral, under the Mitakshara, the right of the wife, who as a daughter-in-law of the father had an absolute right at his death, cannot be defeated at the pleasure of the husband. In self-acquired property, it may be otherwise.

SECTION III.

THE MAINTENANCES OF FEMALES, &c.

विप्रदुष्टां स्त्रियं भर्त्ता निरुन्ध्यादेकवेश्मनि ।
यत् पुंसः परदारेषु तच्चैनां चारयेद्व्रतम् ॥
एतदेव विधिं कुर्य्याद्योषित्सु पतितासु अपि ।
वस्त्रान्नपानं देयन्तु वसेयुश्च गृहान्तिके ॥

मनुः, ११ । १७७. १८९ ।

An exceedingly corrupt wife let her husband confine to one apartment, and compel her to perform the penance which is prescribed for males in cases of adultery.

Let him follow the same rule in the case of female outcasts, but clothes, food, and drink shall be given to them, and they shall live close to the family house. Manu, XI. 177, 189.

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(1) Olagayee v. Pichammal, 9 I. C. 524. Ramanandan v. Rangammal, 12 Mad. 260.

वृद्धौ च मातापितरौ साध्वी भार्य्या सुतः शिशुः।
अप्यकार्य्यशतं कृत्वा भर्त्तव्या मनुरब्रवीत्॥

मिताक्षरामाधवधृतमनुवचनम्।

A mother and a father in their old age, a virtuous wife, and an infant son must be maintained even though doing a hundred times that which ought not to be done.

A text cited in the Mitakshara, Parasara Madhava &c., as Manu's, but not found in Manu's Smriti, probably it is a text of Narada or Vrihaspati.

रक्षेत् कन्यां पिता विन्नां पतिः पुत्रास्तु वार्द्धके।
अभावे ज्ञातयस्तेषां स्वातन्त्र्यं न क्वचित् स्त्रियाः॥
आज्ञासम्पादिनीं दक्षां वीरसूं प्रियवादिनीम्।
त्यजन् दाप्यस्तृतीयांशमद्रव्यो भरणं स्त्रियाः॥
कृताधिकारां मलिनां पिण्डमात्रोपजीविनीम्।
परिभूतामधःशय्यां वासयेद्व्यभिचारिणीम्।
अपुत्रा योषितश्चैषां भर्त्तव्याः साधुवृत्तयः।
निर्वास्या व्यभिचारिण्यः प्रतिकूलास्तथैव च॥

याज्ञवल्क्यः १। ८५, ७६, ७०, २। १४२

The father is to protect the maiden (before her marriage), the married woman is to be protected by the husband, and in old age (in his absence) by sons, or in their absence by kinsmen; because women are never to have independence.

He who abandons an obedient, attentive, son-bearing, and sweet-speaking wife, should be compelled (by the king) to give her a third of his property. If poor, he should (be ordered to) maintain her.

An adulteress is to be allowed to live, deprived of her rights, poorly dressed, fed with a view to sustain life only, dishonoured, sleeping on the ground.

And their (*i. e.*, of the disqualified heirs) sonless wives conducting themselves aright, must be supported, but such

as are unchaste should be expelled ; and so indeed should those who are perverse.

Yajnavalkya, I. 85, 76, 70 ; II. 142.

प्रति संवत्सरं चत्वारिंशत् पणाश्चतुर्विंशदाढकाः, अथवा यावज्जीवं शतं कार्षापणाः तदर्द्धं वेति ।

सरस्वतीविलासधृतविष्णुवचनम् ।

Year by year 40 Panas and 24 Adhakas, or else a hundred Karsapanas as long as she lives, or one-half of this, shall be allowed to a widow.

Vishnu, cited in the Saraswati-Vilasa.

मृते भर्त्तर्यपुत्रायाः पतिपक्षः प्रभुः स्त्रियाः ।
विनियोगात्मरक्षासु भरणे च स ईश्वरः ॥
परिक्षीणे पतिकुले निर्मनुष्ये निराश्रये ।
तत्सपिण्डेषु वासत्सु पितृपक्षः प्रभुः स्त्रियाः ॥
भ्रातृणामप्रजाः प्रेयात् कश्चिच्चेत् प्रव्रजेत्तु वा ।
विभजेरन् धनं तस्य शेषास्तु स्त्रीधनं विना ॥
भरणं चास्य कुर्व्वीरन् स्त्रीणामाजीवितक्षयात् ।
रक्षन्ति शय्यां भर्त्तुर्येदाच्छिन्दुरितरासु च ॥

नारदः, १३ । २८, २९, २५, २६

After the death of her lord, the relations of her husband shall be the guardians of a woman who has no son. They shall have full authority to control her, to regulate her mode of life, and to maintain her.

When the husband's family is extinct, or contains no male, or when it is reduced to poverty, or when no one related to it within the degree of a Sapinda is left, the father's relations shall be the guardians of a woman.

Among brothers, if one die without issue, or enter a religious order, let the rest of the brethren divide his wealth except the wife's separate property.

They shall make provision for his women till they die, in case they remain faithful to the bed of their husband. Should the women not (remain chaste), they must cut off that allowance.

Narada, XIII. 28, 29, 25, 26.

या पत्नी विधवा साध्वी ज्येष्ठेन श्वशुरेण वा।
गोत्रजेनापि* चान्येन भर्त्तव्या छादनाशनैः॥

स्मृतिचन्द्रिकाधृतनारदवचनम्।

Whichever wife (Patni) becomes a widow, and continues virtuous, she is entitled to be provided with food and raiment by the elder brother of the deceased, or by her father-in-law or by another Gotraja.

Narada, cited in the Smriti-Chandrika, XI. 34.

आढकास्तु चतुर्विंशत्वारिंशत्पणांस्तथा।
प्रतिसंवत्सरं साध्वी लभेत मृतभर्तृका॥

स्मृतिचन्द्रिकासरस्वतीविलासधृतनारदवचनम्।

A virtuous woman whose husband has died, receives every year a maintenance of 24 Adhakas and 40 Panas.†

येऽपुत्रा क्षत्रविट्शूद्राः पत्नीभ्रातृविवर्जिताः।
तेषां धनहरो राजा सर्व्वस्यापि पतिर्हि सः॥
अन्यत्र ब्राह्मणात्किन्तु राजा धर्म्मपरायणः।
तत्स्त्रीभ्यां जीवनं दद्यादेष दायविधिः स्मृतः॥
अन्नार्थं तण्डुलप्रस्थमपराह्णे तु सैन्धवम्।
वसनं विंशपञ्चाक्षीतं दद्यमेकं चिमासतः॥
एतावदेव साध्वीनां चोदितं विधवाधनम्।
वसनस्याशनस्यैव तथैव रजकस्य च।
धनं व्यपोह्य तच्छिष्टं दायादानां प्रकल्पयेत्॥

बृहस्पतिः, २५। ६७—७०

Should a Kshatriya, Vaisya, or Sudra die without leaving male issue, or wife, or brother, their property shall be taken (as escheat) by the king, for he is the lord of all.

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* देवरेण for गोत्रजेन is another reading of the text. In the translation of the Smriti-Chandrika the reading *Gotraja* has been adopted by Mr. Iyer. यावत्यो विधवा साध्वी &c., is the reading of the Viramitrodaya.

† 192 measures (Prastha) of grain make an Adhaka. Pana is a coin. In some countries a Pana is considered as forming the eightieth part of a Nishka. See Saraswati-Vilasa.

Except in the case of a Brahmana ; but a king, bent on the practice of virtue, must allot a maintenance to his women. Thus has the law of inheritance been declared.

For her food (the must assign) a *prastha* of rice every afternoon, together with fuel, and one dress purchased for three *panas* must be given to her every three months.

This much has been called the 'widow's wealth' of chaste women.

What is left after setting apart property, sufficient for the expense of her dress, food, and for the washerman, shall be made over to the co-heirs.

Vrihaspati, XXV. 67—70.

दद्याद्धनञ्च पर्य्याप्तं क्षेत्रार्द्धं वा यदिच्छति ।
प्रदद्यात् वत्सरे पिण्डं क्षेत्रार्द्धं वा यदृच्छया ॥
पराशरमाधवधृतबृहस्पतिवचनम् ।

She should be given sufficient wealth, or part of the land if she desires. She should be given food during the year, or part of the land at will (for support).

Text of Vrihaspati, cited in the Parasara-Madhava.

स्थावरञ्श्वशुरं स्त्रीभ्यो यद्दत्तं श्वशुरेण तु ।
न तच्छक्यमपाकर्त्तुमितरैः श्वशुरे मृते ॥
स्मृतिचन्द्रिका धृत बृहस्पति वचनम् ।

Immoveable property granted to women for their maintenance by their father-in-law, the other coparceners are not entitled to resume, on the death of the father-in-law.

Vrihaspati cited in the Smriti-Chandrika.

अद्यचेत् स शिशार्थ्यः स्यान्नैव तां भजते पुनः
प्रीत्या निसृष्टमपिचेत् प्रतिदाप्य स बलात् ॥
यासाच्छादनवासानामाच्छेदो यत्र योषितः ।
ततः स्वमाददीत स्त्री विभागस्थक्षिनस्तथा ॥
लिखितस्य च चक्रीऽयं प्राप्ते भर्तृकुले वसेत् ।
व्याधिता प्रेतजाती तु गच्छेद्बन्धुकुलं ततः ॥

अपकारक्रियासु निर्लज्जा चार्थनाशिका ।
व्यभिचाररता या च स्त्रीधनं सा च नार्हति ॥
यत्रार्थे द्रव्यमुत्पन्नं तत्राद्रव्यं नियोजयेत् ।
स्थानेषु धर्म्यनिष्ठेषु न स्त्रीमूर्खविधर्मिषु ॥
भर्त्रा प्रतिश्रुतं देयमृणवत् स्त्रीधनं सुतैः ।
तिष्ठेत्तृणं कुले या तु न या पितृकुले वसेत् ॥
अदायिकं राजगामि यौषिद्दत्तौर्द्ध्वदैहिकम् ।
अपास्य श्रोत्रियद्रव्यं श्रोत्रियेभ्यस्तदर्पयेत् ॥

कात्यायनः ।

If the husband has two wives and does not love (one of them), he should be compelled to return to her whatever she might have given to him, even out of love.

If food, raiment, and residence be withheld from women, they may exact their own (Stridhanas), and may likewise take a share from the heirs. This is the law laid down by Likhita. When she has got them, she shall live in the husband's family. But if she be afflicted with disease, and in danger of life, she may remove to her father's family.

If a woman is addicted to evil works and wastes money and is unchaste, she does not deserve Stridhana. Property is for sacrifice, therefore it should be given to deserving virtuous persons and not to women, ignorant persons and irreligious men.

The Stridhana promised by the husband (to the wife) should be paid by the sons as a debt (of his), if she lives with the family of her husband, and not, if she lives in the family of her father.

Heirless property goes to the king, deducting, however, a subsistence for the females as well as the funeral charges. But the goods belonging to a venerable priest, let him bestow on venerable priests.

Katyayana, cited in the Ratnakara and other commentaries.

विधवा यौवनस्था चेन्नारी भवति कर्कशा।
आयुषः क्षपणार्थं तु दातव्यं जीवनं तदा॥*

हारीतः।

A widow who is youthful, if she becomes untractable (unchaste, according to the commentators) she should be given maintenance (enough) for preserving her life.

Harita, cited by the commentators.

आढकं भर्तृहीनाय दद्यादामरणान्तिकम्। प्रजापतिः।

To the (incontinent) widow should be given Adhaka as maintenance till death.†

Prajapati, cited by the commentators.

यत्तु भ्रातृभार्य्याणान्तु स्नुषाणाञ्च न्यायप्रवृत्तानां अनपत्यानाम्, पिण्डमाचं गुरुर्दद्यात् जीर्णानि वासांस्यविक्लृतानि।

जगन्नाथधृतशङ्खवचनम्।

The sonless virtuous brother's widows and son's widows, the *Guru* (father-in-law) should give only food, and old but untorn clothes. ‡

Sankha, according to Jagannatha.

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* Cited in the Mitakshara, Ch. II., Sec. I., p. 27.

† This text, the preceding text, and Vrihaspati, XXV. 69, (p. 324) refer according to Madhava, to an unchaste woman. If the next text, *i.e.*, of Sankha be genuine, that also refers to unchaste women.

‡ This is a text of doubtful authenticity as it is not cited by any of the ancient commentators.

SECTION IV.

Stridhana.

History of Stridhana.

The original law among all Aryan nations was that the wife could hold no separate property. On marriage, all that belonged to her, became the husband's. Among European nations the old law has only in recent years been relaxed to a certain extent in favour of women. The Hindus, among all the nations of the earth, first came to recognize, that women were not mere chattels or objects of sport of man, and gave them an honourable position in the family and rights not enjoyed by them elsewhere. The charge of cruelty towards women, levelled against them by foreign nations, owes its origin to the extraordinary value attached in India to chastity, and the very hard rules for preserving it, incomprehensible to foreigners. Otherwise no nation was or is more kind and considerate towards its women, as an impartial consideration of the laws of the Hindus will show. The recognition of the rights of women in India, however, owes its origin quite as much to the anxiety of men to protect their own interests, as to the high ideal of the wife being a necessary helpmate of the husband for the performance of the duties of life. In India, where the joint family system prevailed, and property inherited or obtained by the wife from her relations was originally liable to partition among the coparceners, the hardship of the old law was very keenly felt, not only by the wife, but also by the husband; and the reform of the law became easy. We thus find, that it was in connection with partition that the law of Stridhana or the peculiar property of

women developed. Such property could not be shared by the coparceners. This was the original law. Once the right of women to certain descriptions of property was established, the Rishis also found it necessary to establish the rule not only against the coparceners, but also against the husband, especially when he took another wife.

There is a great divergence, among commentators and text-writers, as to what constitutes, Stridhana, and as to the rules of succession to it, on account of imperfect knowledge of the history of this branch of the law, which modern investigation also, has left as dark as it was before. Now originally all property belonged to the family, and the wife and the daughter had no separate property. Ornaments worn by a woman were the first description of property, which it was thought very unjust that the coparceners should take away from a widow and divide, and the very severe punishment of *Patitya* was prescribed for this gross act of robbery. This was the beginning of the law of Stridhana. It is surprising to find, that the text of Vishnu on this matter, which is identical with the text of Manu, and probably copied from it, should have been considered as slightly different from it by Mr. Mayne, and that the interpretation of it by Messrs. West and Buhler following Nanda-Pandita to the effect that "The ornaments should not be divided while the husbands are alive, but might be divided when they are dead," should have passed current, and been accepted by learned Hindu authors, who have since written books on Hindu law. All the ancient commentators like Medhatithi and the author of the Prakasha, as well as more modern writers

Ornaments worn.

like the author of the Ratnakara, have held, that the texts of Vishnu and Manu are identical, and mean, that if a female is allowed to put on any ornaments during the lifetime of her husband, though they might not have been given to her absolutely, after the husband's death, the coparceners should not deprive her of them. It is a great pity, that the travesty of this humane rule, mentioned above, should have been accepted by modern Hindu writers.

Stridhana in ancient law and in the Rig Veda.

When the practice of purchase of wives became obsolete, on account of the development of the idea of the spiritual character of marriage, it became the custom enforced by the injunction of the Rishis, that the daughter should be given ornaments and some property as marriage portion by her father's family. These two descriptions of property, as well as property given out of love by the husband or his parents, were considered Stridhana very early by the Hindu Lawgivers.* In the Rig Veda, we find the gift before the nuptial fire and what was given while the bride was carried to her husband's home, as was then usual, in a car, mentioned. Like all branches of law, the law of Stridhana can be traced to times as ancient as the Rig Veda.

The sixfold Stridhana.

The lawgivers divided Stridhana into six subdivisions, and Sankha-Likhita laid down that it was only in these six ways that a woman could acquire property. These six descriptions of property were received at or in connection with marriage. They were: (1) what was given before

* According to a text of Vyasa, what is given to the bridegroom during marriage also belongs to the bride.

the nuptial fire, (2) what was given when the bride was carried to her husband's house, (3) what was given by the husband or the father-in-law or the mother-in-law out of love at the time of the first obeisance, &c., (4) what was given by the brother, (5) what was given by the mother, and (6) what was given by the father. These only were originally Stridhana. It appears, however, that afterwards the law was still further relaxed, and property received family after marriage from the husband's or father's called the Anvadheya was considered Stridhana, as also the property received from the husband on supersession. Anvadheya.

In ancient times, there was a custom of giving some property to a woman by her husband's and father's families, on marriage, either at the time or afterwards, for her support, and it was enforced by declaring it to be sinful not to do so. This kind of Stridhana was called Saudayika. The custom has fallen into disease, but orthodox Hindus should revive it in order 'to avoid sin' as the text on the subject says. Saudayika.

Sulka was originally the price of the bride, which used to be received by the father among Hindus as among all other Aryan nations. It was taken by the father, and Manu therefore, does not include it within Stridhana. When the Rishis prohibited the receiving of a price by the father, the father very often insisted, as Haradatta has shown, upon receiving the price that he might give it to the daughter. This was allowable, and this properly "went back to the daughter" and became also her Stridhana. Property acquired by the wife by mechanical arts, or received from Sulka.

strangers to the family belonged to the husband, and was not considered to be Stridhana.

There is a well-known description of Stridhana called Bhartridaya. It originally meant the portion of his property, which the husband could give to the wife, and afterwards it was also understood to mean the property of the deceased husband taken by way of inheritance. Vijnaneswara, anxious as he always was to advance the interests of females, in his commentary on Yajnavalkya, Ch. II., p. 148, upon the word आद्य (*i. e.*, and the rest), built the theory that property received by a woman by inheritance, purchase, partition, acceptance or finding was Stridhana. The text in question only mentions five kinds of Stridhana, and by the words "and the rest" are meant the other kinds of Stridhana mentioned by Manu and other Rishis, but not mentioned there. The commentators and text-writers have waged a furious battle on the interpretation of this word. But it has been forgotten that in ancient times women never took anything by way of inheritance. Commentators before Vijnaneswara had not given women any rights of inheritance. Even the daughter took only as a Putrika, and as she had the rights of a son, the law of Stridhana was not applicable to her. Vijnaneswara had to make his interpretation of the law consistent, and he was obliged to say that property obtained by inheritance was included in Stridhana, by virtue of the words "and the rest." The commentators, whether of the Bengal or the Madras school, who denied the correctness of his interpretation, did not see that such denial was also a denial of the widow's rights of inheritance.

Husband's estate and gift.

having regard to the definition of Stridhana and the text of Sankha-Likhita. A wife according to the Smritis can have no wealth, excepther Stridhana. Gimutavahana, when he defined Stridhana as property "which a woman has power to give, sell, or use independently of her husband," did not consider well the nature of Stridhana, its history or the object of the law. Vijnaneswara had much greater information at his command, and a more comprehensive mind. He knew that Stridhana was every kind of property owned by a female which the coparceners could not touch on partition. Property taken by way of inheritance by women, whether widows or daughters who were not Putrika, he placed in the cotegory of Stridhana. But he did not thereby say that they had absolute power over inherited property. The power of women over the kinds of Stridhana is defined by the texts on the subject. We have already considered the texts and the law about the power of females over inherited property, and we have also seen, how the impression that all kinds of Stridhana are at the absolute disposal of women has led judges and text-writers to hold that according to Vijnaneswara, in property inherited by females, they have an absolute interest.

In the Smritis, we find the nature of Stridhana clearly defined. It is not divisible by coparceners. Neither the husband nor the son, nor the father nor brothers have power to take it or spend it. But the husband can take it "for the performance of religious duties, during illness, or while under restraint." A woman "can enjoy property given for her maintenance, ornaments, the bride-price, and

Incidents of Stridhana.

wealth gained from kinsmen." In Saudayika property, *i.e.*, "property received from the husband's or father's house" a woman has independent power, "for it is given for her maintenance"; "she has power either to sell or make a gift of it even if it be land." But in respect of property received from the husband's estate as Bhartridaya, the movable property, she can dispose of, as she likes, and can enjoy till her death, when the undisposed of balance is taken by the husband's family. The immovable property given by the husband or out of his estate for her maintenance by his family, she cannot sell without necessity, or dispose of by way of gift. "After her death, it is taken by the husband's family." Thus have the lawgivers defined the powers of women over the different kinds of Stridhana. It is not correct to say, that a woman had absolute power over every kind of Stridhana. Vijnaneswara was aware that designating property inherited by a widow from her husband as Stridhana, was not tantamount to giving her full power over it. The Viramitrodaya makes it quite clear. The nature of such property is defined by special texts. Modern lawyers and text-writers have given themselves a great deal of unnecessary trouble in lengthy discussions of this simple position of Vijnaneswara.*

* The Mayukha agrees with the Mitakshara in thinking, that Manu's enumeration of six kinds of Stridhana means only a denial of a smaller number, and like the Viramitrodaya, it holds that every kind of property owned by a woman is her Stridhana. But it makes a distinction between *Paribhashika* and *Aparibhashika* Stridhana, *i.e.*, Stridhana, strictly so called, and other kinds of Stridhana, and says, that in respect of the latter, male children take before female children.

The Smriti-Chandrika and the Madhaviya do not agree with the Mitakshara in its interpretation of the word *Adya* as including every kind of

We have next to see what are the rules of succession to Stridhana according to the Rishis. The texts of the various Rishis are in apparent conflict with one another, and the commentators having failed to reconcile them, have laid down arbitrary rules. We have seen that what was given at marriage was originally considered Stridhana, and that consisted chiefly of ornaments. As daughters took nothing when there were sons, it was thought equitable, that the property given by the father at marriage should be taken by the daughters and their children, and among daughters, by the maiden daughters before married daughters and among the latter by indigent daughters before others. Manu says all the separate property of a woman is the share of the maiden daughter, and that referred probably to the six-fold Stridhana. Gautama, Vasista, Vishnu, Yajnavalkya, Narada and Katyayana all agree in giving this property to the maiden daughter, and failing her, to other daughters, and failing them, according to Narada, it goes to their children. Vijnaneswara understood by '*duhitrinam*' daughters and daughter's daughters, and gave daughter's daughters preference over daughter's sons. The difficulty is to reconcile with the above texts the texts of Sankha-Likhita, Vrihaspati, Paraskara, Devala, Vriddha-Harita, and Manu, IX. 193.

Succession according to the Smritis.

property. The Mad aviya says, that by virtue of it, only such property as is purchased with Stridhana proper is included in Stridhana. The Smriti-Chandrika excludes gains by mechanical arts, and does not include inherited property in the enumeration of Stridhana. in Krishnaswami Iyer's translation we find a passage to the effect, that whatever the mother takes, she takes for herself like the Stridhana called Adhayagni and the like. This passage is wanting in Bharata Siromani's edition of the book, as is pointed by Mr. Justice Banerjea.

Sankha-Likhita, Vrihaspati and Devala agree in holding that the unmarried daughter and the sons take together. Paraskara says, the son does not take when there is a maiden daughter but he takes equally with a married daughter. Vriddha-Harita says, that property received from the husband goes to sons and daughters, but other property only daughters take and failing them, their sons. According to Vrihaspati the married daughter takes only a trifle as a token of respect. Manu in verse 193, says sons and daughters take equally. This text refers to Anvadheya according to the Smriti-Chandrika and the Mayukha. But Vijnaneswara says, that the true meaning of the verse is that all sons take equally and all daughters take equally.

Katyayana lays down the special rule, that in property given by the father's family, the latter took before the husband, and married sisters share with them. Madhava says it refers to a female, married in a disapproved form, and he gives the very satisfactory reason that another text of Katyayana specifically mentions that rule. As to immovable property granted by the father to the daughter for her maintenance, according to Vriddha Katyayana, on the death of the daughter without issue it reverted to the father's family and was taken by her brother. But this text is not cited by any commentator other than Gimutavahana, and its authenticity is therefore doubtful.

It is difficult to reconcile all these texts. As regards Stridhana proper, the law seems to have been that the maiden daughter took first ; failing her, the married daughter ; and that daughter's sons took before the sons. Probably daughter's daughters

and daughter's sons took equally. After the daughter's son, the son, grandson, the husband, and failing them, mother, brother, and father took. We find, that Manu speaks of the gifts subsequent and of the gifts by the husband as distinct from Stridhana proper. It is about this property probably, which subsequently was considered Stridhana, that we find great divergence among the Rishis. The majority of lawgivers say, that it belonged to sons and unmarried daughters equally. Therefore it is probable, that the Anvadheya or gifts subsequent were taken by sons with unmarried daughters, and failing them, by the married daughters. As regards property given by the husband called the Bhartridaya, the rule of Katyayana, is that the widow has got only a life-interest, and it is taken after her death, by the husband's heirs. This rule, there is reason to believe, was accepted as good law. Again, as to gifts subsequent by the father's family and the Sulka, on the woman dying childless, it was considered proper by some, that they belonged to the father's family. That was laid down by Yajnavalkya and Katyayana.

In the result, it seems that we would be justified in accepting the rule laid down by Katyayana, who is regarded as one of the latest of the Lawgivers and who speaks more fully of Stridhana than any of the other Lawgivers, as the law which finally prevailed. The rule is that all Stridhana proper belonged to unmarried daughters first, and then to married daughters, and lastly to sons. Failing children, it passed to the husband. As to subsequent gifts by the husband, they were taken by the husband's heirs, unmarried daughters being allowed equal shares with sons in the first instance, and

Result of the consideration of the texts.

not a quarter share only. Gifts subsequent by the father's family, as well as Sulka, were taken by daughters first, and then by sons, failing whom, they went to brother, mother and father in succession. Sisters were allowed to share with brothers. Failing all these heirs, the property went to the husband.

We have next to consider the text of Vrihaspati which speaks of certain females* who are considered equal to mothers. Vijnaneswara does not refer to it. The Smriti-Chandrika first cited it and interpreted it as meaning that relations to whom the woman would be in the position of a mother, according to the above rule, are heirs ; and they are the sister's son, the husband's sister's son, the husband's brother's son, the son-in-law, and the husband's younger brother. This is very ingenious, and on account of its ingenuity, it was accepted as correct by the subtle minds of Gimutavahana and other modern commentators. If this is correct, then after the husband, it is not the husband's family but these relations who will take, and no others. But the correct interpretation seems to be, that that text only indicates certain heirs and not the order in which they take. It is noteworthy that there is no text laying down, that Stridhana ever goes to the husband's or father's agnates, except such as are specially mentioned.

Vrihaspati's rule about sister's son&c.

It remains to notice the mistake into which Gimutavahana and some other commentators have fallen in considering, that Yautaka in Manu, Ch. XI. meant a description of Stridhana, namely the nuptial presents. This interpretation is opposed to Medhatithi, Kulluka, and Narayana, and is clearly incorrect, having regard to Manu, Ch. IX., v. 314,

The mistake about Yautaka.

where the same word is used in the sense of separate property. Nuptial presents became the separate property of a girl and hence Yautaka came to mean nuptial presents in Bengal and some other provinces. In dividing Stridhana into two divisions of Yautaka and Ayautaka, and settling the law of succession accordingly, Gimutavahana, as usual, showed more ingenuity than knowledge. The law laid down by the leading commentators, however, is considered now to be the only law binding on the Hindus, and we have, therefore, next to see what is the law of succession as laid down by them.

The rule of the Mitakshara.

According to the Mitakshara, all property obtained by a woman is her Stridhana. Vijnaneswara, in citing, in other places, with approval, the text of Katyayana about immovable property inherited or obtained by gift from the husband by a woman seems to be of opinion, that such property will be governed by the rule of Katyayana. As regards property obtained by way of inheritance from the father according to the Mitakshara, it is Stridhana. There is, however, no reason to suppose, that the Mitakshara set aside the law of Manu on the devolution of the property of the Putrika. The property obtained on partition by a mother is considered by Vijnaneswara as Stridhana governed by the general rule, to which the only exception is the case of Sulka, which is taken by brothers of the whole blood. The order of succession to Stridhana in general according to Vijnaneswara is as follows :—

(1) Unmarried daughter, (2) Married daughter, unprovided, indigent, or without issue, (3) Daughter not falling within the above category, (4)Daughter's

daughter, (5) Daughter's son. (6) Son, (7) Son's son, (8) Unmarried daughter of a co-wife, (9) Husband and his Sapindas, if married in one of the approved forms of marriage; if married in other forms, the parents and their Sapindas. Daughter's sons and daughters take *per stirpes*, and not *per capita*.

The share obtained on partition is taken by the daughter first, then by the son born after partition and lastly by separated sons.

The rule of the Smriti Chandrika.

The Smriti-Chandrika divides Stridhana into Yautaka, Anvadheya and the affectionate gifts of the husband, Sulka, and Stridhana other than those mentioned before.

To the Yautaka, the maiden daughter first succeeds; failing her, sons.

To the Anvadheya and the affectionate gifts of the husband (pritidatta) daughters succeed simultaneously with sons. If there be no unmarried daughters, the married daughters take equally with the sons, but the widowed daughters do not share with the sons.

It should be observed, that the rule, that married daughters, though they take with the sons, are disqualified when there are maiden daughters, with whom, however, sons share all the same, is rather inconsistent. Again the rule, that widowed daughters do not take, is based on a misapprehension of the text of Katyayana cited in this section.

As regards other kinds of Stridhana, disagreeing with the Mitakshara, it says, that the maiden and unprovided daughters take equally. After them, the provided daughter, the daughter's daughter, the daughter's son, the son's son and the husband take, in the order mentioned. In case of marriage in one

of the reprehensible forms, the husband takes only if there be no kinsmen of the father. After the heirs mentioned above, the following persons take : (1) sister's son, (2) husband's sister's son, (3) husband's brother's son, (4) brother's son, (5) son-in-law, (6) husband's younger brother. Step-sons also are heirs.

"The Sulka of a married woman is taken by her brother and mother in succession," but that of "an unmarried damsel is taken by the giver." "The property other than the Sulka belonging to an unmarried damsel is taken by the brother, mother, and father in succession."

The general rule applies to all Stridhana, that the husband takes the property of a woman, if married in one of the approved forms, otherwise, the father.

The Parasara-Madhava agrees with the Mitakshara in the main. It, however, defines Yautaka as what is received from the father's family, and further is inclined to the opinion, that property received from the husband's family, the maiden daughter and son take equally. The sonless indigent daughter also may take a share. As regards Bandhudatta, it says that only in case of marriage in a disapproved form, it goes to the father's family and not otherwise. The property of the Putrika is taken by her husband, if there is no afterborn son of her father. Ornaments given by the bridegroom would be taken back by him, if the bride dies before marriage ; but those given by other relations would be taken by the brother. According to Varadaja, the rival wife's daughter is no heir.

The rule of the Parasara-Madhava.

Haradatta lays down the rule, that property

derived from the husband's family or self-acquired, the son and the unmarried daughter take equally. Property derived from the father's family the maiden daughter alone takes. Failing her, sons and married daughters take equally.

The rule of Haradatta.

The Saraswati-Vilasa, and Bharuchi, like the Chandrika, disagree with the Mitakshara, and interpret the text of Gautama on the subject to mean, that the maiden daughter and the unprovided married daughter take together all kinds of Stridhana, excepting nuptial presents, which are taken by the maiden daughter alone.

The rule of the Saraswati Vilasha.

According to the Vivada-Chintamani, the nuptial gifts, furniture and the like, go to the unmarried daughter, and then to the unprovided daughter, and failing her, to the provided daughter, and failing daughters, to sons. In every other kind of Stridhana the rule of Vrihaspati applies, *i. e.*, sons and unmarried daughters take together, married daughters getting something, only as a matter of favour. Then come the married daughter and the daughter's son. After the daughter's son, Stridhana goes to the husband, in case the woman is married in one of the approved forms.

The rule of the Vivada Chintamani.

The Ratnakara says, that all kinds of Stridhana, excepting Yautaka, are taken by sons and maiden daughters equally. The Yautaka which is defined as property given at the time of marriage by the father and the like, as well as property given at any other time by the father, is taken by the maiden daughter and the unprovided daughter equally, before the sons.* It also cites the text of Vrihas-

The rule of the Ratnakara.

* This opinion of the Ratnakara is based on the authority of Halayudha, who was the chief judicial officer of Lakshana Sena, the last indepent

pati, and puts the heirs beginning with the sister's son in the line of heirs. It also declares that every kind of Stridhana of a woman, married in one of the approved forms, having no issue, goes to the husband.

The Madana-Parijata lays down one uniform rule for all kinds of Stridhana. It says, that the maiden daughter takes first of all; after her, married daughters (among them the comparatively poorer one before the richer). The daughter's daughter comes next. After her, the daughter's son. Then come son, grandson, step-son, step-daughter, husband, husband's agnates, and father's agnates, in the order mentioned.

The rule of the Madana-Parijata.

The Mayukha divides Stridhana into Paribhashika, or those which have technical names, or as Mr. Telang put it, 'Stridhana, properly so called, and Aparibhashika,' *i. e.*, other descriptions of Stridhana having no technical names, or Stridhana not properly so called. As regards the second, all that the Mayukha says is, that "the son and the rest take even when there are daughters." The exact meaning of the rule has been discussed by several learned judges, notably by the late Mr. Justice Telang in a recent case. (See p. 238.)

The rule of the Mayukha.

As to the devolution of all kinds of Stridhana proper, the Mayukha agrees in the main, with the Smriti-Chandrika, and adopts its reasons.

Kamalakara, another Bombay authority, makes

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dent king of Bengal. Halayudha, however, defined Yautaka as "what is given to a woman for purchasing articles of her food, and increased by her own skill," and says, "that therein the brothers (*i.e.*, her sons) and married daughters have no shares; but married daughters, who are childless, or sliked by their husbands have equal shares with the maiden daughters."

a slight variation in the ordinary rule of the Mitakshara school, and says "in default of the husband, the daughter's sons and daughter's sons of the rival wife ; and in their default the *mother-in-law* ; the father-in-law ; the husband's brother, his sons, and other next of kin of the husband (succeed), according to the text: 'the wife and daughter also, &c.' This is the opinion of Vijnaneswara and Apararka."*

The rule of Kamalakar.

The Dayabhaga after defining Stridhana to be that over which a woman has absolute control, divides it into (1) Maiden's property ; (2) Yautaka ; (3) Ayautaka or gifts after marriage from the family of the father or of the mother or of the husband ; and Sulka, &c. Yautaka is property given at the time of marriage ; Ayautaka is what is given at any other time ; Pitridatta is the gift of the father.

The rule of the Dayabhaga.

The maiden's property is taken by brother, mother, and father in succession.

When dealing of the Yautaka, the Dayabhaga says, that it is taken by (1) unmarried daughter, (2) betrothed daughter, (3) married daughter having or likely to have a son, (4) barren or widowed and sonless daughter, (5) son ; and that failing issue, it is taken by husband and father in succession. In another place, it says that the grandson, the daughter's son, the step-son, and the step-son's son are heirs, and that the grandson is preferable to the daughter's son. The Dayakrama-Sangraha has placed daughter's son, son's son, son's grandson,

* See Siromoni's Hindu Law, p. 580.

steps-on, step son's son and step-son's grandson after the son, and before the husband.*

The Ayautaka is taken by (1) son and maiden daughter, (2) married daughter having or likely to have sons, (3) grandson, (4) daughter's son†, (5) greatgrandson, (6) sonless daughter, (7) brother, (8) mother, (9) father, (10) husband. The Dayabhaga says that the stepson and his son are heirs.

The Dayakrama-Sangraha places the stepson, the stepson's son, and the step-son's grandson before the widowed and sonless daughter. But from what the Dayabhaga says throughout the Chapter on Stridhana, and in as much as it says, that as long as there is any issue of the body, no other can take, and as it further says that the sonless daughter takes because she is a child of the body प्रजा, it is clear that the sonless daughter should take before the stepson.

* According to the Dayakrama-Sangraha the daughter's son is to be preferred to the son's son, as the daughter is to be preferred to the son. The conflict between Gimutavahana and his commentator shows that the Bengal Pundits were unwise in departing from the rule of Vijnaneswara. Great is the confusion on this point in the writings of the Bengal commentat rs, for their rule is neither founded on reason nor authority. Colebrooke has the following note in this connection. "This passage (Dayabhaga, Ch IV. III. 33) is censured by Srikrishna, who shows by very satisfactory reasoning that the daughter's son ought to inherit before the son of a contemporary wife. Achyuta considers the reading of the text to be questionable, and Maheswara pronounces it to be spurious. He also rejects the words "nor a grandson as unnecessary and improperly introduced in this place. Raghunandana in the Dayatattwa copying Gimutavahana's argument omits the passage altogether ; and the author of the Viramitrodaya has substituted one of a quite different import."

† In Ch. IV. II. 11-12 of the Dayabhaga, the daughter's son is placed immediately after the son's son and before the widowed daughter, but in Ch .IV. III. 33, he is placed after the stepson. Srikrishna notices this conflict and lays down this rule which is approved by Dr. Siromani and Dr. Banerjee. If the latter passage is genuine, it was intended by it, only to prove that the stepson was an heir, and not to lay down the order of succession.

The Dayakrama-Sangraha following the clear meaning of the text of Devala from which Gimutavahana deduces his rule, says, that in Ayautaka property also, the husband takes before the father.

The author of the Dayabhaga, however, says, that according to the text of Yajnavalkya, in property received from the father's, mother's and the husband's family after marriage (*i.e.*, Anvadheya,) as well as in property received before marriage from parents, and in Sulka, the brother, mother and father take before the husband. Gimutavahana had no idea that the text of Vishnu is very similar in its wording to the text of Yajnavalkya and that both the texts laid down the same rule. It is clear, if the texts of Vishnu and Yajnavalkya are compared, that the husband is preferred by those Rishis to the father, in all kinds of property. Gimutavahana was indeed very rash in differing from all other commentators, ancient and modern, in this matter. It is a matter of regret that this rule of the Dayabhaga, which is based on a misinterpretation of the text of Yajnavalkya and which is against all the Rishis and the spirit of Hindu law, has been preferred by the Calcutta High Court to the more correct rule of the Dayakrama-Sangraha and the Dayattatwa.

The Dayabhaga says that Bandhudatta means property given by the parents before marriage. It is Ayautaka, but on account of the next of Manu, it is taken in the first instance by the maiden daughters. All other descriptions of Pitridatta are Anvadheya Ayautaka.

The Dayakrama-Sangraha however, lays down the following rule of succession :—(1) Maiden daughter, (2) Married daughter, having or likely

to have a son, (3) Barren or widowed daughter (4) Son, &c.

Dr. Siromani was of opinion, that "it is evident that in the absence of the unmarried daughter the general rules as to Stridhana succession prevail *i.e.*, Yautaka property given by father is inherited as Yautaka, and Ayautaka is inherited as Ayautaka." The High Court have however, held, that in respect of Pitridatta property given before or after marriage, the mother is to be preferred to the husband.

After the heirs mentioned above, in all the classes of Stridhana, after the husband, the following heirs take in the order mentioned :—(1) Husband's younger brother, (2) Husband's brother's son, (3) Sister's son, (4) Husband's sister's son, (5) Brother's son, (6) Son-in-law. After these, husband's Sapindas take according to their nearness determined by the theory of spiritual benefit. In default of Sapindas, Sakulyas and Samanodakas succeed.* Let us go to the decisions of our Courts. Six distant heirs.

It has been held that there is no presumption of law that property acquired by a Hindu widow after her husband's death or found in her possession forms part of her husband's estate (1), or that property standing in the name of a female member is joint property (2) and is not Stridhana, and that in such cases "there is no justification of law in throwing the onus upon the widow." Presumption of Stridhana.

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* Dayakrama-Sangraha, II. 610.

(1) Dakhina Kali Debi *v.* Jagadishwar Bhuttacharjee, 2 C. W. N. 197. Jadunath, *v.* Ramnarain 11 I. C. 434. Dewan Ranbijai *v.* Indar Pal, 26 Cal. 871 P. C.

(2) Narayana *v.* Krishna, 8 Mad. 214. See however, Chandramoni Dassi *v.* Joykissen Sircar, 1 W. R. 107.

What is Stridhana.

Property purchased by a widow is her Stridhana, if it is purchased with the income of her Stridhana; (1) or by borrowing money, or by her financial skill, which is not the same as skill in mechanical arts, or with movable property given by the husband (2), or with the money given to a widow in lieu of maintenance, (3) or with the savings of her maintenance. (4)

Arrears of maintenance have been held to be Sridhana, and they are so, according to the text of Devala cited in this section. (5) Property received by way of gift (6), or as a legacy from a relative (7) is Stridhana. Property acquired by adverse possession is Sridhana. (8) And when the widow or the son's widow of a member of a joint Mitakshara family takes possession of any property, unless as the result of an agreement, her possession becomes adverse to the reversionary heirs, (9) and property thus acquired becomes her Stridhana. It has been held that the undisposed of profits of the property of the husband inherited by a widow, whether they have reached her hands or not, are not her

(1) Luchman *v.* Kalicharan, 19 W. R. 292 P. C.

(2) Vencata Rama *v.* Ven-atta Suriya, 2 Mad. 333 P. C.

(3) Nellai Kumara *v.* Markathammal, 1 Mad. 166.

(4) Pethasari *v.* Sendamari 8 I. C. 385, 8 Mad. L. T. 284. Subramanian *v.* Arunachelam 28 Mad. I.

(5) Courts of Wards *v.* Mohessur, 16 W. R. 76.

(6) Mussum at Radha *v.* Bisheshur, 6 N.-W. P. 279. See Tukaram *v.* Gunaji, 8 Bom. 129.

(7) Judoonath *v.* Bussant, 18 W. R. 264. Rudri *v.* Rupkuar, 1 All. 734.

(8) Mohim Chunder Sannayal *v.* Kassikanth Sanyal, 2 C. W. N. 161. Vencata Rayudu *v.* Subbammo 13 Mad. L. J. 302. Keanhai Ram *v.* Musammat Amri, 32 All. 189.

(9 Sham Koer *v.* Dah, Koer, 29 I.A. 132.

Stridhana (1) The law of increment to a woman's property is similar to the law of increment to her husband's estate discussed in Ch. III. Sec. 1.

Immovable property obtained from the husband.

Immovable property obtained by a wife from her husband by way of gift or by devise, is her Stridhana, but she has ordinarily only what is called a widow's estate in it, even though the gift is to her and her heirs ; but the gift or devise may be made in such terms as to give her an absolute interest with powers of alienation. (2) In Bombay, there are conflicting decisions on the point. In one of the cases, it has been held that a widow can alienate without express authority (3). The High Court of Madras in a later case dissented from it pointing out that the decision was opposed to earlier decisions of the Bombay Court (4), and to the text of Narada, as well as to the Saraswati-Vilasha (pp. 257, 258 and the Madhaviya. § 51). It was held in that case, that a grant of '*Putra Poutra Paryyantám* of immovable property to a wife and her heirs could not give any power of alienation, though it was her Stridhana, and the heirs of her Stridhana took the property in preference to the

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(1) Sridhar *v.* Kalipada, 11 I. C. 871. Isri Dutt *v.* Hansbatti, 10 Cal. 324 P. C. See howev r, Soorjemoney *v.* Denobundhoo, 9 Moore 123. Rivit Carnac *v.* Jivibai, 10 Bom. 478. Poddomonee *v.* Dwarkanath, 25 W. R. 335.

(2) Kunjo Bihary *v.* Prem Chand, 5 Cal. 684. Kollany *v.* Luchmee 24 W. R. 395. Mathura *v.* Bhikhan, 19 All. 16. Proson o Comar *v.* Tarruknath, 10 B. L. R. 267. See 9 Cal 830. Janki *v.* Bhairon, 19 All. 133. Kanhia *v.* Mahin Lal, 10 All. 495. Rebutti *v.* Sib Chunder, 6 Moore 18. Moulvi *v.* Shewakram, 2 I. A. 7. Lalloo *v* Jagmohan, 22 Bom. 409. Bhoba Tarinee *v.* Peary Lal, 24 Cal. 646. Tikaram *v.* Deputy Commissioner, 26 Cal. 707. (P C.) Sree Braja Kisora *v.* Srinandan, 26 I. A. 66. See 21 Bom. 376, 27 Cal. 44.

(3) Seth Mulchand *v.* Bai Mancha, 7 Bom. 491.

(4) Cotarbasapa *v.* Chanverova, 10 Bom. H. C. 403.

heirs of the husband, to whom the widow had devised the property by will. (1) It should be observed, however, that this is clearly opposed to the rule of Katyayana by which the husband's heirs take such property.

Property in the possession of a widow, confiscated and again granted to her by a Sunnud conferring full proprietory right, has been held to be her Stridhana. (2)

Immovable obtained from the father.

Immovable property given by the father to a daughter after her marriage is her Ayautaka Anvadheya Stridhana. (3)

Property obtained from strangers and by mechanical arts.

Property received from a stranger or acquired by mechanical arts belongs to the husband, according to the Dayabhaga, Smriti-Chandrika, and the Mayukha. There is only one old case on the point (4), but having regard to modern ideas, it is doubtful, whether it will be followed. In a recent unreported case in the Calcutta High Court the rule has not been followed. The Madras High Court have held that the rule that everything acquired by the wife during coverture belongs to the husband has no foundation in Hindu Law and that the contrary is unquestionably true. (5) The Judges in making these observations, had not apparently considered the texts of Manu and the other Lawgivers, cited in this Section.

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(1) Bhujanga *v.* Ramayamma, 7 Mad. 387.

(2) Brij Indar Bahadur *v.* Ranee Janki, 5 I. A. I. In this case the nature of Stridhana according to the Dayahhaga as well as the Mitakshara was considered by the Privy Council.

(3) Ram Gopal Bhattacharjee *v.* Narain Chunder 3 Cal. L. J. 15.

(4) Ramdulal Sirkar *v.* Jaimoni, 2 Morl. Dig. 56. See 12 Bom. 505.

(5) Ramsami *v.* Virasami, 3 Mad. H. C. 272. Vancata *v.* Suriya, Mad. 333 P. C.

The nature of property inherited by a female from a male has been fully discussed in Section I. As regards property inherited from females, even if it is Stridhana of the deceased, under the Bengal school of law, as well as under the Mitakshara School, it has been held that it is not Stridhana, is not alienable and does not pass to the heirs of the female who inherited it but passes on her death, to the heirs of the female from whom she inherited it, on the ground that in property inherited both from males and females the doctrine of revertor applies and that a female always takes a qualified estate in such property. (1) This view of the law is in accordance with the opinion of the Dayabhaga, (2) and the High Court of Madras have held that the law is the same in Madras and even the maiden daughter succeeding to her father takes only a limited estate. The Judges refused to follow the earlier cases on the point and held that the position of the Mitakshara cannot be supported having regard to the opinions of other Commentators (3) The Privy Council have held that the opinion of the Mitakshara that inherited Stridhana is Stridhana is incorrect. Their Lordships said: "they examined the primitive texts upon which the Mitakshara purports to be based; they considered the fundamental principles of the

Property inherited from a female.

(1) Sheo Shankar Lal *v.* Debi Sahai 25 All. 468, 30 I. A. 202. Lala Sheo Pertab Bahadoor *v* The Allahabad Bank, 25 All. 476. 30 I. A. 209.

(2) Bhoobun Mohun *v.* Muddon Mohun, 1 Shome's Rep. 3. Hurrydyal *v.* Grish Chunder, 17 Cal. 911. Prankissen *v.* Noyanmoni, 5 Cal. 222.

(3) Sengamulthammal *v.* Valyanda, 3 Mad. H. C. 312. Virasangappa *v.* Rudrappa, 19 Mad. 110. Janakisetty *v.* Miriyala 32 Mad. 521. Contra Venctarama *v.* Bhujanga, 19 Mad. 107. Narasayya *v.* Vencayya 2 Mad. L. J. 149.

Hindu Law; they reviewed the judicial decisions bearing upon the questions before them; they gave such weight as could properly be given to the very conflicting opinions of numerous pundits and they arrived at their conclusion without hesitation" (1) and they held that "there has been a remarkable concurrence in India among judges, text-writers and pure scholars to the effect that no distinction can be drawn consistently with the text of the Mitakshara between what has been inherited from a male and what has been inherited from a female." It is a matter of satisfaction to find that the Privy Council have upheld the true position of Hindu Law that the opinion of the Mitakshara, and thus of the other commentaries also, may be set aside on an examination of the original texts. But unfortunately in the present instance, there is great difficulty in going against Vijnaneswara. The Privy Council have held that the descent to such property is not governed by the rules of succession to Stridhana but goes to the heirs of her other property. The Smritis, as well as the commentaries, except the Mayukha,contain no provisions, regarding succession to a female's property other than her Stridhana and the family property inherited from the husband and son. We are thus placed in a very difficult position and when a female leaves no son but a daughter's daughter, who would be the heir of her Stridhana, such daughter will not take; and indeed any special rules of succession to such propery that may be laid down will have no texts or commentaries to support them. Indeed there is no authority in the Smritis

(1) 25 All. 474.

for this position. (1)

The Bombay High Court have however, held that the above ruling does not apply to Bombay, both where the Mitakshara prevails and where the Mayukha is in force and that on the principle of *Stare decisis*, property inherited by a daughter from her father must be considered her Stridhana, even for the purposes of succession. (2)

In Bombay, it has been held that a female takes an absolute estate in property inherited from a female, as well as when she takes as a daughter of the house, such as daughter, sister, niece, &c., and not as widow of a male coparcener, and that in such a case, the property devolves as Stridhana on her daughter in preference to the son. (3)

Mother's and widow's share on partition.

A mother's or step-mother's share on partition has been held by the Privy Council not to be Stridhana (see p. 297). Property obtained by a widow on partition on her death reverts to the heirs of her husband. (4)

Property acquired by adverse possession for 12 years by a female becomes her Stridhana. (5)

All Stridhana, except as above stated, is at the absolute disposal of the holder thereof and is alienable by her by way of sale, gift or will. (6) The Bombay High Court has held

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(1) Jagannath says, that such property is absolutely at a woman's disposal, 3 Dig 629. (2) Gulappa *v.* Tayawa, 31 Bom. 453. Bhau *v.* Raghunath, 30 Bom. 229. (3) Tulja Ram *v.* Mathuradas, 5 Bom. 662. Bai Narmada *v.* Bhagwantrai, 12 Bom. 505. Mani Lal *v.* Bai Rewa, 17 Bom. 758. (4) Durga Prosad *v.* Braja Mohun Bose, 39 I. A. 121. (5) Kashiram *v.* Musmut Amre, 32 All. 189. Moghli *v.* Ladh, 13 I. C. 644. (6) Tincowri *v.* Dinanath, 3 W. R. 49. Vencata *v.* Suriya, 2 Mad. 333. P. C. Munia *v.* Puran, 5 All. 310.

in Saudayika, which is defined as property obtained by a woman in the house of her husband or of her father from her brother or parents, she has absolute power of disposal, but in all other kinds of Stridhana her power of disposal *intervivos* or by will is subject to her husband's consent. (1)

Succession Decisions under the Mitakshara-Daughters.

As to the rules of succession to Stridhana under the Mitakshara school, the rule laid down by Vijnaneswara has been affirmed, and it has been held, that the maiden daughter takes first, failing her, the married but unprovided or indigent daughter, and in her default, other daughters. (2) Comparative poverty is the only criterion for settling the claims of daughters. (3) No preference is given to a daughter, who is barren or childless. (4)

In a recent case the Privy Council declined to decide the question whether a son and the son of a predeceased son are equally entitled to inherit Stridhana.(5) In reference to property of males the Privy Council have held that the word son includes son, grandson and great grandson. The question is not free from doubt.

Right of the adopted son.

There were conflicting decisions in the Bombay Sudder Court about the right of the adopted son. In Bengal and Allahabad it has been held that the adopted son like an Aurasa son succeeds to Stridhana. (6) The daughter's

(1) Bhau *v.* Raghunath, 30 Bomb. 229.

(2) Wooma Dai *v.* Gokoolanund, 5 I. A. 40, 3 Cal. 587.

(3) Audh Kumari *v.* Chundra Dai, 2 All. 561

(4) Baku Bai *v.* Mancha Bai, 2 Bom. H. C. 5. Binode Kumaree *v.* Purdhan Gopal Shahel, 2 W. R 176.

(5) Debi *v.* Mahadeo 34 All 234 P. C.

(6) Tincowree *v.* Dina Nath, 3 W. R. 49. Ganga *v.* Budh, 11 I. C. 27 Puddokumary *v.* Court of Wards, 8 Cal. 302. Kali Kamal *v.* Umasankar, 10 Cal. 232. See 33 Cal. 947 F. B. affd. 35 Cal. 896 P. C.

adopted son in like manner should be considered as having the same rights as the daughter's son.

Rule of succession in Bombay and Nagpore.

In Bombay and Nagpore the order of succession to Stridhana, according to the decisions, is that after the direct issue comes the husband. After him come (1) stepson, (1) (2) stepgrandson, (2) (3) co-widow, (3) (4) stepdaughter, (5) stepdaughter's son, (4) (6) husband's mother, (7) husband's father, (8) husband's brother, the full brother being preferred to the half brother, (5) (9) husband's brother's son. (6) A predeceased son's widow is also entitled to succeed. (7)

Right of the husband and his Sapinda.

The husband's Sapindas take before the father's Sapindas and other relations on the paternal and maternal side according to the rule of the Mitakshara and also under the Mayukha which should be made to harmonize, with the former, where the latter prevails. (8)

The adoptive mother has also been preferred to the adoptive father. (9)

The rule has been broadly laid down that whenever the husband's or father's Sapindas are declared heirs, they include the females, wives and daughters of such Sapindas, who would be heirs if the owner was a male. (10)

In Madras, it has also been held that the

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(1) Bhimacharya *v.* Ramacharya, 33 Bom. 452 See 20 I. C. 561.
(2) Gozabai *v* Srimant, 17 Bom. 114.
(3) Bai Kasserbai *v.* Hansraj, 33 I. A. 176. Paramappa *v* Shedappa, 30 Bomb. 607.
(4) Motiram *v.* Mayaram, Bombay Printed Judgments for 1880, p. 119
(5) Parmappa *v.* Shedappa, 30 Bomb. 607.
(6) Musammut Chandrabhaga *v.* Viswanath, 20 I C. 561, 9 Nag L. R. 102. (7) Narmada Bai *v.* Bhagwantrai, 12 Bom 505.
(8) Gozabai *v.* Srimant, 17 Bomb 114. Mussammat Thakoor Deyee *v.* Rai Baluk Ram, 11 Moore 139 Champat *v.* Sheba, 8 All. 993. Peet Koomar *v.* Chatterdharee, 13 W. R. 396.
(9) Ananda Ram *v.* Hari, 11 Bomb L R. 641 (10) Takaram *v.* Narayun, 36 Bomb. 339. Junglibai *v.* Jetha, 32 Bomb. 407.

Succession in Madras.

Mitakshara prevails over the Smriti Chandrika in respect of Stridhana and the threefold division of Stridhana made by the latter should be disregarded. To land given by the father the daughter succeeds in preference to the son and daughters do not take together, as laid down in the Smriti Chandrika. (1)

It has been held that the stepson takes after the husband and before the sister's son. (2) The stepdaughter has also been preferred to husband's collateral Sapindas. (3)

It has also been held that after the husband his Sapindas in the order laid down in the Mitakshara in the rule of succession to males, take and on failure of husband's Sapindas, blood relations of the female herself take before the crown. (4)

In early cases it was held that the daughter-in-law (5) and the brother's widow (6) were not heirs. But recently, the Madras Court following Tukaram *v.* Narayun, has practically adopted the Bombay rule and held that wives of Sapindas, though they are not heirs as such of males, are still entitled to inherit Stridhana and take their rank in the list of heirs as Sapindas. (7) A stepmother has been preferred to a maternal uncle. (8) The husband's brother daughter has been declared an heir as a Bandhu and preferred to the maternal uncle's adopted son. (9)

(1) Muthappudyam *v.* Ammani 21 Mad. 62, disapproving Sengamalathammal *v.* Valayada, 3 Mad. H. C. 312, and Magne, sec. 567.
(2) Brahamappa *v* Papanna, 13 Mad 138
(3) Nanga Pilla *v.* Shivabagvathac, 36 Mad 116
(4) Kankamal *v* Auttamala, 37 Mad 293.
(5) Bandam Setta *v* Bandam, 4 Mad. H C 180.
(6) Thayammal *v.* Annamala, 19 Mad 35
(7) 36 Mad 116. (8) Kamal Bai *v.* Bhagirathi, 16 I. C 939.
(9) Vencata Subramaniam *v.* Thararammah, 21 Mad. 263.

Heirs under the text of Vrihaspati.

Now we come to the six relations mentioned in the text of Vrihaspati. It has been held that the husband's sister's son takes before the sister's son. (1) The sister's adopted son takes in the absence of the husband and his agnatic Sapindas (2), according to the text of Vrihaspati. The six relations, mentioned in that text, take as among themselves, in the following order :—(*a*) Husband's youngest brother, (*b*) husband's brother's son, (*c*) husband's sister's son, (*d*) brother's son, (*e*) sister's son, (*f*) son-in-law. (3) Under the Mithila school, it has been held that the husband's sister's great-grand-son is entitled to succeed in preference to the husband's great-grand-father's son. (4) This ruling is however inconsistent with the recent ruling of the Privy Council on the applicability of the rule of Vrihaspati. (5)

In the last case on this matter, which was one under the Mitakshara school, before the Calcutta High Court, it has been definitely laid down, that the Vira-Mitrodaya cannot be preferred to the Mitakshara, and that the husband's Sapindas take before father's Sapindas and before the heirs enumerated in Vrihaspati's text, who are not husband's Sapindas. (6) The husband's agnatic Sapindas again, take in the absence of nearer heirs, (7) the nearer taking before the more remote, (8) and before the sister's son. (9)

These decisions cannot be reconciled with

(1) Ganeshlal *v* Ajudha, 28 All 345
(2) Runjit *v*. Jagannath, 12 Cal. 375.
(3) Baccha *v*. Jugmohun, 12 Cal 348.
(4) Mohun Persad *v*. Kissen Kishore, 21 Cal. 344.
(5) Bai Kesserbai *v*. Hunsraj Morarji, 30 Bom. 431. P. C.
(6) Jagannath *v*. Ranjit, 25 Cal. 354 (7) Peet Koomar *v*. Chatterdharee, 13 W. R. 396. (8) 8 All. 393 (9) 12 Cal. 348.

one other. But inasmuch as the Mitakshara ignores the text of Vrihaspati, it is reasonable to suppose that if it was authentic, Vijnaneswara refused to follow it.

Law settled by the Privy Council.

The rule of Vrihaspati has recently been considered by the Privy Council and the law and the principles about it settled. Their Lordships observe: "You have the following list of relations to the childless widow and deceased proprietors of the Stridhana, who are said to be like her sons, and have been called by some text-writers secondary sons:—(*a*) Sister's son, (*b*) husband's sister's son, (*c*) husband's brother's son, (*d*) brother's son, (*e*) son-in-law or daughter's husband, (*f*) husband's younger brother. The chief difficulty about the text of Vrihaspati is that we do not know the context in which it occurs. It appears to give promiscuously to the Sapindas of the husband and those of the father without noticing the distinction in the devolution of the property depending upon the form of marriage of the deceased widow. No intelligible principle has been discovered for the order in which they are enumerated. It is at variance with the settled and universally recognised principles of the Hindu Law of Inheritance and the enumeration is obviously not exhaustive." Their Lordships held that "the order of succession is not indicated" by the text but is only an enumeration of heirs and that in the list, the blood relation of the husband, the husband's sister's son, the husband's brother's son and the husband succeeded to the estate of a woman, married in an approved form; and the father's relation, *i.e.*, the sister's son, &c., succeeded in other cases.

Their Lordships held that the list is not exhaustive and neither the co-widow or any other Sapinda of the husband is excluded. The words "and the rest" therefore must mean or include "the other relatives of the husband or father." The rule laid down is that the husband's nearest Sapinda takes in the case of approved marriage and the father's nearest Sapinda in other cases. (1)

The ingenuity displayed by pundits and lawyers in construing this text of Vrihaspati has been considerable. The Privy Council in the case mentioned above made the following observations on this matter : "Three well-known constructions have been put on it. "First, that the words "on failure of the husband of the deceased woman" should be read as meaning "on failure of the husband and his line of Sapindas." Secondly, that Brihaspati's series of secondary sons comes in between the husband and his nearest Sapindas and in the order in which they are mentioned. Thirdly, that a distributive construction should be given to Vrihaspati's text applying the husband's relatives named to the case of a woman married in one of the approved forms and the father's relative to the other case only, and the text should be read as illustrative only and neither exhaustive nor intended to prescribe the order in which the enumerated heirs take. Their Lordships of the Judicial Committee have rejected the first two and adopted the third as correct." The first two interpretations have been conclusively shown to be inadmissible. The third is, it is appre-

(1) Bai Kessarbai v. Hunsraj Moraji, 30 Bom. 431.

hended not quite satisfactory. The question will still remain whether the husband's sister's son will take before the husband's brother's son. Again, in the text, only two blood relation of the father, namely, the sister's son and the brother's son, are mentioned. The Hindu law-givers are very precise and consistent and delight in enumerating categories if they meant to lay down two different rules, they would have mentioned the younger brother before the husband's younger brother. Again this construction would exclude the sister's son and the brother's son in case of approved marriage. The son-in-law could not have come in, if this was the construction intended. This was certainly not intended. Ingenuity often leads to strange results. The truth seems to be that in Hindu society the six persons mentioned are regarded as sons by courtesy. They have therefore been given rights of heirship. Their order is not indicated. By applying the rule that the husband's relations take before the father's relations in approved marriage, the husband's brother's son may be preferred to the brother's son. But it would not be reasonable to practically exclude the sister's son and the brother's son from the list of heirs, in as much as there can be, as a general rule, no marriage in a disapproved form now.

The Madras High Court in a recent case, has held that the Smriti Chandrika cannot override the Mitakshara and as the Mitakshara does not mention the rule of Vrihaspati, the former is not binding, when it goes against the rules of the Mitakshara. (1)

(1) Raju *v.* Ammani, 29 Mad. 358. Muthappadyam *v.* Ammani, 21 Mad. 103 Salemma *v.* Lutchmana, 21 Mad. 103.

Succession to Aparibhasika Stridhana.

By the law of the Mayukha, property given to a married woman by a stranger, and her own earnings are Aparibhasika, or non-technical Stridhana, and it has been held that all Aparibhasika Stridhana devolves in the same manner as if the holder were a male, and widows of Gotraja Sapindas may therefore inherit such Stridhana, just after their husbands, the daughter-in-law being thus preferred to the daughter's daughter. (1) In a recent case Mr. Justice Telang pointed out the mistakes of earlier decisions, and showed that the law of Mayukha was that in Aparibhasika or non-technical Stridhana 'the sons, and the rest' *i.e.*, son, grandson and greatgrandson, take precedence over 'daughters, and the rest, *i.e.*, daughters and their issue and failing both, the rule of succession was identical with that of technical Stridhan. (2) In a later case, from Mahad in District Kolaba, which was held to be governed by the Mayukha, it was held that when a sister inherits property, she takes an absolute estate and her heir is her son under the Mayukha and not the daughter as under the Mitakshara (3).

Succession to Pritidatta and Anvadheya in Bombay.

As regards Pritidatta and Anvadheya or gift subsequent, such as a devise by father, the rule has been laid that under the Mayukha, they are taken equally by the son and the unmarried daughter and in default of an unmarried daughter, by the son and the married daughter. (4) Nothing is said about the unprovided

(1) Lakshmi Bai v Jairam Hari, 6 Bom. 11 C. A., C. J. 152. Bai Narmada v Bhagwant Rai, 12 Bom 505. See 9 Bom. 301, 8 Bom. H. C. 261, O. C. J. (2) Moni Lal Rewadat v Bai Rewa, 17 Bom. 758. The same view has been taken by the Mysore Chief Court, 5 My. L. T. 169. (3) Dayaldas v. Sambubai, 34 Bom. 385 Narahar v. Bhan Moreshwar, 40 Bom. 621. (4) Sitabai v. Wasantrao 3 Bom. L. R. 201. Ashabai v. Hagi, 9 Bomb. 126.

daughter. The rule is far from a clear one and is based upon a doubtful construction of a passage of the Mayukha different from that of Borradaile which had been accepted before. (1) According to the Privy Council, it should be remembered, a construction which harmonizes the Mayukha with the Mitakshara is preferable.

Succession to maiden's property.

In Bombay, it has held that a maiden should be considered as a female married in a disapproved form and the father's sister should be preferred to a male Gotraja of the father five degrees removed. (2) In Calcutta it has been held that the Mitakshara should be preferred to the Viramitrodoya and to a maiden's estate, the sister and the sister's son succeed before the father's brother's son. (3) A father's mother's sister has been preferred in Bombay to the maternal grandmother, in respect of succession to a maiden's estate (4).

In Bombay and Madras daughter inheriting Stridhana take as tenants in-common.

It has been held in Bombay and in Madras that sons and daughters inheriting Stridhana take as tenants-in-common. (5)

Succession to childless woman depends on form of marriage in all provinces.

When a childless woman has been married in an approved form, her estate goes to the husband and his Sapindas. (6) But when she has been married in a disapproved form, like the Asura, it goes to her father and mother and failing them to the father's Sapindas in preference to the husband's Sapindas. (7)

It has been held by the Madras Court that the rule about wealth gained by mecha-

(1) Vasodeo *v.* Vencatesh, 10 Bom. H. C. 139. Krishnaji *v.* Pandurang, 12 Bom. H. C. 65 (2) Tukaram *v.* Narayun, 36 Bom 339. (3) Dwarkanath *v.* Sarat Chunder, 39 Cal. 319 (4) Junglibai *v.* Jeha, 32 Bomb. 409. (5) Bai Parsu *v.* Bai Somlu, 36 Bom. 424. Kuruppan *v.* Sankaranarayana, 27 Mad. 300 F B. (6) Mani Lal *v.* Bai Rewa, 17 Bom. 758. (7) Vejirangam *v.* Lokhuman, 8 Bomb. H. C., O.C.J. 244. Chuni Lal *v.* Surajram, 33 Bom. 431.

nical arts and from strangers belonging to the husband cited in the Smriti Chandrika should not be enforced, as it is not found in the Mitakshara and the ordinary rule of succession to Stridhana applied to such property. (1)

Succession to wealth gained by arts and from strangers.

In Bengal, the peculiar divisions of Stridhana and rules of succession of the Dayabhaga have been recognized and affirmed by the High Court, and it has been further held, that the Dayabhaga should be preferred to the Dayakrama-Sangraha, where they disagree. (2)

Law in Bengal.

It has been held, with what reason it is difficult to see, that a daughter betrothed at the time of her mother's death, cannot inherit Ayautaka property simultaneously with her brothers. (3) Property, given to a woman by her father before her marriage, the mother takes in preference to the husband. (4) In Pitridatta Ayautaka, sons succeed in preference to married daughters. (5)

Succession to Ayautaka.

In respect of Ayautaka, which is Anvadheyaka or gift subsequent, whether by the father or any other person, such as the husband's father's sister's son, the brother, the mother and the father take before the husband. (6) In the last case on the point, it has been held in Bengal, that the husband is to be preferred to the brother in respect of movable property given by the father at the time of marriage

Succession to Anvadheya Ayautaka.

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(1) Salemma *v.* Luchmana, 21 Mad. 103.

(2) Hurry Mohun *v.* Sonatun, 1 Cal. 275.

(3) Sreenath *v.* Sorbomongo'a, 10 W. R. 488.

(4) Judoo Nath *v.* Bussunt Coomar, 19 W. R. 264.

(5) Prosonno Kumar Bose *v.* Sarat Shoshi Ghosh, 12 C. W. N. 924.

(6) Ram Gopal *v.* Narain, 33 Cal. 315. Hurry Mohun *v.* Sonatun, 1 Cal. 275.

but the brother is to be preferred to the husband in respect of such property given by the father after marriage and also to subsequent additions to the ornaments, which must be considered as gifts subsequent. (1) In respect of a leasehold property granted by the father after marriage, the mother has been preferred to the husband, it being held to be Anvadheya Ayautaka. (2) It has also been held that the younger brother of the husband of a childless widow is entitled to succeed to her Ayautaka Stridhana in preference to her step-brother. (3)

Widowed daughter having a dumb son.

Under the Bengal school, it has been held that a widowed daughter having a son, dumb but not shown to be incurably so, is entitled to inherit before the daughter's son. (4) The discussion whether the widow's son was incurably dumb or not, could only be interesting to the ingenious Bengal exponents of the Smritis.

Verses 32 and 33 of the Dayabhaga spurious.

It has also been held that the son of a rival wife cannot be preferred as an heir to the daughter's son, verses 32 and 33 of the Dayabhaga saying the contrary being spurious. (5)

Spiritual benefit how far a ground of succession.

The question how far the doctrine of spiritual benefit governs succession to Stridhana requires some consideration. According to the texts (see Ch. II, Sec. II) the male descendants, the daughter, the daughter's son, husband, father, brother,

(1) Gopal Chunder Pal *v.* Ram Chandra Paramanik, 28 Cal. 311.

(2) Ram Gopal, *v.* Narain, 33 Cal. 315. In case of land devised by the husband, it has been held that an unchaste mother succeeds in preference to the husband's eldest brother. Nogendra Nandini *v.* Raja Benoy, 7 C. W. N. 121.

(3) Debiprosonno *v.* Harendra, 37 Cal. 863.

(4) Charu Chunder *v.* Nobo Sundari, 18 Cal. 337.

(5) Purna Chandra *v.* Gopal Lal Set, 8. Cal. L. J. 369.

daughter-in-law, brother's son and sister's son are entitled to perform the Sraddha of a female. The commentators have laid down the rule of succession to Stridhana in accordance with texts on the subject. The Dayabhaga alone makes use of the doctrine of spiritual benefit in determining succession to Stridhana. In a recent case (1), Mr. Justice Sale, while holding that the son of the full brother of a deceased female should be preferred to the brother of the half-blood of her husband, in regard to movable property obtained by devise from the husband made the following undoubtedly correct observations: "It has been authoritatively pointed out more than once that the doctrine of spiritual benefit does not exclusively govern the right of succession, especially where succession to *stridhana* property is concerned, even in the Bengal school of law. Golap Chandra Sarkar's also says," "Doctrine of spiritual benefit—no test of heirship." At one time it was supposed that the doctrine of spiritual benefit is the key to the Hindu Law of Inheritance. It is however now admitted on all hands that the doctrine is not recognised by the Mitakshara School, that is to say, by the majority of Hindus. In the Bengal school also, the doctrine was for the first time introduced and relied on by Gimutavahana as a correlative argument in support of the texts of law relating to the order of succession." Sir G. D. Banerjee in his book on Stridhana says: "Even in the Bengal school, where the doctrine of spiritual benefit is carried to its utmost extent,

(1) Toolsee Das Seal *v.* Sreemutty Lukhimoney, 4 C. W. N. 743. See also 7 C. W. N. 125.

Jagannath in one place observes that the advantages afforded are not principally considered in treating of separate property held by women."

Daughter's daughter no heir as Bengal.

It has been held that under the Dayabhaga a daughter's daughter is no heir of Stridhana. (1) The decision seems to be against the interpretation of all the other commentators of the text of Yajnavalkya on the subject.

Right's of the full sister's and half-sister's sons in Bengal.

Under the Bengal school, the sister is no heir in respect of Stridhana, and a degraded sister is no heir to another degraded sister. (2) A sister's son takes before the husband's elder brother, and before the daughter's son of the great-grandson of the great-great-grandfather of the deceased and before the daughter's son of the great-grandson of the great-great-grandfather. (3) The opinion has also been expressed that the half-sister's son, takes equally with a full-sister's son (4), but it is against the rule laid down by the Privy Council in the case of agnates.

Disqualifications which exclude.

Disqualifications, which exclude an heir to the estate of a male, also exclude an heir to Stridhana. (5)

Unchastity and prostitution.

Unchastity does not disqualify a daughter from inheriting Stridhana.(6) It would be otherwise if she became a prostitute and Patita. (7) In Madras, it has been held in a recent case, that degradation on account of incontinence does not put an end to the right of a daughter to inherit the Stridhana of her mother. (8).

(1) Madhumala *v.* Lakshman, 22 I. C. 518.
(2) Sornomoyee *v.* Secretary of State, 25 Cal 254.
(3) Dasharathi *v.* Bipin, 32 Cal 261 approved, 7 Bom. L. R. 622 Shashi Bhushan Lahiri *v.* Rajendra Nath, 40 Cal. 82.
(4) 32 Cal. 261. (5) Vallabh Ram *v* Bai Hari Ganga, 4 Bom. H. C. 135, A. J. (6) Ganga *v.* Ghasita, 1 All. 46.
(7) Taramani *v.* Motee, 7 Sel. Rep. 273. In the goods of Kamini Many Bewa, 21 Cal. 697. See 25 Cal. 254.
(8) Angammal *v.* Vencata Reddy, 26 Mad. 509.

As regards succession to the property of prostitutes, there is no mention of it in the Smritis. The Commentators divide women into three classes, Maiden (Kanya), married (Kulastri or Bharya) and prostitutes (Sadharan Stri). The last are outcaste. But exclusion on the ground of being an outcaste has been abolished by Act 21 of 1850. (1) The text of Vrihat Parasara (p. 69) like many others, seems never to have been placed before the Courts, or referred to in any of the text-books. The first reported case on the point is that of Taramonee v. Mottee (2), in which it was held, that the prostitute daughters of a prostitute were her heirs, but not the legitimate daughters, in as much as the degradation of the mother severed all ties with her natural family. The principle by which these cases is to be governed is supposed to be that the degradation of a woman severs the connection between her and the undegraded members of the family but not between her and the other degraded members of her family. (3) But how prostitute daughters can have what other daughters cannot is very difficult to conceive. The Madras High Court has laid down the same rule, which has also been recently approved in Bengal, where it has been held that the husband's kinsmen are no heirs of a prostitute (4). But the soundness of the rule has been doubted in several cases in Calcutta.

Succession to the estate of a prostitute.

In recent cases, it has been held that

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(1) Tara *v.* Krishna, 31 Bom. 511.

(2) 7 Sel. Rep. 325.

(3) Tripura *v.* Harimati, 9 I. C. 68.

(4) Mynabibi *v.* Uttaram, 2 Mad. H. C. 196. In the goods of Kamini Mony, 21 Cal. 697. Bhutnath Mondol *v.* Secretary of State, 10 C.W.N. 1085.

the rule applies to relations existing at the time of degradation only. In the latest case on the question in Calcutta, it has been held that the property of a prostitute does not strictly come within the definition of Stridhana, which is the property of a married woman or of a maiden, still for the purposes of succession, the rules of Stridhana may be regarded as applicable, with the modification that relations existing at the time of degradation cannot take. In that particular case a son and a chaste maiden daughter born after degradation were held entitled to succeed, the court holding that though the texts of Hindu Law do not provide for such cases, decisions of Courts and considerations of equity and good conscience might govern them. The real decision was that the property should be regarded as Stridhana and children born after degradation should take. (1) There is good reason for the rule that a prostitute cannot inherit from her relations but little or none whatsoever for the rule that her undegraded relations are not her heirs and that her degraded relations alone are her heirs.

In an early case, in Madras, it was held, that among dancing women the ordinary Hindu Law applied with the modification that daughters take before sons. (2) The rule that only degraded children can succeed, has been extended so far in Madras, that it has been held, that among illegitimate children, the children that lead immoral lives should be preferred to children that lead moral.

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(1) Tripura *v* Sreematty Harimutty, 15 C. W. N. 807.
(2) Kamakshi *v.* Nagarathnam, 5 Mad. H. C. 16.

lives. (1) The Madras High Court however, in a recent case on the matter, have dissented from the decisions in *Siva Sanga* v. *Minal*, *Narasana* v. *Gangu* and *in the goods of Kamini Mony*, and held, that prostitution does not sever the legal relation, and that a legitimate son succeeds in preference to an illegitimate son and the stepson is an heir to a degraded woman. (2) It has also been lately held that the daughter of the legitimate daughter is to be preferred to a son born after the woman became a prostitute, though such son is also an heir. (3)

A full Bench of the Calcutta High Court have recently held that prostitution does not sever the tie of relation of a woman with her kindred and a brother's son can be her heir, but the question whether husband's relations can take was considered but not decided.(4) The same principle has been followed in Allahabad. (5)

The decisions against the rights of the children of unchaste females are not based on any rule of the Smritis. We have already seen that according to the rule of Vrihat Parasara, (see p. 69) illegitimate as well as legitimate children inherit the estate of a woman, and if it is Stridhana, there is no reason to suppose that the ordinary rule of Hindu Law will not apply. The Vivada Tandava lays down, on the express authority of Devala* that an illegitimate son

(1) Siva Sanga v. Minal, 12 Mad. 277. Narasanna v. Gangu, 13 Mad. 133. In the goods of Kamini Mony Bewa, 21 Cal. 697. See 25 Cal. 254. (2) Menakshi v. Muniandi, 38 Mad. 1144. Subbaraya v. Ramasami, 23 Mad. 164, approved in Angammal v. Vencata, 26 Mad. 512.
(3) Mandaram v. Mandaram, 24 Mad. L. J. 273, 18 I. C. 601.
(4) Harilal v. Tripura Charan, 40 Cal 650.
(5) Narain Das v. Trilok Tewari, 29 All. 4.

* जारदत्तसुत मातृधनं गृह्णीयात्नान्यदिति । Text of Devala cited in the Vivada Tantava.

takes the estate of her mother. But he can never be an heir of her maternal grandfather, according to the Vivada Ratnakara. Since above was written, both the Allahabad and Calcutta High Courts have held that succession to the property of a degraded woman is governed by the ordinary rules of Hindu Law and even the husband may succeed. (1) The husband's right to succeed in such a case however, is denied, as the relationship of marriage is dissolved, by the Berar Court, and the sister's daughter has been preferred to the husband's brother's son there. (2) In Madras, it has been denied that the legitimate, far less an illegitimate, daughter of the sister can be an heir to Stridhana and a custom, by which such a girl adopted by a prostitute may succeed has been held to be invalid, when it is for the purposes of prostitution. (3) In Oude, it has been held on the strength of the authorities cited in this book, (4) that property acquired by a woman from the brother of her paramour is not Stridhana and it goes to her illegitimate children.

Debts of married women enforceable against Sridhana only.

When a married woman having Stridhana, enters into a contract, jointly with her husband, the liability incurred by her, will be presumed to have been intended to be satisfied out of her Stridhana, and she will not be personally liable. (5) A Hindu widow who has remarried, when she contracts debts, will however, be personally liable even after her marriage. (6)

(1) Narain Das v. Trilok Tewari, 29 All. 4. Sundari Dassee v. Nemye Charan Dass, 6 C. L. J. 372. Chhatu Kurmi v. Rajaram, 3 I. C. 374 F. B. Cal. (2) Ramaprosad v Musmut Suba Bai, 4 Nag. L. R. 31.
(3) The Secretary of State v. Musmut Shaman, 6 I. C. 210.
(4) Maharana v Thakur, 12 I. C. 778, 14 O. C. 234.
(5) Govindji v. Lakmidas, 4 Bom. 318. Norotam v. Nanka, 6 Bom. 473. (6) Nahal Chand v, Bai Shiva, 6 Bom. 470.

SECTION IV.

तुभ्यमग्ने पर्य्यवहन्त सूर्य्यां वहतुनासह
पुनःपतिभ्यो जायां दा अग्नेप्रजया सह।
ऋक सामाभ्यामभिहितौ गावौ ते सामनावितः
सूर्य्याया वहतुः प्रागात् सविता यमवासृजत्।

ऋग्वेदः १०म ८५ सू ३६, ३८, ११, १३।

O Fire, the sister of Surya is first taken with presents before you. You then give the wife with children to be born to the husband. Two oxen by name Rik and Shama bore her carriage from the place. When the sister of Surya was carried to her husband's home, the presents which Surya had given her were carried before the car.

Rigveda 10 M. 85 Su. 56; 38, 11, 13.

पत्नी वै पारिणाय्यस्येशा

मेधातिथिधृताश्रुतिः।

The wife is mistress of the wealth obtained by her at marriage.

Text of Veda cited by Medhatithe.

मनुः—

भार्य्या पुत्रश्च दासश्च त्रय एवाधनाः स्मृताः।
यत्ते समधिगच्छन्ति यस्य ते तस्य तद्धनम्॥
अध्यग्न्यध्यावाहनिकं दत्तं च प्रीतिकर्म्मणि।
भ्रातृमातृपितृप्राप्तं षड्विधं स्त्रीधनं स्मृतम्॥
अन्वाधेयञ्च यद्दत्तं पत्या पीतेन चैव यत्।
पत्यौ जीवति दत्तायाः प्रजायास्तद्धनं भवेत्॥
ब्राह्मदैवार्षगान्धर्व्वप्राजापत्येषु यद्वसु।
अप्रजायामतीतायां भर्त्तुरेव तदिष्यते॥
यत्तस्याः स्याद्धनं दत्तं विवाहेष्वासुरादिषु।
अप्रजायामतीतायां मातापितरौतदिष्यते॥*
जनन्यां संस्थितायान्तु समं सर्व्वे सहोदराः।

* The Apararka reads अप्रजायां for अपुत्रायां।

भजेरन्मातृकं रिक्थं भगिन्यश्च सनाभयः ॥
यास्तासां स्युर्दुहितरस्तासामपि यथार्हतः ।
मातामह्या धनात् किञ्चित् प्रदेयं प्रीतिपूर्वकम् ॥
मातुस्तु यौतुकं यत् स्यात् कुमारीभाग एव सः ।
स्त्रियास्तु यद्धनं दत्तं पित्रा दत्तं कथञ्चन ।
ब्राह्मणी तद्धरेत् कन्या तदपत्यस्य वा भवेत् ॥†
अपुत्रायां मृतायान्तु पुत्रिकायां कथञ्चन ।
धनं तत्पुत्रिकाभर्त्ता हरेतैवाविचारयन् ॥
न निर्हारं स्त्रियः कुर्युः कुटुम्बाद्बहुमध्यगात् ।
स्वकादपि च वित्ताद्धि स्वस्य भर्तुरनाज्ञया ॥
पत्यौ जीवति यः स्त्रीभिरलङ्कारो धृतो भवेत् ।
न तं भजेरन् दायादा भजमानाः पतन्ति ते ॥
जीवन्तीनां तु तासां ये तद्धरेयुः स्वबान्धवाः ।
तां क्ष्विष्वाङ्गीरदण्डेन धार्मिकः पृथिवीपतिः ॥

मनुः ८।४१६ ; ९ । १९४-१९७, १९२, १९३, १३१, १९८, १३५, १९९ २०० । ८ । २९

Manu :—

A wife, a son, and a slave, these three are declared to have no property; the wealth which they earn is (acquired) for him to whom they belong.

What (was given) before the (nuptial) fire, what (was given) on the bridal procession, what was given in token of love, and what was received from her brother, mother or father, that is called the six-fold property of a woman.

(Such property) as well as a gift subsequent, and what was given (to her) by her affectionate husband, shall go to her offspring, (even) if she dies in the lifetime of her husband.

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† We find a variation of this text in the Mahabharata, Anushashan, Ch. 47. *v.* 25-26.

स्त्रियास्तु यद्धनं दत्तं पित्रा दत्तं युधिष्ठिर
ब्राह्मण्यास्तद्धरेत्कन्या यथा पुत्रस्तथैव सा ॥
सा हि पुत्रसमा राजन् विहिता कुरुनन्दन ।

If this reading is correct, the rule deduced by the commentators, especially the Dayabhaga, from this text in favour of the maiden daughter would be unsustainable.

It is ordained that the property (of a woman married) according to the Brahma, the Daiva, the Arsha, the Gandharva, or the Prajapatya rite (shall belong) to her husband alone, if she dies without issue.

But it is prescribed that the property which may have been given to a (wife) in an Asura marriage or (one of the) other (blamable marriages, shall go) to her mother and to her father, if she dies without issue.

But when the mother has died, all the uterine brothers and the uterine sisters* shall equally divide the mother's estate.

Even to the daughters of those (daughters) something should be given, as is seemly, out of the estate of their maternal and mother, on the score of affection.

But whatever may be the (Yautaka) separate† property of the mother, that is the share of the unmarried daughter alone.

Whatever property may have been given by her father to a woman (who has co-wives of different castes) that the daughter (of the) Brahmani co-wife shall take, or that (daughter's) issue.

But if an appointed daughter by accident dies without leaving a son, the husband of the appointed daughter may, without hesitation, take that estate.

A woman should never make expenditure from the wealth of the family common to many or from the separate property, without the permission of her husband.

The ornaments which may have been worn by women during their husbands' life-time, his heirs shall not divide. Those who divide them, become outcasts.

A just king should punish with the punishment of theft

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* Kulluka, says, that only unmarried daughters are meant by Manu as taking equally with sons.

† Yautaka has been interpreted by Medhatithi, Kulluka, and Narayana as meaning all the separate property, having regard to the sense in which it is used in Ch. IX 214. This is in accordance with Gautama, and makes the law consistent. The interpretations, given by other commentators and the text-writers, that it means property given by the father and others at the time of marriage, should be rejected. Madhava says, Yautaka means "received from the father's family" at any time.

those kinsmen who deprive a woman of her Stridhana during her life-time.

Manu, VIII. 416; IX. 194-197, 192, 193, 131, 198, 135, 199, 200, VIII. 29.

स्त्रीधनं * दुहितॄणामप्रत्तानामप्रतिष्ठितानाञ्च भगिनीशुल्कम् सौदर्य्याणामूर्द्धं मातुः पूर्व्वेषामेके खञ्च शुल्कं वीढाईति।

गौतमः २८। २४-२६।

A woman's separate property (goes) to her unmarried daughters, and (on failure of such) to poor (unprovided married daughters†). The sister's fee belongs to her uterine brothers, if her mother be dead. Some (declare, that it belongs to them), even while the mother lives. ‡ The Sulka given by the bride-groom is taken by himself.

Gautama, XXVIII. 24-26.

मातुः पारिणेयं§ स्त्रियो विभजेरन्।

वशिष्ठः १७।४६

Let the daughters divide the nuptial present of their mother.

Vasista, XVII. 46.

अलङ्कारो भार्य्याया ज्ञातिधनमेत्येके।

आपस्तम्बः २६-१४ ६।

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* स्त्रीधनं तदपत्यानां (दुहितॄणां) &c. is the reading of Medhatithi.

† 'Unprovided' according to the Apararka and Kalpataru means widowed also.

‡ The fee, *i.e.*, the money which at an Asura or an Arsha wedding the father has taken for giving the sister in marriage, that goes after his (the father's) death to the uterine brothers of that sister, and that happens after the mother's death, but if the mother is alive, (it goes) to her. -Haradatta.

Sacred Books of the East Series, Vol. II, p. 303.

§ The Apararka reads परीणाह्यम् and explains as meaning ornaments. The Ratnakar and the Kalpataru read मातुः पारिवाह्य', and explain पारिवाह्य' as meaning dress, mirror, comb, and the like. The reading adopted here is as appears in the Rev. A. Fuhrer's edition, and the translation is that of Dr. Buhler in the Sacred Books of the East Series.

Vasista also makes mention of Anvadheya in Ch. 16, v. 16.

According to some, the share of the wife consists of her ornaments, and the wealth (which she may have received) from her relations.*

Apastamba, P. II. 6, 14, 9.

मातुरलङ्कारं दुहितरः साम्प्रदायिकं समैरन्वया।

वौधायनः २, २, ३, ४३।

The daughters shall obtain the ornaments of their mother (as many as are) presented according to custom (of the caste) or anything else (that might be given according to custom).

Baudhayana, II 2, 3-43.

ऋक्थं हृताया: कन्याया ऋक्षीयुः सौदराः समम्

तदभावे भवेन्मातुस्तदभावे पितुर्भवेत्॥

अपरार्कादिधृत वौधायनवचनम्।

The heritage of a deceased maiden (given by her maternal grandfather and other relations) her uterine brothers equally shall take; failing them it belongs to the mother; failing her to the father.* Baudhayana, cited in the Mitakshara, Apararka, Smriti-Chandrika, &c. This text is also attributed to Narada.

सौदायिकं स्त्री यथाकाममाप्नुयात्।

स्त्रीधनं मातृगामि तदभावे भ्रातृगामि।

सरस्वतीविलासधृतविष्णुवचनम्।

A woman enjoys the Saudayika property according to her pleasure.

Stridhana (of the Sulka kind) goes to the mother, failing her, to the brother. Vishnu, cited in the Saraswati Vilasa.

पितृमातृपुत्रभ्रातृदत्तमध्यग्न्युपागतमाधिवेदनिकं बन्धुदत्तं शुल्कमन्वाधेयकमिति स्त्रीधनम्। ब्राह्मादिषु चतुर्षु विवाहेष्वप्रजायामतीतायां तद्भर्तुः। शेषेषु च पिता हरेत्। सर्व्वेष्वेव प्रसूतायां यद्धनं तद्दुहितृगामि।

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* The translation of Colebrooke, adopted by Dr. Banerjea, of this text which makes property, received from friends, Stridhana is clearly incorrect.

† Another reading of it is ऋक्थं हृताया: कन्याया ऋक्षीयुः सौदरास्तदभावे मातुस्तदभावे पितुः। Mit. II. 146.

पत्यौ जीवति यः स्त्रीभिरलङ्कारो धृतो भवेत् ।
न तं भजेरन् दायादा भजमानाः पतन्ति ते ॥

विष्णुः १७।१८—२२ ।

What has been to a woman by her father, mother, sons, or brothers, what she has received before the sacrificial fire (at the marriage ceremony), what she receives on supersession, what has been given to her by her relatives, her fee (*sulka*) and a gift subsequent are called woman's property (Stridhana) If a woman, married according to (one of the first) four rites beginning with the Brahma rite, dies without issue, that (Stridhana) belongs to her husband. (If she has been married) according to (one of) the other (four reprehensible rites), her father shall take it. If she dies leaving children, her wealth goes in every case to her daughter. Ornaments worn by women when their husbands were alive, the heirs shall not divide them. If they divide, they become outcasts. Vishnu, XVII. 18-22.

पितृमातृपतिभ्रातृदत्तमध्यग्न्युपागतम् ।*
आधिवेदनिकाद्यञ्च† स्त्रीधनं परिकीर्त्तितम् ॥
बन्धुदत्तं तथा शुल्कमन्वाधेयकमेव वा ।
अतीतायामप्रजसि बान्धवास्तदवाप्नुयुः ॥
अप्रजस्त्रीधनं भर्तुर्ब्राह्मादिषु चतुर्ष्वपि ।
दुहितॄणां प्रसूता चेत् शेषेषु पितृगामि तत् ॥
दत्ताकन्याङ्करन्दक्षीव्यं दद्यात् सद्दीदयम् ।
मृतायां दत्तमादद्यात् परिग्रीध्यीभयव्ययम् ॥
दुर्भिक्षे धर्मकार्य्ये च व्याधौ सम्प्रतिरोधके ।
गृहीतं स्त्रीधनं भर्त्रा न स्त्रियै दातुमर्हति ॥
अधिविन्नस्त्रियै देयमाधिवेदनिकं समम् ।
न दत्तं स्त्रीधनं यस्यै दत्ते त्वर्द्धप्रकीर्त्तितम् ॥
मातुर्दुहितरः शेषमृक्थात्ताभ्य ऋतेऽन्वयः ॥

याज्ञवल्क्यः २।१४२-१४८, ११७ ।

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*The Apararka reads सुत or son for पति or husband.

† *Gimutavahana* reads चैवं for चाद्यञ्च । This will make a great difference in the meaning as will restrict Stridhana to the particular descriptions of property mentioned in the text.

What was given to a woman by the father, mother, husbany or a brother, or received by her at the nuptial fire, or presented to her on her husband's marriage to another wife, as also and other separate acquisition, is denominated a "woman's property." That which has been given to her by her kindred बन्धु as well as her fee or gratuity or any thing bestowed after marriage, her kinsmen* take it, if she die without issue. The property of a childless woman married in the form denominated Brahma or in any of the four (unblamed modes of marriage) goes to her husband ; but if she leave progeny, it will go to her daughters,† and in other forms of marriage (as the Asura, &c.) it goes to her father and mother, on failure of her own issue.

If after having affianced to one, the father should marry the daughter to another, he should pay the amount with interest spent by the first. If she die (after being affianced) he (*i. e.*, the bridegroom) shall receive back what he has given, deduction being made for the expenditure on both sides.

A husband is not liable to make good the property of his wife taken by him in a famine, for the performance of religious duties, during illness, or while under restraint.

To a woman whose husband marries a second wife, let him given an equal sum, (as compensation) for the supersession, provided no separate property have been bestowed on her; but if any have been assigned, let him allot half.

The daughters shall take the residue of their mother's property after payment of her debts. In their default the (male) issue.

Yajnavalkya, II. 143-148, 117.

अध्यग्न्यध्यावाहनिकं भर्तृदायस्तथैव च ।
भ्रातृमातृपितृप्राप्तं षड्विधं स्त्रीधनं स्मृतम् ॥

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* Bandhava is interpreted by Ratnakara and Cimutavahana as meaning uterine brothers. Indeed, Bandhu as regards females, means parents and the father's family.

† Vijnaneswara interprets दुहितृणाम् as daughters and daughter's daughters. Colebrooke translates it as (daughter's) daughters.

स्त्रीधनं तदपत्यानां भर्त्तृगाम्यप्रजासु तु ।
ब्राह्मादिषु चतुष्वाद्युः पितृगामीतरेषु च ॥
मातुर्दुहितरीऽभावे दुहितॄणां तदन्वयः * ॥
भर्त्रा प्रीतेन यद्दत्तं स्त्रियै तस्मिन्मृतेऽपि तत् ।
सा यथाकामम्रीयाद्ध्याद्वा स्थावरादृते ॥

नारदः १३।८, ९, २ ; १।२८

What (was given) before the (nuptial) fire, what (was given) during the bridal procession, the husband's donation, and what was received from her brother, mother, father, that is called the six-fold property of a woman (Stridhana).

Property of a woman (Stridhana) shall go to her offspring; if she have no offspring, it is declared to go to her husband (if she was married to him) according to one of the four (praiseworthy) marriage forms, beginning with the Brahma form; (if she was married) according to one of the other forms, it shall go to her parents.

(And so shall) daughters (divide the property) of their mother (when she dies) or failing daughters, their issue.

What has been given to a wife by her loving husband, that she may spend or give away, as she likes, after his death even, excepting immovables.

Narada, XIII. 8, 9, 2; I. 28.

स्थावराज्जीवनं स्त्रीभ्यो यद्दत्तं श्वशुरेण तु ।
न तच्छक्यमपाकर्त्तुमितरैः श्वशुरे मृते ॥
यद्विभक्तधनं किञ्चिदाद्यादिविविधं स्मृतम् ।
स्त्रीधनं स्यादपत्यानां दुहिता च तदन्विनी ।
अप्रत्ता † चेत् समूढा तु लभते मातृसत्कम् ॥

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* अभावे दुहितृणान्तु तदपत्यस्य एव च is the reading of the Smriti Chandrika. Probably it is right. The first hemistich is wanting. The full text is lost.

† अप्रत्ता चेत् समूढा तु न लभेन्मातृकं धनं—is the reading of Jimutavahana. It means that the unmarried daughter, but not the married one, gets maternal wealth. अप्रत्ता has been interpreted in Bengal to mean unaffianced.

मातृष्वसा मातुलानी पितृव्यस्त्री पितृःस्वसा ।
श्वश्रूः पूर्व्वजपत्नी च मातृतुल्याः प्रकीर्त्तिताः ॥
यदासामौरसी न स्यात् सुतो दौहित्र एव वा ।
तत्सुतो वा धनं तासां स्वबीयाद्याः समाप्नुयुः ॥

बृहस्पतिः २५ । ८६—८९ ।

Such property, whether immovable or other, as has been given to women by their father-in-law, can never be taken away from them by the co-heirs. The separate property of various kinds like a pledge which is Stridhana goes to the children, and the daughter, if not betrothed, has a share in it. If she is married, she shall receive an honorary trifle only.

The mother's sister, the wife of a maternal uncle, a paternal uncle's wife, a father's sister, a mother-in-law, and an elder brother's wife are declared to be equal to a mother. If they have no legitimate son of the body, nor (other) son, nor daughter's son, nor their son, their sister's son, and the rest shall inherit their property.*

Vrihaspati, XXV. 86—89.

पितृमातृपतिभ्रातृज्ञातिभिः स्त्रीधनं स्त्रिये ।
यथाशक्त्या दिसाङ्क्तं दातव्यं स्थावराद्दते ॥
अध्यग्न्यध्यावाहनिकं दत्तञ्च प्रीतितः स्त्रिये ।
मातृभ्रातृपितृप्राप्तं षड्विधं स्त्रीधनं स्मृतं ॥
विवाहकाले यत् स्त्रीभ्यो दीयते ह्यग्निसन्निधौ ।
तदध्यग्निकृतं सद्भिः स्त्रीधनं परिकीर्त्तितम् ॥
यत्पुनर्लभते नारी नीयमाना हि पैतृकात् ।
अध्यावाहनिकं नाम स्त्रीधनं समुदाहृतम् ॥

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* This text is cited in the Apararka, Kalpataru, Smriti-Chandrika, Mayukha, Vivada-Ratnakara, but not in the Mitakshara. The term स्वबीयाद्याः (sister's son, &c.) has been interpreted by the commentators to mean such relations to whom the woman would be considered equal to a mother, and they are the sister's son, the husband's sister's son, the husband's brother's son, the husband's younger brother, and the son-in-law.

प्रीत्या प्रदत्तं यत् किञ्चिच्छ्वश्रावा श्वशुरेण वा ।
पादवन्दनिकं यत्तल्लावण्याज्जितमुच्यते ॥ *
विवाहात् परतो यत्तु लब्धं भर्त्तुकुलात् स्त्रिया ।
अन्वाधेयन्तु तत् प्रीत्या यल्लब्धं स्वकुलात्तथा ॥
ऊर्द्ध लब्धन्तु यत् किञ्चित् संस्कारात् प्रीतितः स्त्रिया ।
भर्त्तुः पितोः सकाशाद्वा अन्वाधेयन्तु तद्विदुः ॥
गृहोपस्करवास्त्रानां दीक्षाभरणवह्निषाम् ।
मूल्यं लब्धञ्च यत्किञ्चिच्छुल्कं तत्परिकीर्त्तितम् ॥
प्राप्तं शिल्पैस्तु यद्दत्तं प्रीत्या चैव यदन्यतः ।
भर्त्तुः स्वाम्यं सदा तत्र शेषन्तु स्त्रीधनं भवेत् ॥
ऊढया कन्यया वापि पत्युः पितृगृहेऽथवा ।
भ्रातुः सकाशात् पितो वा लब्धं सौदायिकंस्मृतम् ॥
सौदायिकं धनं प्राप्य स्त्रीणां स्वातन्त्र्यमिष्यते ।
यस्मात्तदानृशंस्यार्थं तैर्दत्तं तत्प्रजीवनम् ॥
सौदायिके सदा स्त्रीणां स्वातन्त्र्यं परिकीर्त्तितम् ।
विक्रये चैव दाने च यथेष्टं स्थावरेष्वपि ॥
भर्त्तृदायं गते पत्यौ विन्देत् स्त्री यथेष्टतः ।
विद्यमाने तु संरक्षेत् क्षपयेत्तत्कुलेऽन्यथा ॥
अपुत्रा शयनं भर्त्तुः पालयन्ती गुरौ स्थिता ।
भुञ्जीतामरणात् क्षान्ता दायादा ऊर्द्धमाप्नुयुः ॥
न भर्त्ता नैव च सुतो न पिता भ्रातरो न च ।
आदाने वा विसर्गे वा स्त्रीधने प्रभविष्णवः ॥
यदि स्त्रीकृतरं लेषां स्त्रीधनं भक्षयेत् बलात् ।
सवृद्धिं प्रतिदाप्यः स्याद्दण्डञ्चैव समाप्नुयात् ॥
तदेव यद्यनुज्ञाप्य भक्षयेत् प्रीतिपूर्व्वकम् ।
मूलमेव प्रदाप्यः स्यादयदासौ धनवान् भवेत् ॥
व्याधितं व्यसनस्थं वधनिर्व्वेशेऽपि पीड़ितम् ।
ज्ञात्वा निकृष्टं यत्प्रीत्या दद्यादात्मेच्छया पुनः ॥

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* प्रीतिदत्तं is the reading for लावण्याज्जितम् in the Mitakshara the Smriti-Chandrika and the Viro-Mi'rodaya. The Ratnakara the Vivada Chintamani and the Vivada Chandra prefer the latter reading.

जीवत्या: पतिपुत्रास्तु देवरा पितृबान्धवा: ।*
अनीश्या: स्त्रीधनस्योक्ता दण्डास्त्वपहरन्ति ये ॥
तच्च सोपाधि यद्दत्तं यच्च यौगवशेन वा ।
पित्रा भ्राताऽथवा पत्या न तत्स्त्रीधनमिष्यते ॥
भर्त्रा प्रतिश्रुतं देयमृणवत् स्त्रीधनं सुतै: ।
तिष्ठेद्भर्तृकुले या तु न या पितृकुले वसेत् ॥
ऋणं प्रीतिप्रदानञ्च दत्त्वा शेषं विभाजयेत् ।
आमरादिषु यल्लब्धं स्त्रीधनं पैत्रिकं स्त्रिया ।
अभावे तदपत्यानां मातापित्रोस्तदिष्यते ॥
दुहितृणामभावे तु ऋक्थं पुत्रेषु तन्नवेत् ।
बन्धुदत्तन्तु बन्धूनामभावे भर्तृगामि तत् ॥
भगिन्यो वान्धवै: सार्द्धं विभजेयु: समन्तृका: ।
स्त्रीधनस्येति धर्म्मोऽयं विभागस्तु प्रकल्पित: ॥
मिताक्षराऽपरार्कपराशरमाधवकल्पतरुरत्नाकरादिधृत-
कात्यायनवचनानि ।

Two women should be given Stridhana, according to their power, by father, mother, husband, brother and kinsmen up to two thousand *Karshapanas*, excepting immovables.

What is given before the nuptial fire, what is given during the bridal procession, what is given for love and what is received from mother, brother or father :—these are the sixfold property of a woman.

Whatever is given to women at the time of their marriage, before the sacred fire, which is the witness of nuptials, is denominated by sages the property given before the nuptial fire.

What a woman receives while she is led from her parental abode to the house of her husband is called the property of a woman given at the bridal procession.

Whatever is given through affection by the mother-in-law or by the father-in-law, on the occasion of her salutation by touching the feet is called 'gains of amiability.'

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* These texts are placed here by Apararka. They do not appear in other books.

Whatever is received by a woman after marriage from her husband's family or from her own family is called 'gift subsequent.' Whatever is received by a woman through affection from the husband or the parents is gift subsequent according to Bhrigu.

Whatever is received as price (or bribe) by women, (for sending their husbands to work) on houses, on furniture, on carriages, on milking utensils, and on ornaments, is called Sulka. *

Whatever wealth is gained by the practice of mechanical arts, and what is received through affection from a stranger, therein the ownership of the husband always exists; but the rest is woman's property.

By a married woman or by a maiden whatever is received from the husband's father's family, from the brothers, or from the parents is called Saudayika.

The independence of women who have received Saudayika gifts is recognized in that property; for it is given by their kindred for their maintenance, so that they may live pleased. The power of women over gifts of their affectionate kindred is declared both in respect to sale and gift, according to their pleasure, even in the case of immovables.

The husband's Daya (*i. e.*, heritage or gift†) a woman may deal with, according to her pleasure when the husband is dead; but when he is alive, she shall carefully preserve it; or if she is unable to do the same, she shall commit it to the care of his kindred.

A sonless widow keeping unsullied the bed of her lord, and living with her father-in-law and others of the husband's family, shall, being moderate, enjoy until her death; afterwards the heirs shall take.

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* The Smriti Chandrika and the Saraswati-Vilasa interpret this text to mean that "whatever is received form the bridegroom, etc., as the price of household utensils, vehicles, cattle, personal ornaments, and her labour is Sulka."

† दायः is defined in the Dayabhaga and some other commentaries as meaning gift of the husband. It seems also to have meant that portion of the inheritance of the husband (to the extent of 2,000 panas according to Vyasa) which the widow was entitled to.

Neither the husband nor the son nor the father nor the brothers can assume power over a woman's property to take it or bestow it.

If any of these persons by force consume the woman's property, he shall be compelled to make it good with interest, and shall be punished.

If he spends it with her consent out of affection, he should return the principal, if he is rich. If the woman willingly gave up the property knowing him to be diseased, in distress or oppressed by creditors, the latter should repay at his pleasure.

When a woman is living, her husband, sons, husband's younger brothers and father's kinsmen have no power over her Stridhana. If they deprive her of it, they should be punished.

What is given to a woman with a fraudulent intent, or for a particular object by her father, brothers or husband, is not Stridhana.

Stridhana promised by the husband to a wife should be paid by the son as a debt of his, if she lives with the family of her husband, and not, if she lives in the family of her father.

After having paid the debts and the affectionate gifts, the remainder should be partitioned (by the sons) Whatever is received from the father as Stridhana by a woman married in the (reprehensible) forms beginning with the Asura, on failure of children, belongs to mother and father.

In default of daughters, that heritage (Stridhana) belongs to sons: but what is given by Bandhus (parents) belongs to Bandhus (*i. e.*, parents or brothers or their children); in their default it goes to the husband.* Sisters having husbands shall share with Bandhavas (*i. e.*, brothers). This is the settled lawful partition of woman's property.

Katyayana, cited by the Commentators. †

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* The Smriti Chandrika, the Parasara-Madhava and the Mayukha say, that the rule about Bandhudatta refers only to a woman married in a disapproved form.

† The second verse is cited in the Ratnakara, the 1st, 18th and 19th in the Parasara-Madhava, the rest are cited in the Ratnakara, Kalpataru, Mitakshara, etc.

विभज्यमाने वै दाये कन्यालङ्कारमेवहि ।

पराशरमाधवधृतशङ्खवचनम् ।

On partition of heritage, the daughter takes the ornaments.

Sankha cited by Madhava.

प्रेतायां प्रविकायान्तु न भर्त्ता द्रव्यमर्हत्यपुत्रायाः ।

दायभागधृतशङ्खलिखितवचनम् ।

Of the sonless appointed daughter, when dead, the husband is not entitled to the wealth.

Sankha-Likhita, cited in the Dayabhaga and Aparaka *

सहोदरा मातृकं रिक्थमर्हन्ति कुमार्यश्च ।

माधवधृतशङ्खलिखितवचनम् ।

All the brothers equally are entiled to Stridhana and unmarried sisters. †

Sankha-Likhita, cited in the Parasara-Madhava and also in Dayabhaga with a variation.

प्रेतायां प्रविकायान्तु न भर्त्ता दायमर्हति ।

अपुत्रायां कुमार्यां च भ्राता वा तदवाप्नुयादिति । ‡

कल्पतरुपराशरमाधवधृतपैठीनसिवचनम् ।

If an appointed daughter dies without bearing a son, her husband is not entitled to her effects; it is to be taken by the brother. § What is given by the bridegroom as *sulka* is taken by him.

Paithinasi, cited in the Kalpataru and Parasara-Madhava.

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* Apararka says it refers to the case where the daughter herself is made the son.

† The Dayabhaga reads सर्वे सोदर्य्या द्रव्यमर्हन्ति कुमार्यश्च । The reading of Madhava has the merit of agreeing with Manu. Madhava says this text may refer to property obtained from the husband's family.

‡ The reading of Apararka is अपुत्राया भ्राता श्वश्रा वा तदवाप्नुयम् ।

§ The reading of the Kalpataru of the last line is स्वस्रा वा तदवाप्नुयम्, *i. e.* "or, by the sister." Madhava says that the text refers to the case where there is an afterborn son of the father, when only, the husband does not take.

अप्रजायास्तु दुहितुः स्त्रीधनं परिकीर्त्तितम् ।
पुत्रस्तु नैव लभते प्रजायान्तु समांशभाक् ॥

माधवधृतपाराशरवचनम् ।

It is declared that Stridhana belongs to the unmarried daughter, and the son does not take it. But if the daughter be married (the son) gets equal share with her.*

Paraskara, cited in the Parasara-Madhava.

पितृभ्याञ्चैव यद्दत्तं दुहितुः स्थावरं धनम् ।
अप्रजायामतीतायां भ्रातृगामि तु सर्व्वदा ॥

दायभागधृतवृद्धकात्यायनवचनम् ।

Immoveable property of the daughter received from parents always goes to the brother on her dying childless.

Vriddha-Katyayana, cited in the Dayabhaga, but not by any other commentator.

यत्कन्याया विवाहे च विवाहात्परतश्च यत् ।
पितृभ्रातृ गृहात् प्राप्तं धनं सौदायिकं स्मृतम् ॥
द्विसाहस्रपरीदायः स्त्रियै देयो धनस्य तु ॥
यच्च भर्त्रा धनं दत्तं सा यथाकाममाप्नुयात् ॥
विवाहकाले यत् किञ्चित् वरायोद्दिश्य दीयते ।
कन्यायास्तद्धनं सर्व्वमविभाज्यञ्च बन्धुभिः ॥
यदानेतुं भर्त्तृगृहं शुल्कं तत् परिकीर्त्तितम् ॥†

दायभागादिधृतव्यासवचनानि ।

That property which is received by a maiden at her marriage, or afterwards from her father's or brother's house is termed Saudayika.

Property to the extent of two thousand Panas should be

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* Madhava says that daughter here means sonless daughter.

† Apararka attributes the texts to Vriddha Vyasa and reads भर्त्तृ for भ्रातृ in the second line.

given to the wife.* Such property also, as is given by her husband, she may enjoy according to her pleasure.

Whatever is given to the bridgeroom at the time of marriage that property belongs to the bride,† and should not be divided at partition by the kinsmen.

That which is given to bring the bride to the family of her husband is her perquisite.‡

Vyasa, cited in the Dayabhaga, and other digests.

वृत्तिराभरणं शुल्कं लाभश्च स्त्रीधनं स्मृतम् ।
भोक्तौ तत्स्वयमेवेदं पतिर्नार्हत्यनापदि ॥
तथा दाने च भोगे च स्त्रियै दद्यात् सबान्धवम् ।
पुत्रार्त्तिहरणे वापि स्त्रीधनं भोक्तुमर्हति ॥
सामान्यं पुत्रकन्यानां मृतायां स्त्रीधनं स्त्रियाम् ।
अप्रजायां हरेद्भर्त्ता माता भ्राता पितापि वा ॥

रत्नाकरदायतत्त्वादिधृतदेवलवचनानि ।

Property given for her maintenance, ornaments, property given to the bride by the husband for mariage, and wealth gained from kinsmen are declared Stridhana. She herself exclusively enjoys it, her husband has no right to use it, except in distress.

Where Stridhana is needlessly wasted, or enjoyed by the husband, it is returnable with interest. The appropriation of Stridhana for the relief of a child (and other dependants) is proper.

The property of a woman on her death is taken in common by her sons and maiden daughters; in default of issue, the husband, the mother, the brother, or the father shall take.

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* The first two verses are cited in the Saraswati-Vilasa, and the rest in the Dayabhaga. Colebrooke translated in the digest द्विसाहस्र as meaning as two in the thousand. That translation has been inadvertently copied by Dr. Banerjea. It is incorrect according to all the commentaries.—See Dayabhaga, Ujjvala, Ratnakara, Saraswati-Vilasa, Apararka &c.

† The Keshava Vaijayanti cites in the connection the following text :

यद्दत्तं दुहितुः पत्यौ स्त्रियामेव तदन्वियात् ।
मृते जीवति वा पत्यौ तदपत्यमृते स्त्रिया ॥

‡ शुल्कम् has been interpreted by Bissesvara as meaning property given to the bride by the husband with a view to marriage.

Devala cited in the Dayabhaga, the Ratnakara and the Dayatattwa. *

आसुरादिषु यद्द्रव्यं विवाहेषु प्रदीयते ।
अप्रजायामतीतायां पितैव तद्धनं हरेत् ॥

स्मृतिचन्द्रिकाधृतयमवचनम् ।

Wealth which is given at the marriages called Asura and the like, is taken by the father alone, where the woman dies without issue. †

Yama cited in the Smriti-Chandrika.

पैतृकञ्च धनं पुत्रा विभजेयुः सुनिश्चितम् ।
मातृकञ्चेद्दुहितरस्तदभावे तु तत्सुताः ॥
भगिन्यश्च प्रमुदिताः पैत्रिकादाहरेद्धनात् ।
न स्त्रीधनं तु दायादा विभजेयुरनापदि ॥
पितृमातृसुतभ्रातृपत्यपत्याद्युपागतम् ।
आधिवेदनिकाद्यंच स्त्रीधनं परिकीर्त्तितम् ॥

बृद्धहारीतः ४ । १४८—१५० ।

Paternal property the sons divide : this is well settled. Maternal property, the daughters (take) ; failing them, their son.

Sisters delighted participate in the paternal wealth. Stridhana should not be divided by the heirs, except in danger.

Wealth received from the father, mother, daughter, brother, children, and also what is received from the husband when he marries again are called Stridhana.

Vridha-Harita, IV. 148-150.‡

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* The first and the third verses are cited in the Ratnakara, and the translation follows the interpretation of Bissessvara. The second is cited in the Dayatattwa, and the translation is that of Babu Gopal Chandra Sircar.

† The Smriti-Chandrika says, that not only the father takes what is given at the Asura marriage, but that property given by the Bandhavas, *i.e.*, the paternal uncle, brother, maternal uncle, &c., reverts to such relations on the girl dying issueless, and failing them, it goes to the husband.

‡ The reading of the first two verses is what appears both in the Bengal and the Bombay Editions of the collected Smritis. The reading seems to be incorrect, and the meaning is hardly intelligible. I think the correct reading is पैतृकञ्चधनं &c., and the meaning is that the personal property is divided by the sons.

CHAPTER IV.

THE JOINT HINDU FAMILY.

SECTION I.

The Joint Family.

The constitution of the ancient Aryan family.

THERE is no more fascinating subject of study for the scholar, than the ancient institutions of the original Aryan people. For the lawyer also, an investigation of the constitution of the ancient Aryan family and its customs, and their development in India is necessary, having regard to the conflicting interpretations of the law by the leading commentators and modern text-writers.

Dr. Schrader in his "Prehistoric Antiquities of the Aryan Peoples," which contains the result of the latest investigation into the subject says: "The Indo-European family is best conceived as resembling the Roman *familia, i. e.*, as consisting of the women, children, and slaves under the *potestas* of a single housemaster. The wife came into the "hand" of the housemaster by capture or purchase, *in manus venit*, as it is put in the Roman phrase, which is perhaps, connected in fact and in etymology with the Teut *mundium* (from O. H. G. *munt* "protection," "hand" *munt boro*), which again expresses the same idea. The agnatic exclusiveness of the Indo-European family, as regards those

outside it, and the despotic power exercised within its limits by the man over his wives and children has already been described." He then says, that among Indo-Europeans originally the descendants of a common ancestor lived togother after the fashion of the house-communities of the South Slavonic races which are described as follows :

"Such a house-community consists, according to Krauss' description, of a body of sixty or seventy members, who are blood relation to the second or third degree "of course only on the male side." At their head is a house-administrator who is indeed paid the greatest respect, but who is not to be regarded as the master and owner of the family property, like the Roman *pater familias.* The family property is rather the joint property of all the male adult members of the household."

"The house-community dwells together indeed ; but the real house (*ognistiie,* "the place of fire) is occupied solely by the house-administrator and his family, while round it, in a horse-shoe crescent, are grouped the apartments, which are only bed-rooms of the other members. Meals, which it is the business of the *domac'ica* to provide, are taken in common. The men eat first, then the women consume what is left."

"That we are, however, justified in regarding this arrangement as the original Indo-European practice follows from the fact that traces of it have been preserved more or less clearly in Greek and Roman antiquities also."..."It is amongst the Dorians that the original state of things is reflected with especial distinctness. In Sparta the indivisibility of the κλῆρος, which is not to be regarded as a new

arrangement, but as the primeval form of property in land, compelled brothers to live together on the undivided heritage. The eldest was indeed the real heir, ἐστιοπόλος, and the others married or unmarried, partakers and sharers in the use of the family property."

"When the house-father died, all his rights went to the eldest son ; especially were the women of the family, the mother and the sisters, under his guardianship. This seems to have been the ancient Indo-Germanic system."*

Maternal and paternal right.

It was for sometime a matter of controversy whether the primitive Aryan family, centred round the mother or the father. A well-known German writer Von Ihering sums up the conclusion of latest scholarship on the matter in the following words. "Now there cannot be the slightest doubt that maternal right, although very probably once in vogue among the Aryans, must have given place to paternal right long before the Indo-Europeans separated from them. According to Fustel-de-Coulanges the Aryans did not acknowledge any relationship with the mother or her relatives. We must conclude that the maternal right was quite foreign to the Aryan people at the time of the separation of the daughter nations. Later on paternal right was raised into parental right, the reconciliation of paternal and maternal right. Mother, father, parents—herein are the gradual stages of the history of domestic developments made known."† It

* Prehistoric Antiquities of the Aryan peoples by Dr. O. Schrade translated by Professor Jevons, pp. 393-5.

† The Evolution of the Aryan by Rudolph Von Ihering, translated by H. Drucker, M., pp. 40-41.

is noteworthy that though the mother is considered to be under the tutelage of the son according to some Rishis, according to Sankha-Likhita and Narada as long as she is alive, she is the mistress of the household, and the sons are dependent on her. This however, shows only the development of the parental right in India.*

As to ideas of property, the above-named learned writer is of opinion that the 'notion of private property in land and soil was quite unknown to the Aryan : he recognized only common property'. (p. 47.) Ancient idea of property.

The above description of the Indo-European family will help the reader in understanding the law and customs of the Hindus on the subject† which I now proceed to describe.

Jointness was the normal condition of the Hindu family in ancient times. The original idea

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* This shows that Von Ihering is wrong when he says, that "filial affection is not one of the characteristics of the Aryans." The said writer may be right when he says, that the "deposition of the parents in favour of the eldest son is found among the Teutons, where it assumed the character of a legal institution established thousands of years ago"; but he is certainly wrong when he says that it is an original Aryan custom. He may also be right when he says, "of two of the Indo-European nations the Teutons and the Slaves, and also the Iranians, we know, that children cast out their parents or even put them to death." But he is certainly wrong when he says, that though no mention is made among the Aryans of the putting to death of old people in general, "their casting out is mentioned." There is no mention of it in old Hindu books, nor any tradition thereof. The Teutons, after having separated from the Indo-Aryans and settled in countries where the rigors of the climate and the poverty of the soil made the maintenance of the aged an unbearable burden, must have lapsed into absolute barbarism when they adopted the customs mentioned above. The charge against Hindus brought by Von Ihering and other European savants is based upon a mistranslation of the first Vebic text cited in Sec. II of this chapter.

† "The oldest Hindu law-givers lay down the rule that members of a united family have a joint community of worldly and spiritual interests.

was that property, especially immoveable property, belonged to the family, and was intended for its support; no member of the family had any right to dispose of it as he liked, except for family and religious purposes. That seems to have been the law of the ancient Aryan races.* The law laid down by the Rishis was that immoveable property could not be disposed of, except with the consent of all the members of the family, undivided and divided. Division was for the purposes of enjoyment, and not for alienation. This idea was the governing idea among the lawgivers. The priests, however, substituted for it another namely, that wealth was for sacrifices. Manu had placed the high ideal of a noble life of poverty for Brahmins, and ordained that a "Brahmana must not be accumulate poverty except for bare subsistence." "He may either possess enough to fill a granary, or a store filling a grain jar; or he may collect what suffices for three days, or make no provision for the morrow. Among those four (kinds of) Brahmana householders, each later-named must be considered more distinguished, and through his virtue to have conquered the world more completely."† It was this high ideal which priests perverted, and upon it based their doctrine, that wealth was for sacrifices, and for sacifices, even

Ancient Hindu family.

Hence according to them their income and expenditure is conjoint, they cannot individually act or bestow gifts or make loans, nor can they reciprocally bear testimony or become sureties for one another; moreover certain of their religious duties being undivided, one member of the family only is entitled and obliged to perform them for the rest. Accordingly in doubtful cases, it was held, that partition of a family was proved if it could be shown that all or any of these criteria of union were wanting."—Goldstuker's Literary Remains, p. 184, Appendix.

* See in this connection Mallet's Northern Antiquities, p. 277.

† Manu, IV. 3, 7, 8.

the family property could be alienated, and the old idea that all property, especially immoveable property, belonged to the whole family, undivided and divided, became in course of time obsolete.

Original Hindu Law of jointness.

The original Hindu law was that members of the same family up to the third degree should be considered as joint, and after that they should be considered as separate. Sapinda meant 'of the same body' and probably also, 'joint in food,' and we find, that the ancestor, as well as the descendants up to the third degree, have to be made joint in food, given in Sraddha, after death, as they were here on earth. In course of time, as the idea of individual property became more general, earlier division was commended, and we find it stated, that there should be division among brothers on the death of the father, as separate living means separate sacrifices, and consequently increased merit. Notwithstanding this development of the idea of property, partition of property, till after the third generation, was very rare.

Now, according to the ancient lawgivers, as long as the father lived, the sons had no right to property. After the death of the father, it will surprise many to learn that under the law the mother was the head of the family, and the sons were not independent, though they had grown old. After the parents, the eldest brother was the head and the only person who could deal with the family property. The others were dependent members, and all acts by them were of no effect.

Primogeniture and managing member.

The right of primogeniture regarding land, prevailing among the Aryan races of Europe, had probably its origin in its idea of joint family.

Among Aryans originally every joint family was a kingdom in itself, and the law of primogeniture in principalities also, had its origin in the idea that there cannot be divided rule. The ancient Hindu law was that whatever was indivisible should be under the charge of the eldest son. Principalities and religious endowments came under that category. The managing member was bound to maintain the family, and to defray the marriage expenses of the daughters, and to provide portions for them, without making any distinction as between his own children and the children of another coparcener. He had "to protect the shares of minors as well as the increments thereon," to maintain the incapable and infirm members and their childen and even those who were of improper habits, excepting the *patita* and the children born of members while *patita*. He was Swami or Prabhu,* because on him were the burden and the responsibiliy of preserving the property, of performing the duties of the family, sacrifices and cremonies, and of representing the family in its worldly dealings with other people. Every member was entitled to enjoy the profits of the family property equally. The managing member could not reap any personal advantage for his labour. He could not accumulate separate property for himself, out of the profits. His duty was to protect the family, to maintain them and to advance their happiness. He was either the father or the senior brother, and it was the duty of the junior members to honor him and obey him. If he acted

* The usual legal term *Karta* is not to be found in the Smritis or the commentaries. The frequent use of it by learned lawyers of our Courts has substituted it for the proper word *Swami*.

in a way as not to deserve honor or obedience, there was a disruption of the family. Joint members have one mess and one fire and worship, the managing member performing the Yajnas for the whole family. Those that are separate have separate fire, and must perform the five Yajnas separately. It is possible to have the same mess and still be separate, and also to be joint and still have separate mess. This was the old rule.

The idea of joint family, as found among the Lawgivers, was, as I have stated. But in actual every-day life the state of things was often very different. The law of succession is defined as the law which regulates the disputes of brothers after the father's death. Partition among brothers was as frequent as their living together. "As long as the brothers are joint in the performance of religious duties, in food, houses, cattle, fields, servants, giving and receiving, income and expenditure," they are joint. Members of joint family could not give evidence, or become sureties for each other, or give or receive from each other any property. When we find them acting separately in all the above matters, when they "keep their income, expenditure and mortgages distinct, and engage in mutual transactions in money-lending or engage in trading separatly, they are undoubtedly separate," though there has been no deed of partition.

The idea, that until there has been an actual division of property, the family should be considered joint and should have the right of survivorship as among themselves, is not to be found in the Smritis. Indeed the principle of survivorship is a principle enunciated by acute commentators like Vachaspati- Ru'e of survivorship

Misra and others, who improved upon the theory propounded by Vijnaneswara, in order to reconcile the conflicting rules about the inheritance of widows and daughters. They say the rule of inheritance about widows succeeding applies only when one has any property of his own. But when he is a member of a joint family, it cannot be predicated what part of the property is his, and the property on his death remains with the family. The idea that property belonged to the family is as ancient as the Vedas and probably older than they. But the introduction of the principle of survivorship to make the conflicting rules of the Smritis appear to agree is owing to want of knowledge of the history of the law. (Vide the chapter on inheritance).

Rights of female heirs.

We find no indication in the Smritis of one rule of succession for joint property and another for separate property, except in the case of reunited brothers. We have seen that the daughter of the sonless man took his share of the property, as a son, being of the same Gotra with him. We have seen how the widow came to be allowed the enjoyment of the share of the husband's undivided property. We have also seen how and why the law of succession was changed by Yajnavalkya and Vishnu. These lawgivers did not contemplate two different rules of succession. But it appears that their attempt to modify the law ended not in giving greater rights to the widow and the daughter but in wholly taking away their rights. Their rule does not seem to have been popular, and the commentators before Vijnaneswara nearly ignored it. Vijnaneswara and his followers applied it to divided members of the family. Jointness was the normal

condition of the Hindu family and separation was the exception. The widow and the daughter could therefore succeed, only in the not very common case of division among brothers. Thanks to the ingenuity of the Naiyaika *Gimutavahana*, Bengal got the wrong law of the Commentators of the north-west amended by subtlety as great, if not greater, than theirs. Indeed the law of Yajnavalkya and Vishnu was in reality established by *Gimutavahana* by a process which would have seemed quite strange to those old lawgivers. *Gimutavahana* succeeded where they failed. But he succeeded, it should be remembered, only because his law was accepted by the English judges. Otherwise he too might have failed like the great lawgivers whom he followed.

Powers of the managing member.

Sale and mortgage of joint property could only be made by the managing member of the family for the purposes of the family only. Sale of immovable property could never be made except for the support of the family. Any member other than the head of the family could not either sell or mortgage the joint property, or even his own share. In cases of extreme urgency only, he could deal with joint property. Sale or mortage of one share or separate dealing with property meant separation. Therefore, if one made a sale or mortgage of his share, it only meant that there was separation. We find in Narada that dealings by dependent persons are void. Dependent persons are there defined as sons, as long as both parents are alive, and also younger brothers living with their eldest brother as Swami or Prabhu. When the members of a joint family are considered independent, dealing with their own shares would, under the law of

Narada and Vrihaspati, constitute partition. In fact, as will be apparent from the texts cited in this chapter there is no indication in the Smritis of the idea that the members of a joint family had no definite interest in property, before partition. Indeed it is an idea of the commentators, invented for a very different purpose. The courts of the country have fallen into a great error in applying this idea to alienation of property.

We have seen what the law according to the Rishis is. We have now to consider the law as interpreted by the commentators and the judges. Let us first consider the law under Schools other than the Dayabhaga.

Daya—obstructed and unobstructed, and survivorship.

The Mitakshara citing a text of Gautama, considered by some to be spurious, to the effect that ownership is by birth, lays down, that the son, on birth, acquires equal rights with the father in ancestral property. It also defines *Daya* or heritage to be property to which one's right accrues by reason only of relationship with the last owner. Daya is next divided into *Sapratibandha* or obstructed and *Apratibandha* or unobstructed. Obstructed heritage is so called, because the accrual to the right to it is obstructed by the existence of the former owner. It is property which is inherited on the death of the last owner. Unobstructed heritage is that in which the existence of the former owner is no obstruction to the accrual of the right, *i.e.*, where by birth right is acquired. Vijnaneswara does not discuss the matter further. He only says further on that the rule of succession beginning with the wife applies only to the separated man. There is no indication of the rule of survivor-

ship in it. But from what is stated above, subtle commentators like VachaspatiMisra, who followed him, deduced the principle, that in joint ancestral property the interest of the coparceners could not be predicated till partition and that till then, they had no alienable interest as a consequence. These principles have been recognized by our courts as the guiding principles of the law of joint family property, how far correctly, the reader of these pages will judge.

Character of joint family according to Privy Council.

The privy Council have defined the character of a Mitakshra joint family and joint property in the following words: "According to the true notion of an undivided family in Hindu law, no individual member of that family, whilst it remains undivided, can predi cate of the joint and undivided property, that he, that particular member, has a certain definite share. No individual member of an undivided family could go to the place of receipt of rent, and claim to take from the collector or receiver of the rents a certain definite share. The proceeds of undivided property must be brought, according to the theory of an undivided family, to the common chest or purse, and then dealt with according to the modes of enjoyment by the members of an undivided family" (1). It would follow from the above, that the individual interest of a coparcener is not alienable. The principle was recognized in all the Courts of India as good law for many years, but in recent years it has been greatly modified by the decisions, as we shall presently see.

(1) Approvier v. Rama Subbaryan, 11 Moore 75, at pp. 89, 90.

Right by birth and survivorship.

We have already seen, that the son on birth acquires an equal interest with the father in the entire ancestral property, and it has been held, that an adopted son also acquires such right from the date of adoption. (1) The grandson and the greatgrandson also acquire the same interest as the son, by birth. (2)

Brothers and their sons may be joint but nephews have no right of ownership on birth with their uncles.

Time of birth of son affects his right.

The time of the birth of the son is immaterial when the father inherits property from the grandfather, or when he gets ancestral property by partition, or makes additions to ancestral property from its income, as regards the interest taken by the son as against the father ; but it is very material when there is an alienation by the father, because the father has full right to dispose of the entire estate before the birth of the son. (3)

Right of survivorship in joint but not ancestral property.

The Allahabad High Court have held that property may be joint with rights of survivorship without being ancestral and that is also the view of the Bombay High Court (4). It is however difficult to see how there can be any right of survivorship when there is no ancestral property. The reasons given for the existence of such right would be wholly wanting in such a case. But when there was some ancestral property subsequent acquisitions should be considered as accre-

(1) Rangama *v.* Atchama, 4 Moore I. Ram Narain *v.* Bisheshar, 10 All. 413.

(2) Babu Ram *v.* Chote Lall, 11 I. C. 291.

(3) Bholanath Khettry *v.* Kartic, 34 Cal. 372.

(4) Jaman *v.* Ram Protap, 29 All. 667. Chatoorbhooj *v.* Dharamsi, 9 Bomb. 438.

tions to it and the rule of survivorship would be applicable.

What is ancestral and joint property? Inherited property is

The Privy Council overruling previous divisions has recently held that in property inherited from a maternal grandfather and also in self-acquired property of the father inherited by sons living as members of a joint family, the rule of survivorship applies. (1) The Madras High Court has gone further and held that sons of daughter's sons take an interest by birth in inherited maternal grandfather's estate, enabling them to prevent alienation by their fathers. (2) According to the Smritis and the Commentaries however, it is only in property derived from the paternal grandfather, that sons have equal rights with the father, and to such property the rule of survivorship strictly applies. Colebrooke's translation of the passage of the Mitakshara dealing with this subject runs as follows:—"Property in the paternal or ancestral estate is by birth." The correct translation should be property in the paternal or grand-paternal estate is by birth." (पैत्रिके पैतामहे च द्रव्ये जन्मनैव स्वत्वम्।) It is this erroneous translation that has been the cause of the difficulty which has arisen about the true nature of ancestral property. A Full Bench of the Madras High Court have, in a recent case, tried

(1) Raja Chelikani *v.* Raja Chelikani, 29 I. A. 156. (Vencayyaa Garu *v.* Vencata Ramanya, 25 Mad. 678. See Raja Ramnarain *v.* Pertum Sing, 20 W. R. 189. Rampersad Tewary *v.* Sheo Charan Das, 10 Moore 420.) Jasoda Koer *v.* Sheo Pershad Sing, 17 Cal. 33. Saminadha *v.* Thangathanner, 9 Mad. 70.

See Nunda Coomar *v.* Moulvi Ruziooden, 18 W. R. 477. Lochan Sing *v.* Nemdhary, 20 W. R. 170. Pitam *v.* Ujagar, 1 All. 651. Rayadur *v.* Mukunda, 3 Mad. H. C. 455. Karam [Chand *v.* Jairam, 24 I. C. 728 (Punjab).

(2) Sudarsanam *v.* Narasinhalu, 27 Mad. 682. Kurri Ramayya *v.* Villoore, 30 I. C. 889, 18 Mad. L. J. 360.

to distinguish and explain the Privy Council ruling and have held that sons inheriting Stridhana property of the mother do not take as joint tenants with rights of survivorship. (1) The same view has been taken in Bombay. (2)

The Allahabad High Court have referred to the mistranslation as pointed out in this book and have held that in property inherited from the maternal grandfather there can be no interest by birth of the son equal to that of the father preventing alienation by the father. (3)

The Privy Council, it should be mentioned here, in 1896 approved of the decision of Muthusami Aiyar J. in which he held that "coparcenary presupposes a common descent from the same paternal ancestor" and that "daughters and daughter's sons cannot be said to be coparceners so as to form a joint Hindu family." (4) In the latest case before it, the Privy Council held that unless lands came to a person by descent from a lineal male ancestor, it is not deemed ancestral in Hindu Law. (5) In this conflict of opinion it will probably be safe to hold that the incident of survivorship applies to property inherited from the maternal grandfather but not the other incidents of joint grandpaternal property such as interest by birth.

Grandfather's separate property and partitioned property.

Self-acquired or separate property of the grandfather is ancestral when it is inherited by the father. (6) Ancestral property in the hands

(1) Kuruppai Nachair *v.* Sankaranarayanam, 27 Mad. 300 F. B. See 10 I. C. 567. Sudarsanam *v.* Nara Sinhalu, 27 Mad. 682.
(2) Bai Parsoa *v.* Bai Sorab, 36 Bom. 424.
(3) Jamna Prosad *v.* Ram Protap, 29 All. 667.
(4) Muthudavganadha *v.* Parisami, 23 I. A. 132, 137.
(5) Atar Sing *v.* Thakur Sing, 35 Cal. 1039.
(6) Raja Ram Narayan *v* Pertum Singh, 20 W. R. 189. See 29 I. A. 156.

of divided coparceners after partition continues to be ancestral. (1)

Obstructed heritage may not be separate property.

Property may be obstructed heritage and still ancestral. Somehow a meaning has been given to the word 'obstructed' which was never contemplated by Vijnaneswara. The Privy Council have corrected the prevailing error of considering all "obstructed heritage" to be that which is taken by the heirs as tenants-in-common and not as joint tenants (25 All. 687), though, as we have seen above they have gone to the other extreme of holding that all inherited property is ancestral to which the rule of survivorship applies.

Property obtained by gift or devise.

Property obtained by gift or by will, even when it is for maintenance, from the grandfather by the father has been held in Bengal and Madras to be ancestral. (2) But when an illegitimate son was given property for maintenance, the Madras High Court has held that it was not ancestral property. (3) In Bombay it has been held that property acquired by the grandfather with very remote aid from ancestral funds is self-acquired, and, if left by him by will to his son, on terms showing that the latter should take an absolute estate, loses its character of ancestral property in the hands of the son. (4) The same rule has been laid down in a recent case in Allahabad. (5) In Oude, it has been

(1) Adur Money *v.* Chowdry Shibnarayan, 3 Cal. 1. Chatoorbhooj Dharamsi, 9 Bom. 438, 29 All. 244 P. C.

(2) Mudun *v.* Ram Bakas, 6 W. R. 71. Tara *v.* Reebram, 3 Mad. H. C. 50. See Nanomi Babuasin *v.* Madan, 13 Cal. 5. Nagalingam *v.* Ramchander, 24 Mad. 429. Hazarimul *v.* Abane, 17 Cal. L. J. 38.

(3) Krishna Swami *v.* Seetha Lakshun, 31 I. C. 803, 18 Mad. L.T. 542.

(4) Jugmohun Das *v.* Mangal Das, 10 Bom. 285. Timmanacharya *v.* Balacharya, 4 Bom. L. R. 250. Hirabai *v.* Lakshmibai, 11 Bom. 573. Bai Diwali *v.* Patil Bechardas, 26 Bom. 445. Rameshar *v.* Rukini, 14 Oude C. 244, 12 I. C. 770.

(5) Parsotum *v.* Janki Bai, 29 All. 354.

held that property bequeathed by a father and accepted by the sons is self-acquired property, there being no presumption that property in the hands of a person is ancestral. (1) But in Madras, it has been held that in respect of self-acquired property of the grandfather in case of a bequest, it is a question of intention whether it was to preserve its character as ancestral property or was to be considered as self-acquired, though the presumption is that it was intended to descend as ancestral property. (2) In a later case, the same court has inclined to the Bombay view and has held that when the bequest is to persons constituting a joint family, *prima-facie* the donees take in severalty. (3) Having regard to the observations of the Privy Council in the case of Jogeswar Narain *v.* Ramchand (23 I. A. 37) and having regard to the fact that it is consonant to modern ideas, the Bombay rule will probably be given effect to in other Courts.

Property obtained by widow as maintenance or on partition.

Property obtained by a widow for maintenance or on partition retains its character of being ancestral, when it reverts to the heirs on her death. (4)

Purchased property and accretions.

Property purchased with the income of the proceeds of the sale of ancestral property (5), or with ancestral moveables (6), or with money borrowed on the security of ancestral property (7), as well as any accretions to or improvements of ancestral property by the efforts of one member, have all the

(1) Jadunath *v.* Bhabuti, 33 I. C. 785. Rameshar *v.* Rukmini, 14 Oude C. 246.

(2) Nagalingam *v.* Ram Chandra, 24 Mad. 429.

(3) Yethirajulu *v.* Mukunthu, 28 Mad. 563.

(4) Beni Parshad *v.* Puran Chand, 23 Cal. 262. See Nanabhi *v.* Achratbai, 12 Bom. 122. (5) Shudanund Mahapatter *v.* Bonomalee, 6 W. R. 256. Ramanna *v.* Vencata, 11 Mad. 246. (6) Shamnarain *v.* Rughoobur, 3 Cal. 508. (7) Shib Persad *v.* Kullunder, 1 Sel. Rep. 76.

incidents of ancestral property attached to it. (1) Property acquired by the father from the income of the ancestral property before the birth of the son is ancestral property, in which the afterborn son has equal interest with the father. (2)

Confiscated Zemindary re-granted, or obtained as reward or by dispossession.

A mere grant by the Government after confiscation, when it is in recognition of old title, does not change the character of the property (3), nor when title is acquired by one member of the family by forcible dispossession of another. (4) Property granted to a person as reward by the Government is self-acquired property. (5)

Savings and accumulation whether self-acquired.

Whether savings and accumulations are ancestral or self-acquired property is a question of some difficulty. That all savings after the birth of the son belong to him equally with the father seems clear. But as regards savings and accumulations before the birth of the son, they should follow the rules about them in the case of the widow. Until otherwise disposed of before the birth of the son, they become joint property.

Jajman Vritti.

The office of a hereditary priest and emoluments attached to it, known as Yajman Vritti, have been held to be Nibandha and as being among hereditary rights in respect of immovable property (6), which come within the purview of Yajnavalkya II, 121.

Mixed up property is joint.

When the members of a family had but one stock into which each voluntarily threw their self-

(1) Sheodyal *v.* Jadunath, 9 W. R. 61. Meduttia *v.* M. Perumal, 7 I. C. 862. (2) Jugomohun Das *v.* Sir Mangal Das, 10 Bom. 528.

(3) Narayana *v.* Chengalamma, 10 Mad. 1. Kedar Nath *v.* Ratan, 32 All. 415.

(4) Yanumula *v.* Yanumula Boochia, 13 Moore 333.

(5) Munshi Judar Sahai *v.* Kunooar Sham Bahadoor, 17 I. C. 760.

(6) Ghelabhai *v.* Hurgoval, 13 Bom. L. R. 1171.

aquisitions and the income of the whole is devoted to the expenditure of the family and one account is kept of such property and of the ancestral property, they should be considered as joint. (1)

Coparcener may have joint and separate property.

It has been held by the Privy Council that a person may have joint as well as separate property and the rule of survivorship applies to the former and the ordinary rule of inheritance to the latter. (2) In a recent case in the Punjab, in such a case, it has been held that in a separated family, the ordinary law of inheritance applied to the joint property and also (3), when a family has separated in residence, food and worship and its members begin to hold separate property of their own, in respect of any property which they may choose to keep joint, they should be considered as tenants-in-common as in the case of a joint family under the Dayabhaga School. But this is not consistent with the rule that one may be joint in estate though separate in food and worship.

Rule of survivorship should only apply to a family living jointly.

But the rule of survivorship applies according to strict Hindu Law only to a family that keeps joint. It is an incident arising out of the jointness of the family and not out of the character of the ownership as in a joint tenancy. The rule of the Privy Council mentioned above was laid down in a case where the joint property was an impartible family estate in respect of which the family was considered to be joint.

It was broadly laid down in a Bengal case

(1) Lal Bahadoor *v.* Kanbya Lal, 29 All. 249 P. C. Munshi Indar Sahai *v.* Kunwor Sham Bahadoor, 17 I. C. 760. Medeittea *v.* Perumal, 7 I. C. 862.

(2) Katama Natchear *v.* Raja of Shivagunga, 9 Moore 539.

(3) Rolla Ram *v.* Malwa Ram, 12 I. C. 308.

that every Hindu family was presumably joint and if one member was found to be in possession of property, the presumption would be not that he was in possession of it as separate property acquired by him but as a member of a joint family. (1) The Privy Council held in an early case that when the family lived in commensality and possessing joint property, the presumption of law is that all the property they were in possession of was joint property. (2) The rule applied both to Mitakshara and Dayabhaga families. Presumption of joint family property.

The Privy Council however very early modified the above strict rule and held that before any presumption of jointness could arise it must be shown that there was a nucleus of joint property. (3) The rule has been followed in all the Courts. A further relaxation of the old rule was made in certain recent cases, in which it was held that though there was a presumption in favour of jointness, there could be no presumption in favour of a family having joint property nor could it be presumed that property found in the possession of a member was joint property, unless it was shown that the family was possessed of some property by means of which the property in dispute might have been acquired and when that was shown it was for the party alleging self acquisition to prove that it was acquired without any aid from the family property. (4) When also it is proved that all the members Rule of nucleus.

(1) Taruck Joodhesteer, 19 W. R. 178. Gobind *v.* Doorga, 22 W. R. 248. (2) Dharam Das *v.* Shama Sundari, 3 Moore 229. Neelkristo *v.* Beer Chander, 12 Moore 513.

(3) Lakhmun Row *v.* Mullar Row, 2 Knapp. 60.

(4) Ramkishan Das *v.* Tunda Mal, 33 All. 677.
Dwarka Das *v.* Jamna Das, 1 Bom. L. R. 133.
Gurumutter *v.* Gurammal, 32 Mad. 88.
Sheo Golam Sing *v.* Burra Sing, 10 W. R. 198.

threw their earnings into the joint stock, all property standing in the name of one must be presumed to be joint property. (1) A recent Full Bench of the Madras High Court have laid down that when there is no nucleus of joint property, property acquired by one member should be presumed to be his separate property and the burden of proving that he threw it into the common stock was upon those that asserted it. (2) This is a clear and reasonable rule. But unfortunately it has not always been given effect to. (3) Under the Mitakshara, property purchased or standing in the name of one member of a family holding some ancestral property, is presumed to belong to the family. (4)

Presumption under the Dayabhaga.

Under the Dayabhaga however, such a presumption is of a weak character and it has been held in some cases that it does not arise at all. It has even been held that when property was purchased in the name of a son during his father's life time, the burden of proving that it belonged to the father was on the party asserting it. (5)

It has been recently held in Calcutta that the presumptions are identical under both the systems (6), when the family is joint and there is a nucleus of joint property. (7) The Privy Council in a Bengal case held that the presumption of jointness cannot

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(1) Adai Kulam *v.* Subban Chetty, 26 I. C. 33, 27 Mad. L. J. 621.

(2) Etharajalu *v.* Govindarajulu, 32 I. C. 12.

(3) Kundan Lal *v.* Shunker Lal, 35 All. 564.

(4) Vedavelu *v.* Narayana, 2 Mad. 19. Adaikulam *v.* Sabban, 26 I. C. 13. Kundan *v.* Shunker, 35 All. 564.

(5) Saroda Prosad Roy *v.* Villahanund Roy, 31 Cal. 448.

(6) Rama Nath Chatterji *v.* Kusam Kameni, 4 Cal. L. J. 56.

(7) Govind *v.* Radhakristo, 31 All. 477. Kunj Benary Roy *v.* Nemai Chand Pal, 2 I. C. 526.

safely be relied on in a case where the disputed property was in the possession of the person under whom the defendant claimed and was ostensibly that person's own property at his death (1), especially when the coparceners were separate in mess. (2) Following the above ruling, it has been held that the decision depends on the particular facts of a case and it has been doubted whether the presumption of joint property is of general application in regard to particular pieces of property acquired by a member. (3) In a recent case in respect of a Dayabhaga family, the Privy Council have held that when a property stands in the name of a junior member in the absence of evidence that he had separate funds, the presumption was clear and decisive that it was acquired by the head of the family. (4)

Difference between a Mitakshara and Dayabhaga coparcener.

There is a very great difference in the legal positions of members of the Mitakshara and Dayabhaga joint families. The right of a Mitakshara coparcener is like that of a joint-tenant whose interest until partition is undefined and passes by survivorship to the other coparcener, except when he leaves male issue. The right of a Dayabhaga coparcener is that of a tenant-in-common.

The Hindus of Bengal now, generally, even when they live in joint mess, keep their own earnings and their shares of incomes of the family separate and it is fully understood among them that property purchased solely in the name of one member is his own property, except under

(1) Banneo *v.* Kasheeram, 3 Cal. 315 P. C.

(2) Obhoy Churn Ghose *v.* Gobind Chunder Dey, 9 Cal. 237.

(3) Protap Chunder Chakravarty *v.* Sarat Kaminy, 24 I. C. 90.

(4) Parbati Dasi *v.* Raja Baikunt Nath De, 19 Cal. L. J. 129 P. C.

Presumption in Bengal.

exceptional circumstances. The constitution of Hindu families has undergone a very great change under the influence of modern western ideas and the courts should administer the law as applicable to the present circumstances. In a Dayabhaga family, separation in mess constitutes complete separation, because in respect of the ancestral property the shares of the coparceners are defined and their status is that of tenants-in-common. Such a status is separation in law in a Mitakshara family. Thus under the Dayabhaga after separation in mess, all properties acquired by a coparcener in his own name should be presumed to be his separate property.

Presumption in Bombay.

In Bombay, it has been held that, from the general presumption it does not follow that every member of a joint family, who is found to be in possession of property at his death, has necessarily acquired that property as a member of the joint family. Before that presumption can arise, it must be proved that there was at least a nucleus of a joint family property out of which the property acquired by an individual member might fairly be said to have grown, and what constitutes a nucleus depends on the circumstances of each case. (1) The doctrine of nucleus should surely be reasonably applied.

Presumption in Madras.

It has been held in Madras that when the nucleus of joint property is meagre and the income insufficient, if a member had a trade of his own and there was no ancestral property in his possession out of the income of which a property acquired by him could be acquired, it must be held to be his

(1) Dwarkaprasad Raghubur *v.* Jamnadas, 13 Bom. L. R. 138.

self-acquisition. (1) In the Punjab, it has been held that notwithstanding the presumption of jointness, it does not follow that "all the property owned and shops started by individual members are joint of all the members." (2) In Oude, it has been held also in a recent case, following two decisions of Bombay and Allahabad, that there was no presumption when different members of a family earned their living separately that they intended to throw their earnings into a common stock or to abandon their separate rights. (3) In the most recent case on the question, it has been held in Madras that there is no presumption that the earnings of one member of a family belong to the family without evidence that they were thrown into the common stock. (4) Life insurance policies have been held to be separate property unaffected by the presumption mentioned above. (5)

The presumption is of a rather weak character, when the parties are not nearly related to each other, and when one member has been dealing with property in possession as his own and incurring liabilities in respect of it on his own account. (6) When it is found that the parties were living separately, messing separately and worshipping separately, the ordinary presumption, of jointness, it has been held, falls to the ground. (7)

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(1) Garuswami Aiyar *v.* Mari Chetty, 22 I. C. 852. Veelel Chatta *v.* Mari Velil, 33 Mad. 250.

(2) Hari Shunker *v.* Babaram, 18 I. C. 746.

(3) Lachmi Narain *v.* Ram Dyal, 22 I. C. 886. Jangi Nath *v.* Jank Nath, 2 All. L. J. 225. Dwarka Prosad *v.* Jamnadas, 13 Bom. L. R. 138.

(4) Yeechuri *v.* Yeechuri, 30 Mad. L. J. 120, 33 I. C. 861.

(5) Haridas *v.* Narotam, 14 I. C. 769.

(6) Murari *v.* Mukund, 15 Bom. 201. Bodh Sing *v.* Gunesh, 19W. R. 336.

(7) Sham Lal *v.* Chhaggi, 19. I. C 51. Gannu Singh *v.* Bhagwati Koer, 3 Ind. Cas. 234. See 17 Cal. 933, 9 Cal. 817, 30 Cal. 231, 4 Moore 168, 11 Moore 75.

Whatever may be the presumptions, a coparcener, under the law, can have separate property. According to the Rishis, separation in estate is constituted by separation in food and worship and the difficulty has arisen from the fact, that it has been held by our Courts that a family may be joint in estate while separate in food and worship.(1)

Recapitulation of the law about presumption of jointness.

Let us recapitulate the principles laid down by our Courts. "The presumption of law is that all the property they were possessed of was joint property, until it was shown by evidence that one member was possessed of separate property." (2) If a member "was found to be in possession of any property the family being presumed to be joint, the presumption would be, not that he was in possession of it as separate property acquired by him, but as a member of the joint family."(3) "The presumption is in favour of union, as the Hindu Law presumes joint tenancy as the primary state of every family." (4) But it must be shown that the family "was at some antecedent period, not unreasonably great, living in joint estate," (5) and that there was a nucleus of ancestral property from which the property might have been acquired. (6)

Property acquired jointly or when earnings thrown into common stock.

Property acquired by the members of a joint family when there is a nucleus of joint property with the aid of such property or by their joint labour(7)

(1) Neelkristo Deb *v.* Beerchunder, 12 Moore 544. Nargunti *v.* Vengama, 9 Moore 92. See 6 Moore 53. (2) Dharamdas *v.* Shamsundari, 3 Moore 129.

(3) Taruck Chuder *v.* Mahadeo, 21 I. H. 134. Pritkoer. *v.* Mahadeo, 21 I. A. 134. (4) 3 Moore 229

(5) Seogolam *v.* Burra, 10 W. R. 198.

(6) Prankristo *v.* Bhagirathi, 20 W. R, 158. Moolgi *v.* Gokuldas, 8 Bom. 154. Chutoorbhooj *v.* Dharamsi, 9 Bom. 428.

(7) Rampershad *v.* Sheo Charan, 10 Moore 490. Radhabai *v.* Nanaram, 3 Bom. 151. Prankrishto *v.* Bhagirathee, 20 W. R. 158. Lakshman *v.* Jamnabai, 6 Bom. 225.

or when they throw their earnings into the common stock (1) is joint property in whose name soever it may stand, even when the form of the conveyance makes them tenants-in-common, (2) and the onus is on the coparcener setting up self-acquisition to prove it. (3) In all such property there are the incidents of survivorship and inalienability. (4)

It has been held in Calcutta that when the widow of a brother makes an application for letters of administration, which is opposed by the surviving brother on the ground of jointness, the question of joint or separate, need not be gone into, and the widow is entitled to the certificate which can affect only separate property.(5) This decision has made the question of onus more difficult than it was before. It has been held in Madras that a suit for a bare declaration by a coparcener that he is entitled to collect the debts standing in the name of another deceased coparcener is maintainable, although a certificate has been already granted to the widow under Act 1 of 1889.(6)

The difference between a partnership and a joint family was concidered in several cases. (7)

(1) B. Madhavacharya *v.* B. Damodaram, 12 Mad. L. J. 240 17 I. C. 347. Karsandas *v.* Gangabai, 32 Bom. 479. Munisam *v.* Maruthammal, 34 Mad. 211. Lal Bahadoor *v.* Kanhaya Lal, 29 All. 244 P. C.

(2) Jawala Buksh *v.* Dharam Sing, 10 Moore 530. Musmut Cheeta *v.* Babu Miheen Lal, 11 Moore 369. Toondun Sing *v.* Poknarayan, 22 W. R. 199. Prankristo *v.* Bhageerutee, 20 W. R. 158. Dhurrumdas *v.* Sham Sundary, 3 Moore 229. Umrithnath *v.* Gourinath, 13 Moore 542. Poker Mull's goods, 23 Cal. 980.

(3) Lal Bahadoor *v.* Kanhya Lal, 29 All. 244 P. C. Anandrav *v.* Vasantrav, 9 Bom. L. R. 595.

(4) Haridas *v.* Narotum 14 I. C. 769 14 Bom L. R. 237 Karsandas, *v.* Gangabai, 32 Bom. 479. Gobardhun Saha *v* Bulkhan, 1 Pat. L. J 195.

5. Raghubur Hazra *v.* Bahadoor Hazra, 3 C. W. N. CCLXXVII. Raghunath Misser *v.* Pato Koer, 6 C. W. N., p. 345.

(6) Chinnappa Chettiar *v.* Tulsi Ammal, 15 Mad. L. J. 339.

(7) Rungomonee *v.* Kashinath, 13 W. R. 75. Abhoy Chunder *v.* Peary Mohon, 5 B. L. R. 347. Chaturbhuj *v.* Dharamsi, 9 Bom 438.

Difference between a partnership and joint family.

A partnership is dissolved by the death of one of its members, but a joint family can be broken up only by partition. In a partnership, there is no right of survivorship. A joint family differs from a partnership, as well as a strict joint estate in which the joint tenants only and not their heirs take by survivorship, inasmuch as the members of a joint family not only enjoy the right of survivorship but their interest is taken by their male descendants. The points of difference are numerous, and will appear clear to the reader on a consideration of the true nature of joint family property.

Incidents of joint trading business.

A trading business may be joint family property with all its incidents, the managers possessing sometimes greater powers than the ordinary Kurta, because of the exigencies of trading. (1) It has been held (2) that "a trade like other personal property is descendible amongst Hindus, but it does not follow that a Hindu infant, who by birth or inheritance becomes entitled to an interest in a joint family business, becomes at the same time a member of the trading partnership which carries on the business. He can only become a partner by a consentient act on the part of himself and his partners," and it was on this ground held by the late Supreme Court of Calcutta that "an infant of tender years, whose name was used in a partnership business, need not be joined, as a co-plaintiff in a suit by the father to recover a trade debt."(3) A minor cosharer is not personally liable for the debts incurred

(1) Daulatram *v.* Meherchand, 15 Cal. 70 P. C. Bemola Dassee *v.* Mohun Dassee, 5 Cal. 772 F. B. (2) Lutchmanen Chetty *v.* Siva Prokasa, 26 Cal. 349.

(3) Petum Doss *v.* Ramdhon, Taylor 279.

in carrying on the trade but his own share is liable. (1)

Rights of coparceners.

We have next to deal with the rights of individual coparceners. The difference between the Mitakshara school and the Bengal school, as to the rights of individual members is of a radical character. The commentators of the Mitakshara school are सामुदायिक स्वत्ववादी and the commentators of the Dayabhaga school are प्रादेशिक स्वत्ववादी, *i.e.*, a Mitakshara coparcener has indivisible right to the entirety with its incidents of survivorship and inalienability, whereas a Bengal coparcener is an ordinary tenant-in-common having the right to a definite alienable share.

Powers of the father.

Under the Dayabhaga, sons have no right to ancestral property during the lifetime of the father, except a right to maintenance. Early in the last century it was doubtful whether the father could make an unequal division among sons. But it was finally decided in 1831 that the father had absolute power of disposal and alienation. (2) Under the Mitakshara, father and son are equal sharers in ancestral property. But the father is the *kurta* and cannot be removed from the management, except by partition, and has full right to dispose of the income as he likes but not to make alienations, except for family necessity, and his debts, if not contracted for immoral purposes, are binding on the sons.

Rights of enjoyment and to necessary expenses.

It would follow from the very nature of a joint Hindu family, that under the Bengal school, as well as under the Mitakshara school, as long as the

(1) Joykisto Cowar *v.* Nittyanand, 3 Cal. 738. Samalbai *v.* Someshara, 5 Bom. 40. Anath Bandhu *v.* Bepin Behary, 19 I. C. 6.

(2) Juggo Mohon *v.* Nemoo. Morton 90. Motec Lal. *v.* Mitterjeet, 6 S. D. 73.

family was joint, "no individual member of the family could go to the place of receipt of rent, and claim to take from the collector or receiver of the rents a certain definite share. The proceeds of undivided property must be brought, according to the theory of an undivided family, to the common chest or purse and there dealt with according to the modes of enjoyment by the members of an undivided family." (1)

All members of a joint family have equal rights of enjoyment, a brother and his many sons being each entitled to equal enjoyment with a sonless brother. The marriage expenses of brothers, sisters, sons and daughters of coparceners are to be borne by all the brothers, without regard to the number of daughters each brother has got, and a debt contracted for these purposes is binding on the family.(2) The managing member or a surviving coparcener is under the obligation to perform the marriage ceremony of the daughter of an undivided coparcener, dead or living, and it has been held that in case of refusal or neglect the mother of the daughter may give her in marriage and sue the manager for the money expended for the purpose.(3) Marriage expenses of daughters are a charge on the family funds. (4) It would be misfeasance if the manager spends more upon himself and his children than upon his brothers and their children and he should be made to account for such conduct. But

(1) Appovier *v.* Rama Subba, 11 Moore 89; 8. W. R. 1 P. C. Chuckan *v.* Porun, 9 W. R. 483.

(2) D. Srinivasa *v.* Theruvengadathaiyangar, 23 I. C. 261.

(3) Abhay Chandra *v.* Pyari, 5 B. L. R. 347. Damodar Das *v.* Uttamram, Bom. 271. Surendrabai *v.* Shewnarayun, 9 Bom. L. R. 1366.

(4) Vaikuntam *v.* Kallapiran, 23 Mad. 512. Tulsa *v.* Gopal Rai, 6. All. 32.

the Courts will probably in such a case leave the parties to their remedy by partition.

It has been held that the manager of a joint family cannot eject one of the members of the family in possession of a portion of the family property, but the question whether he can obtain joint possession has not been decided though a strong opinion has been expressed that he cannot. (1) In Bombay, it has been held that joint possession could be obtained. (2) It is submitted that joint possession is not the proper remedy in a Mitakshara family. Under the Hindu Law, a joint coparcener, cannot sue another coparcener, as long as they are joint. Every coparcener, who is in possession of any property must be considered to be so on behalf of the family, otherwise there would be limitation. There thus cannot be a suit for possession. If the members do not agree, partition is the only remedy. When there is partition and they become tenants in common there may be a decree for joint possession. Thus in a Bengal family there may be a decree for joint possession. (3)

A junior member, it has been held, cannot make the managing member liable merely on the ground that he could have realised arrears of rent, if he had minded to do so, but did not, though he might be liable for loss incurred for his negligence or misconduct. (4) It is difficult to distinguish between negli-

Liability of the manager.

(1) Raghoba *v.* Ziboo, 11 I.C. 687. 7 Nag. L.R. 82. See Lachmeswar *v.* Manrswar, 19 Cal. 253 P.C. Watson *v.* Ramchand, 18 Cal. 10 P.C.

(2) Ramchandra *v.* Damodar, 20 Bom. 467. See Phane Sing *v.* Nawab Sing, 28 All. 161.

(3) 26 Cal. 555, 9 C. L. R. 70, 20 W. R. 126, 168.

(4) Raya *v.* Gopal Mallau, 11 I.C. 666.

gence and failure to realise arrears not being minded to do so. It seems that a manager of a family, who is not paid for his services and is a bare trustee, should be liable only for wilful or gross negligence.

In one case a distinction was made between the position of the *kurta* in respect of coparceners who are minors and of those who are adults. As regards the adults, he was merely the chairman of a committee which "manage the property together and the *kurta* is but the mouth-piece of the body, chosen and capable of being changed by themselves." But in respect of minors he was strictly a trustee. (1) This position of trustee in respect of the minors is imposed by the Rishis, not only on the manager, but on all the members of the family. But by that is meant, that the adult members are not to waste or misappropriate the shares of the minors. In a very recent case, the Privy Council have thus defined the position of the manager of a joint family: "Such a person is not the agent of the members of the family, so as to make them liable to be sued as if they were the principals of the manager. The relation of such persons is not that of principal or agent or of partners; it is much like that of trustee and cestui que trust." (2) In this view there can be no distinction between adult and minor members as to their rights against the manager, excepting that in the case of the latter he is certainly under an obligation to economise and save and in a suit for partition by minors, when they attain majority.

(1) Chuckun *v.* Poran, 9 W.R.483.

(2) Annamalai Chetty *v.* Murugasa Chetty, 30 I. A. 220.

the court should make him accountable when waste or extravagance is proved.

In a recent case, the Madras High Court has held that the rule laid down in the case of Abhaya-chandra *v.* Pyari Mohun is not applicable in the case of a Mitakshara joint family. (1) But in this matter no reasonable distinction can be made between the position of the manager of a Bengal family and that of a Mitakshara family. In Bengal in a later Mitakshara case the position of the manager has thus been defined. He is not an agent or a trustee and is not under no obligation to economise or save and when accounts are taken at partition the enquiry should be directed to the assets then existing in the hands of the family and the head of the family cannot be called upon to justify the past transactions of the family. (2) Position of the manager.

It has been held, that members who were minors during the management cannot be taken to have consented to the management, and are entitled, when they attain their majority, to hold the manager liable, not only for acts amounting to fraud, but also where the management has been grossly negligent and prejudicial to their interests. (3) Position of minors.

The position of the minors cannot be better than that of the adults, if the manager does his duty, and there is no reason for holding, that their shares are free from the burdens of legitimate family expenses. Vijnaneswara expressly lays down, that minor coparceners may be bound by the acts

(1) Balakrishna *v.* Muthusami, 32 Mad. 271. See 22 Mad. 470, 26 Mad. 544, 28 Bom. 201, 7 Mad. 564.

(2) Bhowani Prosad Saha *v.* Juggernath Saha, 13 Cal. W. N. 309.

(3) Damodardas *v.* Uttamram, 17 Bom. 271.

of the manager. It should be observed that there cannot be a suit to remove a manager, the only remedy of the coparceners being partition.

Liability of the manager to account.

It was for some time doubted whether the manager of a joint family was under any liability to account. It has, however, been finally decided, that he is under such liability, under the Bengal school to adult as well as minor members. In the case of Abhoy Chunder (1), the late Justice Dwarka Nath Mitter, speaking of the liability of the manager, laid down, that "he is certainly liable to make good to them (the coparceners) their shares of all sums which he has misappropriated, or which he has spent for purposes other than those in which the joint family was interested and that no member of a joint Hindu family is liable to his coparceners for anything which might have been actually consumed by him in consequence of his having a larger family to support or of his being subject to greater expenses than the others, because all such expenses are justly considered to be the legitimate expenses of the whole family. Thus for instance, one member of a joint Hindu family may have a larger number of daughters to marry than the others. The marriage of each of these daughters to a suitable bridegroom is an obligation incumbent upon the whole family, so long as they continue to be joint, and the expenses incurred on account of such marriages must be necessarily borne by all the members without any reference whatever to their respective interests in the family estate." Though the manager is liable

(1) 13 W. R., 75 F. B., 19 Mad. L. J. 62, 13 N. 309.

to account, the account from him must be taken on the footing of what has been spent, and what remains, and not upon the footing of what ought to have been spent with proper economy or care as in the case of a trustee. (1) A brother's wife was held by the Privy Council to be entitled to account even for the time when her husband was alive but not for the purpose of enquring into the different payments made by the manager but to ascertain to what portion of the savings or accumulations she was entitled to. (2)

Under the Mitakshara it has been held that the managing members cannot be called upon to account and to justify past transactions in a suit for partition (3), excepting probably in cases of fraud and misappropriation or of gross reckless waste. (4)

It has been held, that in a Mitakshara family the minor member's interest was of the same undefined character as of adult members, and not capable of being taken charge of and separately managed, and no certificate of guardianship can therefore be granted in respect of such interest under Act 40 of 1858, or Act 8 of 1892. (5) The rule applies also to an Aliyasantan family. (6) But the rule does not apply when all the members of a joint family are

Certificate of guardianship of minors.

(1) Chuckun *v.* Poran, 9 W. R. 483. Taracha d *v.* Reeb Ram, 3 Mad. H. C. 177. Jugmohan Das *v.* Mungal Das, 10 Bom. 528. Bhowani *v.* Jaggernath 13 C. W. N. 309.

(2) Sookhmoy, *v.* Srimati Monohurry, 12 I. A. 111.

(3) Balakrishna *v.* Muttusami, 32 Mad. 271. Narayan *v.* Nathage 28 Bom. 201 Contra. Krishna *v.* Subbanna, 7 Mad. 564.

(4) Bhawani Prosad Saha *v.* Juggernath Shah, 13 C. W. N. 315.

(5) Sheonundan Singh *v* Mussamut Ghunsam Kooeree, 21 W.R. 143. Narsing Ray *v.* Venckji, 8 Bom. 595. Shamkuar *v.* Muhananda Sahoy, 19 Cal. 301 Gharibulla *v.* Khalak Sing, 25 All. 407 P.C.

(6) Kaykar *v.* Maru 4 Mad. L T. 462

minors and a guardian may be appointed for them till such time as one of them attains majority. (1)

Succession certificate.

In a joint Mitakshara family no certificate under the Succession Certificate Act is necessary in order to enable the surviving member to realize a debt due to the family. (2) The rule has been extended to impartible estate. (3)

It has also been held that the provisions of Act 19 of 1841 are not applicable to Mitakshara joint family property. (4)

Letters of Administration.

But the Madras High Court has in a recent case held that Letters of Administration can be granted to a coparcener succeeding to the deceased by survivorship and full duty should be paid on the value of the property of the deceased. (5) In Calcutta and Bombay however, the whole property has been considered as exempt from duty. (6)

Mortgages in the name of minor coparceners.

It has been held that a mortgage in the name of a minor member of a joint family is not void and the rule in the case of Mohori Bibi, which makes mortgages to minors void, does not apply. (7)

Right of coparceners to sue and to be sued.

According to the Rishis joint brothers are one person in the eye of law. This position is applicable only to a Mitakshara family, but not to a Bengal family. A Dayabhaga coparcener can

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(1) Ram Chandra *v.* Krishnarao, 32 Bom. 259. Bindajee *v.* Matharabai, 7 Bom. L. R. 809

(2) Jagmohan Das *v.* Allu, 19 Bom. 338. Beejraj *v.* Bhyro, 23 Cal. 912. Bissen Chand *v.* Chatrapat, I. C. W. N. 32, 1862.

(3) Guru Pershad *v.* Dhani 38 Cal. 183.

(4) Sato Koer *v.* Gopal Sahu, 34 Cal. 929.

(5) In the matter of Desa Manavola, 33 Mad. 93.

(6) 23 Cal. 980, 29 Bom. 161.

(7) Meghan *v.* Pran Sing, 30 All. 62 Mohuri Bibi *v.* Dharmdas, 30 Cal. 539.

sue or be sued alone in respect of his share of the property. In regard to the position of a Mitakshara coparcener there are conflicting decisions. It has been held that unlike a Bengal coparcener, a Mitakshara coparcener cannot sue or be sued alone in any litigation in respect even of his own share of the joint estate. (1) But the manager, who has let a tenant into possession, can sue him alone. (2) The manager can always sue as such, but the defendants have a right to insist on the other co-owners being made parties. (3) A suit against a third party will not lie at the instance of one member, even if that party were in possession of joint property by the act of another member or of the manager. (4) It has been held, that the manager of the family, or the registered coparcener or a single coparcener may bring a suit for possession against a trespasser for the benefit of the family. (5) He may also sue alone, if there has been any special loss to himself, not affecting the others. (6) But if the suit is not brought on behalf of the family, a coparcener can only recover his share of the property. (7) A member of a joint family, in whose

(1) Gokool Persad *v.* Etwaree Mahto, 20 W. R. 138. Hari Gopal *v.* Gokal Das, 12 Bom. 158. Balkrishna *v.* The Municipality of Mahad, 10 Bom. 32. Banarsi Das *v.* Maharani Kuar, 5 All. 27. Balkrishna *v.* Morokrishna, 21 Bom. 154. Parameswaran *v.* Shangaran, 14 Mad. 89.

(2) Kutusheri *v.* Uallotil, 3 Mad. 234.

(3) Balkrishna *v.* The Municipality of Mahad, 10 Bom. 32.

(4) Sheo Churn *v.* Chukraree, 15 W. R. 436. Alagappa *v* Vellian, 18 Mad. 33.

(5) Radhaprosh id *v.* Esuf, 7 Cal. 414 Ramayya *v.* Venhataratnam, 17 Mad 122. Arunachala *v.* Vythilinga, 6 Mad 27. Ayappa *v.* Venkata Krishnama, 17 Mad. 122.

(6) Gopee *v.* Ryland, 9 W.R. 279. Chundee *v.* Macnaghten, 23 W.R. 186.

(7) Dursum Sing *v.* Durbijoy Sing, 9 Cal. L. J. 629, Kala *v.* Muthyammul, 12 I. C. 76. Contra Barbar *v.* Ramanna, 20 Mad. 461.

name a bond stands or an agreement has been entered into, may alone sue on it and payment by the debtor to another member is not a good payment (1), especially when the payment is made out of fraudulent motives (2). It has been held that when a contract stands in the name of a member, he can sue on such contract alone and that in a suit for taking partnership account only the persons whose names appear as partners of the firm are necessary parties. (3) In Bombay, it has been held that a member of a joint family has no right to sue in his own individual capacity to recover a debt due to the family. (4)

It was held in Madras and Bombay that as a rule the manager is not entitled to sue or be sued alone on behalf of the family. (5) In Allahabad it was held that the managing members cannot bring a suit to recover a debt due to a family without making the other members parties as plaintiffs or defendants. (6) But in an earlier case it had been held that if the objection was not taken in time the suit was not bad. (7) In recent cases it has been held that the managing

Right of the managing member to sue and to be sued alone.

(1) Adaihalam *v.* Murimuther, 9 Mad. L. R. 31. Durga *v.* Damodar 32. All. 183.

(2) P. A. M. Shak *v.* K. R. Rama 10 I. C. 874. Hossainara Begum *v* Rahinunnissa, 13 Cal. L. J. 3.

(3) Damodhardas *v.* Vishendas, 7 I. C. 584 (Sind).

(4) Shibjiram *v* Vishnu, 2 Bom. L. R. 121.

(5) Angamuthu *v.* Kolanda Velu, 23 Mad. 190, following *v.* Alagappa *v.* Vellian, 18 Mad. 33, and distinguishing Arunachalam *v.* Vythialinga, 6 Mad. 27 and Mahavala *v* Kunhan na, 21 Mad. 373. Shesam Patter *v.* Kera Raghava, 32 Mad. 284. Palmakar *v.* Mohadeo, 10 Bom. 21. Kashinath *v.* Chimnaji, 30 Bom. 477.

(6) Samrathi Singh *v.* Krishna, Prosad, 29 All 311. See 6 Cal. 815,3 Mad. 234,10 Bom. 82, 7 Bom. 217, 14 All. 524, 190 All. W. N. 282.

(7) Pateshri Protap *v.* Narain, 26 All: 528.

can be sued alone (1)

The question has been finally set at rest by the Privy Council, in a later case. (2) Their Lordship say : " The Indian decisions as to powers of managing members of an undivided Hindu joint family are somewhat conflicting. It is however clear that where a business like money-lending has to be carried on in the interests of the family as a whole, the managing members may properly be entrusted with the power of making contracts, giving receipts and compromising or discharging claims ordinarily incidental to the business. Without a general power of that sort, it would be impossible for the business to be carried on." They further held that not only are the managers entitled to make contracts in their own names but to sue and to be sued on such contracts. They also approved of the rule in Arunachala Pillai's case (3) " that the managing member of an undivided Hindu family suing as such, is entitled to bring a suit to establish a right belonging to the family without making the other members of the family parties to the suit."

It was also held in the above case that where coparceners other than the managing members were brought on the record as plaintiffs after the period of limitation the suit was not barred under Sec. 22 of the Limitation Act, though the contrary had been in some earlier cases. (4)

(1) Jaddo *v.* Narayan Sheoshanker, 7 I C. 902. Rama Krishna *v.* Vinayak, 34 Bom. 355. Gana Savant *v.* Narayan, 7 Bom. 467. P. A. M. Sheikh *v.* K. R. Ram, 10 I. C. 874.

(2) Kishen Parshad *v.* Har Narain, 15 C. W. N. 321, 33 All. 272.

(3) 6 Mad. 27.

(4) Ramsebak *v.* Ram Lal, 6 Cal. 815. Kali Das *v.* Nath, 7 Bom. 217. Krishna *v.* Lakshan, 18 Mad. L. J. 275.

In a recent case the Calcutta High Court has held that the Kurta of a joint Mitakshara family can not sue alone upon a mortgage executed in his favour without making the other coparceners parties as such a suit offended against Order 34 R. 7 of the Civil Procedure Code.(1) The decision of the Privy Council however was not before the Judges nor considered by them.

In the latest case on the question, the Privy Council have again decided that the managing member can sue and he sued alone and a decree in such a suit would be binding. (2) Section 85 of the Transfer of Property Act or Order 34 Rule 7 have been held in such a case to be substantially complied with and it has also been held that it is not necessary that in the pleadings the managing member should be described as such. (3)

Decree for or against managing member whether binding on others.

There are conflicting decisions on the question whether a judgment in a suit by or against the Kurta binds the other coparceners, the true principle is thus enunciated by Sir Raymond West. "It was a generally received doctrine that the acts of a manager bound a Hindu family, so long as they were honestly intended for its benefit, or were such as might reasonably be deemed to have that character. The name of a single member of a Hindu family in the land register of the Government might stand for all—Jowla Buksh *v.* Dharum Sing (10 Moore, 530)—without affecting their rights *interse* Mussumut Cheetta *v.* Miheen Lal (11

(1) Sidheshur Pershad *v.* Dharamjit, 22 I. C. 570.

(2) Sheo Shankar Koer *v.* Musmut Juddo Koer, 36 All. 383 P. C. Sheo Dubare *v* Brij, 25 I. C. 849 (Oude).

(3) Madan Lal *v* Kissan Sing. 9 All. L. J. 844 F. B. Hori Lal *v*, Musmut Kunwar, 34 All. 549.

Moore, 369); Umrithnath Chowdhury *v.* Gouri Nath Chowdhury (13 Moore, 542). A lessee from a managing member was obliged to account to him for the rent—Dada Valad *v.* Bhan Valad (Printed Judgments for 1876, p. 11)—and conversely must be maintained in possession against other individual members. A purchase made under Act I of 1845 by a manager in his own name enabled the other members to sue to enforce their rights, notwithstanding the provision in Section 21 that no purchaser shall be ousted on the ground that the purchase was made on behalf of another—Toondun Sing *v.* Pokhnarain (22 W. R., 199). The Hindu family was in fact considered as a corporation whose interests were necessarily centred in the manager; while the manager as the chief member of the family was understood to represent the common interests whenever these were subject to be affected by transactions in which he was engaged even in his own sole name. Union and undivided interests being the rule, the presumption was that a manager was acting for the family, unless it were made out that he acted, and professed to act, for himself alone. This was the case equally with regard to litigation as to other transactions. In a suit filed by or against a Hindu as manager, it was seldom or never, according to the former practice, set forth specifically, that he sued or was sued, both on his own behalf and on behalf of the family. The intimacy of union was such that this was taken for granted. The practice is recognized and not condemned, in *Jogendra Deb Roy's* case (14 Moore, 376) and many decisions, like those in *Mayaram Sivaram v. Jayvantrav Pandurang* (Printed Judg-

ments for 1874, p. 41) and *Narayun v. Pandurang* (5 Bom. 585) have proceeded on an identification of the other members of a Hindu family with the one who has conducted a suit on their behalf.

"Where the other members are infants at the time of the suit, that, no doubt, is a reason for scrutinizing the matter with more than usual care in order to protect them against fraud, but here fraud is not suggested; the suit for redemption was, no doubt, brought by Visram in perfectly good faith, his own interests being concerned equally with that of his infant brother. His capacity to represent the family was not impaired by any collusive artifice to its prejudice, and the practice having been such as it was in 1856, the mere omission to specify the present plaintiff as a party did not prevent his being bound by the suit in which he was effectively represented by Visram. At present Visram would have to set forth the minor brother's name, but the law of 1856 was less exacting in particulars." (1)

The correctness of this decision though doubted in a later case (2) seems beyond dispute according to Hindu Law as laid down by the Rishis. It was at one time thought, that a decree against the manager could not bind the other members, (3) but in the case of a trading business, it has been held by the Privy Council that it is binding on the family. (4) The Madras High Court in the latest

(1) Gansaant *v.* Narayan Dhond, 7 Bom. 467.

(2) Padmakar *v.* Mahadeva, 10 Bom. 21.

(3) Subramaniyayyan *v.* Subramaniyam, 5 Mad. 125, F. B. Abilak Roy *v.* Rudbi Roy, 11 Cal. 293. Maruti *v.* Lina, 6 Bom. 564. Ram Narain *v.* Bisheshur, 10 All. 411. Sunder Lal *v.* Chhitar Mal, 29 All. 1.

(4) Daulat Ram *v.* Neher Chand, 15 Cal. 70.

case on the question, after reviewing all the earlier cases, has held that a decision against the father was binding on the sons, when the father on the facts of a particular case was held to have represented the sons in the previous proceedings. (1) The recent Privy Council ruling mentioned above have finally decided that the managing members when they sue or are sued as such represent the family in a litigation and thus a judgment fairly obtained against them as such should bind the family.

In some cases, the Courts went to the length of holding that in all cases a decree against the father will not bind the sons. (2) But later cases, which seem to be more consonant with the law of the Rishis, have established that the sons are so bound, if it can be shown that on the facts of a particular case the father was held to have represented the sons. (3) The exception is difficult to appreciate. Any judgment obtained fairly against the father ought to bind the sons.

It has been held in Allahabad however, that a judgment against the father cannot operate as *Res Judicata* against a son who was no party to the suit affecting the ancestral property as he does not claim under the father. (4) It has even been held that when a father had obtained a decree

(1) Poduri Basava *v.* Podura Bhoga, 7 I. C. 896. Subanna Bhatta *v.* Subanna, 30 Mad. 324. Kunjan *v* Siddapillai, 22 Mad. 461.

(2) Ram Narain *v.* Bisheshar Prasad, 10 All. 411. Sundar Lal *v.* Chhetar Mal, 29 All. 1 Contra. Jaddo *v.* Sheo Sankar, 7 I. C. 27 All. L. J. 945.

(3) Podara Basava *v.* Podura Bhoga, 7 I. C. 896. Subbana Bhatta *v.* Subbana, 30 Mad. 324. Kunjan Chetty *v.* Siddapellai, 27 Mad. 461.

(4) Ramnarain *v.* Bisheshar, 10 All. 413. Ramanund *v.* Koleshar, A. W. N. (1878) 217.

for redemption within a specified time, the son can disregard it and bring another suit for redemption. (1) In Oude, it has been held that even a great-grand-son can bring a fresh suit for cancellation of an alienation, when his father had already obtained a decree for cancellation on refund of the purchase money. (2) These judgments seem to go too far and calculated to prevent even proper alienation of property by the father. If they are correct there can be no finality of decisions affecting ancestral property.

Extent of the interest which passes in execution sale against manager.

The binding character of a decree against the Kurta both under the Mitakshara and the Dayabhaga Schools, as regards the interests of coparceners not made parties, depends not upon the other members having or not having been made parties but on the character of the debt being or not being for the necessities of the family. (3) It has also been held that a sale in execution of a decree against the managing member passes the interest of the rest, if the suit was brought against him in his representative character for debts incurred for the family. (4) In the nature of the position of the *Prabhu* or *Swami*, which is the word used by the Rishis to indicate the manager (and not *Kurta*), a decree fairly obtained against him ought to bind the family. A mortgage decree against the manager, in whose name the property stood, has been held

(1) Sunder Lal *v.* Chutar Mal, 29 All. 1.

(2) Babu Ram *v.* Choti Lal, 11 I. C. 2916

(3) Kunj Behary *v.* Kandh Prasad, 6 Cal. L. J. 362. Hari. *v.* Jairam, 14 Bom. 597. Sakharain *v.* Deoji, 23 Bom. 572. Dwraka *v.* Bungshi, 9 C. W. N. 879. Baldes *v.* Mobarek, 29 Cal. 583.

(4) Hari Vithol *v.* Jairam, 14 Bom. 597, overruling 6 Bom. 564 and 11 Bom. 700. Dwarka *v.* Bunghshi, 9 C. W. N. 879.

to bind another adult member and his sons, who were not parties to the suit but who were held to have consented expressly or impliedly to the conduct of the suit by the managing member. (1)

Right of the manager to compromise or refer to arbitration.

A manager, even though he be not the father, can bind the family by a reference of a dispute with an outsider regarding any family property to arbitration, provided such reference be for the benefit of the family. Minors of the family are also bound by such reference and award upon it. (2) A *bonafidæ* compromise by the manager is binding on the family. (3)

Right of the manager to acknowledge a debt.

A manager has the same power to acknowledge a debt as to create one. (4) The Madras High Court have held that such an acknowledgment was valid only for extending the period of limitation (5), but the manager has no power to revive a barred claim, without special authority, so as to bind his coparceners other than his sons.

Discharge to the manager and limitation.

A manager can also give a discharge within the meaning of Sec. 7 of the Limitation Act binding all the minor members and limitation will run against all, even when the claim is one for mesne profits. (6)

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(1) Jaddo Kuar *v.* Sheo Sankar, 7 I. C. 902. offd. 36 All. 383. Ramkrishna *v.* Vinayek, 34 Bom. 354.

(2) Balaji *v.* Nana, 27 Bom. 287, Jagannath *v.* Mannulal, 16 All. 131. Chinna *v.* Ganga, 9 Mad. L. J. 34.

(3) T. R. Ganesh *v.* Tuljaram, 1 I. C. 380. Sheo Dular *v.* Bir Bhusan, 25 I. C. 849.

(4) Ram Charan *v.* Gaya, 30 All. 422. Saroda *v.* Durga, 14 Cal. L.J. 484. Bhasker Tatya Shet *v.* Vijalal, 17 Bom. 512 F. B.

(5) Chinnaya *v.* Gurunatham, 5 Mad. 169 F. B. Kondappa *v.* Subba, 13 Mad. 189. Gopal *v.* Madhumatty, 14 B. L. R. 21. Harihar *v.* Bhara, 20 I. C. 590.

(6) Bunwari Lal *v.* Daya Sanker, 13 Cal W. N. 815. Harihar *v.* Bharat, 6 C.L. J. 393. Surja *v.* Khidahish, 4 All. 512. Vigneswar *v.* Bapayyat 16 Mad. 436. Sadulla *v.* Bhanamal, (1882) Punj. Rept. 58, 25 Mad. 26, 34 All. 166.

It has been held in a case under the Dayabhaga school, that a discharge by the Kurta will not have the same effect as a discharge by a manager under the Mitakshara school. (1) A distinction was made between the remedies under a joint contract, in which a discharge by one of the joint creditors would be sufficient, and the remedies against wrongdoers, against whom a minor would not lose his rights, because the adult members did not sue in time. It is difficult to make a distinction between a discharge by a Kurta under the Mitakshara and of one under the Dayabhaga.

Acknowledgement by a coparcener.

It has been held that an acknowledgment or payment of interest by one coparcener in respect of a joint debt may extend the period of limitation against all coparceners both under the Mitakshara and the Dayabhaga.(2)

Where money is borrowed by a manager on his personal security for purposes of necessity, it has been held that his right to contribution arises when he expends the money and limitation runs against his claim from that date and not from the date on which he repays the loan and releases the security.'(3) The rule is opposed to the decision in case of Bimola *v.* Tara Sundaree (14 W. R. 480). It is difficult to see how limitation can run against the managing member of a joint family until there is partition and until he is made to pay more than his share.

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(1) Anando Kishore Das *v.* Anando Kishore Bose, 14 Cal. 50.

(2) Saroda *v.* Durga, 14 Cal. L. J. 484. Krishna *v.* Bhairab, 32 Cal. 1077. Domilal Sahu *v.* Rashan Dobey, 33 Cal. 1278. See 12 Mad. L. J. 610, 22 I. C. 510.

(3) Aghore *v.* Grish, 20 Cal. 18. Sunker Pershad *v.* Gopy, 5 Cal. 321. Ram *v.* Mudnan, 12 W. R. 194.

Under the Dayabhaga school, the powers of the manager and the position of the coparceners *inter se* as to enjoyment of the joint property are not different from what they are under the Mitakshara school as long as they are joint, except as has been mentioned before. (1) But a Bengal coparcener can consider himself separate any moment he likes, and can thus sue or be sued by the other coparceners, without a previous partition. All Bengal coparceners are tenants-in-common, and the ordinary law of co-sharers applies to them in all matters, and the subject need not be treated in detail here. (2) A Bengal coparcener, can sell, mortgage or lease out his share according to his pleasure, and he can sue or be sued by strangers in respect of his individual share. (3) But it has been held, that the debt incurred by a manager for the purpose of a family trading business under the Bengal school bound the other members of the family. (4) Under the Bengal school it has however been held in a recent case that "the Kurta of a joint family has no presumable authority from the other members of the family to contract a debt nor is the debt contracted by him presumably for the benefit of the other members of the family and that "the proposition may be true as regards the sons in a Mitakshara family as to debts contracted

Rights of manager and coparceners under the Dayabhaga.

(1) Abhoy Charan *v.* Peary, 13 W. R. 75 F. B. Eshan *v.* Nand Coomar, 8 W. R 239.

(2) Chukun *v.* Poran, 9 W. R. 438. Nobin Chunder *v.* Mohesh Chunder, 12 W. R. 69. Gopeekissen *v.* Hem Chunder, 13 W. R. 322. Watson *v.* Ram Chand, 17 I. A. 110.

(3) Eshan *v.* Nund Coomar, 8 W. R. 239. Gopeekissen *v.* Hem Chunder, 13 W. R. 322. Nundun Coomar *v.* Lloyd, 22 W. R. 74. Stalkart *v.* Gopal, 20 W. R. 168. Ram Debal *v.* Mitterjit, 17 W. R. 426.

(4) Bemola Dassee *v.* Mohun Dassee, 5 Cal. 792.

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(4) Bemola Dassee *v.* Mohun Dassee, 5 Cal. 792.

by the father but not as regards the members of a family other than the sons." (1) The question that seems to have been decided is one of burden of proof. But when the debt is proved to have been incurred for the purposes of the joint family, there is no reason why all the members will not be bound.

Discharge by or payment to one coparcener who is not the manager when binding.

A discharge by one coparcener of a debt due to the joint family may sometimes bind all. In a recent case in Bombay, it has been held, that even where a debt due to one member of a joint family has been paid by the debtor to another member, the question whether such payment operates as a discharge depends on the circumstances under which it was made, and that when two members managed the family property for the common benefit and the bond was given in consideration for a previous bond in the name of one, the other was bound by the discharge of the first bond. (2)

In the Punjab it has been held that a payment to a son would bind a joint family consisting of father and son. (3) It would appear that in that case it was found that debts used to be paid sometimes to the father and sometimes to the son. It is submitted that to hold that a discharge by a son is good is opposed to the Smritis, which say that the son has no independent power while the father is living. Indeed, if a discharge by a coparcener without the knowledge and consent of the manager be considered binding on the family, it would mean confusion and disruption of the joint family. It was never intended by the Hindu Lawgivers

(1) Nogendra Chunder Dey *v.* Amar Chand Kundu, 7 C. W. N. 725.
(2) Gurushantappa *v.* Chanmallapa, 24 Bom. 123.
(3) Jahangir *v.* Ganda Shah, 10 I. C. 838, 69 P. L. R. 1911.

and is not consistent with the constitution of a Hindu joint family.

It has been held in Madras that the maker of a promissory note being a member of an undivided family, even though he is not the manager, when he had borrowed for the benefit of the family, and the transaction had been assented to by his uncle, the uncle as well as his sons were liable and could be sued on the note. (1)

It has been recently held in the Punjab that when a bond is executed in the name of some members of the family, they can sue alone. In case of a contract by the managing member, he alone can grant receipts but when a bond is in the name of some members only and the debtor is under the impression that the contract is with all the members and has no reason to believe otherwise and thus *bonafidæ* makes a payment to other members, such payment may bind the family. (2) (See pp. 423-4.)

A divided member of a joint family has no right to recover a debt due to the family on behalf of the others and if he does so recover, a suit by another member to recover his share from him is governed by Art. 62 and not by Art. 127 of the Limitation Act, except when such member was a minor under the guardianship of the other. (3)

In the case of a joint Hindu family firm, the rights and liabilities of the partners cannot be decided by exclusive reference to the Indian

Joint family partnership.

(1) Krishna Ayyar *v.* Krishnasami Ayyar, 23 Mad. 597.

(2) Kirpal Sing *v.* Sant Sing, 13 I. C. 305, 71 Punj. Rep. 1911.

(3) Vaidyanatha *v.* Anjasami, 32 Mad. 191. Arunachalam *v.* Ramasamya, 6 Mad. 402.

Contract Act but must be considered also with reference to the general rules of Hindu Law, which regulate the transaction of united families. (1) In a joint family partnership the interest of the partners may be acquired by birth and some of them may be minors and any one member cannot take part in the management so as to bind the firm. The power of representing the firm is limited to the managing member and sometimes to all the adult members managing jointly. (2)

It has been held that the managing member can endorse a Hundi. (3)

Right of suit of one coparcener against another.

Strictly speaking, a Mitakshara coparcener can never sue another coparcener, his only remedy being a suit for partition.(4) He cannot sue for his share of the profits.(5) But a suit will lie for an injunction to restrain waste and improper dealing with joint property, and it has also been held, that "the rule of Hindu Law does not prevent an injunction being granted in cases of ouster of one member of the family from an item of family property, even if it be partnership business." (6) If a co-sharer advances money on mortgage of the shares of other members, a suit for redemption will not lie except at the instance of all. (7) A mortgage of individual

(1) Samalbhai *v.* Someshar, 5 Bom. 38.

(2) Ram Lal *v.* Lakhmichand, 1 Bom. H. C. R, App. 51. Sakorbai *v.* Maganlal, 25 Bom. 206. Topan Mal *v.* Menghomal, 10 I. C. 978.

(3) S. N. S. Narayanan *v.* Kidambara Chidambaram, 12 I. C. 410.

(4) Gobind Chunder *v.* Ram Coomar, 24 W. R. 393. Ramanuja *v.* Virappa, 6 Mad. 90. Phoolbash Koomar *v.* Lalla Jogeswar, 1 Cal. 226.

(5) Ajodhya *v.* Mahadeo, 3 Ind. Cas. 9.

(6) Anant Ramrav *v.* Gopal Balwant, 19 Bom. 269. Ganpat *v.* Annaji, 23 Bom. 144.

(7) Thillai Chetty *v.* Ramanatha, 20 Mad. 295.

interests of some coparceners to another is conclusive evidence of partition according to the Smritis. But if it be allowed without partition, it is difficult to see why the mortgagor will not be allowed to redeem.

When one coparcener is barred whether the rest are barred.

There is some conflict of decisions in regard to the question whether in regard to causes of action accruing to the entire joint family, if one of them is barred all are barred. In regard to a joint contract on a bond in favour of two brothers governed by the Mitakshara School, the Calcutta High Court dissenting from an earlier decision held that in a suit brought by one of the brothers in time when the other brother is brought in after the expiry of the period of limitation the entire suit was barred.(1) The earlier decision mentioned above was one under the Dayabhaga School in which it was held that the original plaintiffs were entitled to a decree, though their co-contractors were barred. (2) The rule laid down in the case of Ram Sebak was affirmed in a subsequent decision by three judges. (3) The rule has also been affirmed by the other High Courts. (4)

The rule in the case of Ramsebuk was held in later cases inapplicable to a claim for compensation for distraint on the ground that it was an action for tort (5) and also to suits against joint mortgages. (6)

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(1) Ram Sebak *v.* Ramlal, 6 Cal. 815.

(2) Baydonath Bag *v.* Girish Chunder Roy, 3 Cal. 26.

(3) Ram Dayal *v.* Junmenjoy, 14 Cal. 791.

(4) Kalidas *v.* Nathu, 7 Bom. 217. Imamuddin *v.* Liladhur, 14 All. 524. Ahinsa *v.* Abdul, 25 Mad. 35. See 69 Punjab R. 1906.

(5) Jagdeo Sing *v.* Padarath Ahir, 25 Cal. 285.

(6) Imam Ali *v.* Baijnath, 33 Cal. 613. Ram Kinkar *v.* Akhil, 5 Cal. L. J. 242 F. B.

In a recent case the Calcutta High Court following certain decisions of other Courts, has held that even if the managing members brought a suit for rent without making the other members parties, who are subsequently added after the expiry of the period of limitation, the entire suit must be dismissed as barred. (1) This decision must now be considered as overruled by the recent Privy Council decision mentioned before. (2)

The correct law according to the Hindu Lawgivers and as recently affirmed by the Privy Council, is that the manager alone can sue or be sued and if the suit by or against him is in time, it is maintainable though the other coparceners may be added as parties after the period of limitation. A suit by or against a coparcener who is not the managing member cannot be maintainable as a suit by or against the family and is liable to dismissal on that ground alone. If the managing member refuses to enforce the just rights of the family, the only remedy left to the other coparceners is separation and in case of gross and wilful neglect, they can make the managing member liable for his action.

Limitation when one member is a minor.

In the above view of the matter, the determination of the question whether if one of the coparceners be a minor, limitation under Sec. 7 will not run against the family until he attains majority because no valid discharge can be given

(1) Mir Sapurah, *v* Gopi, 7 Cal. L. J. 251. See 15 Mad. 111, 10 Bom. 32, 29 All. 311, 28 Bom. 11.

(2) Kissen *v.* Har, 33 All. 272.

by one member without the concurrence of the others becomes immaterial in as much as the managing member can give a discharge which will bind the entire family. (1) All the High Courts, except the Madras, held that where one of the coparceners is a minor, the entire decree can be executed on his attaining majority, though the other coparceners may have been barred. (2) In Madras very recently, there was a difference of opinion but it has been held that if the managing member attained majority three years before suit, the whole family including the minor members would be barred. (3) The Calcutta rule is probably still applicable to divided members of a Hindu family, who are joint decree-holders. There is also some difficulty in the case of joint members of a Dayabhaga family, who are only tenants-in-common having specific shares in the family property. Any one of them can sue or be sued in respect of his share of the property. But as long as they are joint, it is the Kurta, who alone can sue or be sued or can give a valid discharge, even under the Dayabhaga. But the decisions of our courts have tended to place all Dayabhaga coparceners in the position of ordinary tenants-in-common and thus the rulings of the Calcutta High Court may still apply to a Dayabhaga family.

In a recent case, the Privy Council have held that a coparcener who was a minor at the time of

(1) 6 Cal. L. J. 383, 11 All. 512, 16 Mad. 436, 34 All. 565, 25 Mad 26.
(2) Surja Kumar Dutt *v.* Arun, 28 Cal. 465. Sheikh Jamir *v.* Srimati, 7 Cal. L. J. 308. Zamir Hassan *v.* Sundar, 22 All. 199, Bhugwanta *v.* Sukhe, 22 All. 33 Govindaram *v.* Tatia, 20 Bom. 383, Contra. Ahinsa *v.* Abdul, 25 Mad. 26. Seshan *v.* Rajagopala, 13 Mad. 236. See 28 Mad. 479 (3) Ramnadhan *v.* Udatta, 18 I. C. 723. Doraisam *v.* Nandisami, 38 Mad. 118.

Limitation in case of dispossession.

dispossession can bring a suit for the recovery of the entire family property against a trespasser though the father might be barred and the other brother was born after the adverse possession had begun.(1)

A family arrangement properly arrived at is binding on all the members. (2)

Suits by coparceners.

We have already seen that a Mitakshara coparcener can not in strict law sue another coparcener or even a third party in case of dispossession. It has however, been held in some recent cases that a copercener can sue to recover possession against a trespasser let into possession by the manager. (3) It would however, be necessary to sue for the entire property and to make all the coparceners parties.

Modern idea of the rights of Dayabhaga coparcener.

The Hindus of Bengal, governed by the Dayabhaga, have practically discarded the old idea and when joint they are only tenants-in-common who in all contracts and suits should all be made parties.

Joint family of dancing girls and illegitimate brothers

A female member cannot take by survivorship. (4) In Madras, however, it was held, that there could be a joint family consisting of a dancing girl, her sister and her adopted daughter. (5) In later cases on the question however, the same Court has held that there is no justification for such a position. (6)

It has also been held that among Sudras an illegitimate son can be a coparcener with his legitimate brothers and can take by survivorship. (7)

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(1) Ramkishore *v.* Jan Narayan, 40 Cal. 966 P. C. (2) Ram Naresh *v.* Sadhasaran, 28 I. C. 585. (3) Naranbhai *v.* Ram Chol, 26 Bom. 141. Ramkishore *v.* Jainaram, 40 Cal. 966 P. C. (4) Anand *v.* Nownit, 9. Cal. 315. (5) Chalukonda *v.* Ratnachalam, 2 Mad. H. C. 56. (6) Visalakshi *v.* Dorasungo, 29 I. C. 974. Guddati Reddi *v.* Ganapati, 71 I. C. 422, 23 Mad. L. J. 493. (7) Jogendra Bhupati *v.* Nityanand, 18 Cal. 151. Thangum *v.* Suppa, 12. Mad. 401,

THE JOINT HINDU FAMILY.

SECTION I.

ज्येष्ठ एव तु गृह्णीयात् पित्र्यं धनमशेषतः ।
शेषास्तमुपजीवेयुर्यथैव पितरं तथा ॥ *
पितेव पालयेत् पुत्रान् ज्येष्ठो भ्रातॄन् यवीयसः ।
पुत्रवच्चापि तर्त्तेरन् ज्येष्ठे भ्रातरि धर्म्मतः ॥
यत् किञ्चित् पितरि प्रेते धनं ज्येष्ठोऽधिगच्छति ।
भागी यवीयसां तत्र यदि विद्यानुपालिनः ॥
सर्व्व एव विकर्म्मस्था नार्हन्ति भ्रातरो धनम् । †
न चादत्त्वा कनिष्ठेभ्यो ज्येष्ठः कुर्व्वीत यौतकम् ॥
अविद्यानान्तु सर्व्वेषामीहातश्चयनं भवेत् ।
समस्तत्र विभागः स्यादपित्र्यइति धारणा ॥
एवं सह वसेयुर्व्वा पृथग्वा धर्म्मकाम्यया ।
पृथग्विवर्द्धते धर्म्म स्तस्माद्धर्म्माः पृथक् क्रियाः ।

मनुः, ९, १०५, १०८, २०४, २१४, २०५, १११ ।

(Or) the eldest alone may take the whole paternal estate, the other shall live under him just as (they lived) under their father.

As a father (supports) his sons, so let the eldest support his younger brothers, and let them also in accordance with the law behave towards their eldest brother as sons.

Whatever property the eldest (son) acquires (by his own exertion) after the father's death, a share of that (shall belong)

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* Comp. ज्येष्ठो भ्राता पितृसमो मृते पितरि भारत ।
सर्व्वेषां हि स दाता स्यात् स चैतान् प्रतिपालयेत् ॥
Mahabharata Anushashana, 105 Ch. 16.

† Comp. सर्व्वे चापि विकर्म्मस्था भागं नार्हन्ति सोदराः ।
Mahabharata Anushashana, 105 Ch. 10.

to his younger (brothers), provided they have made a due progress in learning.

All brothers who habitually commit forbidden acts, are unworthy of (a share of) the property; and the eldest shall not make (anything his) separate property without giving (an equivalent) to his younger brothers.

If all of them, being unlearned, acquire property by their labour, the division of that shall be equal, (as it is) not property acquired by the father; that is a settled rule.

Either let them thus live together, or apart, if (each) desires (to gain) spiritual merit. Spiritual merit increases when good works are done separately; therefore good works should be done separately.

Manu, IX. 105, 108, 204, 214, 205, 111.

सर्व्वं वा पूर्व्वजस्येतरान् बिभृयात्।
अविद्याः समं भजेरन्।

गौतमः २८। ३, ३१

Or the whole (estate may go) to the first-born, (and) he shall support (the rest) as a father.

Unlearned (coparceners) shall divide (their acquisitions) equally.

Gautama, XXVIII. 3, 31.

तेषामप्राप्तव्यवहाराणामंशान् सोपचयान्
सुनिगुप्तान्निदध्युराप्तव्यवहारप्राप्तात्।
अतीतव्यवहारान् ग्रासाच्छादनैर्बिभृयुः।
अन्धजड़क्लीबव्यसनिव्याधितादींश्च।
अकर्म्मिणः। पतिततज्ञातवर्ज्जम्।

बौधायनः २।२।३।३६-४०

Let them carefully protect the shares of those who are minors, as well as the increments (thereon).

Granting food, clothes, (and shelter), they shall support those who are incapable of transacting legal business, (*viz.*) the blind, idiots, those immersed in vice, the incurably diseased,

and so forth; those who neglect their duties and occupations; but not the outcast, nor his offspring.

Baudhayana, P. II. A. 2, K. 3, S 36-40.

पैतामहेत्वर्थे पितृपुत्रयोस्तुल्यस्वामित्वम्।

विष्णुः १७-२

In grand-paternal property the ownership of the father and the son is equal.

Vishnu 17-2.

मणिमुक्ताप्रवालानां सर्व्वस्यैव पिता प्रभुः।
स्थावरस्य तु सर्व्वस्य न पिता न पितामहः॥
विवादताण्डवधृतविष्णुवचनम्।

The father is master of the gems, pearls, and corals, and of all (other movable property); but neither the father nor the grandfather is so of the immovable property.*

Vishnu cited in the Vivadatandava.

भूर्या पितामहीपात्ता निबन्धी द्रव्यमेव वा।
तच्च स्यात् सदृशं स्वाम्यं पितुः पुत्रस्य चैवहि॥
पितृद्रव्याविरोधेन यदन्यत् स्वयमर्জ্জितम्।
नैवमौद्वाहिकञ्चैव दायादानां न तद्भवेत्॥
भ्रातृनामथ दम्पत्योः पितुः पुत्रस्य चैव हि।
प्रातिभाव्यमृणं साक्ष्यमविभक्ते न तु स्मृतम्॥
विभागनिह्नवे ज्ञातिवस्तुसाक्ष्यभिर्लेखितैः।
विभागभावना ज्ञेया गृहचेतेश्च यौतकैः॥
स्वं कुटुम्बाविरोधेन दैवं दारासुताहृते।
नान्वये सति सर्व्वस्वं यज्ञान्वस्मै प्रतिश्रुतम्।

याज्ञवल्क्याः २। १२१, ११८, ५२, १४९, १७५

*This text is cited in the Mitakshara without naming the author. In the Dayabhaga it is cited as that of Yajnavalkya apparently by mistake, because it appeared in the Mitakshara. It shows, that the author of the Dayabhaga had the Mitakshara before him while writing it. As regards Raghunundana and Srikrishna, who both quote it as of Yajnavalkya, they simply copied from the Dayabhaga. Apararka attributes the text to Narada.

The ownership of both father and son is the same in land, a corody or wealth received from the grand-father.

Whatever else is self-acquired, apart from and without detriment to the parental estate, as a friendly or a nuptial present, does not belong to the co-heirs.

It is ordained that among brethren, between husband and wife, between father and son, there cannot be suretyship, the relationship of debtor and creditor and the giving of evidence (mutually).

When partition is denied, the fact of it may be ascertained by the evidence of kinsmen, relatives and witnesses, and by written proof; or by separate possession of house or field.

Without causing detriment to the family property (everything) may be given except a wife and son. When a man has descendants he should not give away the whole of his property; nor (should he give away) a thing to one different from him to whom the promise was made.

Yajnavalkya, II. 121, 118, 52, 149, 175.

विभज्याऽऽदिक्षतः सर्व्वान् ज्येष्ठीभ्राता यथा पिता।
भ्राता शक्तः कनिष्ठो वा शक्त्यपेक्षा: कुले श्रियः॥
कुटुम्बार्थेषु यश्चीक्षेत्तत्कार्य्यं कुरुते च यः
भ्रातृभिर्भरणीयोऽसौ यामाच्छादन वाहनैः॥
विभागधर्म्मसन्देहे दायादानां विनिर्णयः।
ज्ञातिभिर्भागलेख्यैश्च पृथक् कार्य्यप्रवर्त्तनात्॥
भ्रातृणामविभक्तानामेको धर्म्मः प्रवर्त्तते।
विभागे सति धर्म्मौ हि तेषां भवेत् पृथक् पृथक्॥
दानग्रहणपञ्चप्रकटक्रयोपरिग्रहाः।
विभक्तानां पृथक् क्रियाः पाकधर्म्मागमव्ययाः॥
साक्षित्वं प्रातिभाव्यं च दानं ग्रहणमेव च।
विभक्ता भ्रातरः कुर्य्युर्नाविभक्ताः परस्परम्॥
येषामेताः क्रिया लोके प्रवर्त्तन्ते स्वरिक्थिनाम्।
विभक्तानवगच्छेयुः सिद्धमप्यन्यतस्तु तान्॥

वसेयुर्यें दशाब्दानि पृथग्धर्म्माः पृथक्क्रियाः ।
विभक्ता भ्रातरस्ते तु* विज्ञेया इति निश्चयः ॥
यद्येकजाता बहवः पृथग्धर्म्माः पृथक्क्रियाः ।
पृथक्कर्म्मगुणोपेता न ते क्लृप्तेषु सम्मताः† ॥
स्वान् भागान्यदि दद्युस्ते विक्रीणीरन्नथापि वा ।
कुर्य्युर्यथेष्टं तत् सर्व्वमीशास्ते स्वधनस्य तु ॥
पुत्रेणापि कृतं कार्य्यं यत् स्यादच्छन्दतः पितुः ।
तदप्यकृतमेवाहुर्दासः पुत्रश्च तत्समौ ॥
अप्राप्तव्यवहारस्येत् स्वतन्त्रोऽपि हि नर्णभाक् ।
स्वातन्त्र्यं हि सुतं ज्येष्ठे ज्येष्ठं गुणवयःकृतम् ॥
त्रयः स्वतन्त्रा लोकेऽस्मिन्राजाचार्य्यस्तथैव च ।
प्रतिवर्णं च सर्व्वेषां वर्णानां स्वे गृहे गृही ॥
अस्वतन्त्राः स्त्रियः पुत्रा दासादिश्च परिग्रहः ।
स्वतन्त्रस्तत्र तु गृही यस्य यत् स्यात् क्रमागतम् ॥
गर्भस्थसदृशी ज्ञेयः अष्टमाद्वत्सराद्भिषुः ।
बाल आ षोड़शाद्वर्षात् पौगण्ड इति भण्यते ॥
परतो व्यवहारज्ञः स्वतन्त्रः पितरौ विना ।
जीवतोरस्वतन्त्रः स्याज्जरयापि समन्वितः ॥
तयोरपि पिता श्रेयान् बीजप्रधान्यदर्शनात् ।
अभावे बीजिनो माता तदभावे तु पूर्व्वजः ॥
स्वतन्त्राः सर्व्व एवैते परतन्त्रेषु सर्व्वदा ।
अनुशिष्टौ विसर्गे च विक्रये चेश्वरा मताः ॥
यद्बालः कुरुते कार्य्यमस्वतन्त्रस्तथैव च ।
अकृतं तदिति प्राहु र्धर्म्मशास्त्रविदो जनाः ॥
स्वतन्त्रोऽपि हि यत् कार्य्यं कुर्य्यादप्रकृतिं गतः ।
अकृतं तदपि प्राहुरस्वातन्त्र्यस्य हेतुतः ॥
कामक्रोधाभिभूतार्त्तभयव्यसनपीडिताः ।
रागद्वेषपरीताश्च ज्ञेयास्त्वप्रकृतिं गताः ॥

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* पैतिकेधने is the reading of Apararka who ascribed the text to Katyayana.
† नचेत् कार्य्येषु सम्मताः is the reading of Apararka.

कुलेज्येऽक्षमथा श्रेष्ठः प्रकृतिस्थश्च यो भवेत् ।
तत्कृतं तु कृतं प्राहुर्नाकृतन्तकृतं कृतम् ॥
अन्वाहितं याचितकमाधिः साधारणञ्च यत् ।
निक्षेपः पुत्रदाराश्च सर्व्वस्वाम्ये सति ॥
आपत्स्वपि हि कष्टासु वर्त्तमानेन देहिना ।
अदेयान्याहुराचार्य्या यच्चान्यस्मै प्रतिश्रुतम् ॥
कुटुम्बभरणाद्व्यं यत्किञ्चिदतिरिच्यते ।
तद्देयमपकृत्यान्यत् कुटुम्बी दोषमाप्नुयात् ॥

नारदः १३।५, ३५-४३ ; १।३०-३१, ३४-४२ ; ४।४, ५, ६

Or the senior brother shall maintain all (the junior brothers) like a father, if they wish it, or even the youngest brother, if able; the well-being of a family depends on the ability (of its head).

One who, being authorized to look after the affairs of the family, charges himself with the management (of the family property) shall be supported by his brothers with food, clothing, and vehicles.

When the fact of a legal partition should be called into question, the decision of the dispute (which has arisen) among the sharers shall be founded on (the testimony of) kinsmen, the written deed recording the division of the estate, and the separate transaction of business.

Among unseparated brothers, the performance of religious duties is single. When they have come to a partition, they have to perform their religious duties each for himself.

Giving, receiving, cattle, food, houses, fields, and servants are separate among divided brothers, and so are cooking, religious duties, income, and expenditure *

(The acts of) giving evidence, of becoming a surety, of giving and of taking, may be mutually performed by divided brothers, but not by unseparated ones.

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* I have slightly altered the wording of th tr nsl tion to make the meaning more clear and correct.

Those who transact such matters as these publicly with their co-heirs, should be considered to be separate in affairs, even though there be no written deed (of the partition).

Those brothers who for ten years continue to live separate in point of religious duties and business transactions, should be regarded as separate; that is a settled rule.*

When a number of persons, the descendants of one man, are separate in point of (the performance of) religious duties, business transactions and working utensils† and do not consult each other about their dealings.

They are quite at liberty to perform, according to pleasure, all (such transactions as) gift or sale of their own shares. They are (in fact) masters of their own wealth.

If a son has transacted any business without authorization from his father, it is also declared an invalid transaction. A slave and a son are equal in that respect.

A youth who, though independent, has not yet arrived at years of discretion, is not capable of contracting valid debts. (Real) independence belongs to the eldest son (only); the (right of) seniority is based on both capacity and age.

Three persons are independent in this world: a king, a spiritual teacher, and in all castes, a householder in his own household.

Wives, sons, slaves, and other attendants are dependent. The head of the family who has got property descended from ancestors, is independent in regard to it.

A child is comparable to an embryo up to his eighth year. A youth, who has not yet reached the age of sixteen, is called Poganda (minor).

Afterwards he is no longer a minor, and is independent in

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* "The term 'brothers' is here used to denote coparceners generally. Smriti-Chandrika XVI., 14. The Saraswati-Vilasa (§ 812, Foulkes) contests the correctness of this interpretation. The Nepalese MS. does not give the paragraph, and it is elsewhere attributed to Vrihaspati."

S. B. E. Vol. 33, p. 199.

† According to Apararka it means 'make separate gain or incur separate loss'. It seems to be the correct meaning.

case his parents are dead. While they are alive he can never acquire independence, even though he may have become old.

Of the two (parents), the father has the greater authority, because the seed is superior (to the womb); on failure of the begetter, the mother; on failure of the mother, the eldest son.

All these persons are independent at all times of those who depend on others. They have authority in regard to punishment, the relinquishment and the sale (of property).

If a boy, or one who is wanting in independence, transacts any thing, it is declared an invalid transaction by persons acquainted with the law.

That also which an independent person does, who has lost control over his actions, is declared an invalid transaction, on account of his wanting in independence.

Those who are declared to have lost the control over their actions, who are actuated by love or anger, or tormented (by an illness) or oppressed by fear or misfortune, or biassed by affection or hatred.

That is declared a valid transaction which is done by the senior, or head of a family, if he has not lost the control over his actions (as mentioned above). That is not valid which has been transacted by one wanting in independence.

And Anvahita deposit, a Yachita,* a pledge, joint property, a deposit, a son, a wife, the whole property of one who has offspring;

And what has been promised to another man; these have been declared by the teachers inalienable by one in the worst plight even.

What is left (of the property) after the expense of maintain-

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* "Anvahita is a deposit which has been delivered by the depositor to a third person on condition of its being returned (afterwards to the owner). Yachita is what has been borrowed for use, especially clothes and ornaments, which have been borrowed on the occasion of a wedding or other festival."

ing the family has been defrayed, may be given. But by giving away anything besides, a householder will incur censure.

Narada, XIII. 5, 35-43; I. 30, 32, 34-42 IV. 4, 5, 6.*

एकपाकेन वसतां पितृदेवद्विजार्चनम् ।
एकं भवेद्विभक्तानां तदेव स्याद्गृहे गृहे ॥
पृथगायव्ययधना: कुसीदं च परस्परम् ।
वणिक्पथं च ये कुर्य्यु र्विभक्तास्ते न संशय: † ॥
विभक्ता अविभक्ता वा सपिण्डा: स्यावरे समा:
एकोऽनीश: सर्व्वत्र दानाधमनविक्रये ॥

बृहस्पतिवचनानि ।

The worship of the Manes, Gods, and Brahmans by those residing (together) and cooking their food (in one house) is single. But when they divide the property (the worship) takes place separately in each house.

Those who keep their income, and expenditure and property distinct, and mutually lend money on interest, and those who take to trading (separately) are undoubtedly separate.

Co-heirs whether divided in interest or not, have an equal claim to the immoveable property (of the family); a single parcener has no power to give, mortgage, or sell.†

Vrihaspati, XXV. 6,91-92.

कुसी कृषी च वाणिज्ये निसृष्टार्थस्तु संयुत: ।
प्रमाणं तत्कृतं सर्व्वं लाभालाभव्ययोदयम् ।
स्वदेशे वा विदेशे वा स्वामी तन्न विसंवदेत् ॥

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* The reading of the first line of Narada *v.* 13 Ch. 42, in the Vira-Mitrodaya is स्वभागान्यादि दद्युस्ते विक्रीणीयुरथापि वा । It seems to be a more correct reading than the one appearing in Dr. Jolly's edition, which I have been obliged to adopt.

† This text is attributed to Narada in the Deepakalika.

‡ This text is ascribed to Vyasa in the Dayabhaga and to Narada in the Vivada Tandava, and to Katyayana in the Apararka. The reading adopted in the Kalpataru, Dayabhaga, &c., is सपिण्डा: for दायादा: as read by other Commentators. Sapinda of course means agnates and it seems to me that दायादा: here also means agnates.

कुटुम्बार्थेऽध्यधीनोऽपि व्यवहारं समाचरेत् ।
स्वदेशे वा विदेशे वा तत् स्वामी न विचालयेत् ॥

वीरमित्रोदयधृतबृहस्पतिवचनम् ।

Whatever is done by a member of the family to whom wealth is entrusted for lending at interest, agriculture or trade, whether it be an act of profit, or of loss, of expenditure or of increase, is valid; the Swami or head of the family, should not question it in his own country, or in a foreign country. Should even a dependent member enter into a transaction for the need of the family, the head of the family should not set it aside. Vrihaspati, cited in the Vira-Mitrodaya.

एकोऽपि स्थावरे कुर्याद्दानाधमनविक्रयम् ।
आपत्काले कुटुम्बार्थे धर्म्यार्थे च विशेषतः ॥

रत्नाकरधृतबृहस्पतिवचनम् ।

Even a single individual may conclude a donation, mortgagee, or sale of immovable property, during a season of distress, for the sake of the family, and especially for pious purposes.

A text, cited in Mitakshara without naming the author. The Vivada Ratnakara cites it as a text of Vrihaspati and the Vivada Tandava says that it is a text of Narada.

सर्व्वस्वं गृहवर्ज्यं तु कुटुम्बभरणाधिकम् ।
यद्दत्तं तत् स्वकं देयमदेयं स्यात्ततोऽन्यथा ॥
स्वस्थेनार्त्तेन वा दत्तं श्रावितं धर्म्यकारणात् ।
अदत्त्वा तु मृते दाप्यस्तत्सुतीनावसंशयः ॥
सुतस्य सुतदाराणां वक्तित्वमनुशासने ।
विक्रये चैव दाने च वक्तित्वन्न सुते पितुः ॥
पिता स्वतन्त्रः पितृमान् भ्राताभाक्त्व्य एव च ।
कनिष्ठो वाऽविभक्तस्थो दासः कर्म्मकरस्तथा ॥
न चेच्चगृहदासानां दानाधमनविक्रियाः ।
अस्वतन्त्रकृताः सिद्धिं प्राप्नुयुर्नृपवर्णिताः ।
प्रमाणं सर्व्व एवैते पण्यानां क्रयविक्रये ।

यदि संव्यवहारान्ते कुर्व्वन्तो ज्ञातुमीदिताः।
चेचादीनान्तथैव स्युर्भ्राता भ्रातृसुतः सुतः।
विसृष्टार्थस्तु यो यस्मिं स्तस्मिन्नर्थे प्रभुस्तु सः।
तन्नर्त्ता तत्कृतं कार्य्यं नान्यथा कर्त्तुमर्हति॥

वीरमित्रोदयधृतकात्यायनवचनानि।

The entire property in excess of what is required for the support of the family, and with the exception of the dwelling house may be given.

Whether by one in health or diseased, any gift is made (without delivering) or promised for religious purposes, and if he dies without giving, that should be given by his son without doubt.

The dominion over son's sons and wives is for their guidance, but the father has no dominion over the son as regards sale or gift.

The father having his father living is not independent, and so is younger brother and a brother's son, who are joint in property, and likewise a slave and a workman.

The gift, mortgage, and sale of fields, house or slaves, if made by persons not independent, are invalid, if not approved (by the father or other head of the family who is independent).

These acts are valid in the case of sale or purchase of goods, if they (the dependent persons) deal with the assent (of the head of the family).

In the case fields &c. the like result will follow. Brother, brother's son, or son who has been entrusted with wealth (with power to deal with it in trade, &c.) is master of such property, and what is done by him (in respect of it) the head of the family cannot question.

Katyayana, cited in the Vira-Mitrodaya.*

* The Apararka ascribes the following texts to Katyayana.

वसेयुर्वा दशाब्दानि पृथग्धर्म्मा पृथक्क्रियाः।
विभक्ता भ्रातरस्ते च विज्ञेया पैत्रिकैधने॥
विभक्ता वाविभक्ता वा दायादाः स्थावरे समाः।
एकोऽनीशः सर्व्वत्र दानादाधमनविक्रये॥

स्वं द्रव्यं दीयमानन्तु यः स्वामी न निवारयेत् ।
ऋक्थिभिर्वा परैर्वापि दत्तं तेनैव तद्भवेत् ॥

रघुनन्दनधृतकात्यायनवचनम् ।

When the Swami does not prevent the gift of his own property by a co-sharer or even a stranger, then the gift is in effect made by himself. This is ordained by Bhrigu.

Katyayana, cited by Raghunandana.

अविभाज्यं सगोत्राणामासप्तम्याकुलादपि ।
याज्यं चैत्यञ्च पत्रञ्च कृतान्नमुदकं स्त्रियः ।

स्मृतिचन्द्रिकाधृतौशनसवचनम् ।

Sacrificial gains, land, written documents, food, water, and women are indivisible among kinsmen even to the thousand degree.

Ushana, cited in the Smriti-Chandrika.

दायादैर्नाभ्यनुज्ञातं यत्किञ्चित् स्थावरे कृतम् ।
तत्सर्व्वमकृतं ज्ञेयं यद्येकोऽपि न मन्यते ॥
गृहक्षेत्राणि याज्याश्च प्रसादो यश्च पैत्रिकः ।
मातृकश्च प्रसादो य स्तद्विभागो न विद्यते ।

स्मृतिचन्द्रिकाधृतप्रजापतिवचनम् ।

Whatever act is done in respect of immovable property without the consent of the co-heirs, every such act is to be considered as not done, where even one of the co-heirs does not consent to it.

Partition does not take place of house, lands, sacrificial gains, and also of what has been given by a father or a mother through affection.

Prajapati, cited in the Smriti-Chandrika.

पितृप्रसादात् सिद्ध्यन्ति वस्त्राण्याभरणानि च ।
स्थावराणि न सिद्ध्यन्ति प्रसादे पैत्रिके सति ॥

कौले चक्षुविभागेऽपि न किञ्चित् प्रभुतामियात् ।
भोग एव तु कर्त्तव्यो न दानं न च विक्रयः ॥

स्मृतिचन्द्रिकाधृतबृहद्याज्ञवल्क्यवचनम् ।

By the affectionate gift of the father, the clothes and ornaments are gained; immovable property is not gained even with the father's indulgence.

No one is master of the inheritance descended from ancestors, even when there is partition of wealth. It is simply to be enjoyed; there can be no gift or sale of the same.

Vriddha-Yajnavalka, cited in the Smriti-Chandrika. Narada according to Apararka.

न च स्थावरस्य समस्तस्य गोचसाधारणस्य च ।
नेकः कुर्यात् क्रयं दानं परस्परमतं विना ॥

दायभागधृतव्यासवचनम् ।

A single coparcener may not, without the consent of the rest, make a sale or gift of the whole immovable estate, nor of what is common to the family

Vyasa, cited in the Dayabhaga, Ch. 11 *v.* 27

स्थावरं द्विपदञ्चैव यद्यपि स्वयमर्জ্জितम् ।
असम्भूय सुतान् सर्व्वान्न दानं न च विक्रयः ।
ये जाता येऽप्यजाताश्च ये च गर्भे व्यवस्थिताः ।
वृत्तिं च तेऽभिकाङ्क्षन्ति न दानं न च विक्रयम् ॥*

वीरमित्रोदयधृतव्यासवचनम् ।

Though immovables aud bipeds have been acquired by a man himself, a gift or sale of them should not be made, without convening all the sons. They who are born and they

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* The Dayabhaga reads वृत्तिलोपः विगर्हितः for न दानं न च विक्रयम् ।

who are yet unbegotten, and they who are still in the womb, require the means of support ; no gift or sale should, therefore, be made.

A text cited in the Mitakshara and the Dayabhaga without naming the author. According to Vira-Mitrodaya it is a text of Vyasa.

कामं वसेयुरेकत: संहता इद्विमाचक्षीरन्। पितर्यग्रभे कुटुम्बस्य व्यवहारं ज्येष्ठ: कुर्यादनन्तरो वा कार्यज्ञस्तदनुमतेन न त्वकामे पितरि ऋक्थभागी इड्डे विपरीतचेतसि दीर्घरोगिणि वा ज्येष्ठ एव प्रिष्ठवदर्थान् प्रापयेदितरेषां ऋक्थमूलं हि कुटुम्बमस्वतन्त्रा: पितर्यन्ती मातर्यप्येवमवस्थितायाम्।*

रत्नाकरधृतशङ्खलिखितवचनम्।

(Or) if they choose let them live together (because) being united they may become more prosperous.

If the father be incapable, let the eldest manage the affairs of the family ; or with his consent. a younger brother conversant with business. But partition does not take place if the father be not desirous of it. When he is old, or his mental faculties are impaired, or he is afflicted with a lasting disease, let the eldest, like a father, protect the goods of the rest ; for (the support of) the family depends on the heritage. They are not independent, while they have their father living, or while the mother is with them.

Sankha-Likhita, cited in the Ratnakara.

एकपाकेन वसतामेकं दैवार्चनं गृहे।
वैश्वदेवं तथैवैकं विभक्तानां गृहे गृहे॥

मयूखधृतशाकलवचनम्।

Those that live in the same mess, have one worship, and one fire likewise in their home. Separated (coparceners) have got (separate worship and fire) in each house.

A text of Shakala, cited in the Mayukha

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* The last portion is attributed to Sankha in the Apararka.

एकपाकेन वसतां विभक्तानामपि प्रभुः
एकस्तु चतुरो यज्ञान् कुर्य्याद् वाग्यज्ञपूर्व्वकम् ॥
अविभक्ता विभक्ताश्च पृथक् पाका द्विजातयः ।
कुर्य्युः पृथक् पृथक् यज्ञान् भोजनात् प्राग् दिने दिने ॥

पारिजातधृतं आश्वलायनवचनम् ।

Even of the separated coparceners living in the same mess, the managing member should perform the four Yajnas, beginning with the reciting of the Vedas. When twice born persons have separate mess, whether they are unseparated or separate they should perform the Yajnas separately every day before breakfast.

Aswalayana, cited in the Madana Parijata.

स्वग्रामज्ञातिसामन्तदायादानुमतेन च ।
हिरण्योदकदानेन षड्भिर्गच्छति मेदिनी ॥

मिताक्षराधृतव्यासवचनम् ।*

Land passes by six formalities ; by consent of one's co-villagers, of kinsmen, of neighbours, and of heirs and by gift of gold and water.

A text cited in the Mitakshara without naming the author. It is a text of Vyasa, according to Jagannath.

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* इति कात्यायनं says the Vivada Tandava.

SECTION II.

Alienation of joint family property and debts of the family.

The question of the alienability of joint family property has been, to some extent, discussed in the last section. This question and the question of the liability of the family for debts contracted by its members are of great difficulty, and require fuller treatment. The most important question on the matter of debts that requires determination is the liability of sons and other members of a joint family to pay the debts of the father or of other co-parceners. A cursory reading of the texts will show that there is no ambiguity in the Smritis on the matter and that their rules are clear. The great conflict of decisions of the Indian Courts and the Privy Council is owing to the want of information and of proper apprehension of the Hindu Law on the subject. Most of the texts on alienation are collected in the last section. The rest and the texts on debts are to be found in this section. The law as found in the Smritis seems to be as follows.

Ancient law on the subject.

No mortgage, sale or gift of immovable ancestral property can be made by any single member of a family, whether joint or separate without the assent of the rest. This was a custom common to all the ancient Aryan nations. This was the good old rule when people were simple in their habits, and by law immovable property was made inalienable, because members of the family "born as well as those yet unborn required maintenance." But

that rule was found inapplicable in modern commercial times. It does not apply according to the commentators to the case of separated members of a family. In the case of a joint family, a text supposed by some to be of Vrihaspati, is cited by the commentators to the effect that the managing member or any member of a family can make a mortgage, sale, or gift of joint immovable property, during a time of distress, for the support of the family (which would include the preservation of the family property) and for religious purposes. The Mitakshara has interpreted religious purposes mentioned in the text, to mean indispensable duties like the Sraddha of the father. According to all the lawgivers a sale, gift or mortgage of joint immovable property is bad, except with the assent of the family, but even a dependent member may incur debts binding on the family for certain purposes of urgent necessity. It follows, therefere, that for purposes (which are enumerated below) for which debts by one member, without the assent of the others, are binding on the family, a sale or mortgage of land may be made. As regards gifts, the text mentioned above is the only authority for the position, that a gift for religious purposes, by one member, of joint family lands is good. We do not find in the Manu and the other Smritis any such rule.

Son grandson and great grand son liable to pay the death of the ancestors.

The son, grandson and great-grandson by their birth take upon themselves the worldly and spiritual debts of their three ancestors. They are all in reality the same person in different bodies according to Hindu ideas. This liability was afterwards limited by a special rule of limitation that the

habitity could not extend beyond the grandson. This liability of sons to pay the debts of the father was a legal liability according to the ancient laws of all the Aryan nations. In India, the old law found expression in the very peculiar way mentioned in the Chapter on the Principles of Inheritance. This liability existed, even if the son did not inherit any property at all.

iability hether moral r legal.

When there is ancestral joint property, the liability of the sons is a legal one, and not only moral. The debt of the father is a charge on the property. "Before division, the debts of the father must be paid" is the clear and unambiguous rule of law. The rule is subject to the exception that the debts incurred "for suretyship, for spirituous liquor, for the gratification of lust, or in gambling, for idle gifts, for promises made under the influence of love or wrath, for a fine or toll" need not and should not be paid by the sons. The exemption applies only in the case of a surety for appearance. The son of a man who stood surety for the payment of a debt was liable to pay it.

Debts by Co-parcener.a

The debt contracted by the paternal uncle, eldest brother, or mother, (*i.e.*, the managing members of the family) for the benefit of the household must be paid by all.

Debts not contracted by the managing members need not be paid, but debts contracted by the wife, son, younger brother, or any other dependent member of the family, for the support of the family in times of distress, or for the marriage of daughters, or funeral or Sraddha expenses, is binding on the family, and should be paid by its managing member.

A debt contracted by one of the coparceners carrying on money-lending, agricultural or commercial business for and with the assent of the family, is binding on it.

Kurta alone can sue or be sued.

The father or the eldest brother who is Swami of the family is alone independent, who has the right to sue and to be sued, the others being only dependent members having no such rights.

Mitakshara on the subject.

Now let us go to the Commentators. The Mitakshara makes a distinction between movable and immovable property, and says on the matter of alienation:—"Therefore it is a settled point that property in the paternal or grand-paternal estate is by birth (although) the father has independent power in the disposal of effects, other than immovables, for indispensable acts of duty, and for purposes prescribed by texts of law, as gifts through affection, support of the family relief from distress, and so forth, but he is subject to the control of his sons and the rest, in regard to the immovable estate, whether acquired by himself or inherited from his father or other predecessor. An exception to it follows: "Even a single individual may conclude a donation, mortgage, or sale of immovable property during a season of distress, for the sake of the family, and specially for pious purposes." The meaning of that text is this: while the sons and grandsons are minors, and incapable of giving their consent to a gift and the like; or while brothers are so, and continue unseparted; even one person who is capable may conclude a gift, hypothecation, or sale of immovable property, if a calamity affecting the whole family require it, or the support of the family render it necessary, or indispensable

duties, such as the obsequies of the father or the like, make it unavoidable." It then goes on to say, that separated coparceners may alienate immovable property, the consent of kinsmen spoken by Vrihaspati being necessary for avoiding disputes. On the question of debts the Mitakshara lays down, that whoever inherits the property of a man is liable for his debts in the first instances, but "a son and a grandson should be made to pay the debts of the father even when they take no property," but not when the property is taken by another. "The great-grandson of a man, without a son or a grandson, can be made liable only when he takes ancestral property." As regards father's debts they should be paid with interest, but the grandfather's debts need not be paid with interest." But during minority nobody can be made to pay debts, even if they be, of the father. Nor should debts incurred for spirituous liquor, lust of women, in gambling, or a fine be paid by the son.*

The Vira-Mitrodaya and the Mayukha agree with the Mitakshara. The Mayukha has clearly

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* पुत्रपौत्रहीनस्य प्रपौत्रादयो यदि रिक्थं गृह्णन्ति तदा ऋणं दाप्याः।

नान्यथा स्त्रीधनशुल्कं पुत्रपौत्रौ च रिक्थग्रहणाभावेऽपि दाप्यावित्युक्तम्।

पुत्रेण यथा पितुः सवृद्धिकं ददाति तथैव ऋणं देयं पौत्रेण तत्समं मूलमेव दातव्यं न वृद्धिरिति विशेषो गन्तव्यः।

प्रेतेऽप्यप्राप्तव्यवहारकालो न दद्यात्।

सुरापानेन यत् कृतमृणं कामकृतं स्त्रीव्यसननिमित्तं द्यूते पराजयनिमित्तं दण्डशुल्कयोरवशिष्टम् वृथादानं धूर्तवन्दिमल्लादिभ्यो यत् प्रतिश्रातम्।

धूर्ते वन्दिनि मल्लेच कुवैद्ये कितवे शठे। चरचारणचोरेषु दत्तं भवति निष्फलमिति स्मरणात् एतदृणं पित्रा कृतं पुत्रादिः शौल्किकादिभ्यो न दद्यात्। इति मिताक्षरा।

laid down, that the father has the power of use, but no power of alienation in ancestral movables. Mayakha on the subject.

The Smiriti-Chandrika says, that alienation of ancestral immovable property, except for the support of the family and indispensable duties is invalid, and further says, that the ownership of the son is co-equal with that of the father in ancestral movables. As to the liability of debts while laying down the same rules as the Mitakshara, it adopts the modern view, that sons are not liable if they do not take the father's property, and hence sons joint with the father may be liable, but if they are separate they are not liable for debts incurred by the father after separation.* Smriti Chandrika on the subject.

We next come to the Dayabhaga. It has laid down, that every member of a joint family has the right to dispose of his share of even immovable property. It says, that the prohibition of the Smritis is only a moral obligation, a विधिः, but if the sale is completed, it is not invalid, for a fact cannot be altered by a hundred texts. वचनशतेनापि वस्तुनोऽन्यथाकरणाशक्तेः। The late Dr. Siromani impugned the doctrine of *Factum Valet* as not justified by what Gimutavahana had said. According to him the correct meaning of the passage is, that the character of a thing cannot be altered by a hundred texts. That is no doubt the correct meaning. But upon that patent fact Gimutavahana based his argument that an alienation when actually made,

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* पिता सह विभक्ताश्चाविभक्ताश्च पुत्राः सन्ति तत्र एषां विभागादूर्द्धं पिता यद्दत्तं कृतं तत्तेषां देयं अविभक्तेषु सुतेषु विभक्तानां विभागतः पितृद्रव्याईत्वस्यापगतत्वेन मृते पितरि पुनः पितृद्रव्यांशग्रहणात् मृते पितरि द्रव्यं यद्भक्तेभ्य एव पुत्रो दाप्यः। इति श्रुतिचन्द्रिकायां कृत्यादानप्रकरणे।

though it is immoral, cannot be invalidated. The doctrine of *Factum Valet*, as pointed out by Dr. Siromani has undoubtedly no place in Hindu law; but Gimutavahana's position can only be explained by it. The Smritis say that the alienation of immovable property by a joint coparcener is not only morally wrong but is wholly invalid and "is as if not done." The texts were overlooked by Gimutavahana and his method of interpretation calling the obligation as only moral, or a *bidhi*, is, unknown to other commentators and is only the refinement of a Naiyayika. Raghunandana while following Gimutavahana further cites a text of Katyayana and says that when there is no objection by the co-heirs, "a gift becomes valid by reason of the absence of dissent." We next go to the present law of the country as settled by the decisions of our courts.

Law according to the deciasions.

The question of the validity of an alienation by a member of a Joint Mitakshara family has been found to be one of great difficulty by our courts. Upon the ideas of ownership and survivorship as recognised by our courts, strictly speaking, there can be no valid alienation by a member of a joint family according to his own pleasure. A Full Bench of the Calcutta High Court, in the case of Sadabart Prosad Sahoo, made the following observations: "Accordlng to the law of England, if there be two joint tenants, a severance is effected by one of them conveying his share to a stranger, as well as by partition, but joint tenants under the English law are in a very different position from members of a joint Hindu family under the Mitakshara law. The shares to which the

members of a joint family would be entitled on partition are constantly varying by births, deaths, marriages, etc., and the principle of the Mitakshara law seems to be, that no sharer, before partition, can, without the assent of all the co-sharers, determine the joint character of the property by conveying away his share." The alienation of the immovable property of a family is indeed prohibited by the Shastras, but not on the ground mentioned above. However that may be, the High Courts of Calcutta and Allahabad and the Chief Court of Lahore have, in strict accordance with the above principles, laid down, that voluntary alienations by sale, mortgage, or gift or devise by way to testamentary disposition, of joint property by a member of a joint family, except with the consent of all the coparceners, in Behar, Orissa, Mithila, the N. W. Provinces, Oude and the Punjab are wholly invalid, except when they are made by the father or the manager, under circumstances mentioned below. (1)

Voluntary alienation bad except with consent or necessity of the family.

The Privy Council have held that a father joint with his sons cannot devise by will ancestral property with accretions by subsequent acquisitions (2). But it cannot be doubted that a father or any other has absolute right of disposal in selfacquired property when he does not mix it with the family

(1) Januk Kishore *v.* Roghu, S. D. A. of 1861, p. 213. Sadabart Prosad Sahoo *v.* Foolbash Koer, 12 W. R. F. B. 1. Hanuman *v.* Baboo Kishen, 15 W. R. 6 F. B. Mahabir Prosad *v.* Ramayud, 20 W. R. 192. Chamach *v.* Ramprosad, 2 All. 267. Ramanund *v.* Govind, 5 All. 384. Modhu *v.* Meharban, 18 Cal. 157. P. C. 17. I. A. 194. Balgobind Das *v.* Narain Lal, 20 I. A. 116. 15 All. 339. Peari Lal *v.* Ram Chand, 11 I. C. 443 (Punjab). Kali Sunker *v.* Nawab, 30 All. 507. Lal Bahadoor *v.* Kanhya, 29 All. 244 P. C.

(2) Lal Bahadoor *v.* Kanhya Lal, 29 All. 244. P. C.

property. (1) It has been held that a devise by will, when the father was joint, though bad at the time, may be effectual, if before his death there is partition. (2)

Alienations for consideration good in Madras and Bombay.

In Madras and Bombay, it has been held that an alienation for a consideration by an undivided coparcener is valid, but a gift inter-vivos or by a testamentary disposition is invalid and cannot defeat the rights of the other coparceners. (3) In a recent case, the Madras High Court have held that a gift or testamentary devise is wholly void and a suit for its cancellation is not necessary and if a suit were brought for possession it would not be governed by Art. 91 of the Limitation Act (4).

Gift to daughters.

It has also been held in Madras that a gift of ancestral property to an indigent married daughter or a son-in-law is void as against an undivided son. (5) A Hindu certainly can make gifts as are usual and in accordance with Hindu custom, such as gifts of ornaments to daughters at the time of marriage, but it has been held that a deathbed gift to benefit any body, even a daughter, in anticipation of marriage is bad. (6)

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(1) Sohan Lal *v.* Labhuram, 150 Punj, R. 1907.

(2) Sohan Lal. Labhuram 150 Punj R. 1907.

(3) Gurulingapa *v.* Nandapa, 21 Bomb. 802. Rangasami *v.* Krishnayyar, 14 Mad. 418, F. B. Viraswamy *v.* Ayaswamy, 1. Mad. H. C. 471. Baba *v.* Timma, 7 Mad. 357, F. B. Paunswami *v.* Thatta, 9 Mad. 273. Rama *v.* Venkata, 11 Mad. 246. Lakshman *v.* Ram Chandra, 5 Bom. 61, P. C. Viraya *v.* Hanumanta, 14 Mad. 457. Vasudeva *v.* Vencatish, 10 Bom. H. C. 139. In the matter of Desu Manavula 33 Mad. 93.

(4) Kumarsami *v.* Nanjappa, 13 Mad. L. J. 21.

(5) Nataraja *v.* Vencatachella 12 Mad. L. J. 23

(6) Bachoo *v.* Kushal Das, 4 Bom. L. R. 883.

See 18 Bom. 177, 2 All. 635, 3 Bom. H. C. 66, 12 Bom. H. C. 229.

But there is no reason why a gift in anticipation of marriage cannot be made. It has been held in a recent case in Madras that the father can make a gift for the marriage portion of his daughter and after his death, his son also can make good any deficiency in respect of the marriage portion of a sister married before, out of the family property. (1) A gift by the father of a small portion of the joint ancestral immovable or movable property to his wife and daughter was in some cases held to be wholly void. (2) But in recent cases it has been held in Madras that there is a moral obligation on a Hindu father to make a gift to a daughter on her marriage for her maintenance and a gift to a daughter or to the daughter of a coparcener or to a son-in-law or to a sister (3) of immovable property of a reasonable amount is valid, (4) even if made after their marriage. (5) The reason given is unanswerable. It is, that the gift, if impeached in his life-time, could have been made good by a coparcener by enforcing a partition (39 Mad. 587). An alienation of a small portion of ancestral lands to provide for the maintenance of a mother and the marriage expenses of step-sister are valid. (6) Among Kalon Jats in the Punjab, a gift by a sonless man to a sonless widowed daughter was held to be good. (7) In Calcutta, it has been held that a brother can make a gift on the occasion of the

(1) Kudutamma *v.* Narasinha, 17 Mad. L. J. 528.

(2) Rayakkal *v.* Subbana, 16 Mad 84. Baba *v.* Timma, 7 Mad. 857. Chinuaya *v.* Collector, 8 I. C. 391. Kamakali *v* Chakrapani, 30 Mad. 452. (3) Kudutamma *v.* Narasinha, 17 Mad L. J. 528.

(4) Narayana *v.* Annavi, 39 Mad. 587. Pugala *v.* Vittoraj 11 Mad. L. J. 103, 13 I. C. 475. In *re* Subba Naicker, 30 I. C. 781. Ramasami *v.* Vengudisami, 22 Mad. 113. T. R Sundaram *v.* Krishnasami, 28 I. C. 992. (5) Annavilla Sundaramayya *v.* Cherlu Sitamwa, 35 Mad. 628.

(6) Seeni Ammal *v.* Angamuthy, 13 I. C. 802.

(7) Harnam Sing *v.* Luchman Sing, 10 Pun. R. 1911, 10 I. C. 857.

Dwiragaman of his sister. (1) In Bombay a very rational rule has been adopted. It was held by the late Mr. Justice Ranade, that the gift of Rs. 2,000 out of an estate consisting of ancestral movable property worth Rs. 23,000, out of affection to a widowed daughter-in-law was good. (2) The Privy Council have recently held that a gift of Rs. 20,000 to a daughter by the head of a Mitakshara family when it is out of income is good. (3) It seems therefore clear that the head of a joint family can, out of the income of the property and if that is insufficient, by alienating a small portion of the property, provide for the marriage expenses or customary expenses incidental to marriage and reasonable dowries, without partiality, to all the daughters of the family.

The manager or even a junior coparcener can make a gift of a reasonable portion of the ancestral movable or immovable property to a daughter absolutely for her maintenance. He can also make a gift of a small portion of the ancestral property to any widow of a deceased coparcener or to a widowed daughter-in-law for her maintenance.

In certain cases it has been held that an alienation by the father of a small portion of the ancestral immovable property, such as provision of a permanent shrine for a family idol, "pious and reverential gifts to Brahmanas as Brahmuttra Krishnarpana" and "gifts from affection towards Vishnu and other divinities is valid." (4) These

(1) Charaman *v.* Gopi, 37 Cal. 1. (2) Hanmantapa *v.* Jevabai, 24 Bom. 547 (3) Bechoo *v.* Mankorebai, 31 Bom. 373 P. C.
(4) Raghunath Prasad *v.* Gobind Prasad, 8 All. 76. Gopal Chand Pande *v.* Babu Kunwar Sing, S. D. A. L. P. 1843, Vol. 5, p. 24. See Muddun Gopal *v.* Rambuksh, 6 W. R. 71.

decisions were cited with approval by the late Mr. Justice Ranade in Bombay. (1) The Madras High Court has held that a gift for a temple was wholly void, though a gift to the family idol might be supported on the ground that it might be considered as made for family purposes. (2) A father's power to dispose of the income is unlimited, especially for charitable and religious, purposes, and he can also make gifts of small pieces of land, when they are customary as on occasions of Sraddhas or for the maintenance of daughters, daughters-in-law, wife, mother or step-mother or of the family idols or family priests.

A coparcener may make a gift *intervivos* for justifiable cause, but he cannot do so by will. (3)

A gift by a father on his own behalf and on behalf of his minor son is not void but only voidable, as the Kurta of a family can make a gift with the consent of other coparceners and strangers cannot question such a transaction. (4)

Who can set aside an unjustified alienation and limitation for such action.

Any coparcener, who was born or adopted in the family at the time of the completion of an unjustified alienation by another coparcener, may bring a suit to set aside the alienation which is invalid within 12 years from the time when the alienee took possession but not one born or adopted subsequently. (5) A coparcener born subsequent to the alienation

(1) Hanmantapa v. Jevabai, 24 Bom. 547. (2) 11 Mad. L. J. 310.

(3) Parvatibai v. Bhagwant, 39 Bom. 593.

(4) Sheo Ghulam v. Badri Narayun, 19 I. C 560. See however Mr. Sarwarjan v. Fakhuruddin, 39 Cal. 232 P. C Mohon Bibee v. Dharmodas, 30 Cal. 539 P. C.

(5) Rajaram Tewary v. Luchmun, 8 W. R. 15. Bunwari Lal v. Daya Sunker, 13 C. W. N. 822. Girdhareelal v. Kantolal, 1 I. A. 321. Bhola v. Kartic, 34 Cal. 872. Kumarsami v. Nangappa, 13 Mad. L. J. 21, Narain Das v. Hardyal, 35 All. 571.

has been held entitled to set it aside, if made without the consent of other coparceners existing at the time, (1) even if they all subsequently assent after his birth. (2) The Allahabad High Court however have laid down a consistent rule that a subsequently born son or other coparcener can in no case question an alienation made before his birth. (3) When a son did not contest an alienation by the father within time and was barred, his son subsequently born has been held to be barred. (4) Even a purchaser, whose purchase, though subsequent, is valid, can question a previous invalid alienation. (5)

Under the Benares School, an unjustifiable sale can be set aside only in its entirety and the alienee can get only a personal decree for money against the coparceners who made it. When it was found that the proceeds of the sale or part of them went to the common fund, a coparcener could set aside the alienation only on payment of the whole of the consideration of which the family had the benefit. (6)

Effect of unjustifiable alienation in Bombay and Madras.

In Bombay and Madras, the shares of the coparceners, who made an unjustifiable alienation for consideration, have been held to be bound by it. When part of the consideration was for necessary purposes, a son or other coparcener can recover his share on payment

(1) Hurodat *v.* Beer Narain, 11 W. R. 480. See 13 C. W. N. 822.
(2) Hazarimul *v.* Abani, 17 C. W. N. 280. Ponnambala *v.* Sundarappayar, 20 Mad. 354.
(3) Chatto Lal *v.* Kattu, 33 All. 283. Soundarajan *v.* Saravana, 30 Mad. L J. 592, 34 I. C. 799. See however Tulsi Ram *v* Babu Lal, 33 All. 654 (4) Luchmi Narain *v.* Kishen Kishore, 38 All. 126.
(5) Brijbashi *v.* Gopal, 2 All. W. N. (1908) 200. Muhammad Muthammel *v.* Methu Lal, 33 All. 783 F. B.
(6) Himmat *v.* Bhawani, 30 All. 352. Sudarsana *v.* Narasimhalu, 25 Mad. 147. Husmut Rai *v.* Sundar, 11 Cal. 396.

of the part of the consideration proportionate to his share, (1) though the purchaser can recover the balance by another suit against the sons, if the consideration was not for immoral or illegal purposes. (2)

Equitable rule that alienee is entitled to money introduced in Bengal.

In the Courts have recently introduced a rule of equity which will go a great way in shaking the old rigid rule of absolute inalienability of Mitakshara joint family property. In suits for setting aside alienations the Courts have on principles of equity made a decree for partition declaring the share of the alienor as separated and ordered the recovery of such share conditional on the payment of the purchase money to the alienee as the only person who would otherwise benefit by it would be the alienor who has no rights whatsoever against the alienee. (3) The Privy Council recently held that a gift by a father to an absolute stranger may be set aside but the 'person claiming under the gift may insist in such suit that he stands on the shoes of the father and may claim the share which would come to him on partition.' (4) The equitable claim of the alienee would be extinguished by the death of the alienor before suit (5) but not when he died after the decree even when there is an appeal. It has been held that such a suit by a son abated on his death before decree as his interest passed by survivorship to his father. (6)

The Oude Chief Court has held that where

(1) Vadiavalam *v.* Natasam, 37 Mad. 435. *Contra* Marappa *v.* Rangasami, 23 Mad. 87. (2) Raman *v* Satha, 31 Mad L J. 502.

(3) Bunwarilal *v.* Sunker Misser, 13 C W. N. 815. Mahabir Pershad *v.* Ramyad Sing, 20 W R. 192. Jamuna *v.* Ganga, 19 Cal. 401. Madho Parshad *v.* Meherban, 18 Cal. 157 C.

(4) Ramkishore *v.* Kedar Nath *v.* Jainarayan, 40 Cal 966.

(5) 13 C. W. N. 824. Iswardhari *v.* Narasing, 1 I. C. 899.

(6) Padar Nath Sing *v.* Raja Ram, 4. All 235.

the father sells ancestral property partly for an antecedent debt, the sons can only recover their own shares on payment of the proportionate share of the entire purchase money. (1)

The equities arising when there is partial necessity and as to rights to mesne profits or to be disimbursed for improvements are dealt with at pp. 260-261 in case of alienations by the widow.

Power over self-acquired and separate property.

A Hindu under the Mitakshara has full power of disposition over his self-acquired or separate immovable and movable property. (2)

Attachment effects separation.

It is settled law in all the Presidencies that an attachment in execution of a decree has the effect of the separation of shares, and a sale in execution passes the interests of an undivided coparcener under all the Schools, just as if it were his separate property, and his death subsequent to the attachment does not affect the right of the creditor. (3) In Allahabad (4) it has been doubted whether after the passing of the Transfer of Property Act, this well established rule, which had been given effect to even by that Court for 30 years after the passing of that Act (5), was still applicable.

In Calcutta an attachment before judgment has been held to have the same effect as one after judgment. (6) But in Bombay the contrary has been held, when the defendant died before decree (7)

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(1) Sheopal Sing *v.* Basant Singh, 12 Oud. C. 248. (2) Rao Bulwant *v.* Rani Kishori, 25 I A. 54. Babu Beer Pertap *v.* Moharaja, 12 Moor I. (3) Mudun Thakoor *v.* Kanto Lal, 1 I. A. 321. Dindyal *v.* Jugdip Narayan, 3 Cal. 198 P. C. Hurdeo Narayun *v.* Ruder Perkash, 10 Cal. 626 P. C. Suraj Bunsi *v.* Sheo Prosad, 5 Cal 148 P. C. Thadi Ramarmerthi *v.* Moola Kamea, 24 I. C. 667, Bailur Krishna *v.* Lakshmana, 4 Mad. 302. (4) Ali Ahmod *v.* Sohan Lal, 12 All. L. J 613, 24 I. C. 6. (5) Bakhtawor Sing *v.* Brij Mohan Lal, 3 All. L. J. 127. (6) Ganu Sing *v.* Jangilal, 26 Cal. 534 (7) Subrao *v.* Mahadeve, 15 Bom. L. R. 848 21 I. C. 336, see 17 Mad. 144, 30 Mad. 413. 32 Mad. 429.

In Bombay it has been held that the son's interest in ancestral property may be attached in execution of a personal decree against him and after such attachment an alienation by the father for his own debt is invalid. (1) It is however difficult to reconcile this extension of the son's rights with the rule of Manu that "a wife, a son, and a slave, these three are declared to have no property."

Bengal coparcener has full power of disposal.

Under the Bengal school, as we have already seen in the last Section, he has full power over both ancestral and self-acquired property.

Power over moveables uuder Mitakshara and Mayuksha.

As regards moveables, it has been held in Bombay, that in ancestral moveables sons have equal ownership with the father, and that under the Mayukha law, the father has not the power of giving or otherwise alienating them." (2) But in an earlier case it was held, that under the Mitakshara, the father had absolute power over moveables. (3) This last case was, however, dissented from in a subsequent decision, (4) which was confirmed by the Privy Council without any discussion of the particular question. In a later case the Bombay High Court has held that the father's power over moveables was greater than over immoveable property as he had power of alienation over the former for "indispensable acts of duty and for purposes prescribed by law, such as gifts through affection, support of the family, release

(1) Subraya *v.* Nagappa, 33 Bom. 264. Contra Bhagirathi *v.* Sheobhik, 20 All. 325.

(2) Jugmohan Das *v.* Sir Mangal Das, 10 Bom. at p. 548.

(3) Ram Chandra Dada Naik *v.* Dada Mahadles Naik, 1 Bom. H. C. App. 76.

(4) Lakshman Dada Naik *v.* Ram Chandra Dada Naik, 1 Bom. 561, aff. 7 I. A. 181.

from distress and so forth." (1) In Allahabad, the question was raised, but the judges refused to decide it. (2) In the latest case on the question the Allahabad High Court has held that there is no distinction between moveables and immoveables excepting that in respect of the former the father has the power to make a gift out of affection or to alienate for the purposes of the family but when the gift is to one son out of vindictive motives in order to disinherit another, such a gift is not binding on the latter. (3) In Bengal, in an early case, it was expressly decided that the father has absolute power over moveables under the Mitakshara, (4) but it was explained, and to some extent dissented from in subsequent cases. (5) Sir Barnes Peacock after discussing in full, the question of son's right in ancestral property said, there was no distinction between moveables and immoveables except under certain circumstances, and that was the view adopted in other cases also. (6)

We have already seen that according to Vishnu and Vriddha Yajnavalka, the father has absolute power over moveables. The distinction between a gift out of affection for one and out of dislike for another is too nice to be given affect to as a legal principle. The old Lawgivers made no such distinction. It is practically impossible to curtail the power of the father over the income of the

(1) Hanumantapa *v.* Jivabai, 24 Bom. 554.
(2) Kali Prashad *v.* Ram Charan, 1 All. 159 F. B.
(3) Nandram *v.* Mangal Sen, 31 All. 357.
(4) Sudanunda *v.* Bonomali, 1 Marsh 320.
(5) Sadanund *v.* Soorjoo Monee, 11 W. R. 436.
(6) Raja Ram *v.* Luchman Prosad, 8 W. R. 15 F. B. Laljit *v.* Raj Coomar, 12 B. L. R. 373.

property and money and other moveable property, except by making him liable to an account to the sons, for the only other alternative is prevention by the actual application of force. Now it will be a travesty of Hindu Law to make the father accountable to the sons. Though some of the commentators have laid down that there can be partition of ancestral property at the instance of the son, none of them have gone so far as to question his power over the income as long as the family is joint or to make him accountable to the sons. To hold that would be to strike at the root of filial obedience which is the guiding principle of the domestic life not only of Hindus but of all Asiatic races. As I have shown before the principle of right by birth is the logical outcome of the old custom among all Aryan nations according to which land was inalienable and belonged to the family. That has been forgotten and the result has been one that would have seemed very strange to the old Hindu Lawgivers.

The above observations apply only to alienations without necessity. Alienations for necessity or for the purposes of the family by the managing member or any other member of the family are governed by different considerations. (1) For urgent necessity of the family and sometimes when it is clearly for the benefit of the faimly, the managing member can alienate family property. Even a junior member of the family is justified in doing so when the necessity is very great and pressing. The contingency can only arise when the managing

Alienations for necessity when binding.

(1) Chandra Deo *v.* Harpal, 9 I. C. 293.

member is absent, or incapable, or fraudulently inclined. In all these cases, an alienation by a junior member is valid according to the texts and the spirit of Hindu law.

What is necessity.

The word legal necessity has been variously defined by text-writers and judges. Support of the family, Sraddha of coparceners and their wives, marriage of sons and daughters of coparceners, protection of the family property, alleviation of the distress of coparceners from sickness or from creditors for proper debts or on account of prosections are necessary objects for which the Kurta may dispose of the income of the family property. (1) But legal necessity entitling the manager to create a charge upon or to alienate the family property is a different thing. An alienation can be justified only on the ground that some of the necessities of the family mentioned above cannot otherwise be met.

Mortgage for defending a coparcener.

A mortgage for raising money to defend a member of a joint family against a criminal charge has been held to be binding on the family. (2)

Power of selling for acquiring property.

It has been held in recent cases that a Hindu father or manager is competent to sell or mortgage the joint family lands for the purpose of purchasing other lands, if the sale does not injuriously affect the interests of the other members and is a proper and reasonable act in the interests of the family though there may be no

(1) Devulapalli *v.* Polavarapa, 8. I. C. 195.

(2) Beniram *v.* Man Sing, 11 I. C. 663. See Luchman Kooar *v.* Mudaree Lall, 5 S. D. A. N. W. P. Dalip Sing *v.* Sree Kishoon, 4 N. W. P. H. C. 83.

necessity. (1) There seems to be no reason for curtailing the ordinary power of the father or the managing member of dealing with the family property in any manner which is beneficial to the family. But when there is no actual urgent necessity, the burden should be cast on the alienee to show that the transaction was clearly for the benefit of the family.

In a recent case, it has been held that when money is borrowed for acquiring property for the family by a pre-emption suit, the loan may be considered as for necessity and the borrower after having satisfied himself by enquiry that there was such necessity need not go further and see to the actual application of the money. (2)

In a recent case the Privy Council have held that the "Kurta of an undivided Mitakshara family with the concurrence of the adult members of the family can mortgage the family property for family purposes in case of necessity," so as to bind even minor members in respect of whose property certificates under Act 40 had been granted as such certificates could not be granted under Hindu Law. (3)

Liability of minors-lender must prove absolute necessity and also necessity to borrow at high rate or at compound interest.

The natural guardian of an infant and the Kurta of a joint family, it has been held, can mortgage his interest in case of absolute necessity and not for speculation. The lender in such a case should not only prove the necessity for the loan but also the necessity of borrowing at more

(1) In re Krishnasawmi Doss, 13 I. C. 648. Bohra Jeth Mal *v.* Dharam Sing, 14 I. C. 745.

(2) Nuthu *v.* Kundun Lal, 8 I. C. 836, 7 All. L. J. 1182.

(3) Gharibulla *v.* Kharak, 25 All., 407 P. C.

than the ordinary rate of interest and compound interest, and on his failing to do so, the interest, must be reduced to the ordinary rates of interest so far as the minor is concerned but there should be a decree at the full rate of the contract as against the adult members. (1)

Power of junior members to contract debts binding on the family.

We have seen that in case of urgent necessity or for the performance of indispensable duties of the family, even a junior member of the family can borrow so as to bind the family. (Mitakshara, Ch. I., Sec. 1.) It has been held that a debt contracted by a coparcener for the marriage of his own daughter is binding on the whole family. (2) As long as the family is joint and the managing member does not defray the expenses of such indispensable duties as Sradha and marriages or does not provide for the maintenance of a coparcener, any debt contracted by him for his own necessities must be binding on the family.

It has been held, that a loan contracted by sons for the purposes of the family trade is binding on the father and other members of the family. (3)

Presumption of necessity.

The question whether there is any presumption that a loan contracted by a manager of a joint Hindu family has been contracted for the family purposes is not free from doubt having regard to the decisions of the various Courts. In Bombay it

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(1) Abhiram Pal. *v.* Mukunda, 5 Cal. L. J. 542. See 35 Cal. 428.
(2) Malayandi *v.* Subharasa, 8 I. C. 854.
(3) Krishnasami *v.* Rangasami, 7 Mad. 112.

was held that there was no such presumption. (1) In Allahabad in a recent case it has been held that there was no presumption that a debt contracted by the manager of a firm or family is for its benefit and the person who seeks to bind the other members must "prove that the debt was contracted for their benefit or with their consent or that there was an urgent family necessity therefor." (2)

In the case of a trading business in a recent case the Calcutta High Court laid down that in order to make a brother of the manager liable it was necessary to find—(1) whether the trading business was a joint family business, (2) whether the note given was for the purposes of the trading business and (3) whether the amount covered by the note was appropriated to the purposes of such business. (3) Mr. Mayne in paragraph 308 of his Hindu Law says that the manager "is *ex-officio* the accredited agent of the family and authorized to bind them for all proper and necessary purposes within the scope of his agency." These observations were approved by Mr. Justice Pigot. (4) Mr. Justice Pontifex in Johurra Bibi *v.* Sreegopal (5) pointed out that "all persons carrying on a family business in the profits of which all the members would participate, must have authority to pledge the joint family property

(1) Soiree Padmanabh *v.* Narayan, 18 Bom. 520. Krishna Ramay *v.* Vasudev, 21 Bom. 815.

(2) Lala Ganpat *v.* Munni Lal, 13 Ind. C. 34.

(3) Nagendra Chandra *v.* Amarchand, 7 C. W. N. 725. Sunkur Pershad *v.* Goury Pershad, 5 Cal. 321.

(4) S heo Pershad *v.* Saheb, 20 Cal. 461. Dis 3 Bom. L. R. 668. See 9 C. W.N. 879.

(5) 1 Cal. 470. See 22 Mad. 166, 26 Bom. 206 F. B. 29 All. 176, 11 Bom. L. R. 255.

and credit for the ordinary purposes of the business, and therefore debts honestly incurred in carrying on such business must override the rights of all members of the joint family in property acquired with funds derived from the joint business."

There is thus some conflict of opinion. But the difficulty has been to a great extent removed by the recent Privy Council ruling on the subject cited in the previous section. (1) It seems clear that the manager presumably has power to borrow for the ordinary business of the family or firm, which is within the scope of his agency according to law, and the family are bound by his acts, except when they are dishonest and fraudulent to the knowledge of the creditor. But the creditor must prove that he made fair enquiries which satisfied him that there was a reasonably credited necessity and that the manager was honestly acting within the scope of his authority. (2)

Exception in the case of family firm.

There is one exception, to the general rule that debts contracted by the managing member are binding only when they are for the purposes of the family. When there is a family trading firm, the ordinary rules of partnership would apply to it and a debt contracted in the name of the firm by the manager, though for his own individual purposes, binds all the other members including even the minor members, the apparent authority of the manager being sufficient. (3)

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(1) Kissen Parshad *v.* Har Narayun, 15 C. W. N. 32

(2) Gaya Prasad *v.* Raghunath, 8 All. L. J. 1022, 12 I. C. 178.

(3) Raghunathji Tarachand *v.* The Bank of Bombay, 11 Bom. L. R. 255.

A Hindu acquires by birth or inheritance an interest in a family trading business and his interest in the family property, even when he is a minor, may be pledged by the managing members. But his separate property is not liable, as in an ordinary partnership, without a consentient act on his part. (1)

The rule laid down in the case of Goode v. Harrison (2) that a minor on attaining majority must promptly notify his disaffirmance of a partnership, if he is to avoid future liability, does not apply to a Hindu family business. (3) In a Hindu family the presumption is in favour of affirmance. A Hindu succeeding his father in a family business must be presumed to accept liability for the past debts of the firm. (4)

In case of ancestral business, liability for its debts is not confined to the assets of the business but extends to the shares of all the coparceners adult or minor in the family property. (5)

All negotiable instruments, securities, bills of exchange or promissory notes executed by the manager are binding on the family to the extent of the partnership property. (6) The creditor is not bound to enquire into the finances of the family when the loan is for the family business. (7) Even when the manager executes

(1) Lutchmanen *v.* Siva Prokas 26 Cal. 349. Johura Bibi *v.* Sreegopal, 1 Cal. 470. Bemola *v.* Mohiny, 5 Cal. 792. Joykisto Cowar *v.* Nityanunda Nundy, 3 Cal. 738. Ramlal *v.* Luchmuhaty, 1 Bom. H. C. App. 1 Sukarbai *v.* Majan, 25 Bom 206. Samalbhai *v.* Someswar, 5 Bom. 28. Chalamayya *v.* Varudayya, 23 Mad 167.

(2) (1821) 24 R. R. 307. (3) 29 All. 184.

(4) Subramania Chetty *v.* Ram, 24 I. C. 86. (5) Muthaya *v.* Tinnevelly South India Bank, 37 I. C. 200. See 34 Bomb. 72, 1 Bom. H. C. App. 5. 35 Mad. 692.

(6) Ayyasami *v.* Gurisami, 34 Mad. L. J. 463, 33 I. C. 691. Sanka *v.* Bank of Bengal, 35 Mad. 692 Krishna *v.* Krishnasami, 23 Mad. 597. Contra Setharama *v.* Seshia 1912, Mad. W. N. 1011.

(7) Raghunathji *v.* Bank, 34 Bom. 72. Baba Dui *v.* Bansraj, 27 I. C. 567. Ghaneshyami Das *v.* Hardeo, 52 I. C. 380, 200 L. J. 563.

a note for his own advantage, it is binding on the family. (1) The ordinary rule is that an undisclosed principal cannot be sued on a negotiable instrument (2) and the family cannot be bound, unless it is executed by the managing member as such. (3) But if the creditor proves that the debt was for the purposes of the family business or for family necessity, a promissory note executed by any one coparcener binds the other members, who can be sued on it, though it is a negotiable instrument. (4)

Where a coparcener separates but the family trading business is carried on jointly, his interest in the family property and not his separate property is liable for the debts of the business. (5) When a coparcener on attaining majority severs his connection with the firm, the family property may be liable for debts contracted in his minority. (6)

Duties of manager and creditor.

The principles laid down in the case of Hanooman Prosad Pandey (p. 251) apply to the case of the manager of a Hindu family. If the alienation or "charge is one that a prudent owner would make, in order to benefit the estate," it is binding on the family. "The actual pressure on the estate. the danger to be averted, or the benefit to be conferred upon it, in the particular instance is the thing to be regarded." "The lender is bound to enquire into the necessities of the loan, and to satisfy himself as well as he can, with reference to the parties with whom

(1) Raghunathji Parachand *v.* The Bank of Bombay, 34 Bom. 72.
(2) Subba Narayun *v.* Ramaswam 30 Mad. 88 F. B. Miles *v.* Claim, L. R. (1885) 12 Q. B. 97.
(3) Govindan *v.* Nanee, 27 Mad. L. J. 595, 26 I. C. 750.
(4) Krishna *v.* Krishnasami, 23 Mad. 597 F. B. Chitta Chetty *v.* Tekkani, 31 I. C. 317. (5) Bishambhar *v.* Fateh Lal, 29 All. 176.
(6) Bishambhar *v.* Sheonarain, 29 All. 166.

he is dealing, that the manager is acting in the particular instance for the benefit of the estate." The law on the subject has been attempted to be codified by Sec. 38 of the Transfer of Property Act. As regards sale of joint property, it can only be justified by pressing necessity. When there are debts binding on the family, and they cannot be paid off except by a sale, (1) or when there is a binding decree which may at any time be executed, and property is attached and advertised for sale, (2) or when Government Revenue or rent is due for which the family property may be sold and there is no other way of paying it except by the sale of a portion, a sale by a manager is valid. The cases cited in pages 250-255, and the considerations mentioned there apply to the case of a manager.

Burden of proving necessity.

We have seen before that the Privy Council have held that the position of the manager of a joint family is analogous to that of the widow. (3) The considerations about the evidence of necessity mentioned at p. 259-262 apply to the case of a debt or alienation by the manager. The burden of proving necessity and that he made proper enquiries is on the creditor or the alienee and mere recital of necessity in the deed is not sufficient. He must also prove the necessity for borrowing at an unusual rate. (4) But every case depends on its own circumstances. In a recent case, one of the judges of the Madras High

(1) Purmessur Ojha *v.* Musmut Goolbee, 11 W. R. 446.

(2) Sheoraj Kooer *v.* Nukchedi, 14 W. R. 72.

(3) 6 Cal. 843 P. C.

(4) Hurro Nath Rai *v.* Rundhir Sing, 18 Cal. 311 P. C. See 35 Cal. 428. 6 Cal. L. J. 490.

Court, expressed the opinion that though the burden of proving necessity was on the alienee, the recitals in the deed were good evidence and sometimes by themselves shift the onus and even when there was no necessity, if the creditor made fair enquiries and was satisfied of its existence, the alienation would be binding and when it was proved that a large portion of the debt was borrowed for necessity, it might be presumed that the balance also was borrowed for necessity. (1)

Necessity for excessive interest must be proved.

It has been held that when the rate of interest is exceptionally high, the creditor should prove not only the necessity for the loan but the necessity for borrowing at such a high rate especially if it is accompanied with a condition of compound interest, and on his failing to do so, interest should be decreed at a reasonable rate only against the coparceners who were not parties to the deed. (2)

It has been held that the questions whether necessity had been established is a mixed question of fact and law on which there may be a second appeal.(3)

Alienation without consent of adult members.

In a recent case in Allahabad there was a difference of opinion between two judges on the question whether an alienation by the manager without the consent of the adult members is binding on the family. One of the judges held that the lender is bound to enquire into the necessity, but only the actual pressure on the

(1) Sinnachami *v.* Ramasami, 13 I. C. 14. Maharaja of Bobbili *v.* Raja Kaminigani, 21 Mad. L. J. 593.

(2) Nandram *v.* Bhupal, 8 All. L. J. 1294. Nath Mal *v.* Daht, 13 I. C. 401. See 35 Cal. 428, 5 Cal. L. J. 542, 31 All. 176.

(3) Dirg Bisai *v.* Bhan Partab, 12. I. C. 946.

estate, the danger to be averted and the benefit to be conferred on it are to be regarded and a *bonafide* lender is not affected by precedent mismanagement of the estate. (1)

The Privy Council in the latest case in the case of an alienation by a widow, the principles governing which also apply to alienations by a manager, laid down that "the actual proof of the necessity which justified the deed is not essential to its validity. It is only necessary that a representation should have been made to the purchaser that such necessity existed and that he should have acted honestly and made proper enquiry to satisfy himself of its truth." (2) The credit or of course has to prove that he acted honestly and made proper and sufficient enquiries and a mere recital of necessity is not enough. (3) But after the lapse of a long time, the recital, the Privy Council held in the case above mentioned "is clear evidence of the representation (of necessity) and if the circumstances are such as to justify a reasonable belief that an enquiry would have confirmed its truth, then when proof of actual necessity has become impossible, the recital coupled with such circumstance would be sufficient evidence to support the deed."

In Madras it has been recently held that though the elder brother does not represent himself as the Kurta if the alienation was for the purposes of the family it would bind the younger brother. (4)

(1) 13 I. C. 945, 9 All. L. J. 63. (2) See 6 Cal. 843, 13 C. W. N. 201, 34 Cal. 428, 18 Cal. 311, 14 All. 420, 18 W. R. 77. (2) Nandalal v Jagatkisore 36 I. C. 20, 14 All. L. J. 1103. (3) Mandeldeo v. Raghunarayan, 1 Pat. L. J. 39, Motespali v. Paluriramamirti, 28 I. C. 693, Tribeni v. Ram Narayan, 20 I. C. 951. (4) Gottukalu v. Gottukalu, 32 I. C. 802, Daraisami v. Nandisami, 38 Mad. 118 P. C.

What passes in a sale in execution.

In Bombay, it has been held that where the manager of a joint Hindu family borrows money for the needs of the family and a money decree is passed against the manager for the debt, the sale in execution of that decree will pass not only the manager's interest but also the interests of the other members of the family. (1) The Calcutta High Court has also held that if the debt was contracted for the benefit of the coparceners, and if the money decree on it was substantially against the family, though in form it might be against the head members, in execution the interests of all the members will pass, especially when the coparceners were minors at the time the debt was contracted. (2) There is no difference between the Mitakshara and the Dayabhaga in this matter. (3) But when the manager is sued in his personal capacity and not in his representative character, the adult members cannot be bound. In Madras it has been held in the most recent case on the question that the mere fact that the defendant was not described as the managing member in the suit was immaterial; if he was so in fact and if he was sued to enforce a debt binding on the family the members who had not been made parties would be bound. (4) The late Ms. Justice Ranade made the following observations on the question: "No doubt Mayne in his work on Hindu Law, Sec. 324 does lay down the proposition: "if the

(1) Gurulingappa v. Nandappa, 21 Bom. 797. Magueram v. Tukaram, 2 Bom. 197. Gonesh v. Gopal, Printed Judgments of Bombay for 1898, p. 323. Sakharam v Dioji, 23 Bom. 372.

(2) Buldeo Mubarek, 29 Cal. 583. Sheopershad v. Saheb, 20 Cal. 461. See Krishnasami v. Rungasami, 7 Mad. 113.

(3) Dwarkanath v. Bungshi, 9 C. W. N. 879 Miller v. Runganath, 12 Cal. 389. (4) H. H. M. Jijimba v. Sagniram, 14 I. C. 374.

managing member of the family executes a document which would blind the other members, the proper course is to sue them all. If the creditor chooses, he may only sue the person who executed the document. But if he adopts this course, his execution will only take effect upon the share of the judgment-debtor. He cannot enforce it against the other members (not being sons of the debtor) merely by proving that the transaction was entered into for the benefit of the family." Numerous cases decided by this Court however, show that the statement is not now quite accurate and that there seems to be no difference between the sons and the other members of the family." (1) These observations are correct not only for Bombay but also for the other provinces, as we have already seen. It has been recently held that a mortgage decree against the adult members of the family bound the rest.(2) The Privy Council in the latest case on the question has finally laid down that the manager can be sued alone and the family will be bound by a decree against him when the debt is binding on the family. (3)

As regards debts contracted for the purposes of a family trading business, they are binding on the family and a sale in execution of a decree against the manager only for such a debt will pass the interests of all the members. (4)

Whether debt incurred by a manager binds the other members personally.

In Madras, it was held that a debt incurred by the manager as such and spent for family purposes bound all the members to the extent of the family property but not personally.

(1) 23 Bom. 374. (2) Ramkrishna v. Vinayek, 34 Bom 354.
(3) Kissen Prasad v. Har Narayan, 15 C. W. N. 32.
(4) Doulat Koer v. Mihir Chand, 15 Cal. 70, 14 I A 187. Seo Prasad v. Saheb Lall, 20 Cal. 453. Sakharam v. Dioji. 23 Bom. 372. Buldeo v. Mubarek, 29 Cal. 583. Nogendra v. Amar, 7 C. W. N. 725.

Sir Subramanya Iyer in that case held that 'though the commentators agree with Nandana in his gloss on Manu that "if a debt was contracted for the benefit of a united family, it must be repaid by the members of a family though they may have separated afterwards" but none of them say that it means that it should be paid from property other than what has vested in them by partition'. It was however also laid down that "where it is shown that the contract relied on, though purporting to have been entered into by the manager only, is in reality one to which the other coparceners are actual contracting parties, either because they had agreed before the contract was entered into to be personally bound thereby or because they being in existence at the date of the contract and competent to enter into it, have subsequently duly ratified or adopted it or where, though they did not assent to the particular contract, if there had been such acquiescence on their part in the course of dealings in which the particular contract was entered into as to warrant their being treated in the matter as contracting parties," they would be personally liable. (1) It is difficult to appreciate the distinction here made. The most recent cases in Madras go to show that a personal decree may be obtained against members who had not joined in a bond or a note for a loan for the purposes of the family. (2) When the manager of a joint family incurs a debt binding on the family, it would be hard to make him personally liable and to

(1) Chinna v. Ganga, 9 Mad. L. J. 366.
(2) Chinna Chetty v. Tekany 31 I. C. 317. Krishna v. Krishna Same 23 Mad. 697 F. B.

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(2) Chimna Chetty *v.* Tekany 31 I. C. 317. Krishna *v* Krishna Same 23 Mad. 697 F. B

exonerate his principals, *i.e.*, the members of the family from all personal liability.

We now come to the case, when the father is *Kurta*, or more correctly, *Swami* or *Prabhu* of the family. "There is no question, that considerable difficulty has been found in giving full effect to each of two principles of the Mitakshara law, one being that a son takes a present vested interest jointly with his father in ancestral estate, and the other that he is legally bound to pay his father's debts, not incurred for immoral purposes, to the extent of the property taken by him through his father. It is impossible to say, that the decisions on this subject are on all points in harmony, either in India or here." This is what the Privy Council observed in the case of Nanomi Babuasin. (1) There is no doubt, that the decisions of our courts on the subject are far from being in harmony. The difficulty has arisen on account of importing European ideas of joint property into the Hindu law about the rights of fathers and sons. The law of the Rishis is very clear and definite, as we have already seen. It is difficult to ascertain, not the law of the Rishis but the law of our Courts.

Power of the father and son's liability

The principles of Hindu law on the subject were very clearly and correctly stated by the Privy Council in the case of Hanooman Prosad Pandey (2) in the following words: "Unless the debt was of such a nature that it was not the duty of the son to pay it, the discharge of it, even

Cases ab son's lial for debt the fath consider

(1) Nanomi Babuasin *v.* Modun Mohun, 13 Cal. p.35.

(2) Hanooman Prosad Pandey *v.* Baboee Munraj Koonwaree, 6 Moore 421.

though it affected ancestral estate, would still be an act of pious duty in the son. By the Hindu law the freedom of the son from the obligation to discharge the father's debt, has respect to the nature of the debt, and not to the nature of the estate whether ancestral or acquired by the creator of the debt." The principles here enunciated were affirmed by the Privy Council in the case of Girdharee Lal, but they have since been departed from to a considerable extent by later decisions, as we shall presently see.

In the case of Junuk Krishoree Konwar *v.* Raghunandun Singh, the Calcutta Sudder Dewany Adalut (1) decided, that in case of a private alienation by the father, though it was for paying off bond-debts and decrees, justifying necessity must be shown to make it valid, but in the case of execution sales, the son must show immorality to invalidate it.

We next come to the case of Girdharee Lal *v.* Kantoo Lal. (2) The Privy Council in that case held, that it was "questionable whether a son can under the Mitakshara law recover an undivided share of ancestral property sold by his father," but ancestral property might validly be sold for debts contracted by the father, whether before or after the sons were born, that "it was necessary for the son, in order to set aside the sale of property for the purpose of paying the father's debts, to show that the debt was illegal or contracted for an immoral purpose." In the analogous case of

(1) S. D. A. of 1861, p. 213.
(2) 1 I. A. 321.

Muddun Thakoor *v.* Kantoo Lal, the suit was upon a mortgage, but in execution, properties, hypothecated as well as unhypothecated had been sold as upon an ordinary money decree. The High Court had held that the purchaser was entitled to retain only the share of the father, as the sons were not parties to the suit. But the Privy Council held, that the entire property passed for the following reasons : " It appears that Muddun Mohun Thakoor purchased at a sale under an execution of a decree against the two fathers. He found that a suit had been brought against the two fathers ; that a Court of Justice had given a decree against them in favour of a creditor; that the Court had given an order for this particular property to be put up for sale under the execution ; and, therefore, it appears to their Lordships, that he was perfectly justified, within the principle of the case, which has already been referred to, in 6th Moore Indian Appeal Cases, in purchasing the property." Their Lordships then quote the principles laid down in that case (*i. e.*, of Hanooman Prosad Pandey) as to the rights of a purchaser from the guardian of a minor, and say : "the same rule has been applied in the case of a purchaser of joint ancestral property. A purchaser under an execution is surely not bound to go back beyond the decree.....It has already been shown that if the decree was a proper one, the interest of the sons, as well as the interest of the father, in the property, although it was ancestral, were liable for the payment of the father's debts. The purchaser under that execution, it appears to their Lordships, was not bound to go further back than to see, that

there was a decree against those two gentlemen; that the property was liable to satisfy the decree, if the decree had been given properly against them; and having inquired into that, and having *bonafide* paid a valuable consideration for the property, the plaintiffs are not entitled to come in, and to set aside all that has been done under the decree and execution, and recover back the estate from the defendant." The broad and clear principles laid down by Sir Barnes Peacock in this case were very soon modified by the Privy Council in the case of Deendyal *v.* Jugdeep Narayan (1) in which Sir James W. Colville delivering the judgment of their Lordships held that if the right, title and interest of the father is sold in execution of a mortgage decree against him, the sons can recover the entire joint family property, subject to the right of the purchaser to have the father's "share and interest ascertained by partition." Their Lordships observe, "whatever may have been the nature of the debt, the appellant cannot be taken to have acquired by the execution sale more than the right, title and interest, of the judgment-debtor. If he had sought to go further, and to enforce his debt against the whole property and the co-sharers therein, who were not parties to the bond, he ought to have framed his suit accordingly, and have made those co-sharers parties to it."

The rules laid down in Girdharee Lal's case were considered and approved in the later case of Surja Bunsi Koer. It was decided in that case, that the sons by proving that the debts were contracted

(1) 3 Cal. 198. 4 I. A. 247.

for immoral purposes could recover the family property from an auction-purchaser in execution of a mortgage decree against the father, but as the property "had been attached and ordered to be sold" there was "a valid charge upon the land, to the extent of Adit Sahai's (*i. e.*, the father's) undivided share and interest therein, which could not be defeated by his death before the actual sale," and thus the purchaser was declared entitled to the father's undivided share in the family property. (1)

In the next case, *i.e.*, of Babu Hurdey Narayan, the Privy Council made a distinction between a sale in execution in a mortgage decree, and one in a simple money decree. It was held, that the purchaser of the right, title and interest of the father in an ordinary money decree acquired only the father's undivided share. (2)

The decision in the case of Mussamut Nanomi Babuasin (3) is perhaps the clearest exposition of the law on the subject. In that case all the previous decisions were considered, and their Lordships, taking into consideration the fact that "the right and interest" of the father had been sold, made the following observations:—"Their Lordships do not think that the authority of Deendyal's case bound the Court to hold, that nothing but Girdharee's (the father's) coparcenery interest passed by the sale. If his debt was of a nature to support a sale of the entirety, he might legally have sold it without suit, or the creditor

(1) Surja Bunsi Koer *v.* Sheoprasad Sing, 6 I. A. 88.

(2) Babu Hurdey Narayan *v.* Punḍit Babu Rooder Porkash Misser, 11 I. A. 26.

(3) Mussamut Nanomi Babuasin *v.* Modun Muhun, 13 I. A. 1.

might legally procure a sale of it by suit. All the sons can claim is that, not being parties to the sale or execution proceeding, they ought not to be barred from trying the fact or the nature of the debt in a suit of their own." They further held that "destructive as it may be of the principle of independent coparcenery rights in the sons, the decisions have for some time established the principle, that the sons cannot set up their rights against his creditor's remedies for their debts, if not tainted with immorality," and observed: "On this important question of the liability of the joint estate, their Lordships think, that there is now no conflict of authority." One would have thought the decision in this case would be followed in all subsequent cases. But unfortunately the very next year the Privy Council, upsetting the judgment of Mr. Justice Mitter in the case of Uporoop Tewary, (1) decided, that "each case must depend on its own circumstances," and that when by the sale proclamation only "the right and interest" of the father is sold, nothing but his undivided share could pass. (2) In the subsequent case of Bhagbat Persad, (3) the Privy Council approved and gave effect to the rules laid down in the cases of Girdharee Lal and Nanomi Babuasin mentioned above, and held, that the entire family property passed in execution of a decree against the father, though the "lenders of the money had not made proper enquiries, whether there was actual necessity for

(1) 6 Cal. 749.
(2) Simbhu Nath Pandey *v.* Golab Sing, 14 I. A. 77.
(3) Bhagbut Persad *v.* Musmut Girja Koer, 15 I. A. 99.

the loans." The same rule was laid down in the later case of Meenakshi Naidu, where it was held, that the entire family property passed in execution of a mony decree against the father. (1)

In the case of Uporoop Tewari mentioned above Mr. Justice Mitter made a distinction between the case of a minor son and that of an adult son, on the authority of Ch. I., Sec. I.,pp. 28, 29 of the Mitakshara which is to the following effect: "An exception to it follows. Even a single individual may conclude a donation, mortgage or sale of immoveable property during a season of distress for the sake of the family, and especially for pious purposes. The meaning of that text is this—while the sons and grandsons are minors and incapable of giving their consent to a gift and the like, or while brothers are so, and continue unseparated even, one person, who is capable, may conclude a gift, a hypothecation or sale of immoveable property, if a calamity affecting the whole family require it, or the support of the family render it necessary, or indispensable duties, such as the obsequies of the father or the like, make it unavoidable." It was held, that though the adult son might have been no party to the mortgage or the suit based on it, "if the proceedings were held with his knowledge" "it would be a fair inference from the circumstance, that he was a consenting party to the original transaction." This latter part of the judgment was disapproved by the Privy Council, as we have seen before. Mr. Justice Mitter himself in a later case distinguished this case, and held, that

(1) Meenakshi Naidu v. Immudi Kanaka, 16 I. A. 1.

there was no distinction as between the liability of a minor and an adult son. (1) In the same case it was further held, that there was no distinction as between the liability of a son under a money decree and that under a mortgage decree against the father.

In Bombay, it has been held that it is an established principal of law that ancestral property is available for the payment of the debt of the father, unless the son can prove that the debt was contracted for an immoral or an illegal purpose and the fact that the father is alive at the date of suit does not affect the son's liability. (2) But the same Court has also held that in the absence of special circumstances showing an intention to put up to sale the entire estate of the family sold in execution of a money decree against the father, only the father's interest would pass to the auction-purchaser. (3) This is going back to the rule laid down in Hurdey Narayan's case.

In Calcutta it has been repeatedly held that in case of a simple money-decree, 'a member of a joint Hindu family may be bound by a decree and a sale thereunder of the family property though he is not a party' and 'that as regards the sons they are certainly bound unless the debt be proved by them to have been for immoral purposes.' (4)

(1) Baso Koer *v.* Hurry Das, 9 Cal 495.

(2) Ram Chandra *v.* Fakirappa, 2 Bom. L. R. 450. Chintammerav *v.* Kashinath, 14 Bom. 320. See 20 Cal. 329, 17 All. 542.

(3) Jaheer Mal *v.* Eknath, 3 Bom. L. R. 322. Manohar *v.* Balvant, 3 Bom. L.R. 97. Umad *v.* Gaman, 20 Bom. 687. Bhana *v.* Chundi, 21 Bom 616

(4) Buldeo *v.* Mubarek, 29 Cal. 583. Hare Vithal *v.* Jairam, 14 Bom. 597. Sakhram *v.* Dihji, 23 Bom. 372. Seoprosad *v.* Saheb Lall, 20 Cal. 453. Doulat Koer *v.* Mihir Chand, 15 Cal. 70.

We may, therefore, take it as settled law, that if the family property be sold in execution of a simple money decree against the father for a debt which is not immoral or illegal, and if it appears that the family property and not merely the father's interest was sold, the interest of the sons will pass, whether they are minor or adult. (1) The same principle, it was supposed, applied to mortgage decrees and it was further thought that mortgage-decrees stood on a far more favourable footing than simple money decrees. Law as settled.

A Bench of three judges of the Calcutta High Court, (2) upsetting a careful judgment of Mr. Justice Ghose, held, that after the passing of the Transfer of Property Act, the Hindu Law on the subject has been changed and unless the sons are made parties to the suit by the mortgagee, they cannot be made liable. As it stands, in Calcutta, the holder of a simple money-decree is in a much better position than the holder of a mortgage-decree. This is a result which will appear to be very strange to the ordinary mind, and has followed from a misapprehension of the position of the father under the Mitakshara law. Effect of not making sons parties to mortg ge suits.

Sir Francis Maclean, C. J., based his judgment in the above case on the grounds: (1) that in suits against the father on a mortgage he "as *Kurta* or manager of the property of the joint family" 'did not answer any of the descriptions of representative persons, mentioned in Sec. 437, C. P. C. suits against whom would bind others, and consequently

(1) Dattalraya *v.* Vishnu, 13 Bom. L. R. 949. Minaks hi Nayudu *v.* Immads Kanaka, 16 I. A. I. 12 Mad. 142.

(2) Lal Suraj Prosad *v.* Galab Chand, 28 Cal. 517.

a minor son could not be bound by a decree against the father; (2) that by enacting in Sec. 85 of the Transfer of Property Act that all persons having an interest in the property comprised in the mortgage should be made parties to a mortgage suit, the legislature has abrogated the law laid down by the Privy Council in decisions passed before the passing of the said Act; (3) that "if the father absolutely represented the son, it would not have been open to the son to bring a suit to impeach the mortgage on the ground that the advance was for an illegal or immoral purpose, as clearly he could do." "The legislature did not think fit to place him (the father) in the 'same category as a trustee, executor or administrator" within the meaning of Sec. 437, C.P.C., the learned Chief Justice observes but it is difficult to say, that the father is not a trustee for the family in whom the family property is vested until partition, for the purposes of the family. Again the joint family has been considered to be a corporation whose interests are necessarily centred in the manager. This has been the view held by Mr. Justice West (1) and other eminent Judges, as we have already seen. The section of the Civil Procedure Code that lays down how corporation and companies should sue or be sued are Sections 435 and 436. Sections 435 and 436 clearly say, that a suit by or against an officer or a trustee authorised to sue and be sued on behalf of a corporation or company is a good suit against the said corporation or company. Now, according to the provisions of the Hindu law, the father is the officer who is authorised by law to sue or to

(1) Gan Savant *v* Narayan Dhond Savant, 7 Bom. 467.

be sued* on behalf of the family, if it be regarded as a corporation. As regards the second ground, according to the previous decisions, the father is the person authorised to sue or be sued by the corporation or company, namely, the joint family. Sec. 85 could not be held to have abrogated the previous decisions. The third ground is also based on a misapprehension of Hindu law. According to strict Hindu law, as we have already seen, the father, if he is not the full owner of ancestral property, has yet full power to sell or mortgage it, for the purposes of the family without reference to the sons, and further, the interest of the sons is liable to be sold for the debts, not illegal or immoral of the father, and indeed the sons cannot take ancestral property without paying such debts. It follows from this, that the father represents the estate and the sons fully and absolutely, when the debt is not illegal or immoral. The Privy Council and the High Courts of India have laid down a rule of procedure, that the son, when not a party, could bring a suit for a declaration, that the debt was illegal or immoral. The father could not while contracting an immoral debt represent the son, but until that was proved in a suit, the father should be considered as representing the son absolutely. Indeed under the Hindu law the father alone is "independent," the sons are "dependent" and have

* Sir Barnes Peacock in the case of Kailash *v.* Ellis, 8 W. R. 45 decline to decide the question, whether a suit against an officer of an unincorporated society authorized to be sued by deed, was good. If the father is authorized by Hindu law, which is the substantive law of the land, to sue and be used, it is difficult to see, why a suit against him will not bind the family, while a suit against the officer authorized to be sued in the case of other corporations, is good, notwithstanding Sec. 85 of the Transfer of Property Act.

no rights. The father alone has the right to sue and to be sued, the sons having no such right. This position which is the true position of the father under the Hindu law, does not seem to have been before the judges at all.

Very recently the Privy Council have held that the position of the *Kurta* is that of a trustee for the family. (1) In this view, for the very reasons given by the learned Chief Justice in the Calcutta case, a decree against the father ought to bind the sons. In a later case on the question, the Calcutta High Court has held that when a mortgage by conditional sale by the father had been foreclosed without making the son a party and the son afterwards sued to redeem and failed to discharge the burden which lay on him of proving that the mortgagee had notice of his existence, the suit should fail. The judges in that case made the following observations: "On general principles, it would seem that if the father of a Hindu family can sell ancestral property to pay off debts and the sale cannot be questioned by the son, if the debts are not immoral, the same result would naturally follow if the father mortgaged the property by conditional sale and then suffered the mortgage to be foreclosed. The father could not afterwards redeem, and if the son could not impugn the debt as immoral and was therefore bound by it, it would seem that he could be fully represented by the foreclosure proceedings and would have no more right than his father to redeem subsequently. If the right to repudiate immoral debts is the sole

(1) Annamalai Chetty *v.* Marugasa, 30 I. A. 200.

distinction between a father's position and that of a son in attacking an alienation by the father, it would seem that where this right is not in question the extinction of the father's right to redeem must carry with it the extinction of the son's right also. "(1) The judges also approved of the old Allahabad rule that a son cannot redeem a mortgage unless he can prove that the mortgagee had notice of his interest at the time of the mortgage suit. (2) Recently a Divisional Bench of the Calcutta High Court refused to follow the case of Lala Surja Prosad on the ground that it is inconsistent with the rule laid down by the Privy Council in the case of Bhagbut Pershad Sing. (3) But in a still later case another Divisional Bench of the same court again affirmed the rule laid down in the case of Lala Surja Prosad and held that a son not made a party to a mortgage suit can redeem at any time.(4) All the other High Courts, notwithstanding much divergence in their earlier rulings, have, as we shall see later on, finally held that the rule in the case of Surja Prosad is erroneous and the matter must be considered as set at rest by the recent Privy Council ruling, which lays down that the managing member of a joint Hindu family can alone sue or be sued so as to bind the whole family. (5)

A Full Bench of the Allahabad High Court

(1) Balki Mohapatra *v.* Brojobashi Panda, 14 I. C. 333. See 14 C. L. J. 530, 11 C. W. N. 1078.

(2) Sheodyal *v.* Jagarnath, 12 I. C. 111. Debi Sing *v.* Jiaram, 25 All. 214. Kehu Sur *v.* Chuni, 33 All. 436.

(3) Moheswar Dutt Tewari *v.* Kissen Sing, 34 Cal. 184.

(4) Balkissen Lal *v.* Gopeswar Sing, 14 I. C. 844.

(5) Kissen Parshad *v.* Har Narain, 15 C. W. N. 321 P. C.

held (1), that a mortgage decree obtained without making the sons parties did not bind the sons, but sons, before they could succeed, must show that the mortgagee had notice of their existence. (2) In Allahabad too, the Hindu Judge, Mr. Justice Banerjee, was overruled by the majority of the Full Bench, who held that the son was entitled to a declaration that his interest had not been sold without proof of any other fact, except that he was not made a party. In a later Full Bench, it was held that if the mortgagee with notice of the existence of the sons did not make them parties, the sons could bring a regular suit to recover the property but they could not succeed merely on the ground that they had not been made parties without proving that the debt was immoral and not binding on them. (3) It was also held in another recent case that a son not made a party in the mortgage suit, could afterwards bring a suit for redemption. (4) In a later case, the above ruling was dissented from and it was held that the Hindu Law, as interpreted by the Privy Council, has not been altered by Sec. 85 of the Transfer of Property Act and a son could not bring a suit to redeem against a mortgagee purchaser merely because he had not been made a party in the suit, though the mortgagee had notice of his existence and that the sale could only be avoided by showing that the debt was illegal or immoral. (5) It was

(1) Bhawni Prosad *v.* Kallu, 17 All. 537.

(2) Ram Nath Rai *v.* Luchman Rai, 21 All. 193.

(3) Debi Sing *v.* Jiaram, 25 All. 214.

(4) Ram Prasad *v.* Mon Mohini, 30 All. 256 Dis. 12 I. C. 111.

(5) Kehri Sing *v.* Chuni Lall, 33 All. 436. Sheodyal *v.* Jagannath, 8 All. L. J. 982.

also held in another case that the provisions of Sec. 85 of the Transfer of Property Act were not inflexible and a mortgage decree against the managing member in whose name the property stood bound another adult member and his sons, who had not been made parties to the suit. (1)

Section 85 of the Transfer of Property Act has been repealed by the new Civil Procedure Code, Order 34 rule 1 of which provides that "subject to the provisions of this code all persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties relating to any suit relating to the mortgage," and omits the provision of Section 85 "provided that the plaintiff has notice of such interest." The change has not led to any uniformity of rule in Mitakshara cases. The Allahabad High Court in a recent case ignoring all its previous decisions to the effect that Sec. 85 did not alter the rule of Hindu Law on the subject laid down by the Privy Council held that because that section was repealed by Order 34 rule 1, which is practically identical with Sec. 437 of the old Civil Procedure Code, dismissed a suit where an infant son was not a party though the father was. (2)

In the above case, it was also held that because the infant son of one of the brothers who were all parties to the mortgage had not been impleaded as a defendent, within the period of limitation the whole suit must be dismissed. The decision is

(1) Balwant Sing *v.* Aman, 33 All. 7.

(2) Gendal Lal *v.* Baburam, 13 I. C. 197.

clearly opposed to the rulings of the Calcutta and Bombay Courts (1) and itself makes the admission that it will not be conducive to the ends of justice. Having regard to the recent ruling of the Privy Council (2) that the managing members have authority to sue and to be sued alone, there seems to be no justification for the decision.

In the most recent case on the question, a Full Bench of the Allahabad High Court overruling all previous Full Bench rulings and other cases and dissenting from the case of Lala Suraj Prosad have unanimously held that the question whether all the existing members of a joint Hindu family should not be impleaded as parties in mortgage suits affecting the joint family is not one of procedure but of substantive law and under the Hindu Law, the father or manager represents the family and may sue or be sued as such alone and thus though it is desirable to have all the coparceners before the Court yet no suit ought to be dismissed because some of the sons or other the junior coparceners have not been impleaded. (3) The law is thus settled that a mortgage decree against the father will bind the son though he is not made a party. In such a case, his only remedy is by a separate suit in which he can succeed only on proving that debt was incurred for immoral or illegal purposes.

The Madras High Court disagreeing with majority of the Judges in the earlier Full Bench of the Allahabad Court, and agreeing with Mr.

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(1) Guruvayya Gonda *v.* Dattatrya, 28 Bom. 11. Thakurmani Sing *v.* Dai Rani, 33 Cal. 1093.

(2) Kissen Parsad *v.* Har Narain Sing, 38 I. A. 45, 33 All. 272.

(3) Hori Lal *v.* Munmun Kunwar, 34 All. 549.

Justice Banerjee, have held, that Sec. 85 of the Transfer Property Act has not changed the old law on the subject and all that the sons can claim is to prove the invalidity of the debt in their suit. (1) The Hindu Judge of Madras, Sir Subramanya Ayyar was of the same opinion, and followed that judgment in a recent case. (2) In the latest case on the question the same rule has been affirmed. (3)

In Bombay, in two recent cases without reference to Act 4 of 1882, the old rule, laid down in the case of Nanomi Babuasin, was affirmed. (4) It was held, that "there are only two cases in which son's interest would not pass:" "first when they were not sold" and "second when the debt was not binding on the sons by reasons of its having been contracted for illegal or immoral purposes." In later cases on the question, it has been held that though a mortgage decree may formally be against the father, the son's interest in the family property will pass in execution and that the remedy of the son is by a separate suit to prove that the debt was illegal or immoral.(5) The judges approved of the Madras rule that "as between the father and the son, the father is the representative of his branch of the family and as against the son he has

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(1) Ramasamayyan *v.* Virasami Ayyer, 21 Mad. 221.

(2) Palani Goundan *v.* Rangayya Goundan, 22 Mad. 207.

(3) P. A. M. Sheikh *v.* K. R. Rama, 10 I. C. 874, 21 Mad. L. J. 508.

(4) Devji *v.* Sambhu, 24 Bom. 135. Joharmal *v.* Eknath, 24 Bom. 343. See 8 Bom. 489; 15 Bom. 87; 14 Bom. 320, P. J. for 1898, p. 124. In 15 Bom. 87, it was held, that in case of a money decree, in the absence of special circumstances showing an intention to put up the entire interest of the family in the property, only the interest of the father passes.

(5) Govind *v.* Sakharam, 28 Bom. 383. Beari *v.* Keshava, 11 Mad. 68. Umed Hathesing *v.* Goman, 20, 388. Jagabhai *v.* Bhukurdas, 11 Bom. 37.

a disposing power in regard to the share of the family property belonging to that branch and that the son can only invalidate the sale in execution by showing that it was on account of an obligation to which he was not subject under Hindu Law." In the most recent case on the subject, it has been held that a mortgage decree against the adult members of the family bound the rest and that the rule of procedure laid down in section 85 of the Transfer of Property Act did not interfere with the rule of Hindu Law on the subject. The Court also disapproved of the decision in Bhowani *v.* Kullu. (1)

The Bombay High Court have gone the length of holding, that after the death of the father, the judgment-debtor, if only the mother and not the sons are brought on the record, the sale will pass the entire estate, unless it is shewn that the decree is not binding on the estate; (2) and in another case, under similar circumstances, gave the plaintiff only a right to redeem. (3) The correctness of these decisions is open to doubt, and there is great force in the judgment of the late Mr. Justice Ranade who differed from the majority of the judges in the latter case.

The Nagpore Chief Court has held that the son can redeem a mortgage after a sale in execution of a decree against the father in a suit in which he was no party, on his proving that the creditor had notice of his existence. (4)

(1) Ramkrishna *v.* Vinayek, 34 Bom. 354. Vithu *v.* Babaji, 32 Bom. 375, Chimna *v.* Sada, 12 Bom. L. R. 219.

(2) Achut *v.* Maugnnath, 21 Bom. 539.

(3) Erava *v.* Sedramapya, 21 Bom. 429.

(4) Jian *v* Gopadga, 3 I. C. 578.

In a later decision however, the Nagpore Court has held that the son has no such right. (1)

Recent Privy Council decisions have settled the law. The law has thus been laid down : "In cases governed by the Mitakshara law, a father may sell or mortgage not only his own share but his son's share in family property in order to satisfy a debt of his own not being of an illegal or immoral character and such transaction may be enforced against his sons by a suit or proceedings in execution to which they were no parties," (2) and that the father or manager effectually represented the family in a suit and a decree against him was binding on the sons. (3) In the latest case on the question, the Privy Council have held that a foreclosure decree against the managing members of a Hindu joint family bound the other members as "there are occasions, including foreclosure actions, when the managers of a joint family effectually represent all other members of the family and the family as a whole is bound" by decrees against the managers. The sons who had not been made parties were held to be bound and to be not entitled to bring a subsequent suit for redemption.(4) It was argued that, under Order 34 Rule 1 C. P. C. which has been substituted for Sec. 85 of the Transfer of Property Act, all persons interested must be made parties. Lord Moulton met the argument by a reference to 10 Moore 376, relied upon by the High Court.(5) The Patna High Court on a construction of the above rulings have held

Law as settled by the Privy Council.

(1) Gore *v.* Kashiram, 9 Nag. L. R. I. 18 I. C. 848. (2) Durgadut Sing *v.* Rameshwar Sing, 36 Cal. 943 P. C. (3) Kishen Parsad *v.* Har Narain, 33 All. 272 P. C. (4) Sheo Shankar Ram *v.* Mussammat Jaddo Kunwar, 36 All. 383. (5) 33 All. 71. See Jogendra Deb *v.* Fanindra Deb, 10 Moore 376. Bissessar *v.* Maharaja Luchmessur, 5 I. A. 133. Ramkrishna *v.* Vinayek, 34 Bom. 354.

that coparceners not made parties are bound, even if the mortgagee had notice of their existence, as the family was effectually represented in the suit by its managers (1)

Voluntary alienations by father when binding.

Voluntary alienations by the father by way of sale or mortgage are valid and binding on the sons, when they are made for legal necessity or for antecedent debt "of his own not being of an illegal or immoral character," even when the property is impartible or a maintenance grant.(2) Otherwise, no part of the family property would pass.(3)

Effect of attachment.

An attachment in execution of a decree has the effect of severance of the share of the judgment-debtor, (4) and precludes the accrual of the title by survivorship of coparceners on the death of the judgment-debtor.(5) (See p. 470.)

The share of the father or another coparcener must pass in execution of a money decree against him for a debt, moral or immoral, while he is alive and also after his death when his share has been attached during his lifetime. In the case of a mortgage however, unless it was for justifying necessity or for an antecedent debt, no part of the family property will pass and it can be enforced against the sons only as a simple debt, if it was not illegal or immoral. (6) But there is no reason in support of this fine distinction, as it is open to a creditor to take a money decree instead of a mortgage decree and attach the property in execution.

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(1) Ranjit *v.* Ramjatan, 1 Pat. L. W. 197, 37 I. C. 833.

(2) Durgadut *v.* Rameshwar, 36 Cal. 943. (3) Luchman Das *v.* Giridhur Chowdhury, 5 Cal. 855 F. B. Hanuman Kamat *v.* Dowlut Munder, 10 Cal. 528. Nathaji *v.* Sitaram, 4 Bom. L. R. 587. Mahabir *v.* Basant, 11 I. C. 847 (Oudh). Bholai *v.* Ajudhia Prasad, 3 All. L. J. 85. Chandra Deo *v.* Mata, 31 All. 176 F. B. Kali Shanka *v.* Nawab Sing, 31 All. 507. (5) Suraj Bunsi Koer *v.* Sheoprasad Sing, 6 I.A. 88. 1415. Bailur Krishna Rao *v.* Lakshmana, 4 Mad. 307. Muthusami *v.* Chunammal, 24 I. C. 320. (6) 5 Cal. 855.

An attachment in the case of a mortgage decree is unnecessary. The fact cannot place the mortgagee in a worse position as regards the son than he would have, if he preferred to take a simple money decree. The entire property should pass when the debt was not proved to be immoral or illegal and the father's interest only would pass, even when the debt was immoral or illegal, if it had been attached during his lifetime in case of a money decree or when there has been a mortgage decree. In the case of Deendyal *v.* Jugdeep Narayana (4 I. A. 247) as we have seen before, the Privy Council held that "whatever may have been the nature of the debt," if the right, title and interest of the father is sold in execution of a mortgage decree against him, the son can recover the entire joint family property, subject to the right of the purchaser, to have the father's share and interest, which must be considered to have passed by the sale, "ascertained by partition." Indeed a mortgage decree followed by an order for sale should have the same effect as a money decree in which there has been an attachment and order for sale and the father's share should pass to the purchaser, even when the debt was proved to be immoral or illegal. The effect of an antecedent debt will be further considered later on.

Son not bound to pay immoral or illegal debts.

When however, the son can prove the debt to have been of an immoral or illegal character, he is not bound to pay it nor can his share of the family property be sold for its recovery. Even the father's share cannot be sold in execution of a money decree, if it be not attached during his life-time.

It has been held, it should be mentioned here,

that the onus of proving illegality or immorality of a debt is on the son but a mere general allegation of extravagance and immorality against the father, even if proved, is not sufficient to relieve the son. (1)

Irden of oving im- orality.

The son is liable to pay the debts of the father, which do not fall within the exceptions mentioned in the text of Vasista and Yajnavalkya *i.e.* "debts for suretyship, for spirituous liquor, for lust, in gambling, for idle gifts, for promises under the influence of love or wrath, for a fine or toll." In the Punjab it has been held that, both under the Mitakshara and the Dayabhaga, the son is not liable for debts contracted for liquor supplied to the father. (2) The extension of the rule to persons governed by the Dayabhaga will certainly be strictly in accordance with the rule of that commentary, but it is inconsistent with the rule of absolutely unrestricted ownership of the father in ancestral property as laid down by the decisions under the Dayabhaga in Bengal, and the limitation has never been recognized by the Calcutta High Court.

What debts on not bound o pay.

It has also been held, that the debt of the father as 'surety for payment' is binding on the son. (3) But the grandson is not liable though in possession of

(1) Bhagabut Prosad *v.* Girija Koer, 15 I. A 99. Kishan *v.* Garurudhwaja, 21 All. 238. Ramchandra *v.* Fakirappa, 2 Bom. L. R. 450. Chintamonrao *v.* Kashinath, 14 Bom. 328, Sitaramayya *v.* Vencataram, 11 Mad. 83. Babu Sing *v.* Bihary Lal, 30 All. 156 dissenting from 9 All. 493. Bhagwati *v.* Ganga, 11 I. C. 930, 8 All. L. J. 649 Dattatraya *v.* Kishna. 13 Bom. L. R. 1161.

(2) Khagendra Nath Das *v.* Nanak Chand, 1. I. C. 13.

(3) Tukaram *v.* Gangaram, 23 Bom. 455. Raghunath *v.* Natesa, 17 Mad. L. J. 283. Maharaja of Benares *v.* Ramkumar, 26 All. 611. Rasik *v* Singheswar Roy, 14 I. C. 147, 16 Cal. L. J. 107.

ancestral property, to pay a debt which the grandfather contracted as surety "unless the latter in accepting the liability of a surety received some consideration for it" (1) Katyayana says that the grandson is not liable to pay the debt of the father as surety and the son is only liable to pay such a debt without interest. That is the law of the Smritis. But when any money has been received by the grandfather and spend for the family, it may be reasonable to hold that the grandson is liable.

Debt as surety.

The son is also not liable to pay any debts contracted to pay fines and the like and for criminal misappropriations by the father. (2)

Fines and criminal misappopriations.

There is some conflict of opinion on the interpretation of the word Vyavaharika in the text of Ushana cited in this Section which says that debts which are not Vyavaharika need not be paid by the sons. In the case of Durbar Khachur *v.* Khachar Harsur, (3) the Bombay High Court held that the word meant 'unusual' or 'not sanctioned by law or custom' and that the son is not liable to pay the debts which the father ought not 'as a decent and respectable man to have incurred.' The Calcutta High Court has differed from that interpretation. (4) The text of Ushana should be considered as identical in import with the texts of Vasista and Yajnavalkya and the word Vyavaharika should be considered as meaning debts for liquor, lust, idle gifts and the like not mentioned in detail by the said Rishi Ushana. Indeed; as the Allahabad

Vyabaharika-meaning of.

(1) Narayan *v.* Vencatacharya, 28 Bom. 408.

(2) Mahabir Prosad *v.* Basdeo Sing, 6 All. 234. Nahnee *v.* Hurarам, 1 Bom. 90. Mc. Dowell *v.* Raghava, 27 Mad 71. Pareman. *v.* Bhatta, 24 Cal. 672.

(3) 32 Bom. 348.

(4) Chakouri Mahton *v.* Ganga, 16 C. W. N. 519, 2 I. C. 609

Court has held, there is no justification to exempt the son from liability, except when the debt comes strictly within the text of Yajnavalkya as interpreted in the Mitakshara. (1)

Whether son liable for father's civil misappropriation and tort.

The Madras High Court has approved of the Calcutta decision and held that the son is liable to pay moneys which the father is made to repay on account of his misappropriations of a civil nature. (2) The judges held that Colebrooke's interpretation of the word as meaning 'incurred for a cause repugnant to good morals' was probably correct and expressed the opinion that it meant 'a debt which is not supportable as valid by legal arguments and on which no right could be established in the creditor's favour in a court of justice.' In another case however, the Madras High Court has held that the sons are not liable to pay the debt of the father incurred for paying the Government costs in a pauper suit brought by him knowing it to be false. (3)

The Madras High Court has held that when the misappropriation by the father is a mere breach of civil duty and it is not shown that the father made himself amenable to the criminal law, the son is liable to discharge the obligation of the father. (4) The Bombay High Court has held that a son or grandson cannot be made liable in a decree for damages against the father for wrongfully erecting a dam. (5) The Allahabad High Court has

(1) 9 I. C. 624, 8 All. L. J 306

(2) V nugopal *v.* A. Ramanandhum, 14 I. C. 705, 11 Mad. L. J. 427. Natasayya *v.* Ponnisami, 16 Mad. 99.

(3) Aligireswami *v.* Sundareswara, 20 Mad. L. J. 89, 4 I. C. 105.

(4) Erasala *v.* Addepally, 31 Mad. 472. Kanemar *v.* Krishna, 31 Mad. 472. See 17 Mad. L. J. 283.

(5) Durbar Khachar *v* Khachar, 32 Bom. 384

doubted the correctness of the said decision and held that the son is liable to pay a debt incurred by the father for contesting an action for libel against him. (1) The same Court has rightly observed that the only limitation to the liability of the son is contained in the text that the son is not liable to pay debts for liquor, gambling, lust, unpaid fines and idle gifts and that only criminal misappropriation would exonerate the son. (2) The Bombay High Court has recently disapproved of the rule in Durbar Khachar's case. (3) In Calcutta, it has been held that a decree for mesne profits against the father for profits wrongfully obtained by him should be paid by the son (4) if it was not for wanton interference with the rights of the decree-holder. (5) The Allahabad Court has held that the son is bound to pay money due under an indemnity clause in a sale deed executed by the father which was not tainted with immorality.(6)

Barred debts of the father whether binding.

The Allahabad High Court has held that a barred debt of the father cannot be considered as an antecedent debt. (7) The Madras High Court and the Punjab and Oude Courts in recent cases have held that such a debt may be considered as an antecedent debt for which the son's interest may be bound. (8) The Calcutta High Court,

(1) Sumer *v.* Chaube, 9 I. C. 624, 8 All. L. J. 306.
(2) Niddalal *v.* Collector, 14 All L. J 610.
(3) Ram *v.* Narayan, 17 Bom. L. R. 955.
(4) Peary Lal Sinha *v.* Chandi, 11 C. W. N. 163. Zenamandi *v.* Lanka, 25 I. C. 397. Shiam *v.* Ganeshi, 28 All. 288.
(5) Chakouri *v.* Ganga, 39 Cal. 863.
(6) Raghunundan *v.* Chain Ram 27 I. C. 895.
(7) Indar Sing *v.* Sarju Sing, 11 I. C. 737. 8 All. L. J. 1099. Dalip Sing *v.* Kundan Lal, 35 All. 564.
(8) Subramania *v.* Gopala, 33 Mad. 308. Muthuswami *v.* Subramanya, 14 I. C. 69 Dewan Shib Nath *v.* The Alliance Bank of Simla, 5 I C. 480 Harihar *v.* Bharat, 20 I. C. 590. See Pantulu *v.* Vencataramana, 29 Mad. 200. Bhagabut *v.* Girija, 15 Cal. 717 P. C, 17 Cal. 584.

without deciding whether the son was under a pious obligation to discharge such a debt, held that it was not binding as an antecedent debt and at most, it created a personal liability on the son and a mortgage for it was not binding on him. (1) There is no limitation to a moral obligation and the son is bound to pay the father's debt after the lapse of any period of time. The grandson is also liable to pay it, though without interest. The limit of time according to some commentators is the death of the grandson but according to others, it is the death of the great-grandson.

Antecedent debt when not binding.

The Allahabad and Patna High Courts, as well as the Oude Court, in recent cases have held that if the antecedent debt be proved to have been immoral, it would not bind the son. (2)

Mortgage, no necessity or immorality being proved, whether binding.

In a recent case in Calcutta, (3) it was held "in the case of a Mitakshara family consisting of a father and minor sons, when the father hypothecated ancestral property there being no proved necessity, but on the other hand no proof of immoral or illegal purposes, and no proof that the lender made any enquiry as to the purpose, the debt itself was an antecedent debt," and though the mortgage cannot be enforced, there being no 'debt antecedent to the transaction' to sustain it, the creditor is entitled in a suit against the father and sons, or the sons alone, after the death of the father, to a decree directing the debt to be raised out of the whole ancestral

(1) Ilira *v.* Chandrabali, 13 C. W. N. 9.

(2) Niddha Lal *v.* Collector, 35 I. C. 209, 14 All. L. J. 629. Bhagat Mal *v.* Abdul, 1 Pat. L. J. 86. Sabhumean *v.* Narayanun, 23 I. C. 248 Mad. Babu Sing *v.* Bihary, 30 All. 156. Baktandar *v.* Ram Sing, 35 I. C. 44 (Oude).

(3) Suraj *v.* Golab, 28 Cal. 517. Pran Krishna *v.* Jadu, 2 C. W. N. 603.

estate inclusive of the mortgaged property. (1) but any part of the property, which had passed into the hands of third parties, could not be sold. (2)

The Calcutta High Court in some recent cases held that the debt need not be antecedent to the mortgage in order to bind the son and the period of limitation for a suit upon it against the sons was 12 years. (3) The matter was recently referred to a Full Bench and it was held, following Luchmun *v.* Giridhur, that a mortgage by the father for a debt, which was neither antecedent or for family purposes, could not be enforced against the sons after the father's death and a suit for the purpose was barred after six years from the time when the debt incurred by the father matured. (4) Calcutta decisions.

It should be mentioned here that the Mitakshara in its commentary on Yajnavalkya Ch. 2 V. 92 expressly says that a mortgage with possession by the father is binding on the son and the grandson. That portion of the Mitakshara was not translated by Colebrooke and was never placed before the Judges. The matter is not open to subtle discussions whether antecedent means as being not immediately antecedent to the mortgage or whether it means that it must be one day or more prior to it. Again having regard to the

(1) Luchmans Das *v.* Giridhur, 5 Cal. 855 and Suraj Prosad *v.* Golab, 28 Cal 517.

(2) Khalilal Rahman *v.* Gobind Prosad, 20 Cal. 328. Contra Gunga *v.* Ajudhia, 8 Cal. 131.

(3) Moheswar Dutt *v.* Kissen Sing, 34 Cal. 184. Biswanath *v.* Jagdeep, 40 Cal. 342. Sheo Narayan *v.* Mothadi, 17 C W. N. 1024. Malita *v.* Brindesri Prosad, 40 Cal. 34, dissenting from Luchman Das *v.* Giridhur, 5 Cal. 855, Suraj Prosad *v.* Golab, 28 Cal. 517, Bhaghat *v.* Suba, 7 Cal. L. J. 95. Contra Krishna Prosad *v.* Ram Prosad, 20 C. W. N. 508, Kishun Pershad *v.* Tipan, 34 Cal. 735. See 16 C. W. N. 383.

(4) Brij Nandan *v.* Bidya Prosad, 42 Cal. 1068.

fact that the decision of Suraj Prosad *v.* Golab, which the recent Calcutta Full Bench follows, has been practically overruled by the recent Privy Council decisions.(1) its authority must be considered to be doubtful.

Patna decisions.

The recent decisions of the Patna High Court go to show that that Court is not prepared to follow Lala Suraj Prosad's case and the other cases of the Calcutta High Court based upon that decision.(2)

It has been held there that the liability of the son is not affected by the fact that there was no necessity or that there was no consent of the adult sons, and that the sons can get their shares exempted from liability only by proving affirmatively that the debt was contracted for immoral or illegal purposes (3), and that inadequacy of price can not invalidate an alienation by the father. (4) It has also been held that a charge created by the father is not enforceable after his death. (5)

Allahabad decisions.

In Allahabad, the majority of a Full Bench of five judges have held that the debt must be antecedent to the transaction or incurred for the purposes of the family in order to make a mortgage by the father binding on the son. (6) Justices Banerji, and Richard dissented from the view of the majority. The said Court has since held that even the father's share cannot be sold upon a mortgage by the father when

(1) Sheo Shunkar *v.* Musammut Jaddo, 36 All. 383 P. C. Durgadut *v.* Rameshwar, 36 Cal. 943 P. C. Kissen *v.* Har, 33 All. 272.

(2) Bhola Jhah *v* Karim Bakas, 1 Pat. L. J. 180.

(3) Bhagat Mal Sahu *v.* Abdul Karim, 1 Pat. L. J. 86.

(4) Jugol Kishore *v.* Raghubar, 34 I. C. 89.

(5) Jowala Prosad *v.* Protap, 1 Pat. L. J. 163, 37 I. C. 184.

(6) Chandradeo *v.* Mata Prasad, 31 All. 176 F. B. Contra Debi Dat *v.* Jadu, 24 All. 459. See Jamna *v.* Nain Sukh, 9 All. 456.

the debt is not antecedent to the transaction or for the purposes of the family. (1) This is clearly against the rulings of the Privy Council mentioned before.

In more recent cases, the Allahabad Court has held that when the son allows a mortgage by the father to go unchallenged till the suit is brought, it may be presumed that the son assented to it, when there is no evidence on either side, and the mortgage is binding on him (2).

A Full Bench of the Allahabad Court have also held that in case of a simple money decree the son's interest can be sold in execution (3).

In Madras, Sir Bhasyam Ayyangar held that there was no distinction between an antecedent debt and a present advance (4). But the decision was overruled by a Full Bench which held that the mortgage was not binding on the son, unless there was a debt antecedent to the transaction or justifying necessity (5). The judges however, said in their judgment that they were unable to adopt the view taken in Chidambara Mudaliar's case having regard to the word, antecedent, used in Suraj Bansi Koer's case, "although on principle they might be disposed to do so."

In Bombay, it was held by Sargent C. J. and Nanabhai Haridas J. in concurrence with West and Birdwood J. J. that "the father's disposition of the family estate, is made to affect the son's as

(1) Kalisunker *v.* Nawab, 31 All. 507.

(2) Kamta Parshad *v.* Sidh Narain, 14 I. C 251. Chuttun Lal *v* Kullu, 33 All. 283.

(3) Karan Sing *v.* Bhup Sing, 27 All. 16. F. B.

(4) Chidambara *v.* Koothaperumal, 27 Mad. 326.

(5) Vencataramana *v.* Vencataramana, 29 Mad 200. F. B.

well as the father's interest, except so far as the son can establish that voluntary disposal was made under circumstances which deprived the father of the disposing power." (1) Mr. Justice Ranade and Mr. Justice Barnes approved of this decision in a latter case and held that "ancestral property is available for the payment of the debt of the father, unless the son can prove that the debt was contracted for immoral or illegal purposes" (2). The judges held that a mortgage not proved to have been for family purposes was binding on the son. In another case however the rule was modified and it was held that the true rule was codified in Sec. 38 of the Transfer of Property Act which provides that "when any person authorized only under circumstances in their nature variable to dispose of immoveable property, transfers such property for considerations alleging the existence of such circumstances they shall as between the transferee on the one part and other persons (if any) affected by the transaction on the other part be deemed to have existed if the transferee after using reasonable care to ascertain the existence of such circumstances has acted in good faith" (3). The judges held that when there was no enquiry by the transferee the son would not be bound.

In a recent case (4) the Bombay High Court interpreted the cases of Luchman Das and Khalilur Rahman as laying down the rule that "a mortgage

(1) Chintamanrao *v.* Kashinath, 14 Bom. 320.

(2) Ramchandra *v.* Fakirappa, 2 Bom. L. R. 450. Sec. 24 Bom. 343, 9 Bom. L. R 125.

(3) Jamsetji *v.* Kashinath, 26 Bom. 326. See 4 Bom. L. R. 587 28 Bom. 461.

(4) Nathaji *v* Sitaram, 4 Bom. L. R. 587.

on specific property must in order to bind a son's interest in the property charged be in consideration of a debt antecedent to that mortgage but that if there was no debt antecedent to the mortgage, the debt which was contracted at the time of the mortgage itself will none the less be an obligation binding the general assets, if it is not immoral, for every such debt contracted by the father gives rise to a pious obligation on the part of his son to discharge it," and they held that "every non-immoral debt of the father binds the general assets from the first and so may constitute a joint family necessity which would thereafter justify a specific charge or alienation."

The rule that if the debt is antecedent, say by a day, to the mortgage, it binds the estate, but that it does not do so, if the consideration for the mortgage is paid at the time, is certainly based on earlier rulings of our Courts, but it is difficult to say that it is based on reason or any principle of law. The distinction is so fine, that for practical purposes it might have been disregarded.

The word 'antecedent' according to all the decisions was first used in Suraj Bunsi Koer's case, and admittledly there is no principle of Hindu Law underlying the rule that to support a mortgage the debt must be antecedent to it.

We have already seen that there is a conflict of decisions in the High Courts about the matter. The privy Council very recently noticed this conflict and settled it by laying down the following principles : (1) "In all these cases where it can be established that the estate itself that is under administration demanded or the family interests

justified, the expenditure then those entitled to the estate are bound by the transaction;" (2) "although the correct and general principle be that if the debt was not for the benefit of an estate then the manager should have no power either of mortgage or sale of that estate in order to meet such a debt, yet an exception has been made to cover the case of mortgage or sale by the father in consideration of an antecedent debt"; (3) "to call a borrowing made on the occasion of the grant of a mortgage an antecedent debt is to extend unduly and improperly the whole scope of the exception and that in order to validate such a transaction of mortgage, there must, to give true effect to the doctrine of antecedency in time, be also real dissociation in fact." (1)

The Smritis and the Commentaries make no distinction between an unsecured and a secured debt in regard to the liability of the son The Mitakshara in its commentary on Yajnavalkya II. 192 makes the matter clear and says that a debt unsecured and a debt secured by a pledge have both to be paid without any distinction by the son and the grandson and a pledge by the father may be enjoyed by the creditor till the debt is paid. This portion of the Mitakshara, which is to be found at p. 198 of the second volume, has never been before the judges. Again the rule of Hindu Law is clear, and it has been approved by our courts, that the sons cannot take even ancestral property, without paying the father's debts, for on partition the father's debts, which are not improper, should be first paid.

The Allahabad High Court in a recent

(1) Sahu Ram Chandra *v.* Bhup Sing, 21 C. W. N. 691 P. C. The judgment affirms the principles laid down in Chandradeo Sing *v.* Mata Prasad 31 All. 176.

case has also held that when the sons get themselves exempted because they had not been made parties to the suit against the father, the mortgagee can successfully bring a subsequent suit against the sons to enforce the mortgage and such a suit will not be barred by six years' limitation. (1) This is the result of the extraordinary position created by the ruling of Bhawani Prosad *v.* Kallu. But as the said ruling has since been overruled, sons can now bring a suit to declare their exemption from liability, not on the ground of their not having been made parties, but only on the ground of the immorality or illegality of the debt and a subsequent suit either by them or the creditor will not lie.

The Patna High Court in a recent case left open the question, whether a son deliberately and with notice omitted from a suit upon a mortgage can sue to redeem but held that he can not do so without setting aside the sale in execution within one year from its date. (2)

A son born or adopted after an alienation by the father by sale, mortgage or gift or after the father's share had been attached in execution of a money decree, or when he was in the mother's womb at the time, can not question such alienation and his share must pass under it or under the sale in execution of the decree under which the property had been attached. (3) The Calcutta High Court has held that an after-born son has got the equity of

Rights of after-born sons.

(1) Ram Sing *v.* Subharam, 20 All 544 Matadin *v.* Gaviadin, 31 All. 599. See 31 All. 176 F. B (2) Bhola Jha *v.* Karim, 1 Pat. L. 7 180. Ram Tarun *v.* Rameshar, 11 C. W. N. 1078. Balwant *v.* Aman, 33 All. 7.

(3) Hardi Narayun *v.* Rooder Perkash, 10 Cal. 626 P. C. Narain Das *v.* Hardval, 35 All. 571. Kumarsami *v.* Nangappa, 13 Mad. L J. 21. Chinna Pillay *v.* Kalimathu, 35 Mad. 49 F. B.. Bunwari Lal *v.* Dava Sunker. 13 C. W. N. 822 Bhola *v.* Kartic, 34 Cal. 872. Deo Narayun *v.* Gunga, 26 I. C. 871, 13 All. L. J. 69. Sundarajan *v.* Saravara, 30 Mad. L. J. 592.

redemption. (1) This is not consistent with the rule mentioned above.

It has been held that when an unjustifiable alienation is made by a father without the consent of the sons then living, it is invalid not only against them but also against any after-born son. (2)

In Madras and Bombay, where a coparcener can alienate his share for a consideration, an alienee is entitled to the share of such coparcener undiminished by the birth of an after-born son, who is however entitled to share equally with his brothers living at the time. (3) The death of the alienator before partition can not also divest the interest of the alienee because of the rule of survivorship. (4)

A will by the father however, can not defeat the right of a subsequently born son. (5)

Effect of separation on alienation.

An alienation by the father can not bind the share of a separated son, except when the separation was fraudulent. (6) Under the Hindu Law the son ought to be liable for his share of the debt of the father existing at the time of partition.(7)

When there was a partition after a mortgage but before the sale the Madras High Court held that the creditor shall have to bring another suit to enforce his decree against the son's share. (8) The Allahabad High Court has recently taken a different view and held that the son's share will pass in the sale against the father. (9)

The inalienability of ancestral land is now

(1) Bhola *v.* Kartic, 34 Cal. 872. (2) Hazarimul *v.* Abani. 17 Cal. L. J. 388. Murari Lal *v.* Jalipa, 30 Oud. L. J. 180. 34 I. C. 44. (3) Ganesh Row *v.* Tulja Ram, 26 Mad. L. J. 460. Shivaji Rao *v.* Vasant Rao, 10 Bom L. R. 778. (4) Aiyagiri *v.* Aiyagiri, 25 Mad. 196 F. B. (5) Hanmunt Ram Chandra *v.* Bhimacharya, 12 Bom. 105. Minakshi *v.* Virappa, 8 Mad. 89. (6) Krishnasami *v.* Ramasami, 22 Mad. 519. Rathna *v.* Aiyanachariar, 18 Mad. L. J. 599 (7) Sec 40 Cal. 407, 24 Mad. 555 (8) Krishnasami *v.* Ramasami, 22 Mad. 519. (9) Indar Pal *v.* Imperial Bank, 28 I. C. 593.

part of the ancient history of the law on the subject. As joint property is now considered alienable, unless the circumstances under which it is alienable are definite and easily ascertainable, the family would suffer most and all persons dealing with it would also very often suffer. These circumstances should not therefore be such as would be difficult to define or ascertain. The Hindu Lawgivers never left anything uncertain. The father should be considered as having full power to sell, to enter into an agreement to sell or to mortgage ancestral property, so as to bind the interests of the sons, minor or adult, whether for an antecedent debt or for his present necessities, unless the debt had been incurred for immoral or illegal purposes or the present necessities were brought about on account of such purposes. The sons should have the right to set aside such an alienation in a suit of their own, on proving that the father sold for debts or necessities for purposes immoral or illegal. It should be the duty of the alienee to ask the adult sons, if he has knowledge of them, to join their father in the transaction. When the transferee is proved not to have made any attempt to do so, the circumstances invalidating the sale should be presumed to have existed. But when the adult sons refuse to join or when the sons are minors, it should be the duty of the alienee to make reasonable enquiry upon which he should be satisfied on circumstances reasonably credited that the transaction was not in consequence of immoral or illegal acts of the father. If he satisfies the Court that he made such enquiry the alienation should be binding on the sons, even if they prove that in reality the debt or necessity was for immoral or illegal purposes.

As regards third parties purchasing in execution sales against the father, unless they are proved to be in collusion with the creditor or to have knowledge of the circumstances invalidating a sale, such sales should bind the sons, unless it is proved that only the father's interest was in fact sold.

Extent of interest passing under a sale by father.

A question is sometimes raised whether in a sale by the father, when the deed does not purport to convey more than his own interest surrounding circumstances can be looked into whether the executant purported to convey his own interest or the interest of the family. It has been held in Calcutta and Madras that notwithstanding the fact that on the face of the deed the father conveys his own interest only the entire family interest may have been intended to pass and under such circumstances the court will hold that that was in reality conveyed by the deed. (1) But there may be circumstancss under which it should be held that only the father's interest passed. (2) Having regard to the rulings of the Privy Council on this question mentioned above, it seems that the burden proving circumstances justifying the inference that the entire family property passed is on the purchaser. But as in the case of sales in execution, the question what passed in the sale depends on the question whether the sale was one for necessity or antecedent and not immoral debt and when there was necessity or such debt, it must be considered as a sale of the entire family property.

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(1) Kanti Chunder *v.* Bisheswar, 25 Cal. 585 F. B. Krishna *v.* Thamanna, 17 I. C. 497.

(2) Balwant Singh *v.* R. Rockwell, 34 All. 296 P. C. Simbhu Nath Pande *v.* Golap Singh, 14 Cal. 572 P. C.

Rights of creditors against sons during father's lifetime.

There was some difference of opinion in Madras, whether the sons could be made liable before the death of the father, A recent Full Bench have settled that a personal debt of the father may be enforced against the sons to the extent of the ancestral property, whether the father be dead or living (1).

The Allahabad Court have further held, in a recent case that both as regards a mortgage and an unsecured debt, the father and the son may not only be sued together, but the son may be sued separately, in respect of the same debt after a decree had been obtained against the father. (2)

Sons can be brought in as representatives of the father after his death in mortgage decrees and question of immorality can be tried only there.

A Full Bench of the Calcutta High Court have held that in execution of a decree for money against the father, the son might be brought on the record as his legal representative and the question decided whether the property in his hands was liable to be sold in satisfaction of the decree (3). The question whether the debt was immoral or illegal may also be tried in such proceedings. (4) It would follow from the above that when the sons are brought on the record a separate suit to try the question of their liability would not lie. (4)

The Madras Court has also, in the most recent case on the qestion adopted the Calcutta rule dissenting from its earlier decisions (5).

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(1) Ramsamy *v.* Ullaganatha, 22 Mad. 49.

(2) Dharam Sing *v.* Angan Lal, 21 All. 301.

(3) Amar Chandra Kundu, *v.* Sebak Chand Chowdhury, 34 Cal. 642.

(4) Chander Pershad *v.* Sham Koer, 33 Cal. 676. Shevram *v*, Sakheram, 33 Bom. 39.

(5) Bhagovatulu *v.* Yelesvarapu, 9 I. C. 648 2 Mad W. N. 198. Kurumah *v.* Mayan, 17 Mad. 255. Contra. Zemindar of Karvetna *v.* Trustees, 32 Mad. 429. Karnataka *v.* Hanu maiya, 5 Mad. 255, Ariabudra *v.* Dorasami, 11 Mad. 43, Luchmi *v.* Kunji, 13 Mad. 263. Sec. 27 Mad. 106, 29 Mad. 153.

The Bombay High Court have held that a simple money decree for the personal debt of the father may be enforced against the sons, after his death, in execution. (1)

A Full Bench of the Allahabad Court (2) have, also following a Calcutta case, (3) held, that the son, if he was brought on the record as representative of his father, could, under Sec. 244, C. P. C., raise the question, that the property, sought to be sold, was ancestral which he took by survivorship.

Whether sons and grandson's interest will pass in execution of decree against the son during father's lifetime.

In Madras, it has been held that a sale of the interest of a son during the lifetime of the father in execution of a decree upon a mortgage not binding on the family, will pass the interest of the son and of the grandson and when the father had made a gift of his own interest to the grandson, it was considered as a partition in the eye of the law. (4) But under the Hindu Law of the Rishis, a son is incompetent to execute a bond and a son's debts can never bind the family property, except when for necessity, and gift or no gift, the sale could pass no part of the family property.

Unsecured debt of the father creater no charge.

An unsecured creditor of a Hindu, it has been held, has no charge or lien on the inheritance (5) and if there be no attachment before the death of the father, a debt by him will not be a charge on the property in the hands of the son.

It is settled now that the son cannot be liable for the father's debts when there is no

(1) Umed Hathi Sing *v.* Goman Bhaji, 20 Bom. 385.
(2) Seth Chand *v.* Durga Dei, 12 All. 313.
(3) Rajrup *v.* Ramgolam, 16 Cal. 1.
(4) Kadegan, Peripa, 13 Mad. L. J. 477.
(5) Verankharaja *v.* Papia, 13 Mad. 258.

ancestral property. In Bombay, early decisions made the sons liable, even in such cases according to the strict letter of the Hindu Law, and it was considered necessary to pass an Act to declare the son's liability only to the extent of the property inherited by him. (Act 7 of 1866).

Son not liable when there is no ancestral property.

There is a solitary case in Bombay decided in 1865, which gave effect to the rule of Hindu Law that the grandson is liable to pay the grand father's debt without interest (1). A Full Bench of the Allahabad High Court have however, recently held that the rule cannot apply to the case where there are assets. (2) Mr. Justice Knox in deciding the case fell into the error of supposing that Dr. Jolly's divisions of his collection of the texts of Vrihaspati were the original divisions of the Smriti and that the non-liability of sons appears only in the division of debts for suretyship. The texts of Katyayana and Vyasa make it quite clear that in no case is the grandson liable for interest. The decision of the Allahabad Court is undoubtedly correct when the debt is incurred for the purposes of the family. But when it is not so contracted, the gradson who takes by survivorship can be made liable only under the rule of Hindu Law which lays down that, unless a debt is proved to be illegal or immoral, the son is liable to pay it with interst. But as I have already shown there is no foundation for the rule of survivorship in the Smritis, and it may be equitable to

Whether grandson liable to pay with interest.

(1) Nara Sinharav *v.* Krishnanav, 2 Bom. H. C. 64.

(2) Luchminaran Das *v.* Khunnualal, 19 All. 26. F. B.

disegard it in the case of debts and also to apply the modern doctrine that a debt means principal with interest to debts by Hindus.

The rule of the Smritis was an equitable rule of limitation. It extended the period of limitation for the recovery of debts to the death of the grandson, when the grandfather and the father failed to pay it during their lifetime, but at the same time it laid down that the creditor who made such delay should not get interest. The Lawgivers never intended that when there was no delay, the interest of the grandson could not be made liable for the interest during the lifetime of the father and the grandfather.

Limitation.

A suit for the enforcement of a mortgage executed by the father is governed by the 12 years' rule of limitation. If the mortgage be held, binding on the sons, who have not executed it the same rule will apply. We have already noticed the conflict of decisions on the question whether a mortgage, without necessity and without any antecedent debt to support it, will bind the son's interest and on the question of limitation in respect of remedies against the son. If there is a mortgage binding on the son, the limitation is 12 years; otherwise it is 6 years, when the debt is not immoral and it is sought to be realized from the family properly.

The remedies of the creditor against properties other than those that are mortgaged, as well as against the person of the executant, are barred by six years' limitation when the bond is registered.

It has been held in Allahabad that the liability of a son to pay his father's debts under the Mitak-

shara arises from the moment when the father fails to discharge his obligation and such claim is governed by Art. 120 of the Limitation Act (1). It appears however, that there is nothing in Hindu Law to justify the position that during the lifetime of the father, the right to sue the sons arises on his failure to discharge his obligation. As the liability of the sons extends only to the extent of the ancestral property, during the lifetime of the father when the sons are not separated from him, a decree against the father for a debt not immoral can be executed against the entire ancestral property by making or without making the sons parties to the suit or execution and there is no room for supposing that there is a separate cause of action or a different rule of limitation, when the sons' interests are sought to be sold. Thus the limitation applicable to a suit by a creditor is one and the same against the father and the son. It would be different if properties, other than grandpaternal or paternal, in the hands of the son could be followed in execution of a decree against the father on the strength of the ancient Aryan rule of the son's personal liability to pay the father's debt. In that case only, the hability of the sons will arise on the inability of the father to pay his debts. But the ancient rule became obsolete even during the time of the commentators, who laid down the rule that the liability of the sons extends up to the ancestral property in their hands after the death of the father. During the lifetime of the father, he completely represents his sons in regard to

(1) Champalal *v.* Sham Sundar, 13 I. C. 530

transactions regarding ancestral property, as the Privy Council has held, and thus there is no justification for extending the time for enforcing the remedies of the creditor of the father, when he seeks them against the sons.

Son not personally liable.

There can be no personal decree against the sons for a debt of the father. The remedies of the creditor are confined only to the sale of the ancestral properties in the hands of the sons, whose self-acquired properties are not liable.

Specific performance whether allowable in respect of ancestral property.

Whether specific performance of a contract of sale of ancestral property by the father can be enforced against the sons is a question of some difficulty, When the son is a minor, it has been held that, unless it is proved that it is for his benefit, it can not be enforced (1). When the sons are adult, it is difficult to see why the father should be able to bind the sons by a completed transfer for antecedent debts which are not immoral or illegal but should not be able to enter into a contract of sale so as to bind them. It has been held that there is no difference between the rights of minor and adult sons as regards alienations by the father and it is difficult to see why there should be any in respect of a contract of sale by the father. It is said that the circumstances which would justify an alienation by the father as codified in Sec. 34 of the Transfer Property Act, which enacts that there should be an allegation of necessity and reasonable enquiry by the alienee, would not justify a contract of sale. But the right of the father to

(1) Jamsetji *v.* Kashinath, 26 Bom. 326. Jugul Kishore *v.* Anand-Lal, 22 Cal. 545, Krishnasami *v.* Sundrappayyar, 18 Mad. 41 . Khairuna nesa *v.* Loke Nath, 27 Cal. 276.

to sell is a right under the Hindu Law.

Specific performance of a contract to sell for family necessity may be allowed in respect of joint family property (1), but not of the undivided share of a coparcener under the Mitakshara. (2) Under the Dayabhaga, it is allowable. In Madras also, it is allowable in respect of the interest of an undivided coparcener in the entire family property but not merely in a part of it.(3)

Effect of the recent circular under Sub-Rule 15 C. C. of the Bombay Court.

It has been held in Bombay that on account of Cl. 1 Sub Rule 15 of the Circular of that Court to the effect that "nc interest of any son, brother or other coparcener shall pass unless expressly specified for sale," the interest of any coparcener not advertised for sale can not now pass. (4) A circular can not abrogate a rule of Hindu Law. The Privy Council have held that when, pending a suit for declaration that the father's debt was immoral, an order was passed that the right title and interest of the judgment-debtor should be sold and it was so sold and the declaratory suit subsequently failed, the entire family property passed. (5)

When the son was exonerated because he was no party to the promissory note in suit, the decree could be executed against the properties of both father and son. (6) In Madras, a Full Bench has held that a decree debt against the father, though unavailable to attach the family property, can furnish a fresh cause of action for a suit against the sons.(7)

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(1) 38 Mad. 1191. (2) Sheikh Abdul *v.* Jadunandun, 21 I. C. 528. Janaki *v* Jamun, 22 I. C. 612. Ramdial *v.* Ajudhia, 28 All. 328. See L. R. 19 Q. B. 683, 20 Cal. 508. (3) Subba *v.* Venkatrama, 38 Mad. 1191, 26 Mad. 74, 32 Mad. 320, 33 Mad. 359, 23 Mad. L. J. 610. Mir Sarwarjan *v.* Fakaruddin, 11 C. W. N. 34 F. B. (4) Timappa *v.* Narsinh, 21 I. C. 123. (5) Sripat *v.* Maharaja Sir Prodyot, 21. C. W. N. 442. (6) Shiam Lal *v.* Gonesh, 28 All. 288. (7) Periasami *v.* Seetharam, 27 Mad. 243 F. B.

It has been held that, as under the Mitakshara the father's debts must be paid on partition, sons could not recover the whole or their share of the property sold by the father without refunding the whole of the consideration, without showing that the money had been obtained for immoral purposes. (1) The Allahabad Court has held that an alienation partially for necessity may be set aside in its entirety on payment of the part of the consideration that was for necessity or antecedent debt. (2)

Suit for possession in case of sale without necessity or for partial necessity.

When a sale is set aside, the vender, can obtain a decree against the sons for the consideration money, as a debt of the father. (3)

Property obtained on partition not assets liable for father's surely debt.

Property obtained by sons on partition is not assets of the father during his life-time and a decree for a surety-debt can not be enforced against it. (4)

Limitation.

A suit for possession must be brought within 12 years from the date when the alienee gets possession. (5)

THE JOINT HINDU FAMILY.

SECTION II.

यज्जिभूयं सन्नयति येन चानल्पमश्नुते।
स एव धर्म्यः पुत्रः॥*
प्रातिभाव्यं वृथादानं साक्षिकं सौरिकञ्च यत्।
दण्डशुल्कावशेषञ्च न पुत्रो दातुमर्हति॥
दर्शनप्रातिभाव्ये तु विधिः स्यात् पूर्व्वचोदितः।
दानप्रतिभुवि प्रेते दायादानपि दापयेत्॥
भ्रातरि पुनर्दाता विज्ञातप्रकृताहृतम्।
पश्चात् प्रतिभुवि प्रेते परीप्सेत् केन हेतुना॥
निरादिष्टधनैस्तु प्रतिभुः स्यादधनैः।
स्वधनादेव तद्दद्यान्निरादिष्टः सुतादिभिः॥
असौम्यसाक्षाध्यधीने लौकिके खादिरेऽथवा।
अलब्धप्रकृतर्नैव व्यवहारो न सिध्यति॥

(1) Hasmat Rai v. Gopal, 11 Cal. 396. (2) Ramdayal v. Suraj, 23 I. C. 891. (3) Raman v. Satha, 36 I. C. 387. (4) Devaguptapee v. Vaddadi, 24 I. C. 474. Ramchandra v. Kondayya, 24 Mad. 555. (5) Muhammad v. Mithu Lal, 33 All. 783; See 36 Bom. 135.

यद्गृहीता यदि नष्टः स्यात् कुटुम्बार्थे कृतो व्ययः ।
दातव्यं बान्धवैस्तत् स्यात् प्रविभक्तैरपि स्वतः ॥
कुटुम्बार्थेऽध्यधीनोऽपि व्यवहारं यमाचरेत् ।
स्वदेशे वा विदेशे वा तं ज्यायान्न विचालयेत् ।
कुसीदवृद्धिर्हैं गुरुं नात्येति सकृदाहृता ॥
धान्ये सदे खवे वार्द्धे नातिक्रामति प्रच्छताम् ॥

मनुः ८।१०७ ; ८।१५९-१६२, १६६, १६७, १५१ ।

That son alone on whom he throws his debt and through whom he obtains immortality, is begotten for (the fulfilment of) the law.

But money due by a surety, or idly promised, or lost at play, or due for spirituous liquor, or what remains unpaid of a fine and a tax or duty, the son (of the party owing it) shall not be obliged to pay.

This just mentioned rule shall apply to the case of a surety for appearance (only); if a surety for payment should die, the (judge) may compel even his heirs to discharge the debt.

On what account then is it that after the death of a surety other than for payment, whose affairs are fully known, the creditor, may (in some cases) afterwards demand the debt (of the heirs)?

If the surety had received money (from him for whom he stood bail) and had money enough (to pay), then (the heir of him) who received it, shall pay (the debt) out of his property; that is the settled rule.

A contract made by a person intoxicated, or insane, or grievously disordered (by disease and so forth), or wholly dependent, by an infant or very aged man, or by an unauthorised (party) is invalid.

If the debtor be dead and (the money borrowed) was expended for the family, it must be paid by the relatives out of their own estate, even if they are divided.

Should even a wholly dependent person (member) make a contract for the behoof of the family, the senior (managing

member of the family), whether in his own country or abroad, shall not rescind it.*

In money transactions interest paid at one time (not by instalments) shall never exceed the double (of the principal); on grain, fruit, wool, or hair, (and) beasts of burden, it must not be more than five times (the original amount).

Manu, IX. 107; VIII, 159-163, 166, 167, 151.

ऋक्थभाजि ऋणं प्रतिकुर्य्युः।
प्रातिभाव्यवधिक्शुल्कमद्यद्युतदण्डा न
पुत्रानध्याभवेयुः। चिरस्थानेऽर्द्धं गृह्यं। †

गौतमः १२। ४०, ४१, ३१।

The heirs shall pay the debts (or a deceased person).

Money due by a surety, a commercial debt,‡ a fee (due to the parents of the bride), debts contracted for spirituous liquor or in gambling, and a fine shall not involve the sons (of the debtor).

If (the loan) remains outstanding for a long time, the principal may be doubled (after which interest ceases).

Gautama, XII. 40, 41, 31.

धनयाहिषि प्रेते प्रव्रजिते द्विदशसमाः
प्रवसिते वा तत्पुत्रपौत्रे धनं देयम्॥
नातः परमनिच्छुभिः। सपुत्रस्य वा वाऽपुत्रस्य
वा ऋक्थग्राही ऋणं दद्यात्। निर्धनस्य स्त्रीग्राही
न स्त्री पतिकृतम्। न स्त्रीकृतं पतिपुत्रौ।

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* I have slightly altered the translation of Dr. Buhler in order to make the meaning more clear.

† ऋणप्रदातारस्य ऋक्थभाजः ऋणंप्रतिकुर्य्युः is the reading in the Saraswati-Vilasa. मद्यशुल्कद्युतदण्डा न पुत्रानव्याभवेयुः is the reading in the Vira-Mitrodaya. The reading in the Calcutta and Bombay editions of this text making दण्डा न as दण्डान् is clearly incorrect. See Vivada-Ratnakara, p. 68.

‡ 'Debt' is wrong. It should be 'toll' and a fee due to the parents &c. should be omitted, for Sulka here means tax or toll as in Manu 8 Ch. 158, cited above and not fee.

न पिता पुत्रकृतम्। अविभक्तैः कृतमृणं
यस्त्रिष्ठेत् स दद्यात्।* पैतृकमृणमविभक्तानां
भ्रातृणाञ्च। विभक्ताश्च दायानुरूपमंशम्॥
गोप-शौण्डिक-शैलूष-रजक-व्याधस्त्रीणां पतिर्दद्यात्।
वाक्प्रतिपन्नं कुटुम्बिना देयम्।
कस्यचित् कुटुम्बार्थे कृतञ्च।
दर्शने प्रत्यये दाने प्रतिभाव्यं विधीयते।
आद्यौ तु वितथे दाय्याविंतरस्य सुता अपि॥

विष्णुः ६। २३-३९, ४१।

If he who contracted the debt should die, or become a religious ascetic, or remain abroad for twenty years, that debt shall be discharged by his sons or grandsons. But not by remoter descendants against their will.

He who takes the assets of a man, leaving or not leaving male issue, must pay the sum due (by him).

And (so must) he who takes† as wife the widow left by one who had no assets.

A woman (shall) not (be compelled to pay) the debt of her husband or son. Nor the husband or son (to pay) the debt of a woman (who is his wife or mother). Nor a father to pay the debt of his son.

A debt contracted by coparceners shall be paid by any one of them who remains (living).‡

And so shall the debt of the father (be paid) by (any one of) the brothers (or their sons) before partition. But after partition they shall pay severally according to their shares of the inheritance.

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*The reading of Ratnakara of this Sutra is as follows:—

अविभक्तैः कृतमृणं तदेकोऽपि यस्तेषां मध्ये तिष्ठेत् स दद्यात्॥

† Dr. Jolly translates this part as 'takes care of the wife.' It is not correct. Nandapandita interprets it as I have translanted it. He says स्त्रियं भार्यात्वेन स्वीकरोति, &c.

‡ Dr. Jolly translates यस्त्रिष्ठेत् as 'who is present.' I think it means who survives. I have literally translated it as 'who remains.'

A debt contracted by the wife of a herdsman, distiller of spirits, public dancer, washer, or hunter, shall be disharged by the husband (because he is supported by his wife).

(A debt of which payment has been previously) promised must be paid by the householder.

And (so must he pay that debt) which was contracted by any person for the behoof of the family.

Suretyship is ordained for appearance, for honesty, and for payment; the first two (sureties, and not their sons), must pay the debt on failure of their engagements, but even the sons of the last may be compelled to pay it.

Vishnu, VI. 27-39, 41.

ऋणमस्मिन् सन्नयति ।

अथाप्युदाहरन्ति—

प्रतिभाव्यदत्तादानमाधिकसौरिकञ्च यत् ।
दण्डशुल्कावशिष्टञ्च न पुत्रो दातुमर्हति ॥
द्विगुणं हिरण्यं त्रिगुणं धान्यम् ॥

वशिष्टः १७।१ ; १६।३ ; २।४४

The father throws his debt on the son.*

Now they quote also (the following verse): A son need not pay money due by a surety, anything idly promised, money due for losses at play or for spirituous liquor, nor what remains unpaid of a fine or a toll.

(For principal and interest) double may be taken for gold (money) but treble for grain lent.†

Vasista, XVII. 1; XVI. 31; II. 44.

ऋणं लिख्यकृतं देयं पुरुषैः स्त्रिभिरेव तु ।
आधिस्तुभुज्यते तावत् यावत्तन्न प्रदीयते ।
अविभक्तैः कुटुम्बार्थे यद्ऋणञ्च कृतं भवेत ।

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* Debt here is usually understood by commentators as debt due to the Manes. But it meant temporal debts, also as I have shown before. The Sutra is the same as Vishnu, XV. 45, See Manu, IX. 107.

† I have not followed the translation of Dr. Buhler. I have put it in different words to make the passage clear.

दद्युस्तद्कुथिनः प्रेते प्रोषिते वा कुटुम्बिनि ॥
न योषित् पतिपुत्राभ्यां न पुत्रेण कृतं पिता ।
दद्यादृते कुटुम्बार्थान्न पतिः स्त्रीकृतं तथा ॥
सुरा कामद्यूतकृतं दण्डशुल्कावशिष्टकम् ।
प्रथादानं तथैवेह पुत्रो दद्यान्न पैतृकम् ॥
गोपशौण्डिकशैलूषरजकव्याधयोषिताम् ।
ऋणं दद्यात् पतिस्तेषां यस्माद्वृत्तिस्तदाश्रया ॥
प्रतिपन्नं स्त्रिया देयं पत्या वा सह यत्कृतम् ।
स्वयं कृतं वा यद्दत्तं नान्यत् स्त्री दातुमर्हति ।
पितरि प्रोषिते प्रेते व्यसनाभिप्लुतेऽथवा ।
पुत्रपौत्रे ऋणं देयमिक्ष्वे साक्षिभावितम् ॥
ऋक्थयाहृ ऋणं दाप्यः योषिद्दयाहृस्तथैव च ।
पुत्रोऽनन्याश्रितद्रव्यः पुत्रहीनस्य ऋक्थिनः ॥
दर्शनप्रतिभुर्यश्च मृतः प्राप्तयिकोऽपिवा ।
न तत्सुचा ऋणं दद्युः दद्युर्दानाय ये स्थिताः ॥
विभजेरन् सुताः पित्रोरूर्ध्वं ऋक्थमृणं समम् ॥
वस्त्रधान्यहिरण्यानाम् चतुस्त्रिद्विगुणाः स्मृताः ॥

याज्ञवल्क्याः २।८६, ४५—५२, ५४ ६६

A debt entered in a deed should be paid by three generations, but a pledge shall be enjoyed as long as the debt is unpaid.

A debt incurred by undivided kinsmen on account of the family shall be discharged by the heirs of the head of the family, should the latter die or leave the country.

A woman has not to pay a debt incurred by her husband or by her son, nor a father the debt of his son; except such debts be incurred on account of the family; it is the same with a husband (in respect of a debt) incurred by his wife.

A son has not to pay, in this world, his father's debt incurred for spirituous liquor, for gratification of lust, or in gambling; nor a fine, or what remains unpaid of a toll; nor (shall he make good) idle gifts.

As to debts or wives of herdsmen, distillers, players, washermen, and hunters, their husbands have to pay; because their maintenance depends upon their wives.

A debt acknowledged, one incurred by her jointly with her husband, one incurred by herself (solely)—these must be paid by the wife; none other need be paid by her.

If a father have gone abroad or been subdued by calamity, his debt shall be paid by his sons and grandsons; on their denial the debt must be proved by witnesses.

He who takes the property of one who leaves no (capable) son, shall pay the debts; so he who takes the widow; also that son whose paternal estate no other has appropriated, (and who in such case shall always be deemed fit to inherit propery;) and if one die without any son, then, whoseover succeeds to the property.

After the death of the parents, the sons should divide the wealth and the debts equally.

With interest, loans of cloth, paddy and gold may be increased four-fold, treble, and double respectively.

Yajnavalkya, II. 89, 45-52, 39.

पितर्य्युपरते पुत्रा ऋणं दद्युर्यथांशतः।
विभक्ता अविभक्ता वा यौ वा तामुद्धरेदृणम्॥
पित्र्येणाविभक्तेन भ्रात्रा वा यद्धनं कृतम्।
भ्रात्रा वा यत्कुटुम्बार्थे दद्युस्तद्रिक्थिनोऽखिलम्॥
क्रमादव्याहृतं प्राप्तं पुत्रैर्यन्नर्णमुद्धृतम्।
दद्युः पैतामहं पौत्रास्त्रयस्तुर्यान्निवर्त्तते॥
इच्छन्ति पितरः पुत्रान्स्वार्थहेतोर्यतस्ततः।
उत्तमर्णाधमर्णेभ्यो मामयं मोचयिष्यति॥
पूजनीयास्त्रयोऽतीता उपजीव्यास्त्रयोऽगताः।
एतत्पुरुषसन्तानमृणयोः स्यात्तुर्यके॥
न पुत्रर्णं पिता दद्याद्यात् पुत्रस्तु पैत्रिकम्।
कामक्रोधसुराद्यूतप्रातिभाव्यकृतं विना॥
पितुरेव नियोगाद्यत् कुटुम्बभरणाय वा।
ऋणं वा यत्कृतं कृच्छ्रे दद्यात् पुत्रस्य तत् पिता॥
मिथ्यान्नेवासिदासस्त्रीप्रेष्यक्रकरैश्च यत्।
कुटुम्बहेतोरुत्पन्नं दातव्यं तत्कुटुम्बिना॥

याहकी यदि नष्टः स्यात् कुटुम्बे च कृतो व्ययः।
दातव्यं ज्ञातिभिस्तस्य विभक्तैरपि तद्धनम्॥
दाप्यः परर्णमेकोऽपि जीवत्स्वविषुतैः कृतम्।
प्रेतेषु न तु तत्पुत्रः परर्णं दातुमर्हति॥
न स्त्री पतिकृतं दद्याद्धनं पुत्रकृतं तथा।
अभ्युपेताहते यद्वा सह पत्या कृतं भवेत्॥
दद्यादपुत्रविधवा नियुक्ता वा सुसुषुषा।
यो वा तद्रिक्थमादत्ते यतो ऋक्थहरं ततः॥
अप्राप्तव्यवहारश्चेत् स्वतन्त्रोऽपिनर्णभाक्।
सातन्त्र्यम्हिच्युतम् ज्येष्ठे ज्येष्ठं गुणवयःकृतम्॥
न च भार्याकृतमृणं पत्युर्वापि कथं भवेत्।
आपत्कृताहते पुंसां कुटुम्बार्थाय हि दुस्तरः॥
अन्यच्च रजकव्याधगोपशौण्डिकयोषिताम्।
तेषां तत्प्रत्यया वृत्तिः कुटुम्बं च तदाश्रयम्॥
भार्या स्नुषा च भृत्यश्च भार्य्यायाश्च परिग्रहः।
एतावद्भिर्धनं देयं भूमिं यश्चोपजीवति॥
यच्चिष्टं पितृदायेभ्योदत्त्वर्णं पैत्रिकं च यत्।
भ्रातृभिस्तद्विभक्तव्यमृणी न स्याद्यथा पिता।
हिरण्यधान्यवस्त्राणां वृद्धिर्द्विश्चियतुर्गुणाः॥*

नारदः १।२—६, १०—१३,
१५—१९, २५, १३। ३२, १। १०७।

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* The Mitakshara cites the following text as one of Narada.—

नर्ध्वाक् सम्वत्सरादिं ज्ञात्पितरि प्रेषिते सुते।
ऋणं दद्यात् पितृव्ये वा ज्येष्ठे भ्रातर्यथापि वा॥

The following texts are cited as Narada's in the Vivada Tandava.

पित्रा पितर्णसम्बन्धमात्मीयं चात्मनाकृतम्।
ऋणमेवं कृतं शोध्यं विभागे बन्धुभिः सह॥
धर्म्मार्थं प्रीतिदत्तं च यद्धनं स्वेन योजितम्।
तद्भ्रियमाणं विभजेन्न दानं पैत्रिकाद्धनात्॥

The penalty for non-payment of debts according to Narada is that th debtor is born as the slave of the creditor's house:

कीटिभूते तु सम्भूर्णे जायते तस्य वेश्मनि।
ऋण संशोधनार्थाय दासो जन्मनि जन्मनि॥

नारदः ३।८।

The father being dead, it is incumbent on the sons to pay his debt, each according to his share (of the inheritance), in case they are divided in interest. Or if they are not divided in interest, the debt must be discharged by that son who is the manager of the estate.

That debt which has been contracted by an undivided paternal uncle, brother or mother, for the benefit of the household must be discharged wholly by the heirs.

If a debt has been legitimately inherited by the sons and left unpaid, such debt of the grandfather must be discharged by his grandson. The liability for it does not include the fourth in descent.

Fathers wish to have sons on their own account, thinking in their minds: "He will release me from all obligations towards superior and inferior beings."

Three deceased (ancestors) must be worshipped, three must be reverenced before the rest. These three ancestors of a man may claim the discharge of their two-fold debt from the fourth in descent.

A father must not pay the debt of his son, but a son must pay a debt contracted by his father, excepting those debts which have been contracted from love, anger, for spirituous liquor, games or bailments.

Such debts of a son as have been contracted by him by his father's order, or for the maintenance of the family or in a precarious situation must be paid by the father.

What has been spent for the household by a pupil, apprentice, slave woman, menial or agent, must be paid by the head of the household.

When the debtor is dead and the expense has been incurred for the benefit of the family, the debt must be repaid by his relatives (agnate members of the family) even though they be separated from him in interests.

Every single coparcener is liable for debts contracted by another coparcener if they were contracted while the coparceners were alive and unseparated. But after their death, the son of one is not bound to pay the debt of another.

The wife must not pay a debt contracted by her husband,

nor one contracted by her son, except if it had been promised by her, or contracted in common with her husband.

A sonless widow, and one who has been enjoined by her dying husband (to pay his debts) must pay it, or (it must be paid) by him who inherits the estate. (For) the liability for debts goes together with the wealth.*

A debt contracted by the wife shall never bind the husband unless it had been contracted at a time when the husband was in distress. Household expenses are indispensably necessary. The wives of washermen, huntsmen, cowherds and distillers of spirituous liquor are exempt from this rule. The income of these men depends on their wives, and the household expenses have also to be defrayed by the wives.

A wife, a daughter-in-law, a servant, he who marries the widow: by these have debts to be paid, as also by one who lives on the produce of land (inherited from the) (debtor).

What is left (of the father's property), after paying the father's debts, shall be divided by the brothers, in order that their father may not continue a debtor.

The (maximum) increase allowed of gold, grain, and clothes (lent on interest) is double, treble and four-fold (of the principal respectively).†

Narada, I. 2-6, 10-13, 15-19, 25; XIII. 32; I, 107.

अभावे च पितुः सुतैः ॥

पित्रामेवायती देयं पश्चादात्मीयमेव च ।
तयोःपैतामहं पूर्व्वं देयमेवऋणं सदा ॥
ऋणमात्मीयवत् पित्रा पुत्रैर्देयं विभावितम् ।
पैतामहं समं देयं न देयं तत्सुतस्य तु ॥

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* ऋक्थम् means wealth and not right of succession as translated by Dr. Jolly.

† The translation of Dr. Jolly is incorrect. He says interest may rise till it be double. It should be 'principal and interest'; वृद्धिः is not interest, but increase.

His translation of the preceding two verses is also incorrect. I have not therefore followed his translation there too.

पितव्यभ्रातृपुत्रस्त्री दासशिष्यानुजीविभिः ।
यदृग्गृहीतं कुटुम्बार्थे तदृग्गृही दातुमर्हति ॥
सौराधिकं तथादानं कामक्रोधप्रतिश्रुतम् ।
प्रातिभाव्यं दण्डशुल्कशेषं पुत्रान्न दापयेत् ॥
ऋणभाग्दव्यहारी च यदि सीपद्रवः सुतः ।
स्त्रीहारी तु तथैव स्यादभावे धनहारिणः ॥
शौण्डिकव्याधरजकगोपनापितयोषिताम् ।
अधिष्ठाता ऋणं दाप्य स्तासां भर्तृक्रियासु तत् ॥
हिरण्ये द्विगुणा वृद्धिः :

बृहस्पतिः ११।४८—५३, १३*

If the father is no longer alive, (the debt must be paid) by his sons. The father's debt must be paid first of all, and after that a man's own debt; but a debt contracted by the paternal grandfather must always be paid before these two even.

The father's debt, on being proved, must be paid by the sons, as if it were their own; the grand-father's debt must be paid by his son's son without interest; but the son of a grandson need not pay it at all.

When a debt has been incurred, for the benefit of the household, by an uncle, brother, son, wife, slave, pupil, or dependant, it must be paid by the head of the family.

Sons shall not be made to pay (a debt incurred by their father) for spirituous liqnor, for idle gifts, for promises made under the influence of love or wrath, or for suretyship; nor balance of a fine or toll (liquidated in part by their father).

The liability for debts devolves on the successor to the estate when the son is involved in calamity, or on the taker of the widow, in default of a successor to the estate.

Debts contracted by the wives of distillers of spirituous liquor, hunters, washermen, herdsmen, barbers or the like persons, shall be paid by their protector; for they were contracted for the affairs of their husbands.

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* ऋणं पुत्रकृतं पित्रा शीघ्रं यदनुमोदितम् ।
सुतस्नेहेन वा दद्यान्नान्यथा दातुमर्हति ॥
Is also a text of Vrihaspati, cited in the Vivada-Ratnakara.

On gold and other precious metals (the interest may make (the debt) double.

Vrihaspati, XI. 48-53, 13.

पित्र्यार्णे विद्यमाने तु न च पुत्री धनं हरेत् ।
देयं तन्निकृते द्रव्यं मृते पुत्रस्तु दाप्यते ॥
यद्दृष्टं दत्तशेषं वा देयं पैतामहन्तु तत् ।
सदोषं व्याहृतं पित्रा नैव देयमृणं क्वचित् ॥
पित्रा दृष्टमृणं यत्तु क्रमायातं पितामहात् ।
निर्दोषं नीकृतं पुत्रै र्देयं पौत्रैस्तु तद्भवेत् ॥
पैतामहन्तु यत् पुत्रै र्न दत्तं रोगिभिः स्थितैः ।
तत् स्यादैवंविधं पौत्रैर्देयं पैतामहं समम् ॥
प्रातिभाव्यागतं पौत्रैर्दातव्यं न तु तत् क्वचित् ।
पुत्रैरपि समं देयमृणं सर्व्वत्र पैटकम् ॥
गृहीत्वा बन्धकं यत्र दर्शनेऽस्य स्थिती भवेत् ।
विना पिटधनात्तस्माद्ग्राह्यः स्यात्तद्धनं सुतः ॥
पित्रभावे तु दातव्य मृणं पौत्रेण यत्नतः ।
चतुर्थेन यदादत्तं तस्मात्तन्निवर्त्तयेत् ॥
विद्यमाने तु रोगार्त्ते स्वदेशात् प्रोषिते तथा ।
विंशात् संवत्सराद्देयमृणं पिटकृतं सुतैः ॥
व्याधितोन्मत्तबालानां तथा दीर्घप्रवासिनाम् ।
ऋणमेवंविधं पुत्रान् जीवतामपि दापयेत् ॥
सान्निध्येऽपि पितुः पुत्रै र्ऋणं देयं विभावितम् ।
जात्यन्धपतितोन्मत्तक्षयश्वित्रादिरोगिणः ॥
एकच्छायाकृतं सर्व्वं दद्यात्तु प्रोषिते सुतः ।
मृते पितरि प्रिवंशं परर्णं न कदाचन ॥
एकच्छायाप्रविष्टानां दाप्यो यस्तत्र दृश्यते ।
प्रोषितस्य सुतः सर्व्वं पित्रंशर्णं मृतस्य च ॥
कुटुम्बार्थमशक्तेन गृहीतं व्याधितेन वा ।
उपप्लवनिमित्तञ्च विद्यादापत्कृतन्तु तत् ॥
कन्यावैवाहिकञ्चैव प्रेतकार्य्यं च यत् कृतम् ।
एतत् सर्व्वं प्रदातव्यं कुटुम्बेन कृतं प्रभोः ॥

प्रोषितस्यामतेनापि कुटुम्बार्थकृतं ऋतम् ।
दासस्त्रीमाद्यगिण्यै वा दद्यात् पुत्रेण वा भृगुः ॥
ऋणं पुत्रकृतं पित्रा न देयमिति धर्मतः ।
देयं प्रतिश्रुतं यत् स्यादृद्यश्च स्यादनुवर्षितम् ॥
देयं भार्याकृतमृणं भर्त्रा पुत्रेण माद्यकम् ।
भक्तार्थं कृतं यत् स्यादभिधाय गते दिशम् ॥
भर्त्रा पुत्रेण वा सार्धं कैवलीनात्मना कृतम् ।
ऋणमेवंविधं देयं नान्यथा तत्कृतं स्त्रिया ।
मर्त्तुकामेन वा मर्त्रा उक्ता देयमृणं त्वया ।
अप्रपन्नापि सा दाप्या धनं यद्याश्रितं स्त्रिया ॥
ऋणं तु दापयेत् पुत्रं यदि स्यान्निरुपद्रवः ।
द्रविणार्हश्च धुर्यश्च नान्यथा दापयेत् सुतम् ॥
व्यसनाभिप्लुते पुत्रे बाले वा यत्र दृश्यते ।
द्रव्यं कृद्धापयेत्तत्र तस्याभावे पुरस्थितः ॥
नाप्राप्तव्यवहारेस्तु पितर्यूर्ध्वं परेते क्वचित् ।
काले तु विधिना देयं वसेयुर्नरकेऽन्यथा ॥
निर्धनैरनपत्यैस्तु यत् कृतं शौण्डिकादिभिः ।
यः स्त्रीणामुपभोक्ता तु दद्यात्तदृणमेव हि ॥
अमतेनैव पुत्रस्य प्रधना यान्यमाश्रयेत् ।
पुत्रेणैवापहार्यं तद्धनं दुर्व्यसनिभिर्विना ॥
या स्वपुत्रन्तु जह्यात् स्त्री समर्थमपि पुत्रिणी ।
आहृतं स्त्रीधनं तत्र पित्र्यर्णं शीघ्रयेन्नरः ॥
दीर्घप्रवासिनिर्बन्धुजड़ोन्मत्तादिलिङ्गिनाम् ।
जीवतामपि दातव्यं तत् स्त्रीद्रव्यसमाश्रितैः ॥
मणिमुक्ताप्रवालानां सुवर्णरजतस्य च ।
तिष्ठति द्विगुणा वृद्धिः फलकैटाविकस्य तु ॥

मयूखरत्नाकरादिधृतकात्यायनवचनानि ।

While the father's debts remain (unpaid), the son shall not take the wealth of the father, which should be made over to the creditor; where (the father dies) without wealth, the son should be made to pay.

A debt of the grandfather which is proved, or what remains unpaid of a gift should be paid. A debt of the father which is tainted with immorality, or which was disputed by him, should not be paid.

A debt of the father which is proved, an ancestral debt which has descended from the grand-father, if faultless and unpaid, is to be paid by the sons and grandsons, according to Bhrigu.

A debt of the grandfather, unpaid by his sons who are afflicted with disease, that should likewise be paid by the grandsons, without interest.

The debt of suretyship need on no account be paid by the grandsons, but must be made good by the son, without interest.

Should a man become surety for the appearance of a debtor, on receipt of a pledge from him, his son shall be compelled to pay that debt, even when without assets from his father.

When the son is dead, the grandson will pay, with care, the debt (up to the amount received as debt), and also the debt incurred by the fourth in ascent. Beyond him the liability ceases.

The debt (contracted) by the father, who, though living, is afflicted with disease, or has remained away from his country, shall be paid after the twentieth year.

Sons should be made to pay such debts of the father who is living, but who is diseased, insane, old, or gone out of his country for a long time.

Even when the father is near, sons should pay the proved debts of a father who is blind from birth, outcast, insane, or ill of consumption, &c.

When the father has incurred a debt together with another, the son should pay it when the father is absent in a foreign country, but when the father is dead, he should pay only the father's share of the debt, and never the debt of the other.

When debts are contracted jointly, whoever is found shall be made to pay. If the father is absent, the son should pay the whole, but if he is dead, the son should pay only the father's share.

A debt contracted for the support of the family on account of inability or illness or dire misfortune, know that as a debt incurred in danger.

A debt incurred for a daughter's marriage, or for obsequial ceremonies; all these (debts) when contracted by a (dependent) member of the family should be paid by the managing member.

Bhrigu says, that debts contracted for family (purposes), though without authority, by the slave, wife, mother, pupil, or son of one who has gone on a distant journey, shall be paid.

The debt incurred by the son is not legally payable by the father, except that which is promised to be paid (by him at the time of taking the loan) or afterwards acknowledged (as payable.)

A debt contracted by the wife should be paid by the husband, and (one contracted) by the mother (should be paid) by the son, when it is contracted for maintenance, when one goes away without providing for them, permitting them to contract debts (or without so permitting).

A debt contracted together with the husband or son, or only by herself, should be paid by a woman, and no other.

A wife who has been addressed by her dying husband (thus) "you shall pay my debts," shall be made to pay though unwilling, if she has received wealth.

The son shall be made to pay the debts (of his father) when he is capable of inheriting wealth, not being sfflicted with any incurable disease, and is capable of bearing the debt, but not otherwise.

When the son is found in distress, *i. e.*, "afflicted with disease," &c., or is a minor, he who takes the wealth or the wife should be made to pay.

When the father is dead (the debt) should not be paid by minor sons; when they are of age they should pay according to their share (or the wealth they receive); otherwise they go to hell.

The debt contracted by sellers of spirituous liquor, (fishermen), &c., when they die without wealth or children, should be paid by the person who enjoys their women.*

* It appears from this text that the rule about payment of debts by the taker of wife refers to these lower castes.

When without the consent of the son, a woman with wealth takes to another man, if she has got no daughters, her Stridhana should be taken by the son.

A woman with a son if she deserts a capable son, he (the son) should pay off the father's debt by taking all her Stridhana. So says Manu.

Of persons who are long absent in foreign countries, or without kinsmen, or are idiots, afflicted with insanity, &c., or ascetics, even when they are living, they who take their wealth or their wives should pay the debts.

For gems, pearls and coral, for gold and silver, for fruits, and for cloth made of silk and wool the increase (of principal with interest) can be only twofold.

Texts of Katyayana, cited, some in the Ratnakara, and others, in the Mayukha and Vira-Mitrodaya, Smriti-Chandrika,&c.

भ्राता पितृव्यमातृभ्यां कुटुम्बार्थकृतं कृतम् ।

विभागकाले दैयं तद्दक्षिभिः सर्व्वमेव तु ॥

स्मृतिचन्द्रिकासरस्वतीविलासधृतकात्यायनवचनम् ।

A debt contracted by a brother, uncle or mother, for the purposes of the family should be paid by the co-sharers at the time of division. Katyayana, cited in the Saraswati-Vilasa.

ऋणं पेतामहं पौत्रः प्रातिभाव्यागतं सुतः ।

समं दद्यात्तत्सुतौ तु न दाप्याविति निश्चयः ॥

मयूखधृतव्यासवचनम् ।*

The grandson shall pay the debt of the grandfather, and the son should pay the debt of suretyship without interest. Their sons *i.e.*, son of the grandson in respect of the grandfather's debt, and the son of the son in respect of the suretyship debt should not be made liable : this is the settled law

Vyasa, cited in the Mayukha and Apararka.

दण्डं वा दण्डशेषं वा शुल्कं तच्छेषमेव वा ।

न दातव्यन्तु पुत्रेण यच्च न व्यवहारिकम् ॥

मिताक्षराधृतौशनसवचनम् ।

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* हिरण्ये द्विगुणीभूते कालं कृतेऽवधौ ।

वन्धकस्य धनी स्वामी द्विसप्ताहं प्रतीक्षते ॥

A text of Vyasa, cited in the Ratnakara.

The son has not to pay a fine or the balance of a fine, or a tax (or toll), or its balance (due by the father), nor that which is not proper. Vyasa, according to the Ratnakara, but Usana, according to the Mitakshara.

लिखित्वा मुक्तकं वापि देयं यत्तु प्रतिश्रुतम्।
परपूर्व्वस्त्रियै तत्तु विद्यात् कामकृतं ऋणम्॥
यत्र हिंसां समुत्पाद्य क्रोधाद्द्रव्यं विनाश्य वा।
उक्तं तुष्टिकरं यत्तु विद्यात् क्रोधकृतन्तु तत्॥

रत्नाकरधृतव्यासवचनम्।

The debt due upon a written bond or on a promise, to a woman who was another's before (and not married by him), is called a debt for love.

Having done an injury to another or destroyed his things through anger, if anything is promised in satisfaction, it is called a debt for anger.

Vyasa cited in the Ratnakara.

सुराकामद्यूतकृतं वृथा दानं तथैव च।
दण्डशुल्कावशिष्टञ्च पुत्रो दद्यान्न पैतृकम्॥
पितरि प्रोषिते प्रेते व्यसनाधिष्ठितेऽपि वा।
पुत्रपौत्रैरृणं देयं निह्नुते साक्षिचोदितम्॥

बृहद्धारीतः ४। १४२, १४७

Debts incurred for spirituous liquor, lust, gambling, what is idly promised as gift, or what remains unpaid of a fine or a tax or duty: (these debts) of the father, the son should not pay.

When the father is absent in a distant country, or dead, or overwhelmed by calamity, his debt should be paid by his sons and grandsons; if concealed, when proved by witnesses.

Vriddha-Harita, IV. 142, 147.

स्थावरे विक्रयो नास्ति कुर्य्यादाधिमनुज्ञया।

विवादताण्डवधृतस्मृतिवचनम्।

Of land there cannot be a sale. It can only be mortgaged with the consent of the coparceners.

Text of a Smriti cited in the Mitakshara and the Vivada Tandava without naming the author.

SECTION III.

Partition.

"Where a partition of the paternal property, is instituted by the sons, it is called by the learned, partition of property, Dayabhaga—a title of property." So says Narada. So say all the lawgivers. The Hindu Lawgivers did not allow any right to the son to get a partition of property, as long as the father lived, or against his wish. The son, who got separated from his father and obtained partition of the family, was according to Baudhayana very nearly an outcast and one who should not be invited to a Sraddha. All the other lawgivers also ordain that a son who quarrels with his father should not be invited to a Sraddha. Probably they meant one who got partition from his father. According to some, one who is an enemy of his father is disqualified from getting any share. It is clear, however, that in ancient times among Hindus, the son was considered as having as much right to ancestral property as the father, and though it was immoral and against the law as laid by the lawgivers, he could get his share of the property when he liked. The beautiful parable of the prodigal son begins with these words: "A certain man had two sons. And the younger of them said to his father, give me the portion of goods that falleth to me. And he divided unto them his living."* A beautiful variant of this, the most beautiful of

Rights of the son under ancient law.

* If the son had no right among the Jews to compel his father to partition it is very curious to find the story where we find it.

parables, also appears in the Buddhistic Sutras, composed about two centuries before the Christian era.* In India, prodigal sons sometimes, compelled their fathers to give them a share of the property. That in very ancient times sons had no rights is clear from the texts. The *patria potestas* of the Roman law shows that it was the same with the Latin branch of the Aryan race. How then came the idea of the equal right of sons to be recognized in India? That the change was not introduced by the Mitakshara, as is stated by Babu Golap Chandra Sircar and other writers, is apparent from the texts and from what is stated above. The old Aryan law of the son, wife and slave being without independent rights is repeatedly stated by the lawgivers but still all of them recognize the equal right of the son to ancestral property. Probably, it was only another way of expressing the ancient Aryan law that land belonged to the family and was inalienable It appears that since the time of the Vedas, sons assumed great importance from the idea inculcated in some of them that the son is another body of the father, who as soon as he is born frees the latter from the three debts and upon whom devolves the debt of the ancestors. It is probably on this idea that the idea of the right of the son to the property of the ancestors on birth had its origin. The idea got firm hold of the Hindu mind, long before the Smritis were composed. The Lawgivers wanted to go back to the old law and ordained that there could be no partition against the father's wish, and they imposed a penalty upon such undutiful conduct.

* See Saddharma Pundarika—Sacred Books of the East, Vol. XXI., p. 100.

Nevertheless they had to declare that father and son had equal rights in ancestral property and also to recognize partition by the sons in the father's lifetime and define the rights of sons born after partition. This probably was a remnant of the ancient Aryan custom evidenced by the texts of the Vedas cited in this section, according to which the father always divided his wealth among his sons when old.

Son's right partition under the Smritis.

The increase in the number of prodigal sons and abhorrence of their conduct, propably led the lawgivers to modify the idea of the almost sacred character of the son and to revert to the original law which had never become obsolete, namely, that the son had no rights during the lifetime of the father and that there could be no legal dispute between father and son, husband and wife, master and slave.

The law as found in the Smritis is as follows :—

Rules of the Smritis.

(1) The son has no right to enforce partition against the father's wishes during his lifetime.

(2) The father is recommended to make a partition among his sons, when old, and to retire to the forest or live in the house indifferent to worldly affairs.

(3) The father can make any division of self-acquired property he likes.

(4) There can be no partition when one of the coparceners is a minor under sixteen.

(5) The wives, as well as the mothers, of the father, are entitled to share equally with the sons.

(6) As regards property derived from the paternal grandfather, the father and the son have equal rights in it, and an unequal division is not allowed.

(7) On a partition, an unmarried sister is entitled to a fourth share of the inheritance. This was imperative and the rule was enforced by a very severe penalty—the penalty of being made *Patita.*

(8) Sons take the shares of their predeceased fathers and likewise grandsons and great-grandsons. A joint-family consists of the descendants of one person up to the fourth generation. Beyond that, there is division in the eye of the law.

(9) What has been earned by one's valour or otherwise by his own efforts without the help of the family or the family property, what has been earned by learning or received with the wife at marriage or what has been received by him by way of gift from father, mother or friend, belongs to him exclusively.

10. When property has been acquired by the coparceners with the help of one another or when every body brought his own earnings into the common fund, there should be an equal division of the whole.

11. A son born after partition shall alone take the property of his father and also of his mother, if there are no daughters. *If any of the sons be re-united with the father, they shall all share equally.

12. Property dedicated to pious uses or for sacrifices, the family god and the house for such god are also indivisible. Originally these and the paternal dwelling-house belonged to the eldest son. This was the original law. Afterwards the law was changed and every thing which was productive of profit was made divisible by Vrihaspati overruling previous law on the matter. It is one of the

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* See Parasara Madhava

few instances of one law-giver expressly overruling other lawgivers.

13. Partition can be made only once and can be reopened only in case of concealment subsequent arrival of a coparcener from abroad and like causes.

14. The rule of succession is the same in the case of members of a divided and of an undivided family. But the commentators have modified the rule by the addition that in case of an undivided family, heirs, who are females or claim through females, cannot take. The Dayabhaga cites a text of Yama, which is not cited by any other commentator according to which joint immoveable property is taken simultaneously by both the full-brother and the step-brother, but the latter is excluded in regard to separate immoveable property.

Definition of heritage and partition according to Mitakshara.

According to the Mitakshara, as we have already seen, "Daya or heritage signifies wealth which becomes the property of another, solely by reason of relationship to the owner" and not on account of the death of the owner. Partition according to the writers of the Mitakshara School is the "adjustment into specific portions, of divers rights of different members accruing to the whole of the family property."

Apararka's definition.

According to Apararka "partition does not create a new right; it only places the ownership of each of the joint owners in his share of the estate."

The definition of partition and heritage according to Dayabhaga.

According to the Dayabhaga, on the other hand "heritage is used to signify wealth, and property dependent on relation to the former owner arises on the demise of that owner" and partition is the "allotment of separate portions of the family property

to the co-sharers corresponding to the shares already owned by each."

Mitakshara and Dayabhaga systems compared.

The nature of the interest taken by members of a joint family according to the different schools has already been described, and need not be recapitulated here. The Dayabhaga joint family consists of coparceners, who will be regarded as divided according to the Mitakshara but who are only living in joint mess and joint worship with joint management of property. The Dayabhaga joint family like the Mitakshara family is distinguished from ordinary co-owners of property by the fact that as long as they live joint, there is no separate account kept of the income of the share of each coparcener and of the expenditure actually incurred on himself and his branch of the family, all being jointly liable to pay for the entire family expenditure; and also by the fact that the manager has got powers which are described in Sec. 1, which are not possessed by ordinary joint managers.

Let us proceed to the consideration of the cases. Partition under both the schools, when completed, is a division of interest as well as of possession. Under the Dayabhaga the son is not co-owner with the father and all coparceners are tenants-in-common to whom the ordinary rules of partition of such tenures apply. The difficulty is to ascertain the incidents of the Mitakshara family.

What would constitute partition under the decisions—agreements about partition.

Upon the peculiar nature of the legal status of the Mitakshara family created by Vijnaneswara, it has been held that an agreement to hold the property in certain specific shares, verbal (1) or by

(1) Rewan Prosad *v.* Radha Bie, 4 Moore 16, 7 W.R.P.C. 358 Ram Chandra *v.* Damodar, 20 Bom. 467.

deed, (1) without actual division of the property, if there was an intention of present separation of the family, (2) constitutes such partition, as would make the coparceners separate members without rights of survivorship, even if there be no actual division of property. (3) An Ekrarnama, which stated that defined shares had been allotted to the several coparceners was separation in law though some of the coparceners lived jointly after it. (4)

Decrees and arbitration awards of partition-effect of.

A decree in which there is a numerical division by which the share of each is fixed, but no partition by metes and bounds is a valid, separation. (5) A decree or judgment, (6) or an award, (7) for partition operates as a severance of interest from its date. In Bombay, however, it has been held, that a decree for partition, pending in appeal or not executed is not sufficient.(8) The Bombay rule cannot be supported in view of the recent Privy Council decisions.

A Full Bench of the Madras High Court has recently held that the mere institution of a suit for partition constitutes separation. (9)

It was held in Allahabad that where by an arbitration award property was divided and one share was given to an uncle and another jointly to two nephews, the latter could not be considered

(1) Appovier *v.* Rama Subba Ajyan, 11 Moore. 75, 8 W. R. P. C. Ashabai *v.* Hagi, 9 Bom. 115. Ade Deo *v.* Dukharan, 3 All. 532. Anant *v.* Damodari, 13 Bom. 25. Balkissen *v.* Ramnarain, 30 Cal. 738 P. C. (2) Tej Pratab *v.* Champa Kali, 12 Cal. 96. (3) Gajapathi *v.* Gajapati, 13 Moore. 497, 14 W. R. P. C. 33. (4) Balkishen *v.* Ramnarain, 30 Cal. 738 P. C. Musummat Kisore *v.* Musummat Mandra, 10 I. C. 365. (5) Rampershad *v* Lakhpati, 30 Cal. 231 P. C. (6) Joynarain *v.* Grish Chandra, 4 Cal. 434 P. C. Chidamboram *v.* Gouri, 2 Mad. 83. Subbaraya *v.* Manika, 19 Mad. 345. Lukhmeon *v.* Narayan, 24 Bom. 182.

(7) Krishna Panda *v* Balaram, 19 Mad 290. Subbaraya *v.* Sadasiva, 20 Mad. 490. (8) Sakharan *v.* Hari Krishna, 6 Bom. 113.

(9) Sundarnarayan *v.* Arunachalam, 39 Mad. 136, 159 F. B.

to have separated. (1) But those members whose shares were defined by an arbitration award should be considered as separate.(2) (See p. 560).

Registration of separate shares, enjoyment of separate portions, how for evidence of partition.

Mere definition of shares in the Collector's register (3) or the enjoyment of different portions of the property (4) or its income in shares, for convenience, (5) it was held, would not constitute partition when it was not intended. But when the intention to separation is proved, these may constitute partition. Opening of separate account in the Collectorate has been held to be good evidence of separation. (6) Recently the Privy Council held that when there was a numerical division of shares as conclusively shown in petitions for registration under Act 7 of 1876 B.C. there was separation (7) even when one of the coparceners was a minor. (8) When the name of the mother of one of the coparceners on his death was entered on the Revenue Records in respect of his share that was not conclusive evidence of separation, but when in addition there was separate entry of names in regard to specified areas and separate mortgages by the coparceners, separation was well established. (9)

Cesser of commensality evidence of partition.

Cesser of commensality has been held to be a strong proof of partition but not conclusive. (10)

(1) Durga De *v.* Balmukund, 29 All. 93.
(2) Jwala Prasad *v.* Janki Koer, 7 I. C. 905, 7 All. L. J. 975.
(3) Hoolash *v* Kashi, 7 Cal 369 Ambica *v.* Sukhmani, 1 All. 473 Rewa Prosad *v.* Deo Dutt, 27 I. A. 39
(4) Rampersad *v* Sheo Charan, 10 Moore 490. See, however, 31 All. 417 P.C. (5) Sonatun *v* Jagut, 8 Moore 86. (6) Tej Protab *v.* Champa Kali, 12 Cal. 96. Ramlal *v.* Devi Dat. 10 All. 490 Murari Vithoji *v.* Makund, 15 Bom. 201. Gajendra *v.* Sirdar Sing, 1 All. 176.
(7) Rampershad Sing *v.* Lakhpati Koer, 30 Cal. 231 P. C.
(8) Parbati *v.* Nanilal, 31 All. 412 P. C. (9) Netram Sing *v.* Musammat Tursa Kunwar, 20 I. C. 967 P. C., 18 Cal. L. J 234.
(10) Gonesh Dutt *v.* Jewach, 31 Cal. 262 P. C. Anunda *v.* Khedoo, 14 Moore 412. Contra Ranganatha *v.* Narayanasami, 31 Mad. 48.

Partition may be by parol.

A partition need not be by deed but may be by parol, (1) notwithstanding the Transfer of Property Act. (2) Registration also is not necessary to validate an agreement to partition, which constitutes severance of rights. (3)

Whether one Coparcener can separate without suit and without consent.

We next go to the question whether one coparcener can separate without a suit. There are some old cases which decided that one coparcener could, simply by declaring his intention to separate, bar the application of the right of survivorship. (4) But later cases established a contrary rule, as we have already seen. (5) Now if one of the coparceners is unwilling to partition amicably, it is practically impossible for another to separate from him without a suit, for a deed of partition or agreement to partition can be executed only when all agree to do so. This is neither reasonable, nor just, nor conducive to the interests of the community or of the individual. Here at least the Courts should consider what the law was before. The principle established by our courts that the interests of joint Mitakshara coparceners are indeterminate may favour the position that there can be no partition except by mutual consent or by suit, but it is not inconsistent with the position that one coparcener may separate himself from the family against the wishes of the rest. Narada and Brihaspati (see pp. 447, 449) lay down clearly

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(1) Komalambal *v.* Krishnasamy, 2 Mad W. N. 310, 10 I C. 385.

(2) Lucchimmal *v.* Gangaramal, 34 Mad. 72, Alamala *v.* Babe, 2 I. C. 455 (3) Pothi Naicken *v.* Najama, 28 I. C. 625, 28 Mad. L. J 423.

(4) Bulakee *v.* Mt. Indurputtee, 3 W. R. 41 ; Mt. Vatos *v.* Rowshun, 8 W. R. 82 ; Phoolbash *v.* Juggeswar, 14 W. R. 345 ; Joy *v.* Goluck, 25 W. R. 335, Affd., 4 Cal. 434 ; Raghabanunda *v* Sadhu, 4 Cal. 425, see 5 Cal. 474, 30 Cal. 231. (5) In the matter of Phulkoer, 8 B. L. R, 388 (note) ; Debee Pershad *v.* Phoolkoeree, 12 W. R. 510.

that a coparcener, if he lives in separate mess, worships separately, carries on money—lending and other business separately, gives and receives separately, he must be considered as a divided member, even if there be no written deed. Narada further lays down the rule of evidence that if for ten years a coparcener lives separately as regards religious ceremonies and business transactions, it would be conclusive evidence of partition. The Mitakshara allows any single coparcener to separate. The Mayukha clearly lays down that any one coparcener may separate merely by declaring that he is separate (Ch. IV, sec. 312). Indeed, it has been forgotten that jointness is predicated of the family in the Hindu Law Books and is not an incident of the family property, which was only inalienable according to old law. There is no foundation for the rule that the law of survivorship may adhere to a person notwithstanding his separating from the family. The Courts should revert to the old law and once again establish the rule that it is competent to a coparcener to separate himself from the family simply by declaring his intention to separate by giving a notice to that effect to the other coparceners, and by living separately and carrying on his religious and worldly works separately. Only his intention to separate must not be in consequence of a temporary quarrel made up thereafter, but it should be deliberate and followed by actual separate living with the intention of being separate permanently. There have been some recent cases tending towards the above position. Separate residence, mess and money—

concealment and the like. When an extra share has been given to the eldest brother by agreement, it cannot be questioned on the ground of mistake of law. (1)

Re-opening of partition.

Where there has been a *bonâ fide* mistake and a part of the property allotted to a co-sharer is recovered from him by a third party, the former can reopen the partition. (2) Similarly in case of partial partition, the portion left undivided may subsequently be divided. (3)

Adjustment of shares when one son of one brother separates.

Among sons of several brothers living together, if one separates, it has been held in Madras that on a subsequent partition, shares should be adjusted according to stock deducting the share taken by the son, who separated before, from the share of his branch.(4) The Bombay Court on the strength of the Mayukha has held that no such deduction should be made. (5) The Madras rule seems to be more equitable.

Debts should be paid and provision made for females and disqualified heirs and marriages of daughters on partition.

Under all the schools, on a partition, debts due by the family should be paid and provision should be made for the maintenance of females and disqualified heirs and for marriage expenses of unmarried daughters. Under the Mitakshara, the father's debts, which are not immoral should also be paid. (6) Future provision for marriages and the like of the male coparceners cannot however be made. (7) Money spent by a coparcener for the repair, improvement or benefit of the family property should be reimbursed to him. (9) No deduction can be made from the

(1) Sivagnana Taver *v.* Pereasami, 5 I. C. 6. Moro Viswanath *v.* Ganesh, 10 Bom. H. C. 4441. Muthusami *v.* Muthusami, 27 I C. 33.
(2) Maruti *v* Rama, 21 Bom 333. (3) Ayodhya *v.* Mahadeo, 3 I. C. 9. (4) Mayanath *v.* Narayana, 5 Mad. 362. (5) Panjivandas *v.* Icharam, 17 Bomb. L. R. 701, 30 I. C. 968. See 6 Bom. L. R. 925. (6) Tarachand *v.* Reeb Ram, 3 Mad. H C. 177. (7) Narayana *v.* Ramalinga, 39 Mad. 587. Srinivasa Iyengar *v.* Thiruvengadathaiyangar, 38 Mad. 556.
(9) Muthuswami *v.* Subramaniya, 1 Mad. H. C. 309.

share of a member when he has spent more on legitimate family purposes than another member. (1)

Manager's liability for extravagance or waste.

The manager, as long as the family is joint, is not liable for extravagance or waste, unless it is immoral or amounts to misappropriation. (2)

Manager's liability to account

Under the Dayabhaga School, the manager is liable to account. (3) Under the Mitakshara in Calcutta and Madras, it has been held that the manager is not liable before partition, and though a coparcener excluded from the family may call for an account, other members cannot do so, even in a suit for partition, except in case of fraud or misappropriation. The parties have no right to look back and claim relief against past inequality of enjoyment or like matters and the only account the Kurta is liable to render is as to the state of the property in regard to which the usual enquiries in an ordinary partition suit must be made by the Court. (4) In Bombay it was held that the manager was liable to account in a partition suit. (5) But in the most recent cases there, as well as in Madras, it has been held that he is liable only when there are minor coparceners.(6) But the mode of account should be under all the Schools in accordance with the principles enunciated in 5 B. L. R. 347 and in 17 Bom. 271.

(1) Lakshman *v.* Ram Chandra, 1 Bom. 561. Damoder *v.* Uttamram, 17 Bom. 271. Abhoy Charan *v* Peary, 5 B. L. R. 347.

(2) Raja Setrucherla *v.* Virabhadra, 22 Mad. 470. P. C

(3) 5 B. L. R. 347.

(4) Pormeshwar Dubey *v.* Gobind, 20 C. W. N 25. Balakrishna *v.* Muthuswami, 32 Mad 271. Narayin Bin Babaji *v.* Nathaji Durgaji, 28 Bom. 201. Bhowani *v.* Juggernath, 13 C. W. N 315. 17 Bom. 271. Annamalu *v.* Murugasa, 26 Mad. 544 P. C.

(5) Koneras *v.* Gurrai, 6 Bom. 589. Damodardas *v.* Uttamram, 17 Bom. 271. Bhivrao *v.* Sitaram, 19 Bom. 532.

(6) Narayun *v.* Nathaji, 28 Bom. 208. Srenevasha *v.* Theruvongathaiyangar, 38 Mad. 556.

texts. It has been held that a partition made by the father cannot be questioned even by a minor son on attaining majority without proving fraud or undue influence. (1) But when a share was given to an invalidly adopted son, the latter was held entitled to a share out of the father's share in equity, though the other sons were not bound by the partition. (2) When by a document called a will, a father made a partition of the property, and the arrangement was acted upon by all parties for a long time, it was held by the Privy Council that it was a valid partition binding on the members and also on their sons who must be considered to have been represented by their fathers. (3)

There may be partial partition, family continuing joint.

A partition, it has been held, may be partial, so that the family may continue joint in respect of some property and separate in respect of others. (4) There can however, be no partial partition without ascertainment of shares. It has been held by the Madras, Bombay and Patna High Courts that when partial partition is proved, there is a presumption that there has been an entire separation. (5)

Effect of some members separating.

It has been held that some coparceners may separate, the rest being joint (6), or the

(1) Balkishen *v.* Ram Narayun, 30 Cal. 738 P. C, Yeechuri *v.* Yeechuri, 33 I C. 961, 30 Mad L. J. 308.

(2) Ramkishore *v.* Jai Narain, 40 Cal. 960 P. C.

(3) Brijraj Singh *v.* Kunwar Sheodan, 35 All. 337 P. C.

(4) Kathama Natchear *v.* Raja of Shiva Ganga, 9 Moore. 536. Radha Churun *v* Kripa, 5 Cal. 474 Mathusami *v* Nulla Kulantha, 18 Mad. 418. Gauri Sankar *v.* Atmaram, 18 Bom. 611 Bhowani Prosad *v.* Jaggonath, 13 C W. N. 309. Ajodhya Pershad *v.* Mahadeo, 14 C W. N. 221. Satyakumar *v.* Satya Kripal, 10 Cal. L. J. 503.

(5) Vaidyanatha *v.* Aryasami 32 Mad. 191. Sundaramma *v.* Kamakota, 26 I. C. 514 Singheswar *v.* Rameshwar 34 I. C. 466 (Patna).

(6) Upendra *v.* Gopeenath, 9 Cal. 817. Anandobai *v* Hari Suba, 35 Bom 293. Khemankari *a.* Sela, 3 C. W. N. C. XXVIII. Upendra *v.* Gopeenath, 9 Cal. 817. Mania *v.* Narayan, 5 Mad. 63. See Radha *v.* Kripa, 5. Cal. 474. Contra Rungasami *v.* Sundram, 35 I. C. 56.

branches of a family may separate, the members of each branch continuing joint. (1) In certain cases, it was held that separation of some of the members of a family can take place only by the separation of all, and those that continue joint should be considered as constituting a reunited family in which there is no right of survivorship. (2) The Madras High Court has held that in such a case there is a presumption of general separation. (3) In a recent case, the Privy Council have held that "there is no presumtion when one coparcener separates from the others, that the latter remain united. In many cases it may be necessary, in order to ascertain the share of the outgoing member to fix the shares which the other coparceners are or would be entitled to, and in this sense the separation of one is said to be a virtual separation of all. And their Lordships think that an agreement amongst the remaining members of a joint family to remain united or to reunite must be proved like any other fact." (4) But in a later case, the Privy Council have again affirmed the old rule that when one out of three brothers separates and takes his third share of the property, the other two brothers continue to be joint with rights of survivorship as between themselves. (5) The Calcutta Court has held that when a partition was made by the executor of the will of the father by which the property was defined in three shares one

(1) Bata *v.* Chinta, 12 Cal. 262 (2) Pitamber *v.* Harish Chunder, 15 W. R. 200. (3) V. Balakrishna *v.* V. Raju, 27 Mad 736. (4) Balabux *v.* Rukhnabai, 30 Cal. 725 P. C. Rampersad Sing *v.* Lukhpati Koer, 30 Cal. 231 P. C Balkissen *v.* Ramnarayun, 30 Cal. 738 Distinguished 40 Cal. 407. (5) Kedar Nath *v.* Ratan Sing, 32 All. 415.

being taken by a major son and two shares by two minor sons who continued to live jointly, the latter were separate in law, and it was also held that if the members of a family admitted partition among some of them but asserted that the rest remained undivided, the onus would be on the party so asserting to prove jointness. (1)

Hem Chandra in his famous book on Jaina Law in Section 129 lays down that separation of one member is separation of all.

Suit for partition must embrace the whole property.

A suit for partition must embrace the whole of the family property (2), both under the Mitakshara and the Dayabhaga, unless some part of the property lies out of the jurisdiction of the Court or is otherwise incapable of partition, and all the co-sharers must be made parties. (3) The plaintiff in such a suit must bring into account all the property in his possession, though part of it may be out of the court's jurisdiction. (4)

An alienee of the interest of a coparcener in a portion of the family property cannot bring a suit for partial partition (5), but the coparcener whose share has not been sold may always sue for partition of the parcel sold. (6) When a

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(1) Ramanath *v.* Kusum, 4 Cal. L. J. 62.

(2) Haridas *v* Prannath, 12 Cal. 566. Jogendra *v.* Juggobundhu, 14 Cal. 122. Iburamsa *v.* Thirumala, 20 Mad. L. J. 743, 7 I. C. 559 F. B. Mukund *v.* Jogesh, 35 I. C. 370 (Patna).

(3) Punchanun *v.* Shib Chunder, 14 Cal. 835. Balaram *v.* Ramchundra, 22 Bom. 922. Parusottam *v.* Atmaram, 23 Bom. 597.

(4) Ram Lochun *v.* Raghubur, 15 W. R. 111 ; Laljit *v.* Rajcoomar 25 W. R. 353. Harinarayana *v.* Gangatrao, 7 Bom. 272. Rampersad *v.* Sheohurum, 10 Moore, 490. See 22 Bom. 928, 18 Bom. 389.

(5) Khemankari *v.* Sita, 3 C. W. N. CXXVIII. Mania *v.* Narayan, 5 Mad. 362. Vencatarama *v.* Meera Labai, 13 Mad. 275. Pandurang *v.* Bhaskar, 11 Bom. H. C. 72. Palani Konan *v* Masa, 20 Mad. 243.

(6) Sripatti China *v.* Sripatti Suriya, 5 Mad. 196. Subramanya *v.* Padmanabha, 19 Mad. 267. Ram Charan *v.* Ajudhi, 28 All. 50. Ibaramsa *v.* Thiramalei, 34 Mad. 269 F. B.

Rights of alienee of undivided share.

coparcener sells his share in certain specific property for consideration, in Bombay and Madras, where such alienation is valid, the alienee is not entitled to joint possession and acquires only an equity to enforce his rights in a suit for partition and to have the property alienated set apart for the alienor's share if possible, (1) but he cannot sue for partition and allotment to him of the share of the property alienated to him, (2) or for mesne profits. (3) A Court of equity will, if possible, allot to him the share of the parcel purchased by him, (4) but when the parcel sold is the dwelling-house other equities will arise under the law. (5) When a coparcener sells his undivided share, it has been held in Madras that by such act there is separation and the alienee acquires a good title and can bring a suit for partition. (6) These principles can apply under the Benares School only when there has been an attachment and sale in execution. Under the Bengal School, the purchaser of the share of a coparcener in specific property may ask for partition of the property purchased by him. (7)

When two coparceners hold separate property, they may partition it without making the other coparceners parties. (8)

(1) Manjaya *v.* Shanmaga, 38 Mad. 684 Narayun *v* Nathaji, 28 Bomb 201. Pandarang *v* Bhaskar, 11 Bom H. C. 72. Udaram *v.* Ranee, 11 Bom H C 76 (2) Manjaya *v* Shanmuga, 38 Mad. 684 (3) 39 Mad. 265 disapproved on other points in 39 Mad. 172 F. B.

(4) Dularam *v.* Padaldas, 35 I. C. 678. 10 Sind. L R. 84. Narayan *v.* Nathaje, 28 Bom 201. Udaram *v.* Ranee, 4 Bom. H. C. 76, Ram Charn *v.* Ajodhia, 28 All. 56. Manjaya *v.* Shunmuga 38 Mad. 684.

(5) Girija Kant *v.* Mohun, 35 I. C 290.

(6) Soundarajam *v* Arunachalam, 39 Mad. 172 F. B. Maharaja of Bobbili *v* Vencataranaju, 39 Mad. 265. Kota Balabhadra *v.* Khetra Das, 31 Mad. L. J. 275. (7) Bepin Behary Moduck *v.* Lall Mohun Chattopadhyay, 12 Cal. 209. Jogendra *v.* Juggobandhu, 14 Cal 122. Girija Kant *v.* Mohun, 35 I. C. 290. Hem Chunder Ghose *v.* Thakomoni, 20 Cal. 538 Amolak *v.* Chandan Sing, 24 All. 483.

(9) Lachmi Narain *v.* Janaki Das, 23 All. 216. Purushottam *v.* Atmaram, 23 Bom. 596.

When son or grandson can compel partition.

Under the Mitakshara, a son or a grandson may claim partition even against the wishes of the father or grandfather. (1) A recent Full Bench of the Bombay High Court have held, that a son cannot sue his father, when the father is living jointly with the uncles. (2) The distinction is a very nice one, but it was never contemplated by Vijnaneswara. It has not been given effect to by the Madras High Court. (3) The Calcutta High Court dissenting from the Bombay decision, have held that a Mitakshara coparcener can maintain a suit for partition when both his father and grand-father are alive, if they allow the property to be wasted and his own interest is imperilled. (4)

In the Punjab it has been held that "in the Punjab at least, the Mitakshara doctrine of a son being born with a share is not known, nor has a son a right to compel partition." (5)

There may be suit for partition on behalf of a minor.

A suit for partition can be brought on behalf of a minor coparcener governed by the Mitakshara only on the ground of malversation by the adult members or other circumstances, which show that partition will be beneficial to his interest, and not otherwise, because by a partition the minor loses his right of survivorship. (6)

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(1) Mussamut Deobansi *v.* Lwaraka, 10 W. R. 273. Laljit *v.* Raj Coomar, 20 W. R. 336. Jugol Kishore *v.* Siva Sahai, 5 All. 430. Nagalinga *v.* Subbrammanlya, 1 Mad. H. C. 77.

(2) Apaji *v.* Ram, 16 Bom. 29 F. B.

(3) Subba *v.* Ganasa, 18 Mad. 179.

(4) Rameswar *v.* Luchmiprosad, 31 Cal. 111.

(5) Jowahir *v.* Musammat Chandi, 90 Punj. R. 1892. Tulsi Ram *v.* Shib Das, 19 I. C. 11. Rajaram *v.* Hansari, 105 Punj. R. 1895. Nathu Rai *v.* Mannu Rai, 115 Punj. R. 1886.

(6) Deo Bunsi *v.* Dwarka Nath, 10 W. R. 273. Alemelmmal *v.* Arunacheliam, 3 Mad. H. C. 69. Damoodur *v.* Senabutty, 8 Cal. 537. Kamakshir *v.* Chedambara, 3 Mad. H. C. 94. Bholanath *v.* Ghooeram, 29 All. 373.

Execution purchaser may demand partition.

An execution purchaser of the interest of an undivided coparcener can demand partition under all the schools. (1) When the entire family property is attached but on claim by some co-shares, their shares are released, such release does not constitute partition and does not give the creditor or heir any rights on that ground. (2) The correctness of this position is not free from doubt having regard to the rule of the Privy Council that attachment constitutes severance of interest.

Rights of purchasers of undivided shares in Bombay and Madras.

In Madras and Bombay, but not in Bengal and in the N.-W. Provinces, the purchaser of the undivided share of a coparcener for a consideration can claim partition, (3) but not a donee. (4) But it has been held in Madras that an alienation for consideration of a portion of the family property would not give to the alienee a right to possession before partition of the entire property, (5) and he cannot claim partial partition of the family property against the other members. (6) This would practically make partial alienations for consideration invalid though alienations of the entire share would be valid. It is not a very logical position. It would thus be more consistent to allow the alienee of a part to ask for partition of the entire property against all the coparceners. In Bombay, it has been held that the alienation of an undivided share does not constitute partition, and the

(1) Deen Dyal *v.* Jugdeep Narayan, 3 Cal. 198 P. C.

(2) Mudit *v.* Runglal, 29 Cal. 797

(3) Vasu Dev *v.* Venkatesh, 10 Bom. H. C. 139. Verasvami *v* Ayya Sami, 1 Mad. H. C. 471.

(4) Baba *v.* Timma, 7 Mad. 357. Vrandavandas *v.* Yamunabai, 12 Bom. H. C. 229.

(5) Padala *v.* Madavarapu, 12 I. C. 408.

(6) Iburamsa *v.* Teruvencatasami, 20 Mad. L. J. 743. 7 I. C. 559 (F. B).

alienee is entitled to rights of survivorship and his share is also liable to be diminished by the birth of other coparceners before regular partition. (1) It would follow that the death of the alienor before partition would destroy all the rights of the alienee. Again an alienee, if he is not a coparcener, can never get his interest enlarged by survivorship. That is a contingent interest which can accrue only to joint coparceners with certain qualifications as to degree. The position of the Bombay Court is thus difficult to understand. An alienation of undivided property in which the right of survivorship flows from the nature of the interests of the coparceners, can be valid only on the supposition that it must be considered as causing partition, and it was upon this ground that the Privy Council held execution sales of undivided shares to be valid.

Whether mother, grandmother and sister can sue for partition.

Wife, mother, grand-mother and sister have been held as not entitled to sue the male members for partition, though they are entitled to shares on partition among the male coparceners, but if the interest of an undivided coparcener has passed into the hands of a purchaser, they are entitled to bring such a suit. (2) It has however been held in Allahabad that a mere severance of interest without actual division does not entitle the mother to a share. (3) It is difficult to appreciate this fine distinction. A partition made between four sons without allotting the mother a share was held to be not binding on her and the widow of

(1) Gurlingapa *v.* Nandapa, 21 Bom. 797.

(2) Bilaso *v.* Dinanath, 3 All. 88. (3) Beti Kuar *v.* Janki, 7 I. C. 908, 7 All. L. J. 980.

one of the brothers, it was held, could recover only one fifth as her late husband's share. (1)

Agreement not to partition how far valid.

An agreement to continue joint for all time is not binding, and a direction in a will prohibiting partition or postponing the period of partition is also invalid. (2) It is however, competent to enter into an agreement not to divide joint property for a limited period, but only when it is for a consideration. (3) It has been held in Calcutta that an agreement between coparceners not to partition may be binding on the immediate parties thereto, if in pursuance of a family arrangement by which the members get a certain benefit however small. (4) Such an agreement cannot bind the descendants of the parties. (5) It is competent to a member to enter into an agreement to enjoy his share by taking a lump sum in lieu thereof from the other members. (6)

Compromise by which male issue of survivor would take valid.

A compromise by which brothers settled their disputes and agreed that in the event of any one of them dying without male issue his share would be taken by the others. In equal shares has been held to be good, both under the Mitakshara and the Dayabhaga, as not being repugnant to Sec. 6 of the Transfer of Property Act. (7)

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(1) Ganesh Dutt *v.* Jewa ch., 31, Cal. 262 P. C.

(2) Rajendra Dutta *v.* Shamchand, 6 Col. 106. Anand *v.* Prankrishna, 11 W. R. 19. O. J. Makoonda *v.* Gonesh, 1 Cal. 124. Jebun *v.* Ramnath, 23 W. R. 297. See Secs. 10 & 11 of the Transfer of Property Act.

(3) Srimohun Thakur *v.* Macgregor, 28 Cal. 769. Radha Nath Mukerjee *v.* Taruk Nath, 3 C. W. N. 126.

(4) Krishnendra *v.* Debendra, 12 C. W. N. 793.

(5) Abu Mahomed *v.* Kaniz, All. W. R. (1905) 240.

(6) Subharya *v.* Rajaram, 12 Mad. L. J. 91.

(7) Ram Niranjan Sing *v.* Prayag Sing, 8 Cal. 138. Kanti Chunder Mukerji, *v.* Ali Nabi, 8 All. L. J. 199.

The existence of a minor is no bar to partition. (1) But it cannot be allowed when it is not beneficent to the infant concerned. (2) A partition made by the adult members will bind a minor, if just and legal. He may, when he becomes of age, sue to set aside the partition, if it can be shown to have been illegal, fraudulent, unfair or prejudical to his interests (3), or if it is made in such a manner that there are no means of testing its validity. (4) Such a suit may be brought within three years after the minor has attained majority, if it is brought on the ground of fraud or mistake when the minor was represented by a guardian (5), but within 12 years from the time when the exclusion becomes known to the minor, in other cases. (6) It has been held that a partition effected without reserving any share for a minor member of the family and without the consent of some one authorized to act on his behalf is invalid as against the minor. (7) The minor's share is also not bound with the liabilities of the guardian for his defalcations of joint property. (8)

Existence of a minor how far a bar to partition—minor's rights.

We next go to the consideration of the question how shares are ascertained on partition based on

Ascertainment of share.

(1) Appovier's Case, 11 Moore 89.

(2) Bachoo *v.* Mankorebai, 31. Bom. 373 P. C.

(3) Balkissen Das *v.* Ramnarain, 30 Cal. 738 P. C. Dewbunsi *v.* Dwark Nath, 10 W. R. 273. Chanvirapa *v.* Danava, 19 Bom. 593. Damodur *v.* Uttaman, 17 Bom. 271.

(4) Kalisunkar *v.* Dinendra, 23 R. W. 68.

(5) Chanvirapa *v.* Danava, 19 Bom. 593.

(6) Lal Bahadur *v.* Sivpal, 14 All. 498. Krishnabai *v.* Khangowda, 18 Bom. 197.

(7) Krishna Bai *v.* Khangowda, 18 Bom. 197, approved by the Privy Council in Ganesh *v.* Musmut Jewach, 31 Cal. 262.

(8) Sonu *v.* Dhondu, 28 Bom. 330.

the devolution of interest according to the rule of survivorship.

Misconception about the constitution of joint Hindu family.

Mr. Mayne and other writers on Hindu Law have laid down that in a joint family under the Mitakshara there is no succession, Mr. Mayne says: "The whole body of such a family, consisting of males and females constitutes a sort of corporation, some of the members of which are coparceners, that is, persons who on partition would be entitled to demand a share, while others are only entitled to maintenance. In Malabar and Canara, where partition is not allowed, the idea of heirship would never present itself to the mind of any member of the family. Each person is simply entitled to reside and be maintained in the family house and to enjoy that amount of affluence and consideration which arises from his belonging to a family possessed of greater or less wealth. As he dies out his claim ceases and as others are born their claims arise. But the claims of each sprung from the mere fact of his entrance into the family and not from his taking the place of any particular individual. Deaths may enlarge the beneficial interest of the survivors by diminishing the number who have a claim on the common fund, just as births may diminish their interests by increasing the number of claimants." This description of a Hindu family is applicable to a Malabar Marumakatayam or a Canarese Alayasantana family with its peculiar constitution of succession through females, which ignores paternity and as Mr. Mayne himself says such a constitution is of Non-Aryan origin and is a grotesque parody of the law of the Aryan Hindus.

The rule of survivorship as at present understood has been evolved by lawyers who were familiar with the law of the South and who mistook the constitution of families of the above description to be based on Hindu law. We have seen that the rule of survivorship is not to be found in the Smritis or the commentaries. Only certain later commentators in order to reconcile the two rules, by one of which the widow succeeds and by the other of which the male coparcener succeeds, says that in the latter case as the rights of the coparceners before partition are not definable, the surviving coparcener and not the widow succeeds. This is the only foundation for the so called rule of survivorship. Now Mr. Mayne after the above description of a joint family says that under the Mitakshara Law the right to a share passes by survivorship among the remaining coparceners subject to the rule that where any deceased coparcener leaves male issue, they represent the rights of their ancestor to a partition," and he says that "further what passes is not a share but the right to have a share on partition." This again would have appeared unintelligible to the Hindu Lawgiver or commentators. The interest of a coparcener is not 'the right to partition' or 'the right to have a share on partition' nor is it quite correct to say that claims of coparceners arise 'not from their taking the place of any particular individual.' The Mitakshara, the Apararka and other commentators whose opinions on the subject are cited above are wholly against such assumptions based on principles deduced from the English rule of survivorship. These observations are necessary for the consi-

Rule of survivorship how evolved.

deration of the question how far the rule of survivorship governs the devolution of property in a joint Mitakshara family.

According to the strict rule of survivorship when there are say three joint brothers and one of them dies having 2 sons and another 3 sons, the surviving brother and the 5 nephews would be entitled to equal shares. But it has been correctly held that the rule of representation applies and the nephews only take the place of their deceased father and divide among themselves the share to which they would have been entitled, if living.

Thus the rule of survivorship is not applicable to a Mitakshara joint family as regards the devolution of its property. The rule of devolution in such a case is that the female heirs and male heirs claiming through females, who are entitled to take the estate of a separated member, cannot take the estate of a joint coparcener. Excepting this special rule, all the other rules of inheritance apply to the estate of a joint coparcener. The question of course can only arise on a partition and then the shares of the members should be adjusted according to the ordinary rules of inheritance among members living together. Under the Dayabhaga among members of a joint family, questions about survivorship do not arise and their shares on partition are adjusted according to the ordinary rules of inheritance, but unlike the Mitakshara, the Dayabhaga allows the female heirs to take the shares of joint sonless coparceners.

On partition shares determined by rule of rvivorship.

The Calcutta and the Allahabad High Courts have applied the rule of survivorship in case of devolution of interest in a Mitakshara joint

family and have held that it is not governed by the rules of inheritance which apply only to a separated member. The actual point decided was that where in an undivided family, a person died without leaving issue but leaving a brother and the son of a predeceased brother surviving, the nephew is not excluded from succession by the brother and on partition they both take equally. (1) It should be observed here that the Mitakshara does not lay down two different rules of succession in the cases of separated and unseparated coparceners. (2) Again if the strict rule of survivorship applied in the case of a joint family, when a person died leaving nephews only, they would take *per capita* and not *per stirpes*. But the contrary rule has been established. As it stands, the law settled by the courts is that the devolution of interest in a joint Mitakshara family is regulated by the rule of survivorship modified by the rule that the descendants of a common ancestor take *per stirpes* and not *per capita* (3) and that the sons of predeceased coparceners take the shares which they would take if they were living.

Shares of sons of disqualified heirs.

According to the strict rule of survivorship mentioned above as established in our courts, the sons of disqualified sons living in a joint Mitakshara family, though they might have been born after the death of the grandfather should take their proper

(1) Bhimul Dass *v.* Choonee Lal, 2 Cal. 379 F. B. Debi Parshad *v.* Thakur Dyal, 1 All. 105 F. B. See Ajodhya Roy *v.* Hardwar Roy, 9 Cal. L. J. 488.

(2) The decision in the case of Raghabanand *v.* Sadhu, 4 Cal. 452 can be justified only on this ground.

(3) Rajnarain Sing *v.* Heeralal, 5 Cal. 142.

share on partition, like sons of predeceased sons, in the cases mentioned before. But the contrary rule has been laid down in Allahabad and Bombay. (1) The Madras High Court has however held, that the son of a disqualified son is not debarred in such a case. (2) The Calcutta High Court in a Daya-bhaga case has held that the grandson is debarred (3). The matter is fully dealt with before (pp. 217—220).

Whether descendants more remote than the third take shares.

On partition the shares of coparceners are determined on the footing that they take *per stirpes*, and not *per capita*, as stated above. It has been decided that descendants, more remote than the third, of the common ancestor, notwithstanding the texts of Devala and Katyayana (pp. 58, 92), can live together as a joint family, and on partition take their shares of the property according to the rule mentioned above. (4) In Madras, in the case of an impartible Zemindary, the sixth descendant from the common ancestor succeeded in preference to the widow, on the ground that the family was joint. (5)

Share of the afterborn son.

Under the Mitakshara, a son born after partition by the father takes all his father's property. (6) If a male child was in the mother's womb at the time of the partition, as the Vivada Chintamoni says, the partition shall have to be reopened, and a share shall have to be allotted to him. (7)

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(1) 5 All. 589, 6 Bom. 616, 32 Bom. 455.

(2) 9 Mad. 64. (3) 2 B. L. R. 103.

(4) Moro Viswanath *v.* Gonesh, 10 Bom. H. C. 444. Gavaridivam *v.* Ramanooran, 6 Mad. W. C. 93. Girwardhari *v.* Kulahal, 4 S. D. 9. Sri Abhinna *v.* Arni, 15 I. C. 412. See 23 Bom. 638.

(5) Yenumala *v.* Ramandora, 6 Mad. H. C. 93. (6) Nawal Sing *v.* Bhagwan Sing, 4 All. 427. (7) Must Berago Moye *v.* Nubokissen Set, 238.

A Hindu father cannot, under the Mitakshara law, by will, interfere with the rights of posthumous sons in ancestral property. (1) An afterborn son may reopen a partition when the father reserved no share to himself. (2) But in Bombay, it has been held, on the strength of the Mitakshara, the Mayukha and the Chandrika, that though the father might give a third share to one of his three sons who separate, an afterborn son cannot reopen the partition. (3) The late Justice Ranade who delivered this judment was of opinion that the texts of Vishnu and Yajnavalkya which direct separated brothers to give a share to an afterborn son, apply only to a posthumous son in case of a partition among brothers. He relied on the case of Kandasami *v.* Doraisami (2 Mad. 307) in which a partition made by a father without the consent of the sons between two sets of sons by different wives *bona fide* and in conformity with Hindu Law was upheld and to another early case in Bombay (4) where such a family arrangement once made was held to be final. He also referred to another early Madras case, in which an after-born son sued his uterine brothers and father and an adopted son of his father, who had been separated after having been given a share, where it was held that the share given to the latter could not be disturbed. (5) This decision of Ranade J. makes a distinction between the case of an afterborn son, where the father keeps no share for himself, and the case where

(1) Hanmant *v.* Bhima, 12 Bom. 105.
(2) Chengama *v.* Munisami, 20 Mad. 75.
(3) Ganput *v.* Gopal, 23 Bom. 636. See 33 Bom. 267.
(4) Moro *v.* Gonesh, 10 Bom. H. C. 444.
(5) Yekeyamean *v.* Agniswarian, 4 Mad. H. C. 307.

the father divides the property living joint with his two sons, giving to the third, who separates, a third of the property *i.e.*, in effect makes a division between the three sons, keeping no share for himself and the case of Kandasami *v.* Doraisami relied upon by him, which in reality decided that an unequal partition is not binding on the sons, though the father has every right to make a partition without reference to the sons. Having regard to the decisions according to which the separation of one coparcener may be in law separation of all, the ground on which the judgment of Justice Ranade is based fails. Indeed, it would be unjust and inequitable and against the trend of decisions on the point, not to allow the afterborn son to re-open a partition in such a case, and it is not right to ignore the texts of Vishnu and Yajnavalkya, which direct such re-opening, on the ground that they are "somewhat vague."

In a recent case, the Calcutta High Court has held that when a father has divided some of his property among all his sons and keeps two of them, who are minors, under his custody, the latter have no preferential right of inheritance over the property of the father. (1) It was a Dayabhaga case. Indeed there is no reason upon the principles laid down by the Dayabhaga for an afterborn son to take the entire property of his father as under the Mitakshara, for the sons have no right to partition against the father according to Gimutavahana.

The rule has been affirmed that "of several brothers living together in family partnership,

(1) Harachandra Das *v.* Ramchandra Das, 9 I. C. 834.

should one acquire by means of funds common to the whole, the property acquired belongs jointly to all the brothers. Should however, the means of acquisition drawn from the joint funds be of little consideration and the personal exertions considerable two shares belong to the acquirer." (1) So where a joint family business was built up after the death of one of the brothers with slight assistance from the common fund, on partition the widow of the deceased was held entitled only to a half of the share of each of the surviving brothers. (2)

Acquirer double share.

The rights of disqualified heirs and female members of the family, have been dealt with before. (Ch. II., Sec. 8, Ch. III., Secs. 2, 3). It should however, be mentioned here that according to Yajnavalkya, II. 115, on partition by the father, during his lifetime, (and by parity of reasoning, on partition after his death) the sonless widows of deceased sons, grandsons and other coparceners, who had not received Stridhana from their husbands or fathers-in-law, should be allotted the shares, which their husbands, if living, might have received. The rule seems to have been recognized during the time of Viswarupa, but unfortunately is not recognized now, and such widows are only entitled to maintenance. The same commentator also says, that disqualified heirs had, according to custom prevailing in his time, a vested interest in grand-paternal property, but from their incapacity to appropriate to their own use more than what was necessary for

Rights of disqualified heirs and female members.

(1) Purtab Bahadoor *v.* Tilukdharee, I. S. D. 179. Lal Chand *v.* Swarnamoyi, 13 C. W. N. 1133.

(2) 13 C. W. N. 1133. 10 C. W. N. 768.

their maintenance, they themselves got no shares, but their sons did. (1)

It has been held by the Privy Council that a member of a joint family may hold separate and self-acquired properties to which his other coparceners have no right on partition. It is a matter of difficulty to ascertain in such a case what is separate or self-acquired property. For a full discussion of it and of the presumptions arising in such cases and the burden proof both under the Mitakshara and the Dayabhaga the reader is referred to pages 406 to 412.

The burden of proving self-acquisition in joint family having a nucleus of ancestral property is on the party alleging it and also when some of the properties are admitted to be joint and it is asserted that others are self-acquired. (2) But where there had been an admitted disruption of the family and an actual partition, if one of the members sued subsequently for a share of the property, in the hands of another claiming it as self-acquired, the plaintiff must prove that it was joint property. (3) There seems to be no reason to make a distinction as regards the onus in cases before and after the partition. But the true rule is that "for once is a partition made" and a party can subsequently sue for a share of joint property not actually divided at partition only on the ground of fraudulent

(1) Viswarupa who was, as is well known, one of the earliest and most learned of the commentators of Yajnavalkya, vigorously disputes the position, that persons who are incompetent to perform the Yajnas are disqualified. See Vol. II., p. 16.

(2) Tarak Chunder Toladar *v.* Joodheesthir, 19 W. R. 178. Kanhra Lal *v.* Debi Das, 22 All. 141.

(3) Ramnath *v.* Kusum, 4 Cal. L. J. 62.

concealment and the like. In such a case, the plaintiff must not only prove his special case for redistribution but also that the property was joint property.

Where there has been a *bona fide* mistake and a part of the property allotted to a cosharer is recovered from him by a third party, the former can reopen the partition. (1) Similarly in case of partial partition, the portion left undivided may subsequently be divided. (2) A partition can always be reopened in case of fraudulent concealment. Reopening of partition.

In ascertaining the partible property of the family and dividing it, debts, not immoral, of the father should first be paid, (3) and also debts due by the family, and before partition, provision should be made for the maintenance of females and disqualified heirs and marriage expenses of unmarried daughters, which are a charge on the family property. In a partition at the instance of the son with his father and brothers, the brothers are entitled to have set apart from the family property a sum sufficient to defray the expenses of their respective Upanayan and marriage ceremonies and also for the marriage ceremonies and dowry of their sisters, such sum to be calculated according to the extent of the family property. A father's wife and mother are also entitled to a share equal to that of a son, but from the share of the father's wife must be deducted the value of any Stridhana received by her from her father-in- Charges to be paid at partition.

(1) Maruti *v.* Rama, 21 Bom. 333.
(2) Ayodhya *v.* Mahado, 3 I. C. 9.
(3) Tarachand *v.* Reeb Ram, 3 Mad. H. C. 177.

law or husband. (1) Money spent by a coparcener out of his own separate property for the repair, improvement or benefit of the family property should be reimbursed to him. (2) The above rules are common to all the schools of Hindu Law, excepting the question of the share of the step-mother which is discussed at p. 296. Both under the Bengal and Mitakshara schools no deduction can be made from the share of a member on the ground that he has spent more on legitimate family purposes, than another member. (3)

Manager's liability for extravagance or waste.

The manager cannot be made liable for his extravagance or for waste, unless it is immoral or amounts to misappropriation. When however, after partition, members leave the entire property under the management of one, the latter is responsible like an ordinary manager. (4)

Manager's liability to account.

It has been held in recent cases that under the Mitakshara in a suit for partition by a member not excluded from the family, he can not call upon the manager to account, unless he establishes fraud or misappropriation. (5) Under the Bengal School, the manager is liable to account. (6) Under the Mitakshara also, on principle, he should be so liable, though his liability under the account for moneys spent by him must be determined by rules of Hindu Law. The matter has been dealt with at pp. 420-421.

(1) Jairam *v.* Nathu, 31 Bom. 54.

(2) Muthuswami *v.* Subramaniya, 1 Mad. H. C. 309.

(3) Lakshman *v.* Ram Chandra, 1 Bom. 561. Damoder *v.* Uttamram, 17 Bom. 271. Abhoy Charan *v.* Peary, 5 B. L. R 347.

(4) Raja Setrucherla *v.* Virabhadra, 22 Mad. 470.

(5) Balakrishna *v.* Muthuswami, 32 Mad. 271. Narayin Bin Babaji *v.* Nathaji Durgaji, 28 Bom. 201. Bhowani *v.* Juggernath, 13 C. W. N. 315. 17 Bom. 271. Annamalu *v.* Murugasa, 26 Mad. 544 P. C.

(6) 5 B. L. R. 347.

A coparcener can have no claim for mesne profits previous to partition, except when he was a minor during the management or was entirely excluded from ancestral property or from the portion of which he had been in possession by arrangement among the members. (1) In a suit for partition mesne profits can be granted only when there has been an unlawful exclusion but where the managing member all along offered to pay a monthly allowance to the plaintiff, which was refused as inadequate, mesne profits could not be granted. (2)

Limitation.

In a suit for partition, the question of limitation very often arises. Under the Mitakshara system, as we have seen before, strictly speaking a coparcener can never sue another coparcener, his proper remedy being a suit for partition. In such a suit, the question of limitation can be raised. Under the Dayabhaga however, a coparcener can maintain a suit for joint possession without partition, as well as a suit for partition and in both suits, the same question of limitation on the ground of exclusion may be raised.

Limitation runs from date of exclusion both under the Mitakshara and the Dayabhaga.

Under Art. 127 of the Limitation Act, a person has the right to bring a suit for his share of the joint family property within 12 years from the date when his exclusion from it becomes known to him, in a Mitakhara as well as in a Dayabhaga family. Under the Act of 1871, he could do so within 12 years from the date when he claimed and

(1) Raja Vencata *v.* Narayya, 2 Mad. 128 P. C. Bhivrav *v.* Sitaaam, 19 Bom. 532. Sankar Bux *v.* Hardeo, 16 Cal. 397 P. C. Damodardas *v.* Uttamram, 17 Bom. 27.

(2) Suraj Narain *v.* Iqbal Narain, 18 I. C. 30 P. C.

was refused his share. (1) The right has been circumscribed under the new Act. (2)

Applicability of Art. 127.

Art. 127 applies only to joint family property, even though it be indivisible. (3) It does not apply to persons claiming right through daughters, who were not members of the family, or to partitioned (4) or separate or self-acquired property (5). It applies both to moveable and immoveable property and also to property left undivided after a partial partition. (6)

Burden of proving exclusion.

Art. 142 has no application to cases where the plaintiff has been excluded from the joint family property, even under the Dayabhaga law and Art 127 is applicable in all such cases. (7) The onus in such cases is on the defendant to prove that the exclusion from the joint family became known to the plaintiff more than 12 years before suit. (8)

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(1) Kalikeshore *v.* Dhununjoy, 3 Cal. 228.

(2) Narain *v.* Lokenath, 7 Cal. 461.

(3) Saroda *v.* Doyamoye, 5 Cal. 938. Muttakee *v.* Tummappa, 15 Mad. 189.

(4) Mothura *v.* Boikunt, 11 C. L. R. 312. Kartic *v.* Saroda, 18 Cal. 442. See 4 Cal. 680, 14 Cal. 544, 12 Mad. 292, 23 Bomb. 137.

(5) Thakur *v.* Pertab, 6 All. 442. See 9 Cal. 237, 10 All. 109, 18 Mad. 418.

(6) Ajodhya *v.* Mahadeo, 3 I. C. 9.

(7) Umesh *v.* Jagodish, I. C. W. N. 543.

(8) Ramanath *v.* Kusum, 4 Cal. L. J. 56.

SECTION III.

गोषुप्रशस्तिं वनेषु धेषे भवंस विश्वेबलिं स्वर्णः ।
वि त्वा नरं पुरुत्रा सपर्यन् पितुर्न जिन्रेर्वि वेदो भरत ॥

ऋग्वेदः १ म ७० सू १।

O Fire ! give us good cattle. May all beings give us good presents of wealth. Worshipping thee in many lands in various ways men take wealth from Thee, as sons take wealth from their old father.*

Rigveda, 1 M. 70, S. 5.

इदमित्था रौद्रं गूर्तवचा ब्रह्म क्रत्वा शचामंतरासौ ।
क्राणा यदस्य पितरा मंहनेष्ठाः पर्यत्यक्थे अहभा सप्तहोतृन् ।

ऋग्वेदः १० म ६१ सू १ ।

(Navanedistha the son of Manu) being ready, recited this hymn pleasant to Rudra, accomplished by wisdom, in the midst of the sacrifice (celebrated by the Angirasas who had forgotten it) to the seven Hotris on the sixth day. That hymn which his parents (and his brothers) who were dividing (the family

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* Some of the most eminent among European savants have strangely interpreted this hymn as evidencing that the ancient Teutonic custom of murdering parents when very old, also existed among the ancient Indian Aryans. A cursory reading of the text and the translation based upon Sayana's commentary will show that that interpretation is not possible. The text shows that it was the custom in ancient times for fathers to divide their wealth among their sons. This custom and the custom of leaving off all worldly pursuits in old age had its origin in philosophy which might have been induced by the remembrance of a custom more ancient than the time when the Hindus and the Teutons parted company, of putting an end to the lives of parents who became unbearable burdens in their old age in those hard times. But from the time of the Rigveda, Indians had the high philosophy of the relinquishment of the world by old fathers who were deeply respected by their sons.

property without giving him a share) advised him to recite as a means of his acquisition of cattle.*

Rigveda, 10 M. 61, S. 1.

मनुःपुत्रेभ्यो दायं व्यभजत् ।

तैत्तीरीय संहिता ३ । १९ । ४ ।

Manu divided his wealth among his sons.

Taittiriya Sanhita III. 19. 4.

यो वै भागिनं भागान्नुदते क्षयते वैनं स यदि तं न क्षयतेऽथ पुत्रमथ पौत्रं क्षयत इति ।

ऐतरेयब्राह्मणम् २ – १ – ७ ।

He who deprives a sharer from his share, the person so deprived destroys the depriver, and if not him, his son or his grandson.

A text of Veda cited in the Mitakshara and the Saraswati-Vilasa. According to the Mayukha, it is a text of Gautama. But it is in reality a text of the Aitereya Brahmana (2-1-7).

भार्य्या पुत्रश्च दासश्च त्रय एवाधनाः स्मृता ।

सङ्गदंशो निपतति ।

ऊर्द्धं पितुश्च मातुश्च समेत्य भ्रातरः समम् ।

भजेरन् पैतृकं रिक्थमनीशास्ते हि जीवतीः ॥

भ्रातृणामविभक्तानां यद्युत्थानं भवेत् सह ।

न पुत्रभागं† विषमं पिता दद्यात् कथञ्चन ॥

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* From this text it appears that on a partition father, mother and brothers were entitled to shares. Indeed the present rule of partition date back to the time of the Rigveda. The text further shows that parents had full power to deprive one of the sons of his share. This is made dear by a passage of the Aitereya Brahmana 5 A. 14 which runs as follow : नाभानेदिष्टं वै मानवं ब्रह्मचर्यं वसन्तं भ्रातरो निरभजन् स अब्रवीत् एत्य किं मह्यमभाक्त्येतमेव । It says that Navanadistha, who was residing with his guru as a Brahmachari, being deprived of his share by his brothers with the concurrence of the father complained to the latter, who however gave him no share but showed him a way of acquiring wealth by reciting the Raudra Mantra.

† न तत्र भागं विषमं is the reading of the Apararka.

अनुपघ्नन् पितृद्रव्यं श्रमेण यदुपार्ज्जयेत्* ।
स्वयमीहितलब्धं तन्नाकामो दातुमर्हति ॥
पैतृकन्तु पिता द्रव्यमनवाप्तं यदाप्नुयात् ।
न तत् पुत्रैर्भजेत् सार्द्धमकामः स्वयमर्ज्जितम् ॥
येषां ज्येष्ठः कनिष्ठो वा हीयेतांश प्रदानतः ।
हियेतान्यतरौ वापितस्यभागीनलुप्यते ॥
पुत्रिकायां कृतायान्तु यदि पुत्रोऽनुजायते ।
समस्तत्र विभागः स्याज्ज्येष्ठता नास्ति हि स्त्रियाः ॥
स्त्रीभ्योंऽशेभ्यस्तु कन्याभ्यः प्रदद्युर्भ्रातरः पृथक् ।
स्वात् स्वादंशाच्चतुर्भागं पतिताःस्युरदित्सवः ॥
वस्त्रं पत्रमलङ्कारं कृतान्नमुदकं स्त्रियः ।
योगक्षेमं प्रचारञ्च न विभाज्यं प्रचक्षते ॥
ऋणे धने च सर्व्वस्मिन् प्रविभक्ते यथाविधि ।
पश्चाद्दृश्येत यत् किञ्चित्तत् सर्व्वं समतां नयेत् ॥
ऊर्द्धं विभागाज्जातस्तु पित्र्यमेव हरेद्धनम् ।
संसृष्टास्तेन वा ये स्युर्विभजेत स तैः सह ॥
यो ज्येष्ठो विनिकुर्व्वीत लोभादभ्रातॄन् यवीयसः† ।
सोऽज्येष्ठः स्यादभागश्च नियन्तव्यश्च राजभिः ॥

मनुः ८ । ४१६ ; ९ । ४३, १०४, २१५, २०८, २०९, १३४, ११५, २१९, २१८, २१६, २१३ ।

A wife, a son, and a slave, these three are declared to have no property.

Once is the partition of the inheritance made.

After the death of the father and of the mother, the brothers, being assembled, may divide among themselves in

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* Cited in the Mahabharata Anushashanika, 105 Ch. 12, with some variation.

† अथयो विनिकुर्व्वीत ज्येष्ठोभ्राता यवीयसः ।
Mahabharata Anushashanika 105 Ch. 7.

equal shares, the paternal (and the maternal) estate, for, they have no power (over it) while the parents live.

If undivided brethren, (living with their father) together make an exertion (for gain) the father shall on no account give to them unequal shares (on a division of the estate).

What one (brother) may acquire by his labour without using the patrimony, that acquisition, (made solely) by his own effort, he shall not share unless by his own will (with his brothers).

If a father recovers lost ancestral property, he shall not divide it, unless by his own will, with his sons, (for it is) self-acquired (property).

If the eldest or the youngest (brother) is deprived of his share (on the ground) of his becoming (an ascetic and the like) or dies, his share is not lost (to his heirs).

If, after a daughter has been appointed, a son be born (to her father), the division (of the inheritance) must in that (case) be equal; for there is no right of primogeniture for a woman.

To the maiden sisters, the brothers shall severally give (portions) out of their shares, each out of his share one-fourth part; those who refuse to give (it), will be outcasts.

A dress, a vehicle, ornaments, cooked food, water, and women, property destined for pious uses or sacrifices, and a pasture-ground, they declare to be indivisible.

And if, after all the debts and assets have been duly distributed according to law, any (property) be afterwards discovered, one must divide it equally.

But a son, born after partition, shall alone take the property of his father, or if any (of the other sons) be reunited with (the father), he shall share with them.

An eldest brother who through avarice may defraud the young ones, shall no (longer hold the position of) the eldest, shall not receive an (eldest son's additional) share, and shall be punished by the king.

Manu, VIII. 416; IX. 43, 104, 215, 208, 209, 134, 118, 219, 218, 216, 213.

विभागे यत्र सन्देहो दायादानां परस्परम् ।
पुनर्विभागः कर्त्तव्यः पृथक् स्थानस्थितैरपि ॥
स्मृतिचन्द्रिकामयूखवीरमित्रोदयधृतमनुवचनम् ।

When there is doubt as to partition among coparceners, there should be a fresh division even by those living separately.

Cited in the Smriti-Chandrika, Mayukha and Vira-Mitrodaya as a text of Manu.

ऊर्द्धं पितुः पुत्रा ऋक्थं भजेरन्निवृत्ते रजसि
मातुर्जीवति चेच्छति ।
विभक्ताजः पित्र्यमेवेति ।
उदकक्रियायोगक्षेमकृताश्च व्यविभागः स्त्रीषु च* ।
न भोजयेत्.....पिता चाकामेन विभक्तान् ।
गौतमः २८ । १, २, २९, ४६ ; १५ । १९ ।

After the father's death let the sons divide his estate. Or, during his lifetime, when the mother is past child-bearing, if he desires it.

A son, born after partition, takes exclusively (the wealth) of his father.

Water, (property destined for) pious uses or sacrifices, and prepared food shall not be divided.

(Let him not feed at Shraddha). * * sons, who have enforced a division of the family estate against the wish of their father.

Gautama, XXVIII. 1, 2, 29, 46 ; XV. 19.

अथ भ्रातॄणां दायविभागः । यास्वनपत्याः
स्त्रियस्तासामापुत्रलाभात् ।
येन चैषां स्वयमुत्पादितं स्यात् तं भ्रातरमेव हरेत् ।
वशिष्ठः १७ । ४०, ४१, ५१ ।

Now follow the rules regarding the partition of the (paternal) estate among brothers. And (let it be delayed) until those widows who have no offspring (but are supposed to be pregnant) bear sons.

* The Apararka adds the words संयुक्तासु which means enjoyed.

And if one of the (brothers) has gained something by his own (effort) he shall receive a double share.

Vashistha, XVII. 40, 41, 51.

पुत्रेभ्य दायं विभजेदिति श्रुतिः

समम्: सर्व्वेषामविशेषात्।

पितरनुमत्या दायविभागः सति पितरि।

तेषामप्राप्तव्यवहाराणां मध्यान् सोपचयान् सुनिगुप्तान् निदध्युराप्तव्यवहारप्रापणात्।

बौधायनः प्र २। अ २। का ३। सू ३, ८, ३६।

Manu divided his estate among his sons says the Veda.

A father may, therefore, divide his (property) equally amongst all without (making any) difference.

While the father lives; the division of the estate takes place (only) with the permission of the father.

The shares of sons who are minors, together with increase, should be placed under good protection until the majority of the owners.

Baudhayana, P. II. A. 2, K. 3, S. 3, 8, 36.

जीवन् पुत्रेभ्यो दायं विभजेत् समम्। ज्येष्ठो दायाद इत्येके।

क्षेत्रविशेषे सुवर्णं कृष्णा गावः कृष्णं भौमं ज्येष्ठस्य। रथः पितुः परिभाण्डं च गृहे। अलङ्कारो भार्यायाः स्त्रातिधनं चेत्येके। तच्छास्त्रैर्विप्रतिषिद्धम्। सर्व्वे हि धर्म्मयुक्ता भागिनः।

जायापत्योर्न विभागो विद्यते।

आपस्तम्बः प्र २। प ६। ख १४। सू १, ६-९, १४, १६।

He should, during his lifetime, divide his wealth equally amongst his sons. Some declare that the eldest son alone inherits.

In some countries gold (or) black cattle, (or) black produce of the earth is the share of the eldest. The chariot and the furniture in the house are the father's (share). According to some, the share of the wife consists of her ornaments, and the wealth (which she may have received) from her relations. Therefore all (sons) who are virtuous inherit.

No division takes place between husband and wife.

Apastamba, P. 2, P. 6, K. 14, S. 1, 6—9, 14, 16.

विभागश्चेत पिता कुर्य्यात् स्वेच्छया विभजेत् सुतान् ।
ज्येष्ठं वा श्रेष्ठभागेन सर्व्वे वा स्युः समांशिनः ॥
यदि कुर्य्यात् समानंशान् पत्न्याः कार्य्याः समांशिकाः ।
न दत्तं स्त्रीधनं यासां भर्त्रा वा श्वशुरेण वा ॥
अंशस्थानीयमानस्य किञ्चिदुद्धृत्य पृथक् क्रिया ।
न्यूनाधिकविभक्तानां धर्म्म्यः पिटकृतः स्मृतः ॥
विभजेरन् सुताः पित्र्यमृक्थमृर्द्ध्वं पितुः समम् ।
मातुर्दुहितरः शेषमृणान्ताश्च ऋतेऽन्वयः ॥
पितृद्रव्याविरोधेन यदन्यत् स्वयमर्जितम् ।
मैत्रमौद्वाहिकं चैव दायादानां न तद्भवेत् ॥
सामान्यार्थसमुत्थाने विभागस्तु समः स्मृतः ।
अनेकपितृकाणान्तु पितृतो भागकल्पना ॥
भूर्या पितामहीपात्ता निबन्धो द्रव्यमेव वा ।
तच्च स्यात् सदृशं स्वाम्यं पितुः पुत्रस्य चैव हि ॥
विभक्तेषु सुतो जातः सवर्णायां विभागभाक् ।
दृश्यादृश्या तद्विभागः स्यादायव्ययविशोधितात् ॥
पितृभ्यां यस्य यद्दत्तं तत्तस्यैव धनं भवेत् ।
पितुरूर्द्ध्वं विभजतां माताऽप्यंशं समं हरेत् ॥
असंस्कृतास्तु संस्कार्य्या भ्रातृभिः पूर्व्वसंस्कृतैः ।
भगिन्यश्च निजादंशादुद्धृत्यांशन्तु तुरीयकम् ॥
औरसाः क्षेत्रजास्तेषां पित्र्यौषा भागहारिणः ।
सुताश्चैषां प्रभर्त्तव्या यावद्यै भर्त्तृसात्कृताः ॥
अन्योन्यापहृतं द्रव्यं विभक्ते यत्तु दृश्यते ।
तत् पुनस्ते समैरंशैर्विभजेरन्निति स्थितिः ॥

याज्ञवल्क्यः २ । ११५-११८, १२०-२४, १४१, १२६ ।

A father when making partition (of his property), can divide it among his sons as he pleases, either giving to the eldest the best share, or in such wise that all share equally.

If he give equal shares, such of his wives as have not received Stridhana from their husband or father-in-law, shall also equally share.

If one have means, and do not desire (to share in the paternal estate), he shall be separated, something trifling being given to him. A lawful distribution by father in smaller or larger shares, (if in accordance with the Sastras,) is valid.

After decease of the parents let the sons make equal division of the property and of the debts; and so the daughters of what is left of the mother's (Stridhana) after (paying) her debts; and if there be no daughters, the sons or other issue take it.

What has been self-acquired by any one, as an increment without diminishing the paternal estate, likewise a gift from a friend or a marriage gift, does not belong to the co-heirs.

If, however, the common property, be augmented, equal division is enjoined. In making division among several grandsons regard should be had to the respective (portions of their deceased) fathers.

In as much as the ownership of father and son is co-equal in the acquisitions of the grand-father, whether they be land, any settled income, or movables, in them, the ownership of the father and son is equal.

If a son be born of a wife of equal caste, after partition made, he is to share; or a share may be allotted him from the estate as it is, after allowing for income and expenditure.

Whatever property may be given by the parents to any child, shall belong to that child. If partition be made after the father's death, the mother shall also have an equal share.

Those of the brothers whose ritual ceremonies have not been accomplished, shall have them completed by others whose ritual is gone through. So in like manner as to the ritual of sisters (each of the brethren) devoting a fourth part of his share.

The arurasa sons of those (disqualified) persons, also their Kshetraja sons, if themselves free from defect succeed to shares; and their daughters are to be maintained until provided with husbands.

Whatever, after partition has taken place may be discovered to have been wrongly appropriated by one of the sharers, shall be equally divided by them all. This is enjoined.

Yajnavalka, II. 115-118, 129-124, 141, 126.

विभागधर्म्मसन्देहे बन्धुसाक्ष्यभिलेखितैः।
विभागभावना कार्य्या न भवेद्दैविकी क्रिया॥

चन्द्रिकाधृतबृहद्याज्ञवल्क्यवचनम्।

When there is doubt as to partition, it should be determined by members of the family, witnesses, and deeds. There is no determination by ordeal.

Vriddha-Yajnavalkya, cited in the Smriti-Chandrika and the Mayukha.

पिता चेत् पुत्रान् विभजेत् तस्य स्वेच्छा स्वयमुपार्जितेऽर्थे*। पैतामहेत्वर्थे पितृपुत्रयोस्तुल्यं स्वामित्वम्। पितृविभक्ता विभागानन्तरोत्पन्नस्य भागं दद्युः।

मातरः पुत्रभागानुसारेण भागापहारिण्यः। अनूढाश्च दुहितरः।

विष्णुः १७। १-३; १८। ३४, ३५

If a father makes a partition with his sons, he may dispose of his self-acquired property as he thinks best. But in regard to wealth inherited from the paternal grandfather, the owership of father and son is equal. (Sons), who have separated from their father, should give a share to (a brother) who is born after partition.

Mothers shall receive shares proportionate to their sons' shares; and so shall unmarried sisters.

Vishnu, XVII. 1—3; XVIII. 34,35.

क्रयविक्रयदानग्रहणप्रातिभाव्यसाक्षित्वसम्भूयकारित्वनिध्याधानादिकं परस्परकृतं विभागहेतुरिति।

सरस्वतीविलासधृतविष्णुवचनम्।

Mutual transactions in buying, selling, giving, receiving, suretyship, giving evidence, becoming partners, buying treasure, &c., are sources of division.

Vishnu, cited in the Saraswati-Vilasa.

मणिमुक्ताप्रवालानां सर्व्वस्यैव पिता प्रभुः।
स्थावरस्य तु सर्व्वस्य न पिता न पितामहः॥

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* The Apararka reads the following just after this:
पितर्जितेऽपि धने कदाचित् पुत्राएव विभागकर्त्तारो भवन्ति।

पितृप्रसादात् भुज्यन्ते वस्त्राण्याभरणानि च ।
स्थावरं तु न भुज्यन्ते प्रसादे पैतृके सति ॥
अपरार्कधृतनारदवचनम् ।

The father is the master of gems, pearls, and corals. Neither the father, nor the grandfather is the master of immovable property. By the father's pleasure, clothes and ornaments are enjoyed, but the immovable property is not enjoyed by the father's pleasure.

A text cited in the Parasara-Madhava, Mitakshara and other books, without naming the author. Apararka attributes it to Narada and Kamalakara to Vishnu.

विभागोऽर्थस्य पित्रास्य पुत्रैर्यत्र प्रकल्प्यते ।
दायभाग इति प्रोक्तं तद्विवादपदं बुधैः ॥
पितर्य्यूर्द्धं गते पुत्रा विभजेरन् धनं क्रमात्* ।
मातुर्दुहितरोऽभावे दुहितॄणां तदन्वयः ॥
मातुर्निष्कृत्ते रत्नेषु प्रत्तासु भगिनीषु च ।
निष्कृत्ते वापि रमणे पितर्युपरतस्पृहे ॥
पितैव वा स्वयं पुत्रान् विभजेद् वयसि स्थितः ।
ज्येष्ठं वा श्रेष्ठभागेन यथा वास्य मतिर्भवेत् ॥
विभक्तारश्च सर्व्वान् ज्येष्ठो भ्राता यथा पिता ।
भ्राता भक्तः कनिष्ठो वा भक्त्यपेक्षाः कुले स्त्रियः ॥
द्वावंशौ प्रतिपद्येत विभजन्नात्मनः पिता ।
समांशभागिनी माता पुत्राणां स्यान्मृते पतौ ॥
ज्येष्ठायांशोऽधिको ज्ञेयः कनिष्ठायावरः स्मृतः ।
समांशभाजः शेषाः स्युरप्रत्ता भगिनी तथा ॥
पित्रैव तु विभक्ता ये हीनाधिक्यसमैर्धनैः ।
तेषां स एव धर्म्मः स्यात् सर्व्वस्य हि पिता प्रभुः ॥
व्याधितः कुपितश्चैव विषयासक्तमानसः ।
अन्यथाशास्त्रकारी च न विभागे पिता प्रभुः ॥

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* अतऊर्द्धं पितुः पुत्रा विभजेयुर्धनं समम् is the reading of the Vivada Tandava.

भर्त्तव्याः सुताः कुर्युः तेते तत्पुत्रास्तदंशभागिनः ॥
यच्छिष्टं पितृदायेभ्यो दत्त्वार्धं पैतृकं च यत् ।
भ्रातृभिस्तद्विभक्तव्यमृणी न स्याद् यथा पिता ॥
येषां तु न कृताः पित्रा संस्कारविषयाः क्रमात् ।
कर्त्तव्या भ्रातृभिस्तेषां पैतृकादेव ते धनात् ॥
नारदः १३ । १-५, १२, १३, १५, १६, २२, ३२, ३३

Where a partition of the paternal property is instituted by the sons, it is called by the learned, Partition of property (Dayabhaga), a title of law. *

The father being dead, the sons shall divide the father's estate ; (and so shall) daughters (divide the property) of their mother (when she dies) ; or, failing daughters, their issue.

(The distribution of the property shall take place) when the mother has ceased to menstruate and the sisters are married, or when the father's sexual desire is extinguished, and he has ceased to care for worldly interests.

Or let a father distribute his property among his sons himself, when he is striken in years, either allotting a larger share to the eldest son, or (distributing the property in any other way) following his own inclination.

Or the senior brother shall maintain all (the junior brothers), like a father, if they wish it, or even the youngest brother, if able ; the well-being of a family depends on the ability (of its head).

Two shares let the father keep for himself when distributing his property. The mother shall receive the same share as a son (when the sons divide the property) after her husband's death.

To the eldest son a larger share shall be allotted, and a less share is assigned to the youngest son. The rest shall take equal shares, and so shall an unmarried sister.

When a father has distributed his property amongst his sons, that is a lawful distribution for them (and cannot be

* The Vidava Tandava cites the following text from the Madanaratna and says Daya includes property derived from the mother also :

पितृद्वारागतं द्रव्यं मातृद्वारागतं च यत् ।
कथितं दायशब्देन तद्विभागोऽधुनोच्यते ॥

annulled), whether the share of one be less, or greater than, or equal to, the shares of the rest ; for the father is the lord of all.

A father who is diseased, or angry, or absorbed by (sinful) worldly interests, or who acts illegally, has not the power to distribute his property (as he likes).

(Persons insane, &c.) shall be maintained by the family ; but their sons shall receive their respective shares (of the inheritance).

What is left (of the father's property), when the father's obligations have been discharged, and when the father's debts have been paid, shall be divided by the brothers, in order that the father may not continue a debtor.

For those (brothers), for whom the initiatory ceremonies* have not been duly performed by their father, they must be performed by the (other) brothers, (defraying the expense) from the paternal property.

Narada, XIII. 1-5, 12, 13, 15, 16, 22, 32, 33.

पितोरभावे भ्रातॄणां विभागः संप्रदर्शितः ।
मातुर्निवृत्ते रजसि जीवतोरपि जायते ॥
क्रमागते गृहक्षेत्रे पिता पुत्राः समांशिनः ।
पैतृकी न विभागार्हाः सुताः पितुरनिच्छया ॥
द्रव्ये पितामहोपात्ते स्थावरे जङ्गमे तथा ।
समर्णशिलमाख्यातं पितुः पुत्रस्य चैव हि ॥
पैतामहं हृतं पित्रा स्वशक्त्या यदुपार्जितम् ।
विद्याशौर्यादिता वाप्तं तत्र स्वाम्यं पितुः स्मृतम्† ॥
समन्यूनाधिका भागाः पित्रा येषां प्रकल्पिताः ।
तथैव ते पालनीया विदेयाः स्युरतोऽन्यथा ॥
जीवद्विभागे तु पिता गृहीतांशसमं स्वयम् ॥

* Some commentators include marriage among the ceremonies to be thus performed, and this is in accordance with Yajnavalkya, II. 124.

† This text of Narada is cited in the ancient commentary of Aparaka, as following the preceding text : Dr. Jolly has omitted it. The Aparaka, also cites the following text in this connection.

प्रदाय स्वेच्छया कुर्याद्भोगं चैव ततोधनात् ।
एतत् सर्वं पिता पुत्रैर्विभागेनैव दाप्यते ॥

सवर्णासु च ये जाताः सर्व्वे पुत्रा द्विजन्मनाम्।
उद्धारं ज्यायसे दत्त्वा भजेरन्नितरे समम्॥
समवेतैस्तु यत् प्राप्तं सर्व्वे तत्र समांशिनः।
तत्पुत्रा विषमसमाः समभागहराः स्मृताः॥
तदभावे तु जननी तनयांशसमांशिनी।
समांशा मातरस्तेषां चतुर्थांशास्तु कन्यकाः॥
वस्त्रादयो विभाज्या येरुक्तास्तैर्न विचारितम्।
धनं भवेत् समुद्धारात् पञ्चालङ्कारसंश्रितम्॥
मध्यस्थितमनाजीव्यं दातुं नैवास्य शक्यते।
युक्त्या विभजनीयं तदन्यथानर्थकं भवेत्॥
विक्रीय वस्त्राभरणमृणमुद्गृह्य लेखितम्।
कृताकृताग्नेन परिवर्त्त्य विभज्यते॥
उद्धृत्य कूपवाप्यम्बुसारेण गृह्यते।
एकां स्त्रीं कारयेत् कर्म्म यथांशेन गृहे गृहे॥
वह्नयः समांशतो देया दासानामप्ययं विधिः।
योगक्षेमवती खाभः समत्वेन विभज्यते॥
यथाभागानुसारेण सेतुः क्षेत्रं विभज्यते।
प्रचारश्च यथांशेन कर्त्तव्य ऋक्थिभिः सदा॥
कृतेऽकृते विभागे वा रिक्थौ यत्र प्रवर्त्तते।
सामान्यन्तु भवेद् यत्तु तत्र भागहरस्तु सः॥
ऋणं लेख्यं गृहं क्षेत्रं यस्य यैतामहं भवेत्।
चिरकालप्रोषितोऽपि भागभागागतस्तु सः॥
गोक्षसाधारणं त्यक्त्वा योऽन्यदेशं समाश्रितः।
तद्दंशस्यागतस्यांशः प्रदातव्यो न संशयः॥
क्लीवः पङ्गुर्वापि समस्तो वापि यो भवेत्।
जन्मनामपरिज्ञाने क्षेमितांशं क्रमागतम्॥
यत् परम्परया भोक्ताः स्वामिनः स्वामिनं विदुः।
तदन्वयस्यागतस्य दातव्या गोक्षजैर्महो॥

बृहस्पतिः २५। १—५, ८, १४, ६४, ७६—८४, २२—२६

After the death of both parents, division of the property among brothers has been ordained (to take place). It may

take place even in their lifetime, if the mother be past child bearing.

Houses and landed property, inherited from an ancestor, shall be shared equally by the father and sons; but the sons cannot claim a share of their father's own property without the consent of the father.

Of property acquired by the grandfather, whether immovable or movable, father and son are declared to be entitled to equal shares.

In grand-peternal property once lost and afterwards recovered by the father, in self-acquired property and in what is acquired by learning or valour, the father's power of disposal is declared.*

Those (sons) for whom their shares have been arranged by the father, whether equal, less, or greater, must be compelled to abide by such arrangement. Otherwise (if they try to alter the arrangement), they shall be punished.

When a partition is made during (the father's) life, the father shall reserve a couple of shares for himself.

All sons of the twice-born, begotten on women equal in easte (to their husbands), shall take equal shares, after giving a preferential share to the eldest.

Whatever has been acquired by all together, in that property they all have equal shares. Their sons, whether unequal or equal (in number), are declared (to be) heirs of the shares of their (respective) fathers.

But on his death the mother shall take a son's share. The (step) mothers shall share equally with them; the maidens (daughters) shall take fourth-part shares.

Those by whom clothes and the like articles have been declared indivisible have not decided properly. The wealth of the rich depends on clothes and ornaments.

(Such wealth) when withheld from partition will yield no profit; but neither can it be allotted to a single (coparcener). Therefore it has to be divided with some skill; or else it would be useless.

* This text is omitted by Dr. Jolly. It is found in the Aparaka. Without it the meaning of the next verse becomes misleading.

Clothes and ornaments are divided by (distributing the proceeds after) selling them ; a written bond (concerning a debt, is divided) after recovering the sum lent ; prepared food (is divided) by an exchange for (an equal amount of) unprepared food.

The water of a well or pool shall be drawn and used according to need. A single female (slave) shall be successively set to work at their houses (by the several sharers) according to their shares (of the inheritance).

If there are many of them, they shall be divided equally. The same rule applies to male slaves as well. Property obtained for a pious purpose shall be divided in equal shares.

Fields and embankments shall be divided according to their several shares. A common (road or) pasture-ground shall be always sued by the coheirs in due proportion to their several shares.

Whether partition has or has not been made, whenever an heir comes forward, he shall receive a share of such wealth as he can prove to be the joint property (of the family).

Whether it be a debt, or a document, or house, or field, which has been inherited from the paternal grandfather, he shall take his proper share of it, when he returns after a protracted absence even.

When a man has gone abroad, leaving the joint estate of his family, his share must undoubtedly be given to his descendant who has returned from abroad.

Whether he be the third or the fifth or even the seventh in descent, he shall receive the share belonging to him by right of succession, when his birth and family name can be ascertained.

He whom indigenous inhabitants and neighbours know to be the legal owner, to the descendants of that man must the (land) be surrendered by his kinsmen, when they make their appearance.

Vrihaspati, XXV. 1-5, 8, 14, 64, 79-84, 22-26.

पित्रा सह विभक्ता ये सापत्ना वा सहोदराः ।
अपुत्रजाश्च ये तेषां पितृभागहरास्तु ते ॥

अनीशः पूर्वजः पित्रे भ्रातृभागे विभाजकः ॥
पुत्रैः सह विभक्तेन पिता यत् स्वयमर्जितम् ।
विभक्तजस्य तत्रार्द्धमनीशाः पूर्वजाः स्मृताः ॥
यथा धने तथार्घे वा दानाधानक्रयेषु च ।
परस्परमनीशास्ते मुक्त्वा और्ध्वदेहिकम् ॥
* * * *
साधारणं ऋणन्यासमिश्रवे छद्मना क्रियाम् ।
पार्श्वेऽनिकरीं कृत्वा बलान्नैव प्रदापयेत् ॥
मायाविनो धृतधनाः क्रूरा लुब्धाश्च ये नराः ।
सम्नीत्या साधनीयास्ते स्वार्थहान्या छलेन वा ॥

रत्नाकरधृतबृहस्पतिवचनानि ।

When the half brothers or whole brothers have become separated from the father and they have brothers subsequently born, these latter shall take the father's share: one born before (partition) is not entitled to the father's share, nor is one born after partition, to the brother's share.

What is acquired by the father himself after having become separated from the sons, belongs to (the son) born after partition; those born before are ordained, to be not entitled to it.

As in wealth, so also in debts, and in gifts pledges and sales, they are independent of all other, excepting mourning, libations and exequial rites.

In case of concealment of a debt or deposit belonging to the joint family, the payment of the same shall not be enforced by force but by having recourse to an artful contrivance causing indirect loss.

When men, who hold property, are dishonest wicked and avaricious, they shall be dealt with by gentle means or through some contrivance or deprivation of interest

Vrihaspati, cited in the Ratnakara.

गुरुस्त्रिष्वी पितापुत्रौ दम्पती स्वामिभृत्यकौ ।
एतेषां समवेतानां व्यवहारो न विद्यते ॥*

अपरार्कमदनरत्नधृतबृहस्पतिवचनम् ।

* विरोधेतु मिथस्तेषां व्यवहारो न सिध्यति is the reading of the Vivada-tandava.

Between teacher and pupil, father and son, husband and wife, master and servant, who are joint, there can be no legal dispute.

Text of Vrihaspati, cited in the Apararka and Madanaratna &c.

अत ऊर्ध्वमृक्थभागी न जीवति पितरि पुत्रा ऋक्थं विभजेरन् यद्यपि स्यात्* पश्चादधिगतमेतेरनर्हा एव पुत्राः। अर्थधर्मयोरस्वातन्त्र्यात् पितरि निर्दोषे।

जीवति वा पितरि ऋक्थभागोऽनुमतः प्रकाशं वा मिथो वा धर्मतः।

स यद्येकपुत्रः स्यादौ भागावात्मनः कुर्य्यात्।

न वास्तुविभागो नोदपात्रायस्कारसंयुक्तस्त्रीवाससामपां प्रचारवर्त्मनामविभाग्येति प्रजापतिः।†

रत्नाकरादिधृतग्रन्थलिखितवचनानि।

Since partition of the estate takes place after his decease, sons cannot divide it while the father leaves, though there be property subsequently acquired by them; they have no power (tó make such a partition), since they are not independent in respect of wealth and religious duties, when the father is free from defect.

When the father is living, partition of wealth, if allowed by him, may take place either publicly or privately, according to what is right.

If there be only one son, the father will take two shares.

No division of a dwelling takes place, nor of iron water-pots, ornaments, nor of women and clothes enjoyed by one, nor channels for draining water. Prajapati has so ordained.

Sankha-Likhita cited in the Kalptaru-Parasara Madhava, Ratnakara, Vira Mitrodaya and other digests,

अकामेपितरि ऋक्थविभागी वृद्धेपिरोगितचेतसिदीर्घरोगिणि वा। यद्येकपुत्रः स्यात्तदा द्वौ भागौ वात्मनः कुर्य्यात्।

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* The Viramitrodaya reads स्वाम्यं for स्यात्। The meaning would then be "though ownership is afterwards acquired."

† The reading of the Apararka which seems to be more correct runs thus: न चास्ति विभागोऽग्नीदपात्रायस्कारसंयुक्तस्त्रीवाससामुपचारार्थानां विभाग्येति प्रजापतिः। It omits the dwelling house from the list of impartible things.

ज्येष्ठएव पितृवदर्थान् पालयेदितरेषां तु ऋक्थमूलमेव कुटुम्बमखतन्त्रा पितृमन्तो मातर्यैवमवस्थितायाम्।

अपरार्कधृतशङ्खवचनानि।

There may be partition when the father is without desire, old, when his intellect is pervested, or afflicted with longstanding disease. The father when making partition, may take two shares when there is only one son. The eldest should manage the property and support the rest like the father. The family depends on wealth. Sons are without independence when the father is alive and also as long as the mother is living.

Sankha cited in the Apararka.

पूर्व्वनष्टान्तु यो भूमिमेकश्चेदुद्धरेत् क्रमात्।
यथाभागं खभन्तेऽन्ये दत्त्वांशन्तु तुरीयकम्॥

मिताक्षराधृतशङ्खवचनम्।*

Land (inherited) in regular succession but which had been formerly lost, and which a single (heir) recovers solely by his own labour, the rest may divide according to their shares, giving him a fourth part.

Sankha, cited in the Mitakshara, Ch. I, Sec. 3.

पैतामहं समानं स्यात् पितृःपुत्रश्च चोभयोः।
स्वयं तूपार्ज्जिते पित्रा न पुत्रः स्वाम्यमर्हति॥†
पैतामहञ्च पित्र्यञ्च यत् किञ्चित् स्वयमर्ज्जितम्।
दायादानां विभागे तु सर्व्वमेतद्विभज्यते॥
ऋक्थं प्रीतिदत्तन्तु दत्त्वा ज्येष्ठं विभाजयेत्।
आचतुर्थात्तु तद्दद्यात् क्रमेणैव तु तत्सुतैः॥
भ्राता पितृव्यमातृभ्यां कुटुम्बार्थमृणं कृतम्।
विभागकाले देयं तद्दक्थिभिः सर्व्वमेव तु॥

* According to Apararka, it is a text of Rishyasringa.

† This text is found in the Apararka. The same Commentary also cites the following text of Katyayana :

स्वशक्त्याऽपहृतं नष्टं स्वयमाप्तं च यद्भवेत्।
एतत्सर्व्वं पितापुत्रैर्विभागे नैव दाप्यते॥

तद्दत्तं धनिभिर्देयं नान्यथैव प्रदापयेत् ।
भावितञ्चेत् प्रमाणेन विरोधात्परतो यदा ॥
पित्रा पितृव्यसत्त्वस्थमात्मीयत्वात्मना कृतम् ।
ऋणमेवंविधं शीघ्रं विभागे बन्धुभिः सह ॥
धर्म्मार्थं प्रीतिदत्तं च यद्दत्तं स्वनियोजितम् ।
तद्दृश्यमानं विभजेन्न दानं पैतृकाद्धनात् ॥*
दृश्यमानं विभज्येत गृहं क्षेत्रं चतुष्पदम् ।
गूढद्रव्याभिसङ्काया प्रत्ययस्तत्र कीर्त्तितः ॥
गृहोपस्करवास्त्रास्तु दीक्षाभरणकर्म्मिणः ।
दृश्यमाना विभज्यन्ते कीर्षं गृढं ऽब्रवीन्नृगुः ॥
धनं पत्न्यर्विशेत्तु धर्म्मार्थं यन्निरूपितम् ।
उदकं चैव दाराश्च निवन्धो यः क्रमागतः ॥
धृतं वस्त्रमलङ्कारो नानुरूपश्च यद्भवेत् ।
यच्चाकालोपयुक्तानि तथा यौज्यानि बन्धुभिः ॥
गोप्रचारश्च रथ्या च वस्त्रं यच्चाङ्गयोजितम् ।
प्रयोज्यं न विभज्येत मिथ्यार्थं च बृहस्पतिः ॥
श्वशुरस्य मातेः संङ्घस्य धर्म्मो ग्रामस्य यो भृगुः ।
उदितः स्यात् स तेनैव दायभागं प्रकल्पयेत् ॥

* * * *

प्रोषितस्य तु यो भागो रक्षेयुः सर्व्व एव तम् ।
बालपुत्रं ऋते ऋक्थं रक्ष्यं तत्तन्तु बन्धुभिः ।
पौगण्डाः परतस्तन्तु विभजेरन् यथांशतः ॥
स प्राप्तव्यवहाराणां विभागस्य विधीयते ।
पुंसां च षोड़शे वर्षे जायते व्यवहारिता ॥†

* * * *

प्रच्छादितन्तु यत्नेन पुनरागत्य तत् समम् ।
भजेरन् भ्रातृभिः सार्द्धमभावे तु पितुः सुताः ॥

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* This and the preceding verse are attributed to Narada in the Vivada-Tandava.

† This text is found in the Apararka.

अन्योऽन्यापहृतं तच्च दुर्विभक्तञ्च यद्भवेत् ।
पश्चात्प्राप्तं विभज्येत समसांशेन तद्गुणैः ॥
विभक्तेनैव यत् प्राप्तं धनं तस्यैव तद्भवेत् ।
हृतं नष्टञ्च यल्लब्धं प्रागुक्तञ्च पुनर्भजेत् ॥
बन्धुनापहृतं द्रव्यं बलान्नैव प्रदापयेत् ।
बन्धुनाऽविभक्तानां भोगन्नैव प्रदापयेत् ॥

रत्नाकरादिधृतकात्यायनवचनानि ।

In grandpaternal property father and son have equal rights. But in self-acquired property of the father the son has got no right.

Whatever is inherited from the grandfather or from the father, or is self-acquired, all that should be divided at a partition among heirs.

But having given affectionate gifts (promised by the father) out of the heritage the residue should be divided. And that should be received by their issue, in (their) order down to the fourth.

But all debts incurred for the purpose of the family by a brother or a paternal uncle, or the mother, must be paid by the co-heirs, at the time of partition.

That debt shall be paid to the creditor when after contest, the same is established by evidence; otherwise they shall not be compelled to pay.

The paternal debt, the debt incurred by a relative (for the family) and a debt incurred by a member himself (for the family) such debts are payable jointly by the co-heirs at the partition.

Whatever is given for a religious purpose or through affection, and whatever debt is on account of a member himself, the same shall be divided when known; there can be no gift from the patrimony.

Whatever is known, houses, fields and quadrupeds, should be divided. If concealment of property is suspected, then discovery (by ordeal) is prescribed.

Household furniture, beasts of burden, milch cows, ornaments and workmen (slaves, &c.) that are visible shall be divided; and in case of property being concealed Bhrigu ordains the

kosha or an ordeal by drinking water in which an idol has been washed.

But property recorded in a document, what is settled for (common) religious purpose, (bells, &c.) water, women, what is hereditary corrody ;

Worn clothes, ornaments, what is not suitable (for partition), such things being enjoyed by the coparceners in a manner suited to the occasion ;

The path for cows, the carriage, road, clothes that are actually worn on the body, (prayojya) what is requisite for use, (books, &c.), or what is intended for arts should not be divided : so Vrihaspati declares.

Whatever law has been declared applicable to a country, to a caste, or a class, or to a village, the partition is to be effected in accordance with that alone : so Bhrigu declares.

The share of a person who has gone abroad, shall be preserved in its entirety : when a man dies leaving an infant son, his heritage should be protected by the relatives of the son. The infants shall afterwards divide the same, according to their proper shares.

Partition is proper of those who have attained majority. Men attain majority in their sixteenth year. *

Whatever is concealed by any one, the sons should, after the death of the father, assemble and divide with their brethren, in equal shares :

Bhrigu says, what is concealed by different members, and what has been improperly divided, and what has been received subsequently, shall be divided in equal shares.

Whatever is acquired by a separated coparcener, shall belong to him alone ; but whatever was stolen, or lost, of the aforesaid property, shall be divided afresh.

Whatever effect has been stolen by a kinsman, shall not be recovered by force : undivided kinsmen shall not be compelled to pay (compensation) for enjoyment.

Texts of Katyayana cited in the Ratnakara, &c.

* This text is cited in the Apararka and is not found in the Ratnakara.

द्वंशग्रहरोऽद्धहरो वा पुत्रवित्तार्जनात् पिता ।
मातापि पितरि प्रेते पुत्रतुल्यांशभागिनी ।

दायभागधृतकात्यायनवचनम् ।

A father takes either a double share or a moiety of his son's acquisition of wealth; and a mother also, if the father be deceased, is entitled to an equal portion with the son.

Katyayana, cited in the Dayabhanga.

स्वजातिभिर्बान्धवैश्च भुक्तं यत् स्वजनेन तथा ।
भोगात्तच्च न सिद्धिः स्याद्गोगमन्येषु कल्पयेत् ॥
अप्राप्तव्यवहाराणां धनं व्ययविवर्जितम् ।
न्यसेयुर्बन्धुमित्रेषु प्रोषितानां तथैव च ॥

वीरमित्रोदयधृतकात्यायनवचनम् ।

Enjoyment by one's own caste-people, agnates, or relatives is not valid enjoyment (*i.e.*, is ineffectual). Effectual enjoyment is that by strangers.

The wealth of infants without being liable to any expenditure should be deposited with relatives or friends and likewise of those who have gone abroad.

Katyayana, cited in the Vira-Mitrodaya.*

जीवति पितरि पुत्राणामर्थादानविसर्गाधिपेषु न स्वातन्त्र्यं कामदाने प्रोषिते चार्त्तिं गते वा ज्येष्ठ एवार्थांश्चिन्तयेत् ।

जीवन्नेव वा विभज्य वनमाश्रयेद्दृढव्रताश्रमं वा गच्छेत् । स्वल्पेन वा संविभज्य भूयिष्ठमादाय वसेद्यदुपदर्शयेत् पुनर्भ्यो गृह्णीयात् । चौर्यांश्च विभजेत् ।

विभज्यमाने गवां समूहे वृषभमेकधनं वरिष्ठं वा ज्येष्ठाय दद्युर्देवताग्रहञ्च । इतरे निष्क्राम्य कुर्युः ।

एकस्मिन्नेव दधिघं ज्येष्ठायानुपूर्व्वमितरेषाम् ।

रत्नाकरधृतव्यासीतवचनानि ।

While the father lives, sons are not independent in respect of the receipt, alienation and recovery of wealth; but if he be

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* The Viramitrodaya also cites the following text of Katyayana :

सकल द्रव्यजातं यज्ञागतं गृह्णन्ति तत्समैः ।
पितरौ भ्रातरश्चैव विभागीधर्म्म उच्यते ॥

prodigal, absent in a remote country, or afflicted with disease, let the eldest son manage the affairs.

The father when living may distribute (the whole property amongst the sons) and retire to a forest or enter the order of old age; or he may distribute a small portion and continue to live in his house reserving the larger portion for himself. Should he lose, he may take back from them, and to such as become indigent he may give a portion.

When a division takes place a bull from a herd or one excellent article and the image of the family god and the house* should be given to the eldest, the rest shall remove, and build.

Or if there is only one (home-stead) then the best should be given to the eldest and as regards the rest, the order of seniority should be followed.

Harita, cited in the Ratnakara.

यद्यसमाप्तवेदाः कनीयांसस्तदा सहवसेयुः।

अपरार्कधृतहारीतवचनम्।

If the younger brothers have not finished studying the Vedas, the brothers should live joint.

Harita cited in the Apararka.

विभक्तेष्वनुजोजातः सवर्णो यदि भागभाक्।

वृद्धहारीतः ४ अध्यायः।

If after partition a younger brother is born he is entitled to a share, if of equal caste.

Vriddha-Harita, IV.

समत्वेनैव भ्रातॄणां विभागस्तु विधीयते।

उशनाः।

The division of heritage among uterine brothers is equal.

Usana, cited in the Ratnakarat.

पितर्युपरते पुत्रा विभजेयुर्धनं पितुः।

अस्वाम्यं हि भवेदेषां निर्हृषि रितरि स्थिते॥

अपरार्करत्नाकरधृतदेवलवचनम्।

* I would prefer "the temple of the family idol" to "god and house.

After the death of the father, sons should divide his wealth. As long as the faultless father is alive they have no right.

Devala, cited in the Apararka and Ratnakara.

पितामहेन यद्दत्तं पित्रा वा प्रीतिपूर्व्वकम् ।
तस्य तन्नापहर्त्तव्यं माता दत्तञ्च यद्भवेत् ॥
* * * * *
क्रमागते गृहक्षेत्रे पिता पुत्राः समांशिनः ।
पैतृकी न विभागार्हाः सुताः पितुरनिच्छतः ॥
असुतास्तु पितुः पत्न्यः समानांशा प्रकीर्त्तिताः ।
पितामह्यश्च ताः सर्व्वा मातृतुल्याः प्रकीर्त्तिताः ॥
अविभाज्यं सगोत्राणामासनक्षेत्रकूपादपि ।*
याज्यं चैवञ्च पत्रञ्च कृतान्नमुदकं स्त्रियः ॥

कल्पतरुधृतव्यासवचनानि ।

Whatever is given out of affection to a (co-sharer) by the grand-father, by the father, or by the mother should not be taken away from him.

In houses and fields inherited from ancestors in regular course, the father and son are equal sharers, but in the property of the father (himself) the sons are not entitled to share against the will of the father.

But the sonless wives of the father, are declared equal sharers; and all the grandmothers also are declared equal to mothers (as sharers).

A place of sacrifice, or an object of worship, land, securities, conveyance, dressed food, water and women are not divisible among those of the same gotra or family though distant by a thousand generations.

Vyasa, cited in the Kalpataru, Ratnakara, &c.

पितामहपितृभ्याञ्च दत्तं माता च यद्भवेत् ।
तस्य तन्नापहर्त्तव्यं शौर्य्यभार्य्याधनं तथा ॥

हरदत्तधृतव्यासवचनम् ।

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* अविभाज्यं सगोत्राणामासनं शयनादिकम् (seats and beds of the Sagotras) is the reading in the Dayatattwa. It seems to be the better reading.

Whatever has been given by the grandfather, father, or mother to a coparcener, and the wealth (acquired by) valour, as well as the wealth of the wife, should not be divided by the co-heirs.

Vyasa, cited by Haradatta.

भ्रातृणां जीवतोः पित्रोः सहवासोविधीयते ।
तद्भावे विभक्तानां धर्मस्तेषां विवर्द्धते ॥

अपरार्कधृतव्यासवचनम् ।

As long as the father and the mother are alive, the brother should live joint. After their death, the merit of divided brothers increases.

Vyasa cited in the Apararka.

जननीत्वधना पुत्रैर्विभागेऽंशं समं हरेत् ।
सधना तु यावता स्वधनस्य समभागता ॥

मयूखधृतस्मृतिवचनम् ।

If the mother is without wealth, on partition among sons, she would take a share equal to theirs; but if she has wealth, she will take so much, that her wealth may be equal to the share of the sons.

A text of an unnamed Smriti cited in the Mayukha only and thus of doubtful authenticity.

For other Texts, see Ch. II., Sec. VIII., and Ch. III., and also Ch. IV., Sec. IV.

SECTION IV.

The self-acquired property, gains of learning, &c.

Rule of the Lawgivers.

The rule of Manu on this subject is very clear and simple. He says, in a joint family of unlearned men whatever is acquired by each, by personal labour, is joint property. Everybody is capable of personal labour, and it is to be presumed that there is not much difference between the earnings of one man and another, when both are ignorant and unskilled. But if one brother by his own labour gets a particularly valuable property which he does not wish to share with the rest, he is entitled to keep it to himself, provided it was acquired without using the patrimony. As to gains of learning, they always belonged to the acquirer, and so did gifts received from a friend or during marriage. Vishnu's rule is identical with Manu's. Gautama has also a very short rule. He says, whatever the learned coparcener has acquired by his own efforts the unlearned cannot share. As among the unlearned, division of everything is equal. The rule of Gautama does not, therefore, clash with that of Manu. Yajnavalkya agrees with Manu. The comment of Vijnaneswara, that in respect of acquisitions by learning, marriage, &c., in order to be separate property, they must have been acquired without the use of paternal wealth, is wholly unjustifiable, and is due to the anxiety of commentators to reconcile all texts however irreconcilable. When we come to Narada we find him agreeing with Manu, only adding to the category of separate pro-

perty those acquired by valour and by gift from father or mother. He, however, makes the reservation, that if one brother maintains the family of another while the latter is engaged in study, he is entitled to a share of the wealth gained by that study. The rule of Narada apparently refers to a case where there is no paternal wealth, and one brother, not having himself the advantage of education, toils, not only for the maintenance of the family but for meeting the personal expenses of another brother, desirous of giving the latter advantages, of which he was probably deprived, on account of poverty and untoward circumstances. Hundreds of such cases are to be found in Bengal and other parts of India. A not very learned brother stints himself and his own family to give his younger brother a good education, probably mortgages and sells his own property, so that the other may not only get honors in the Indian Universities, but also in the English Universities. It is of such cases, that Narada spoke, and it will be encouraging ingratitude of the blackest dye according to Hindu ideas, and unjust according to all, if a person educated in this way is allowed to enjoy the wealth gained by him without sharing it with his poorer brother. But Narada never spoke of the case in which the brother is maintained out of the paternal wealth, for in that case there is absolutely no justification for holding, that a learned brother should divide his earnings with other members of his family.

Katyayana added to the list of separate property that which is acquired by art and skill in workmanship. But he defined "gains of science" as what is gained by one educated, while supported

by a stranger. He probably meant to emphasize the rule of Narada, but he says nothing about it. He only says, that in the case of a person trained in arms by his father or brothers, the gains of his valour are divisible among the family according to Vrihaspati. In the texts of Katyayana on the subject, we find him quoting authority for his positions. Unfortunately we do not possess the texts which were probably before him. The texts, which we possess of Vrihaspati, lay down the same rule as Manu, except in the case of re-united brothers, among whom the acquirer is entitled to a double share.

Rule of double share.

Vyasa agrees with Manu in the main, but makes an exception in the case of wealth acquired by valour, with the aid of articles belonging to the family, when the acquirer is only entitled to a double share. This allotment of a double share is a peculiar rule which is mentioned by the law-givers in connection with the eldest brother's share, and the share which the father may take on partition. Vasistha, while giving a double share to the eldest son and enjoining the giving of three shares to the son of the Brahmani and two shares to the son of the Kshatriya wife and equality in the case of others, says that in self-acquisitions a coparcener has a double share. The rule of the double share is long obsolete in the case of the eldest brother's share, as well as of the father's share, and should be considered as so in the case of self-acquisitions, and the rule of Manu followed.

From the above it is tolerably clear, that the rule of Manu as modified by Narada agreeing as it does with that of Vishnu, Gautama and Yajnavalkya,

is the law governing self-acquisitions, including gains of learning, and that it is a simple rule consonant with reason and natural justice. The chief difficulty arises when we come to the commentators and the rulings of our Courts.

Rule of the Mitakshara.

Vijnaneswara applies the proviso "without detriment to the father's estate" mentioned in the text of Yajnavalkya to every kind of self-acquisition, and says: "what is obtained from a friend as the return of an obligation conferred at the charge of the patrimony; what is received at a marriage concluded in the form termed Asura or the like; what is recovered of the hereditary estate, by the expenditure of the father's goods; what is earned by science acquired at the expense of ancestral wealth, all that must be shared with the whole of the brethren and with the father."

Smriti-Chandrika restricts rule of double share to gains of science.

The Smriti-Chandrika restricts the texts about double share to the gains of learning.

Rule of the Dayabhaga.

The Dayabhaga, agreeing with Visvarupa,* cites his opinion, that "when wealth is not acquired by giving or using paternal property, it is declared by the sages not to be common, any more than wealth received on account of marriage; it becomes not common, merely because property may have been used for food or other necessaries, since that is similar to the sucking of mother's breast"; and says "it is, therefore, demonstrated that wealth acquired by means of joint stock used for the

* What Visvarupa says is this: "Whatever is acquired by one without detriment to the paternal wealth and what is received from friends and at marriage, belong to the acquirer alone; × × × Wealth received from friends and the like is certainly indivisible even if acquired to the detriment of the paternal wealth." Vol. I p. 4.

express purpose of gain, is common property; and no other is so."

Old decisions of Bombay and Madras.

The first decision on the question is one by the Madras High Court in which we find the strange proposition propounded, that a dancing girl and her mother may constitute a joint Hindu family. It was held that "if these gains of the deceased daughter were to be considered gains of science, they were joint property of the acquirer and her mother." (1) In another case it was held, that gains by prostitutes would not be joint property. (2) The same Court has also held, that the gains of a Vakil who had received only a general education from his father and "received a family maintenance" were joint family property. (3) The last decision was followed by the Bombay High Court in an early case. (4) But in Madras it has also been held, that gains by trading were separate property, though the acquirer was maintained, educated, and married out of the ancestral wealth. (5)

Decisions of Bengal and Privy Council.

It has been held in Bengal, however, in the well-known case of Dhanukdhary Lal *v.* Gunpat Lal, (6) that the law laid down in Madras and Bombay is not correct. The late Mr. Justice Dwarka Nath Mitter in deciding that case said: "the plaintiff's case in the Court below was that the defendant received his education from the joint estate, and that he is consequently entitled to participate in every property that has been

(1) Chala Konda *v.* Ratna Chalem, 2 Mad. H. C. 56.

2) Bhoologam *v.* Swornam, 4 Mad. 330.

(3) Durvasala Gangadharudu *v.* Narasamma Durvasasala, 7 Mad. H. C. 47.

(4) Bai Manchha *v.* Narotamdas, 6 Bom. H. C., A. C. J. 1.

(5) Chellaperoomall *v.* Viraperoomall, 4 Mad. Jur. 54.

(6) 10 W. R. 122, 4 B. L. R. 201.

acquired by the defendant by the aid of such education. But the contention is nowhere sanctioned by the Hindu Law, and I see nothing in justice to recommend it." This view of the law was approved by the privy Council in a Madras case, in which, while holding that property acquired by trade was separate property, their Lordships made the following observations : "It does not become necessary to consider whether the somewhat startling proposition of law put forward by the appellant, which, stated in plain terms, amounts to this :—that if a member of a joint family receives any education whatever from the joint funds, he becomes forever afterwards incapable of acquiring by his own skill and industry any separate property—is or is not maintainable. Very strong and clear authority would be required to support such a proposition. For the reason that they have given, it does not appear to them necessary to review the text-books or the authorities which have been cited on the subject. It may be enough to say, that according to their Lordships' view, no texts which have been cited go to the full extent of the proposition which has been contended for. It appears to them, further, that the case reported in 10 W. R. in which a judgment was given by Mr. Justice Jackson and Mr. Justice Mitter, both very high authorities, lays down the law bearing upon this subject by no means so broadly as it is laid down in two cases, which have been quoted, as decided in Madras ; the first being to the effect that a woman adopting a dancing girl and supplying her with some means of carrying on her profession, was entitled to share in her gains ; and the second to the effect, that the gains of a Vakil, who has

received no special education for his profession, are to be shared in by the joint family of which he was a member; decisions which have to a certain extent also been acted upon in Bombay. It may hereafter possibly become necessary for this Board to consider whether or not, the more limited and guarded expressions of the law upon the subject of the Court of Bengal, is not more correct than what appears to be the doctrine of the Courts of Madras." (1)

Recent rulings of Bombay and Allahabad

The emphatic assurance of Mr. Justice Mitter mentioned above that "the contention is nowhere sanctioned by the Hindu Law" was challenged by the Bombay High Court, in the case of Lakḥman *v.* Jamna Bai, (2) in which the judges, after considering the texts and all the previous cases, came to the following conclusion: "We think that we shall be doing no violence to the Hindu texts, but shall be only adapting them to the conditions of modern society, if we hold that, when they speak of the gains of science which has been imparted at the family expense, they intend the special branch of science which is the immediate source of the gains, and not the elementary education which is the necessary stepping stone to the acquisition of all science." This view has been subsequently affirmed by the Bombay High Court (3) and approved by the Allahabad Court in a recent case. (4)

Indeed, in the conditions of modern society, the old law is not applicable, and the texts of

(1) Pauliem Valoo *v.* Pauliem Soorayu, 4 I. A. 109, 1 Mad. 252.
(2) 6 Bom. 225.
(3) Krishnaji Mahadev *v.* Moro Mahadev, 15 Bom. 32.
(4) Lachmin Kuar *v.* Debi Prasad, 20 All. 435.

Katyayana, cited in this section, make it clear that the gains of science are defined in detail by the Rishis, and the gains, that come before the courts in these days, do not fall within that definition.

It has however been held that Katyayana's definition of gains of sience is not exhaustive but only illustrative and gains from astrology are gains of science (1) Astrology way well come within the definition of Katyayana. But a professor could not receive any remuneration for imparting knowledge under the old rule and the salary which he may receive now cannot be said to have been contemplated as falling within his definition by Katyayana. This only shows that it is better to hold that Katyayana's rule is exhaustive, especially as there is no reason to consider that it was only illustrative.

It was held in an old case, that nuptial gifts were separate property, even though the expenses of marriage were met out of joint funds. (2)

Rule of the additional share of the acquirer.

We next come to the consideration of the question, whether the acquirer of property is entitled to a double share. In Bengal it has been held, that if any property is acquired with small aid from the family property, but through the special exertions of a member, he is entitled to a double share. (3) The law has been held to be the same under both the Dayabhaga and the Mitakshara schools. (4) In Bombay, it has been held, that when the aid from

(1) Durga Das Joshi *v.* Ganesh, 32 All. 435.

(2) Sheo-gobind *v.* Sham-narayan, 7 N. W. P. 75.

(3) Sree Narain *v.* Gooro Pershad, 6. W. R. 219. Sheo Dyal *v.* Jadoonath, 9 W. R. 61. Jadoomonee *v.* Gangadhur. 1 Boulnois 600. Partab Bahadoor *v.* Tilakdhary, I. S. D. 178. Ram Pershad *v.* Sheo Churun, 10 Moore 490, Dharmadas *v.* Amulyadhan, 33 Cal, 126. Lal Chand *v.* Swarna Kumary, 12 C. W. N. 1133.

(4) Goor Churn *v.* Golukmoney Fulton, 164..

ancestral property is very remote, property acquired chiefly by one's own ability and exertion, belongs to the acquirer solely. (1) and is not liable to partition, subject to a right of retaining an additional quarter share by the acquirer (2) It has been held under the Bengal school that the father always takes a double share, even if the acquisition of the son has been made without the use of the joint funds (3)

Judges have freely expressed their opinion that the rule of Sankha that he who reacquired lost family property should get only an additional fourth share, should not be given effect to, in the conditions of modern society. But what has been actually decided is that these rules should be strictly construed and applied only in cases where the family had been violently or wrongfully dispossessed or adversely kept out of possession for a length of time (4)

It would be simpler and very much better to avoid all difficulties by affirming the rule of Vrihaspati as good law, that when coparceners keep their acquisitions and expenditure separate, or take to trading separately, they should be considered as separate.

Burden of proof.

The question of barden of proof has been discussed in sections 1 and 3. The rules of the Smritis and the cowmentators on the rights of the acquirer, who is a member of a joint family, to his own acquisitions throw a flood of light on the question and if they had been considered in connection with

(1) Jug Mohan Das *v.* Sri Mangal Das, 10 Bom. 528.

(2) Rajaba Bajirao *v.* Trimbak, 34 Bomb. 106.

(3) Dharmadas *v.* Amulya, 33 Cal. 1126.

(4) Bajara *v.* Trimbuk, 34 Cal. 106. See 6 W. R. 58, 5 Mad. H. C. 157.

the question as to what shouid be considered separate property, the law would probably have been more definite and reasonable. The reasonable rule of Vrihaspati mentioned above has always been overlooked.

The old rule was that in a joint family all property, except those mentioned in the texts cited in this section, in the possession of any individual coparcener is joint property. The Privy council modified the rule by laying down in old cases that only where there was a nucleus of ancestral property, the presumption was all properties acquired by any one coparcener was joint property the question of proportion of the nucleus to the property acquired being immaterial (1) But recent cases tend to make the rule more conformable to moden ideas and it has been held that the nucleus must be such from which the property ultimately acquired might be fairly said to have grown and what constitutes nucleus depends on the circumstances of a case. (2) The of rule he nucleus.

It has been recently held by the Privy Council that when one coparcener acquires property without the aid of ancestal property but throws it in the common stock and the income of the whole of the property is devoted to the expenditure of the family, one account being kept of the incomes from self-acquired and ancestral properties, the whole must be regarded as joint property (3) The whole question should be considered from this standpoint. When a person acquires property and keeps it Effect of mixing up.

(1) Luximon Row *v.* Mullar Row, 2 Knapp. 60. Rampershad *v.* Sheo Charan, 10 Moore, 490.

(2) Dwarka Das *v.* Jamradas, 1 Bomb. L. R. 133.

(3) Lal Bahadoor *v.* Kanhya Lal, 29 All. 244 P. C. Munshi Indar Sahai *v.* Kunwar Sham Bahadoor, 17 C. L. J. 299.

separate from the family funds, it can not be said that such property is joint property. It is only when ancestral property and acquisitions are mixed up or the acquisitions are with the help of ancestral property and thus are strictly aceretions to it, even if they are acquired with the special efforts of one coparcener, they must be considered as joint. But when a person lives apart from the family and is not in charge of ancestral property, there is no room for any presumption of the acquisition being joint family property and the question of nucleus has no bearing on it. Even when a person hoes as a member of a joint family and keeps his own acquisitions separate and a separate account is kept of the income and expenditure of joint funds, there can be no room for any presumption of jointness.

Limitation.

It has been held by the Privy Council that if a person is dispossesed or discontinues his possession of his self-acquired or other separate property in favour of the joint estate for 12 years, his claim on the ground of separate property is barred (1)

THE JOINT HINDU FAMILY.

SECTION IV.

यत्किञ्चित् पितरि प्रेते धनं ज्येष्ठोऽधिगच्छति ।
भागी यवीयसां तत्र यदि विद्यानुपालिनः ॥
अविद्यानान्तु सर्व्वेषामीहातश्चेद्धनं भवेत् ।
समक्षञ्च विभागः स्यादपित्र्य इति धारणा ॥

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(1) Vasudeva Padhi Khadanga Garu *v.* Maguni Devan Bakshi Maharatrulu Garu, 28 I. A, 81.

विद्याधनन्तु यद्यस्य तत्तस्यैव धनं भवेत् ।
मैत्राौद्वाहिकञ्चैव माधुपार्किकमेव च ॥
अनुपघ्नन् पितृद्रव्यं श्रमेण यदुपार्जयेत् ।
स्वयमीहितलब्धं तन्नाकामो दातुमर्हति ॥
पैतृकन्तु पिता द्रव्यमनवाप्तं यदाप्नुयात् ।
न तत् पुत्रैर्भजेत् सार्द्धमकामः स्वयमर्जितम् ॥

मनुः ९ । २०४, २०५, २०६, २०८, २०९ ।

Whatever property the eldest (son) acquires (by his own exertion) after the father's death, a share of that (shall belong) to his younger (brothers), provided they have made due progress in learning.

But if all of them, being unlearned acquire property by their labour, the division of that shall be equal, (as it is) not property acquired by the father : that is a settled rule.

Property (acquired) by learning belongs solely to him to whom (it was given), likewise the gift of a friend, a present received on marriage or with the honey-mixture.

What one (brother) may acquire by his labour, without using the patrimony, that acquistion, (made solely) by his own effort, he shall not share unless by his own will (with his brothers).

But if a father recovers lost ancestral property, he shall not divide it, unless by his own will, with his sons, (for it is) self-acquired property.

Manu, IX. 204, 205, 206, 208, 209.

स्वयमर्जितं वैद्यो वैद्येभ्यः कामं प्रकिरेत् ।
अवैद्याः समं भजेरन् ।

गौतमः २८ । ३०, ३१ ।

What a learned (coparcener) has acquired by his own efforts he may (at his pleasure) participate with his learned (coparceners). (*a*)

Unlearned (coparceners) shall divide (their acquisitions) equally.

Gautama, XXVIII. 30,31

अन्येन चैषां स्वयमुत्पादितं स्यात् स द्व्यंशमेव हरेत्।

वशिष्ठः १७। ५१।

And if one of the (brothers) has gained something by his own (effort), he shall receive a double share.

Vasistha, XVII. 51.

पित्र्यद्रव्याविरोधेन यदन्यत् स्वयमर्जितम्।
मैत्रमौद्वाहिकञ्चैव दायादानं न तद्भवेत्।
क्रमादभ्यागतं द्रव्यं कृतमभ्युद्धरेत्तु यः।
दायादेभ्यो न तद्दद्याद्विद्यया लब्धमेव च।

याज्ञवल्क्यः २। ११९, १२०।

Whatever else is acquired by the coparcener himself, without detriment to the father's estate, as a present from a friend, or a gift at nuptials, does not appertain to the co-heirs. Nor shall he, who recovers hereditary property, which had been lost give it up to the parceners: nor what has been gained by science.

Yajnavalkya, II. 120, 121.

For the texts of Vishnu, see Vishnu, Ch. 18, v. 42 and 43, which are identical with Manu, Ch. 9, v. 208, 209, cited above.

अपित्र्यं गार्भं धान्यं मैत्रं वैद्यमाकस्मिकमादायाप्तं प्रविभाज्यमेतत् ऊर्द्धं सर्व्वमविभाज्यमिति।

सरस्वतीविलासधृतविष्णुवचनम्।

Non-paternal property, stridhana, property, such as is connected with religious duties, received from friends, obtained by learning, or accidentally received, are subject to division up to the end of ten years; subsequently, the whole is indivisible.

Vishnu, cited in the Saraswati-Vilasa.

श्रौर्ध्वभार्य्याधने चोभे यच्च विद्याधनं भवेत्।
चौरक्षेत्रान्यविभाज्यानि प्रसादो यश्च पैतृकः॥
माता च स्वधनं दत्तं यत्तस्मै स्यात् प्रीतिपूर्व्वकम्।
तस्याप्येषो विधिर्दृष्टो माताऽपि हि यथा पिता॥
कुटुम्बं बिभृयाद्भ्रातुर्यो विद्यामधिगच्छतः।
भागं विद्याधनात्तस्मात् स लभेताप्रुतोऽपि सन्॥

वैद्योऽवैद्याय नाकामी दद्यादंशं स्वतोधनात् ।
पित्र्यं द्रव्यं समाश्रित्य न चेत्तेन तदाहृतम् ।

नारदः १३ । ६, ७, १०, ११ ।

Property gained by valour, or belonging to a wife, and the gains of science, are three kinds of wealth not subject to partition; and so is a favour conferred by the father (exempt from partition.)

When the mother has bestowed (a portion of) her property on any (of her sons) from affection, the rule is the same in that case also; for the mother is equal to the father (as regards her competence to bestow gifts).

When one brother maintains the family of another brother, who is engaged in studying science, he shall receive a share of the wealth gained by that study, though he be ignorant (himself)

A learned man is not bound to give a share of his own (acquired) wealth against his will to an unlearned co-heir, unless it have been gained by him using the paternal estate.

Narada, XIII. 6, 7, 10, 11.

पैतामहं हृतं पित्रा स्वशक्त्या यदुपार्जितम् ।
विद्याशौर्यादिनाप्तञ्च तच्च स्वाम्यं पितुः स्मृतम् ॥
प्रदानं स्वेच्छया कुर्यादभोगञ्चैव तत्तोधनात् ।
तदभावे तु तनयाः समांशाः परिकीर्त्तिताः ॥
संसृष्टिनां तु यः कश्चिद्विद्याशौर्यादिभिर्धनम् ।
प्राप्नोति तस्य दातव्यो दशमः शेषाः समांशिनः ॥

बृहस्पतिः २५ । १२, १३, ७७ ।

In property belonging to the grandfather which had been taken away and has been (afterwards) recovered by the father through his own exertions, as well as in property acquired by learning, valour in arms, &c., the father's ownership has been declared.

He may make a gift out of that property, or even consume it at his will. But in his default, his sons are pronounced to be equal sharers.

If among reunited coparceners any one should acquire property through learning, valour, or other independent effort

of his own), a double share must be given to him ; the rest shall take equal shares.

Vrihaspati, XXV. 12, 13, 77.

पूर्व्वं नष्टां तु यो भूमिमेकश्चेदुद्धरेत् क्रमात् ।
यथाभागं लभन्तेऽन्ये दत्त्वांशन्तु तुरीयकम् ।
मिताक्षरादायभागधृतशङ्खवचनम् ।*

Land (inherited in regular succession), but which had been formerly lost, and which a single heir shall recover solely by his own labour, the rest may divide according to their allotments, having first given him a fourth-part.

Sankha, cited in the Mitakshara and the Dayabhaga. According to the Apararka, it is a text of Rishyasringa.

नाविद्यानान्तु वैद्येन देयं विद्याधनात् क्वचित् ।
समविद्याधिकानान्तु देयं वैद्येन तद्धनम् ॥
परभक्तप्रदानेन प्राप्तविद्यो यदन्यतः ।
तया प्राप्तन्तु यद्वित्तं विद्याप्राप्तं तदुच्यते ॥
उपन्यस्ते च यल्लभ्यं विद्यया पणपूर्व्वकम् ।
विद्याधनन्तु तद्विद्याद्विभागे न विभज्यते ॥
शिष्यादार्त्विज्यतः प्रश्नात् सन्दिग्ध प्रश्ननिर्णयात् ।
स्वज्ञानश्रमसाद्यादाल्लभ्यं प्राध्ययनाच्च यत् ।
विद्याधनन्तु तत् प्राहुर्विभागे न विभज्यते ॥
शिल्पेष्वपि हि धर्म्यांऽयं मूल्याद्यश्चाधिकं भवेत् ॥
विद्यापणकृतश्चैव याज्यतः शिष्यतस्तथा ।
एतद्विद्याधनं प्राहुः सामान्यं यदतोऽन्यथा ॥
परं शिरस्य यल्लभ्यं विद्यया पणपूर्व्वकम् ।
विद्याधनन्तु तद्विद्यान्न विभाज्यं बृहस्पतिः ॥

* The Ratnakara says that this text is not cited in the Parijata, the Kamadhenu, the Kalpataru and the Smriti Maharnava and should not be given effect to.

विद्याप्रतिग्रहेणाप्तं न विद्याहीनमादिशेत् ।
ऋत्विङ्न्यायेन यल्लब्धमेतद्विद्याधनं भवेत् ॥
आरभ्य संशयं यत्र प्रसभं कर्म्म कुर्व्वते ।
तस्मिन् कर्म्मणि तुष्टेन प्रसादः स्वामिना कृतः ॥
तत्र लब्धन्तु यत्किञ्चिद्धनं शौर्य्येण तद्भवेत् ।
भक्ताहृतं भवेद्दस्युविभाज्यं नैव तत्स्मृतम् ॥
संग्रामादाहृतं यत्तु विद्राव्य द्विषतां बलम् ।
स्वाम्यर्थे जीवितं त्यक्त्वा तज्जाहृतमुच्यते ॥
यल्लब्धं लाभकाले तु सजात्या कन्यया सह ।
कन्यागतं तु तद्विद्यात् शुल्कं* वृत्तिकरं स्मृतम् ॥
वैवाहिकन्तु तद्विद्याद्भार्य्यया यत् सहागतम् ।
धनमेवंविधं सर्व्वं विज्ञेयं कर्म्मसाधकम् ॥†
कुशी विनीतविद्यानां भाटचार्य्यां पितृतोऽपि वा ।
शौर्य्यप्राप्तन्तु यद्वित्तं विभाज्यं तद्दृढस्मृतिः ॥

माधवरत्नाकरधृतकात्यायनवचनानि ।

Never shall a learned man give wealth acquired by learning to those that are devoid of learning ; but to those who are equal or superior in learning, (share of) that wealth should be given by the learned man.

What has been acquired by learning after instructions received from a stranger, and getting maintenance from one of a different family, is called wealth gained by learning.

What is gained by proving superior learning after a prize has been offered (by some third person), must be considered as the gains of learning, and ought not to be divided (among coparceners).

What has been obtained from a pupil, or by officiating as a priest, or for answering a question, or for determining a doubtful

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* शुल्कं वृत्तिकरं is the reading of Apararka† धर्म्मसाधकम् is the reading of Apararka,

शौर्य्यप्राप्तं विद्यया च स्त्रीधनं चैव यत् स्मृतम् ।
एतत् सर्व्वं विभागे तु विभाज्यं नैव ऋक्थिभिः ॥

Is also a test of Katyayana cited by Madhava.

point, or through display of knowledge, or by success in disputation, or for superior skill in reading, the sages have declared as the gains of learning, and not subject to distribution.

The same rule likewise applies to the arts, and to increase of price from superior skill in them. A prize gained which had been offered for the display of superior learning, and a gift in a sacrifice, a present from a pupil (previously instructed), have been declared to be gains of learning. What is otherwise acquired is common to all co-heirs.

Even what is won by surpassing another in learning after a stake has been deposited is gains of learning, and not divisible according to Vrihaspati.

What is obtained by the boast of learning, what is received from a pupil, what is received by officiating as a priest is gains of learning according to Bhrigu.

When (a soldier) performs a gallant action and favour is shown to him by his master pleased with that action ; whatever property is then received by him shall be considerd as gains of valour. What is taken under a standard is declared not to be subject to distribution. What is seized (by a soldier) in war after risking his life for his master and routing the forces of the enemy, is called spoil taken under a standard.

Whatever is gained with a damsel of the same caste, at the time of receiving her, that wealth coming with the damsel is Sulka, causing prosperity.

That is known as nuptial gift, which comes with the wife : all this kind of wealth is known as effective of (separate) work.

Of brothers such as have received education in the family or from the father. the property gained by valour, is divisible according to Vrihaspati.

Katyayana, cited in the Apararka is Ratnakara.

स्वयमाप्तं तं नष्टं स्वयमाप्तञ्च यद्भवेत् ।
एतत् सर्व्वं पितापुत्रैर्विभागेनैव दाप्यते ॥

स्मृतिचन्द्रिकाधृतकात्यायनवचनम् ॥

Ancestral property, which had been seized by others since recovered by the father by his own efforts, as well as what

is acquried the father, all such property the father can not be compelled to share with the sons in partition.

विद्याप्राप्तं शौर्य्यधनं यच्च सौदायिकं भवेत् ।
विभागकाले तत्तस्य नान्वेष्टव्यं तदृक् थिभिः ॥
अनाश्रित्य पितृद्रव्यं स्वशक्त्याप्नोति यद्धनम् ।
दायादेभ्यो न तद्दद्याद्विद्यालब्धञ्च यद्भवेत् ॥
साधारणं समाश्रित्य यत्किञ्चिद्वाहनायुधम् ।*
शौर्य्यादिनाप्नोति धनं भातरस्तत्र भागिनः ।
तस्य भागद्वयं कार्य्यं शेषास्तु समभागिनः ॥

व्यासः ।

Whatever is gained by science, and wealth acquired by valour and the Saudayika (affectionate gifts from kindred to women) shall not be claimed by the co-sharers.

Whatever property is acquired by one's own exertions without making use of the father's property shall not be given to the co-heirs, as also what is gained by learning.

When property is acquired by valour and the like with the aid of any common property such as conveyance or a weapon, therein the brothers are sharers ; to him (*i.e.*, the acquirer), two sharers are to be given, the rest are equal sharers.†

Vyasa, cited in the Ujjvala, Apararka Ratnakara, &c.

पितामहपितृभ्याञ्च दत्तं माता च यद्भवेत् ।
तस्य तद्रापहर्त्तव्यं शौर्य्यभाग्यधनं तथा ॥‡

हरदत्तधृतव्यासवचनम् ।

Whatever has been given by the grandfather, father, or mother to a coparcener, and the wealth (acquired by) valour,

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* वाहनादिकम् is the teading of the Madana-Parijata.

† The Ratnakara says, this refers to gains of valour other than those techni.ally so called.

‡ कृत्ये कृते वा विभागे ऋक्थी यत्र प्रवर्त्तते ।
साधान्यमेतद्भावयति तत्र भागहरम् सः ॥

स्मृतिचन्द्रिकाधृतव्यासवचनम् ।

The above is also a text of Vyasa.

as well as the wealth of the wife, should not be taken by the co-heirs.

Vyasa, cited by Haradatta in the Ujjvala.
See also Yajnavalkya, II. 123.

क्षेमं पूर्तं योगमिष्टमित्याहुस्तत्त्वदर्शिनः।
अविभाज्ये च ते प्रीक्ते शयनासनमेव च॥

लौगाक्षिवचनम्।

The learned say that Kshema is Purta or an act of charity (like digging a tank which is the cause of preserving the good that has been got) and that Yoga is Ishta or a sacrificial act (which is the cause of getting the good that has not been got) these are declared to be indivisible, and so are also a couch and a seat.*

Laugakshi, cited in the Chandrika.

SECTION V.

Reunion.

Definition of re-union.

REUNION is defined to be living together, after partition, of father and son, brother and brother, or uncle and nephew. This is the opinion of the Mitakshara, the Dayabhaga and other commentaries. Indeed according to a text of Vishnu cited in the Saraswati Vilasha, there can be re-union of these three classes of relations only and of no others.† The Vira-Mitrodaya, the Vivadaratnakara and the Mayukha however, in ignorance of the text of Vishnu mentioned above, say that the mention of certain relations in the rule is only illustrative and that there can be reunion among all coparceners who were at one time joint.

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* Parasara Madhava says: Yogakshema means umbrellas, chowries, arms, horses, conveyances and the like.

योगक्षेम शब्देन छत्रचामरशस्त्रवाहनादि प्रभृतय उच्यन्ते।

† This also is the opinion of Kamalakara, Prokasha and the grea majority of commentators. The Vira-Mitrodaya admits that this is the opinion of a great many.

Succession in case of reunion.

The law of succession to the property of a member of a reunited family has been the despair of the commentators. They lay down an arbitrary order of succession and say that there is no principle there. The law is therefore in a state of hopeless confusion. The Mitakshara and all the other commentators agree in holding, that 'reunion is a cause of taking wealth which supersedes the ordinary rule. The reunited coparcener, whoever he is, is to be preferred to the unreunited one. But in as much as there is another rule that 'to be born of the same mother is a cause of taking wealth,' the rule of reunion to be compatible with it, is that the unreunited full-brother is entitled to take equally with the reunited half-brother. The Mitakshara adds to it, that uterine sisters take equally with reunited half-brothers. Beyond this, it says nothing, and Babu Golap Chunder Sircar has fallen into an error in ascribing the rule of succession of the Vira-Mitrodaya to the Mitakshara.

According to the Smriti-Chandrika, there is a great difference between jointness and reunion. In the former, there is no ascertainment of shares, but in the latter there is such ascertainment. There may be inequality in the shares of reunited members. The shares are kept distinct and are taken by the respective heirs of the coparceners, excepting that the widows do not take. The Mayukha is of the same opinion.

The order of succession, according to the Smriti-Chandrika, is as follows: (1) son, grandson, great-grandson, (2) reunited full-brother, (3) separate full-brother, (4) reunited half-brother (but when there are reunited half-brothers and separated

full-brothers, the immovable property is taken by the full-brother and full-sister, while the movables are taken by reunited half-brother), (5) the reunited father or paternal uncle, (6) separated half-brother, (7) father, (8) mother, (9) virtuous widow, (10) sister, married or unmarried, (11) Sapindas and lastly (12) Samanodakas. The Saraswati-Vilasa says, that the widow is only entitled to maintenance.

The Mithila writers agree with the Mitakshara.

The Mayukha says that the reunited member has in every case preference over the unreunited. But when there are unreunited full-brothers and reunited half-brothers, uncles and the like, the separated full-brother &c., take equally with the reunited half-brother &c. After the brother, takes the mother, then the father, then the widow, then the sister, then the daughter, and after her the nearest sapinda.

The Vira-Mitrodaya lays down the following rule of succession :—(1) Son, grandson, great-grandson, (2) reunited whole brother, (3) a reunited half-brother and a separated full-brother,(4) reunited mother, (5) reunited father, (6) any other reunited coparcener,(7) a half-brother not reunited, (8) mother not reunited, (9) father not reunited, (10) widow, (11) daughters, (12) daughter's son, (13) sister. On its own admission, there is no principle in this absurd rule of succession. It is not based on the texts, if properly understood.

The anomalous texts referred to by me, in the chapter on inheritance, are all supposed to be applicable to this what was considered by the commentators as an anomalous state of things. But there is

no authority for the use of those texts for the purpose. Those texts do not purport to apply to a reunited family. The texts that really bear on this question are all given in this chapter, and there does not seem to be any great difficulty in finding out their meaning. The principles laid down in the texts are the following.

1. The reunited member takes the property of his reunited deceased coparcener as in an ordinary joint family, with the following modifications :—

(*a*) A full-brother, even if not reunited, takes the inheritance in preference to a half-brother unreunited, and jointly with a reunited half-brother.

(*b*) The widow is entitled only to maintenance.

(*c*) The unmarried daughter enjoys the share of the father till marriage, when it reverts to the family

(*d*) The full-sister's right to a share is declared by Manu and Vrihaspati. Vrihaspati says, that she takes when there are no children, no father, and no widow surviving. Medhatithi, Kulluka and Raghavananda say that the text refers to unmarried sisters, and that married sisters do not take. This seems to be correct.

2. The person who is entitled to perform the Sraddha takes the wealth of a reunited person.

The law is thus, subject to the right of the sister mentioned above, identical with the law of succession in joint family, except that the uterine brother, in the exceptional case of keeping separate, while there is reunion with the step-brother, takes with the step-brother.

According to the Dayabhaga, the rule of reunion applies only to the case of brothers, father and son, and uncle and nephew reuniting. According to it,

Rule of the Dayabhaga.

the rule only lays down an exception to the ordinary law of the exclusion of the half-blood by full-blood, in so far as the reunited half-brother, uncle or his son, though excluded by the reunited full-brother, &c. takes equally with them when these latter are separate. According to it, the reunited full-brother excludes the separated full-brother, and likewise the reunited half-brother excludes the separated half-brother. It says no more on the subject, and it would thus appear that beyond this qualification, the ordinary rule of succession laid down by it is not modified, and the widow is not excluded as she clearly is, according to the text of Narada and Sankha, which is given effect to by the writers of the Benares school.

In a recent case it has been held that the rule of reunion applied in a family governed by the Dayabhaga family in regard to succession. (1)

It was considered doubful whether the law of reunion applied to the descendants of the persons reunited. It has been held, that the rule applies to all the agnatic descendants living together. (2). It has also been held, that under the Dayabhaga school, the law of reunion applies only to the case of father and son, brother and brother, and uncle and nephew, reuniting, and their descendants ; but it has been considered that under the Mitakshara and the Mithila school, the law of reunion applies to coparceners other than those mentioned above, reunit.

Who can reunite according to the decisions.

(1) 35 Cal. 726.

(2) Abhai Charan Jana *v.* Mangal Jana, 19 Cal. 634. Kesabram Mahapattar *v.* Nandkishore Mahapattar, 3 B.L.R., A.C.J. 7. Tara Chand Ghose *v.* Pudum Lochun, 5 W. R. 249. Ramhari *v.* Trihiram, 7 B. L. R. 336 Gopal Chunder *v.* Kenaram, W.R. 35.

ing. (1) This however, is against the texts of the Rishis and also against the opinion of the principal commentators. No good purpose is served by extending the scope of the anomalous and irregular law of reunion and allowing persons other than such near relations as father and son, brother and brother and uncle and nephew.

Since the above was written the Calcutta High Court has, in a recent case, held that under the Benares School, reunion is restricted to the three classes of cases, namely (1) between father and son, (2) between brothers and (3) between paternal uncle and nephew, and that there can be no reunion between first consins. (2)

In a recent case, the Privy Council have held that according to the text of Vrihaspati there can be reunion "between persons who were parties to the original partition" and their Lordships further observed in that case, that "it is difficult to see how an agreement to reunite can be made by or on behalf of a minor." (3)

The Madras Court in a recent decision, agreeing with the Calcutta Court, has held, that when some of the members of a joint family separate from the rest, it is not a disruption of the whole family, and those that keep together should be considered as joint, and cannot be considered as reunited members, as was held in certain old Calcutta cases. (4) It has been also held in the

(1) Abhai Charan Jana *v.* Mangal Jana, 19 Cal. 634.

(2) Basanta *v.* Jogendra, 33 Cal. 371. See Balabux *v.* Ramnarain, 30 Cal. 738. P.C.

(3) Balabux *v.* Rukhmabai, 30 Cal. 715 P. C.

(4) Sudarsanam *v.* Nara Simhulu, 25 Mad. 149. Upendra Narayun Myti *v.* Gopee Nath, 9 Cal. 817. Contra. 1, Hyde 214, 15 W. R. 300, 3 B.L.R., A.C.J. 7.

same case disagreeing with the case of Shamnarain *v.* Court of Wards, (1) that "there is no warrant for importing a fiction of division followed by a fiction or reunion, for the purpose of impressing property acquired or owned exclusively by some members of an undivided family, who do not in themselves form a branch family." The Privy Council, however, in the recent case (2) mentioned above, have held that when one coparcener separates, there is no presumption of union among the rest and the separation of one is the virtual separation of all and an agreement to remain joint or to reunite in such a case must be proved like any other fact.

A reunion to which a minor is a party has been held to be invalid. (3) It has also been held that when minor members continue to live with one of the adult members after separation, that fact alone could not constitute reunion, in which there must be a junction of estate with an intention to reunite. (4) Indeed when there has been a partition, it requires very strong evidence to prove reunion after many years. (5)

Rule of succession according to the decisions.

As regards succession, it would be simpler under the Mitakshara to hold that, as between descendants of reunited coparceners, the ordinary rule of joint family should apply.

The Madras High Court recently held that succession to the property of reunited coparceners

(1) 20 W. R. 197.
(2) Balabux *v.* Rukhmabai, 30 Cal. 725.
(3) Lakhana *v.* Basava, 15 Mysore C. C. R. 96.
(4) Ruse Mendli *v.* Sundar Mendli, 37 Cal. 703.
(5) Dwarka Prosad *v.* Jamnadas, 13 Bom. L. R. 133.

is governed by the rule of survivorship. (1) The rule applies not only to the members reunited but to their sons who continue joint.

In Madras, it has been held, that the adopted son of a reunited half-brother takes equally with separated full-brothers. (2)

A very important question arises as to the rights of creditors against coparceners who reunite. Reunion certainly should not affect the rights of persons who lend to separated persons who afterwards reunite. Reunion does not revive all the incidents of a joint family and it would be inequitable to hold that by reuniting a person can deprive his creditors of their remedies against his properties. The Smriti Chandrika says that even in case of reunion the ascertainment of shares made before continues and in that view the share of a reunited coparcener is liable for his debts. Rights of creditors.

THE JOINT HINDU FAMILY.

SECTION V.

विभक्ताः सह जीवन्तो विभजेरन् पुनर्यदि ।
समस्तत्र विभागः स्याज्ज्यैष्ठ्यं तत्र न विद्यते ॥
येषां ज्येष्ठः कनिष्ठो वा ह्रीयेतांशप्रदानतः ।
निरंशास्यतरो वापि तस्य भागो न लुप्यते ॥
सौदर्य्या विभजेरंस्तं समेत्य सहिताः समम् ।
भ्रातरो ये च संसृष्टा भगिन्यश्च समांशयः ।

मनुः ९ । २१०—२१२ ।

If brothers (once) divided and living (again) together (as coparceners) make a second partition, the division shall in that case be equal ; in such a case there is no right of primogeniture.

(1) Samudrala *v.* Samudrala, 33 Mad. 165. Narasinha *v.* Vencata, 23 Mad. 166.

(2) Ramasami *v.* Venkatesam, 16 Mad. 440.

If the eldest or the youngest (brother) is deprived of his share or if either of them dies his share is not lost (to his immediate heirs). (1)

His uterine brothers, having assembled together, shall equally divide it, and those brothers who were reunited (with him) and uterine sisters. (2)

Manu, IX. 210-212.

संसृष्टिनि प्रेते संसृष्टी ऋक्थभाक्।

गौतमः २८। २८।

If a reunited coparcener dies (without male issue) his reunited coparceners take the heritage.

Gautama, XXVII. 28.

Vishnu Ch. 17, *v.* 17 is identical with Yajna-valkya II. 143, and Vishnu Ch. 18, *v.* 41 is identical with Manu IX. 210.

पितृव्यपितृभ्रातृभिरेव संसर्गो नान्यैरिति। संसृष्टधनं न पत्न्यभिगामि। संसृष्टीनां पिण्डकर्मण्यधिकारीति। भिन्नोदराणां संसृष्टिनो ऋक्थीयुः।

सरस्वतीविलासधृतविष्णुवचनम्।

Reunion is with a paternal uncle, a father, or a brother alone; not with others. The property of a reunited man does not go to his wife. Amongst reunited men he who presents the funeral ball is the person that takes the share. Amongst non-uterine brothers the reunited shall take.

Text of Vishnu, cited in the Saraswati-Vilasa.

संसृष्टिनस्तु संसृष्टी सोदरस्य तु सोदरः।
दद्यादपहरेच्चांशं जातस्य च मृतस्य च॥
अन्योदर्यस्तु संसृष्टी नान्योन्यदर्यौ धनं हरेत्।
असंसृष्यपि वा दद्यात् संसृष्टी नान्यमातृजः॥

याज्ञवल्क्यः २। १४३, १४४।

A reunited (brother) shall keep the share of his reunited (coheir) who is deceased or deliver it to (a son subsequently)

(1) Loses his share by reason of being outcaste or Sanyasi, as eunuch etc. after partition. (Medhatithi, Kulluka and Raghavananda.)

(2) Sisters means unmarried sisters according to Medhatithi, Kulluka and Raghavananda.

born. But an uterine (or whole) brother shall thus retain or deliver alotment of his uterine relation.

A half brother being again associated with the deceased may take the succession, but not a half brother though not reunited : but one united (by blood though not by copercenery) may obtain the property ; and not (exclusively) the son of a different mother.

Yajnavalkya, II. 143, 144.

ऊर्द्धं विभागाज्जातस्तु पित्र्यमेव हरेद्धनम् ।
संसृष्टा सोदरा वापि स्युर्विभजेरन्निति स्थितिः ॥
संसृष्टानान्तु यो भाग स्तेषामेव स दृश्यते ।
अतोऽन्यथांशभाजस्तु निर्वेशिष्ठितरानियात् ॥
भ्रातृणामप्रजाः प्रेयात् कश्चिच्चेत् प्रव्रजेत्तु वा ।
विभजेरन् धनं तस्य शेषास्तत् स्त्रीधनं विना ॥
भरणं चास्य कुर्व्वीरन् स्त्रीणामाजीवितक्षयात् ।
रक्षन्ति शय्यां भर्त्तुर्येदाच्छिन्दुरितरासु च ॥
या तस्य दुहिता तस्या पित्र्यांऽशो भरणे मतः ।
आसंस्काराद्धरेद्भागं परतो विभृयात् पतिः ॥*

नारदः १३ । ४४, २४—२७ ।

One born after partition shall receive his father's property exclusively. Or they who have reunited with the father, shall come to a division with (the son born after partition) : such is the law.

That portion (of the property) which belongs to a reunited coparcener is declared to be absolutely his own. So when one of the sharers has no issue, it shall go to the rest (after death) of those who are childless.

* The last 3 verses are attributed to Sankha also in the Kalpataru and by many of the text-writers.

The reading adopted by Professor Jolly in the printed Narada Smriti of the last line is आसंस्कारं भजेरं स्तां &c. It is apparently incorrent. भजेरन् is plural, and its nominative cannot be दुहिता ; nor can it mean 'maintain' as it has been translated in the Sacred Books of the East Series. While adopting the reading as well as the translation of the other verses, I have changed that of the last verse according to the reading, of the Ratnakara the Vira-Mitrodaya, and the Parasara Madhava.

If among several brothers one childless should die, or become a religious ascetic, the others shall divide his property excepting the Stridhana.

They shall make provision for his women till they die, in case they remain faithful to the bed of their husbands. Should the women not (remain chaste) they must cut off that allowance.

She who is his daughter, her father's share is for her maintenance : she takes that share till marriage. Afterwards the husband shall maintain her.

Narada, XIII. 44, 24-27.

विभक्तो यः पुनः पित्रा भ्रात्रा वैकत्रसंस्थितः ।
पितृव्येणाथवा प्रीत्या स तु संसृष्ट उच्यते ॥
विभक्ता भ्रातरो ये तु सम्प्रीत्यैकत्र संस्थिताः ।
पुनर्विभागकरणे ज्यैष्ठं तेषां न विद्यते ॥
कदाचिदा प्रमीयेत प्रव्रजेदा कथञ्चन ।
न लुप्यते तस्य भागः सोदरस्य विधीयते ॥
या तस्य भगिनी सा तु ततोऽयं लब्धुमर्हति ।
अनपत्यस्य धर्म्योऽयमभार्य्यपितृकस्य च ॥
संसृष्टौ यौ पुनः प्रीत्या तौ परस्परभागिनौ ॥
संसृष्टानान्तु यः कश्चिद्विद्याशौर्यादिनाधिकम् ।
धनं प्राप्नोति तत्रास्य ह्यंशः शेषाः समांशिनः ।

बृहस्पतिः २५ । ७२—७७ ।

He who (having been divided) is again living through affection, together with his father or brother, or with his uncle even, is said to be reunited with them.

When brothers formerly divided are again living together through affection, and arrange a second division, the right of primogeniture does not accrue in that case.

When any one (brother) should die or any how renounce worldly interests, his share is not lost : it is allotted to his uterine brother.

If there be a sister she is entitled to a share of his property. This is the law regarding (the wealth) of one destitute of issue and who has no wife or father.

When two (coparceners) have reunited through affection, they shall mutually inherit their property.

If among reunited coparceners any one should acquire property through learning, valour or (other independent effort of his own) a double share must be given to him ; the rest shall take equal shares.

Vrihaspati, XXV. 72-77.

संसृष्टानान्तु संसृष्टाः पृथक्स्थानां पृथक्स्थिताः ।

अभावेऽंशहरा ज्ञेया निर्वीजान्योन्यभागिनः ।

रत्नाकरधृतकात्यायनवचनम् ।

Of the reunited, however, the reunited, and of the separated the separated are known to become heirs in default (of the widow and the like) : each takes the share of the other if childless.

Katyayana, cited in the Vivada-Ratnakara.

अल्पधनन्तु यद्द्रव्यं संसृष्टानां च तद्भवेत् ।

भूमिं गृहं त्वसंसृष्टाः प्रगृह्णीयुः यथांशतः ॥

प्रजापतिः ।

Concealable wealth (*i. e.*, movable property) goes to the reunited (even if not) born of mother's womb. Land and house are taken by the unreunited in due share.

Prajapati, cited by Mitra-Misra and other commentators.

For the texts of Sankha and Devala, supposed by some to lay down the rule of succession in case of reunion, see p. 171 and p. 178.

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* The Vivada Tandava cites the following text of Katyayana :

विभक्ताः पितृवित्तार्द्धे कृत्वा प्रीतिवासिनः ।

विभजेयुः पुनर्दृष्ट्वा स समेतोदयीयतः ।

CHAPTER V.

ADOPTION.

SECTION I.

Different Kinds of Sons.

IT is said by writers on Hindu Law, English and Indian, that in India the marriage system was of an anomalous kind, and that society was so immoral that all illegitimate sons had the status of legitimate sons. Nothing can be further from the truth. The opinion is based on a misunderstanding of the law and ignorance of its history. How unfounded the charge is in respect of marriage, has, I believe, been abundantly proved in the chapter on marriage. The second branch of the charge based on the enumeration of twelve different kinds of sons by the lawgivers, is equally unfounded. It is unfortunate that Indian writers very often adopt the opinion of English writers without consulting their own books.

History of the 12 kinds of sons.

I have already shown how in very ancient times a peculiar idea got possession of the Aryan mind that a man is born burdened with debts temporal and spiritual, and it is by placing the burden on a son that he conld avoid the horrors of the condition after death of a man dying with debts. This made the sonless Hindu ready to adopt any kind of a hypothetical son. The first among such sons was the Kshetraja, *i. e.*, the son by a younger brother. It appears, however, that even during the time of the Vedas the practice was condemned by Aupajanghani, a Rishi, of the White Yajur

Veda, who was probably supported by the good king Janaka of the Videhas. The Dharma Sastras quote a *gatha* as sung by the god Vayu to that effect. The said *gatha* is referred to by Manu who says that though these kinds of sons have been mentioned, a son born of the seed of one belongs to the begetter and never to any other person. Vrihaspati says that Manu himself has prohibited Niyoga. It appears that at the time of the Rig Veda, probably even before that, the subsidiary sons were recognized, but the Rig Veda says that they "cannot be accepted." However, the old idea of the great necessityof sons not having fallen into disuse, some of the later Smritis enumerate them, but they were actually prohibited by the later Rishis. Apastamba and Vrihaspati expressly prohibit all these eleven kinds of sons (the Aurasa and the Putrikaputra not being considered in the category of subsidiary sons). It is at least fully three thousand years when all these anomalous sons were prohibited, and the extreme purity of Hindu family life established. It is a fact beyond doubt that sexual purity in family life is more jealously guarded among Hindus than among other nations, and it would have been very strange indeed, that in times of their pristine glory the Hindus were not more moral than at present. As a matter of fact the Rishis laid down an ideal of pure life, not met with in any other society.

Position of the different kinds of sons.

Of these sons we find the Kanita mentioned in the Rig Veda. But then he is mentioned as the son of the daughter. Probably the Putrikaputra was meant. When we come to the Smritis, we find all the twelve sons mentioned and their status defind.

We find, however, that they all disagree with each other as to the relative position of these sons. The Smritis very seldom disagree with one another, and it is because, that these sons had fallen into disuse, and that the discussion of the subject had become more speculative than material in those times, that there is such a great divergence (see the table as to the relative position of these sons in Mayne's Hindu Law). All sons except the Aurasa and the Putrika-putra, are considered as merely substitutes for the son, like oil for clarified butter, as Vrihaspati puts it. They held a very inferior position. They were not Sapindas, and only took the *gotra* of the adopter and his wealth. Six of them did not take the *gotra* even. Among these six, contrary to Manu, some of the lawgivers place the adopted son. There is no indication that these sons were heirs of relatives. They could only offer *pinda* to the adopter.

This chapter has been compiled with the object of dispelling the popular error about the immorality of ancient Hindu society, and with the object that it may not be said that matters unfavourable to Hindu morality have been suppressed.

This chapter will also serve to demonstrate the error, that has crept into the law as administered now in this country, that the adopted son occupies the same legal position as the Aurasa son in respect of the adoptive father and mother and their relations. This last matter is dealt with in detail in the next section.

Position of the adopted son.

ADOPTION.

SECTION I.

परिषद्यं ह्यरणस्य रेकणो नित्यस्य रायः पतयः स्याम ।
न सूनवे भुवे अन्यजातमस्त्यचेतानस्य मा पथो विदुक्षः ॥
नहि गभायारणः सुशेवोऽन्वीदर्यो मनसा मंतवा उ ।
अधा चिदोकः पुनरित्स एत्या नो वाज्यभीषाडेतु मन्यः ।
यथा चिद्वशो अश्वाः वधुश्रवसि कानीते सा व्युष्टादहे ।
को नां श्रयुक्ता विधवेव देवरं * * * ।

ऋग्वेदः ७ म । ४ सू । ७, ८ ; ८ म । ४६ सू । २१ ; १० म । ४० सू । २ ।

The wealth of the debtless man suffices. Therefore may we be the possessors of such wealth which has not to be given back. O Agni that is no offspring which is begotten by another.

Do not know the way of those that do not know. Son begotten of another though productive ofpines haps cannot be accepted as son. And he goes to his own place. Therefore may a son, full of good, the slayer of enemies and new-born come to us.

As Basha the son of Ashva, obtained wealth in the morning from king Prithushrava the Kanita (the son of a maiden daughter).

Who invites you to sacrifices as the widow invites to the bed her husband's younger brother, &c., &c.*

Rig-Veda, 7 M. 4 S. 7, 8 ; 8 M. 46 S. 21
10 M. 40 S. 2.

सुचान् द्वादश यानाङ् नृणां स्वायम्भुवो मनुः ।
तेषां षड्बन्धुदायादाः षड्दायादबान्धवाः ॥

---

* Prof. Roth says, that this refers to the custom of marrying the husband's younger brother. It probably referred to Niyoga.

All the sons born of the seed of another are also declared to belong to the begetter and not to any other person in the following text of Manu.

य एतेऽभिहिताः पुत्राः प्रसङ्गादन्यबीजजाः ।
यस्य ते बीजतो जातास्तस्य ते नेतरस्य तु ॥

औरसः चेत्रजश्चैव दत्तः क्रत्रिम एव च।
गूढोत्पन्नोऽपविद्धश्च दायादा बान्धवाश्च षट्॥
कानीनश्च सहोढश्च क्रीतः पौनर्भवस्तथा।
स्वयंदत्तश्च शौद्रश्च षडदायादबान्धवाः॥
चेत्रजादीन् सुतानेतानेकादश यथोदितान्।
पुत्रप्रतिनिधीनाहुः क्रियालोपान्मनीषिणः॥

मनुः ९। १५८-१६०, १८०।

Among the twelve sons of men whom Manu, sprung from the self-existent, enumerates, six are kinsmen and heirs, and six not heirs, (but) kinsmen.

The legitimate son of the body, the son begotten on a wife, the son adopted, the son made, the son secretly born, and the son cast off, (are) the six heirs and kinsmen.

The son of an unmarried damsel, the son received with the wife, the son bought, the son begotten on a remarried woman, the son self-given, and the son of a Sudra female, (are) the six (who are) not heirs, (nor) kinsmen.*

These eleven, the son begotten on the wife and the rest (*i.e.*, all except the Aurasa and the Putrikaputra) as enumerated (above), the wise call substitutes for a son, (taken) in order (to prevent) a failure of the (funeral) ceremonies.

Manu, IX. 158-160, 180

औरसचेत्रजदत्तक्रत्रिमगूढोत्पन्नापविद्धा ऋक्थभाजः कानीनसहोढपौनर्भवः पुत्रिकापुत्रस्वयन्दत्तक्रीता गोत्रभाजश्चतुर्थांशभागिनश्चौरसाद्यभावे।

गौतमः २८। ३२-३४।

A legitimate son, a son begotten on the wife, an adopted son, a son made, a son born secretly, and a son abandoned (by his natural parents) inherit the estate (of their fathers).

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* Medhatithi, Narayana and Nandana interpet *Adayadabandhava* as "neither heirs nor kinsmen." I prefer to follow them and have therefore slightly changed the translation of Dr. Buhler who has followed Kulluka by changing *but* to *nor* before *kinsmen*.

The son of an unmarried damsel, the son of a pregnant bride, the son of a twice-married woman, the son of an appointed daugher,* a son self-given, and a son bought, belong to the family only.

On failure of a legitimate son or (of the) other (five heirs) they receive a fourth (of the estate).

Gautama, XXVIII. 32-34.

द्वादश क्षेत्र पुत्राः पुराणदृष्टाः।

स्वयमुत्पादितः स्वक्षेत्रे संस्कृतायां प्रथमः।

क्षेत्रजो द्वितीयः तृतीयः पुत्रिका पौनर्भवश्चतुर्थः कानीनः पञ्चमो गूढोत्पन्नः षष्ठः इत्येते दायादा बान्धवा ज्ञातारो महतोभयादित्याहुः। अथादायादाः—तत्र सहोढ़ एव प्रथमो दत्तको द्वितीयः क्रीतस्तृतीयः स्वयमुपागतश्चतुर्थः। अपविद्धः पञ्चमः शूद्रापुत्र एव षष्ठो भवतीत्याहुरित्येतेऽदायादाबान्धवाः।

अथाप्युदाहरन्ति यस्य पूर्वेषां षण्णां न कश्चिद्दायादः स्यादिति तस्य दायं हरेरन्निति। वशिष्ठः १७। १२-१६, २५-२८, ३०-३३, ३६ ३९।

Twelve (kinds of) sons are seen in ancient history.

The first is the son begotten by the husband on his legally married wife.

The second is the Kshetraja, the third is the Putrika, the fourth is the Paunarbhava, the fifth is the Kanina, the sixth is Gudhotpanna. They declare that these (six) are heirs and kinsmen, preservers from a great danger. Now among those who are not heirs (adayada), the first is the Sahodha, the second is the Dattaka, the third is the Krita, the fourth is the Swayamupagata, the fifth is the Apabiddha, the sixth is the Sudraputra. These are kinsmen, not heirs.

Now they quote (the following rule). These (last mentioned) six (sons) shall take the heritage of him who has no heir belonging to the first-mentioned six (classes).*

Vasistha, XVII. 12-16, 25-28, 30-33, 36-39.

* Haradatta is of opinion, that the son of an appointed daughter means here the son of an appointed daughter of lower caste.

* Vasistha gives examples of sons bought and self-given, Ch. 17, S. 32, 35 :

"Harish Chandra forsooth was a king. He bought the son of Agigarta Sauyavasi."

"Sunahsepa forsooth, when tied to the sacrificial stake, praised the gods ; there the gods loosened his bonds. To him spoke each of the officiating priests.—"He shall be my son." He did not agree to their reqest. Then they made him make this agreemeut. "He shall be the son of him he chooses." Visvamitra was the Hotri. He became his son."

औरसं पुत्रिकापुत्रं क्षेत्रजं दत्तकृत्रिमौ ।
गूढजं चापविद्धं च कानीनं च सहोढ़ जं तथा ।
स्वयंदत्तं निषादं च गोत्रभाजः प्रचक्षते ।
तेषां प्रथम एवेत्याहौपजङ्घनिः ॥

बौधायनः २ प्र । २ अ । ३ क । ३१-३३ ।

Now they quote also (the following verses). They declare the legitimate son, the son of an appointed daughter, the son begotten on a wife, the adopted son, and the son made, the son born secretly and the son cast off, (to be entitled) to share the inheritance.

"They declare the son of an unmarried damsel and the son received with the bride, the son bought, likewise the son of a twice-married female, the son self-given, and the Nishada (son of a married Sudra female), to be members of the family.

Aupajanghani (declares that) the first among them alone (is entitled to inherit, and to become a member of his father's family).*

Baudhayana, P. 2, A. 2, K. 3, S. 31-33.

सवर्णामपूर्व्वां शास्त्रविहितां यथर्त्तु गच्छतः पुत्रा स्तेषां कर्म्मभिः सम्बन्धः । दायेनाव्यतिक्रमश्चोभयोः ।

पूर्व्वपत्न्यामसंस्कृतायां वर्णान्तरे च मैथुने दोषः ।
तथापि दोषवान् पुत्र एव ।
उत्पादयितुः पुत्र इति ब्राह्मणम् ।

दृष्टो धर्म्मव्यतिक्रमस्साहसं च पूर्व्वेषाम् । तेषां तेजो-विशेषेण प्रत्यवायो न विद्यते ।

तदुक्त्वोच्य प्रयुञ्जानः सौदत्यवरः ।
दानं क्रयधर्म्मसापत्यस्य न विद्यते ।

आपस्तम्बः २ प्र । ६ प । १३ ख । १-६, ८-११ ।

* Aupajanghani is one of the teachers of the white Yajurveda mentioned in the Satapatha-Brahamana. In the printed Ajmir edition of the Satapatha Brahmana we find his name spelled as Aupajandhini. Dr. Hultch however, in his edition of the Baudhayana after comparing various manuscripts prefers Aupajanghini. There is great difficulty in distinguishing dha from gha in Sanskrit manuscripts.

Those begotten by a man who approaches in the proper season a woman of equal caste, who has not belonged to another man, and who has been married legally, are sonst They have a right to (follow) the occupations (of their castes), and to (inherit) the estate.

If a man approaches a woman who had been married before or was not legally married to him, or belongs to a different caste, they both commit a sin.

A Brahmana (says). "The son belongs to the begetter."*

Transgressions of the law and violence are found amongst the ancient (sages) They committed no sin on account of the greatness of their lustre.

A man of later times, who seeing their (deeds) follows them, falls.

The gift (or acceptance of a child) and the right to sell (or buy) a child are not recognised.

Apastamba, P. 2, P. 6, K. 13, S. 1-6, 8-11.

पिण्डदोऽंशहरश्चैषां पूर्वाभावे परः परः ।

याज्ञवल्क्यः २ । १३५ ।

Of these twelve sons (Aurasa, Putrikaputra Khetraja, Gudhaja, Kanina, Paunarbhava, Dattaka, Krita, Kritrima, Swayamdatta, Sahodha, Apabiddha) failing each preceding one, the other gives the *pinda*, and takes the inheritance.

Yajanavalkya, II. 132.

अथ द्वादश पुत्रा भवन्ति । एतेषां पूर्वः पूर्वः श्रेयान् । स एव दायहरः । स चान्यान् बिभृयात् ।

विष्णुः १५ । १, २८-३० ।

And now there are twelve kinds of sons. (Aurasa, Kshetraja, Putrikaputra, Paunarbhava, Kanina, Gudhotpanna Sahodha, Dattaka, Krita, Swayamupagata, Apabiddha, and

* The next Sutra is as follows : Now they quote also (the following Gatha from the Veda) : "Having considered myself formerly a father, I should no longer allow wives to be approached by other men, since they have declared that a son belongs to the begetter in the world of Yama. In the next world the son belongs to the begetter."

Yatrakvachanotpadita, *i. e.*, the son born by any woman whatever).

Amongst these (sons) each preceding one is preferable (to the one next in order).

And he takes the inheritance (before the next in order) and let him maintain the rest.

Vishnu, XV. 1, 28-30.

अप्रशस्तास्तु कानीन गूढोत्पन्नसहोढ़जा: ।
पौनर्भवश्च नैवैते पिण्डरिक्थांशभागिन: ॥

वीरमित्रोदयधृतविष्णुवचनम् ।

The Kanina, Gudhotpanna, Sahodha, and Paunarbhava, these are disapproved. They are not sharers of the Pinda or of the wealth.

Vishnu, cited in the Vira-Mitrodaya.

औरस: चेत्रजश्चैव पुत्रिकापुत्र एव च ।
कानीनश्च सहोढ़श्च गूढ़ोत्पन्न स्तथैव च ॥
पौनर्भवोऽपविद्धश्च लब्ध: क्रीत: कृतस्तथा ।
स्वयं चोपगत: पुत्रा द्वादशैत उदाहृता: ॥
एवां षड्बन्धुदायादा: षड़दायादबान्धवा: ।
पूर्व्व: पूर्व्व: श्रुत: श्रेयान् जघन्यो यो य उत्तर: ॥

नारद: १३ । ४५-४७ ।

The Aurasa, Kshetraja, Putrikaputra, Kanina, Sahodha, Gudhotpanna, Paunarbhava, Dattaka, Apabiddha, Krita, Kritrima, Swayamdatta are declared to be the twelve sons. Among these, six are kinsmen and heirs, and six are not heirs but* kinsmen. Each preceding one is declared to be superior (to the one following next), and each following one is inferior (to the preceding one).

Narada, XIII. 45-47.

उक्तो नियोगी मनुना निषिद्ध: स्वयमेव तु ।
युगक्रासादशक्यो यं कर्त्तुं मर्त्यो विधानत: ॥

---

* As in the text of Manu, I would prefer *nor* to *but* here.

अनेकधा स्मृताः पुत्रा ऋषिभिर्ये पुरातनैः ।
तच्छक्यं नाधुना कर्त्तुं प्रतिषेधैरिदन्तन ॥
पुत्रास्त्वयोदश प्रोक्ता मनुना यैरनुपूर्व्वशः ।
सन्तानकारणस्तेषामौरसः पुत्रिकादयः ॥
आज्यं विना यथा तैलं सद्भिः प्रतिनिधिः स्मृतः ।
तथैकादश पुत्रास्तु पुत्रिकौरसयोर्विना ॥
एक एवौरसः पित्र्ये धने स्वामी प्रकीर्त्तितः ।
तत्तुल्या पुत्रिका प्रोक्ता भर्त्तव्यास्त्वपरे सुताः ॥
दत्तोऽपविद्धः क्रीतश्च कृतः पौनर्भवस्तथैव च ।
जातिगुह्याः कर्म्मगुह्याः मध्यमास्ते सुताः मताः ॥

बृहस्पतिः २४ । १२, १४ ; २५ । ३३—३५, ४० ।

The Niyoga has been declared by Manu, and again prohibited by the same Manu himself; on account of the successive deterioration of the (four) ages of the world, it must not be practised by mortals (in the present age) according to law.

The various sons who were appointed by ancient sages cannot be adopted now by men of the present age, as they are destitute of power.

Of the thirteen sons mentioned in succession by Manu, the Aurasa and the Putrikaputra continue the family.

As in default of clarifield butter oil is admitted by the virtuous as a substitute (at sacrifices), so are the eleven sons (admitted as substitutes), in default of a legitimate son of the body and of an appointed daughter.

No one but a legitimate son the body is declared to be heir of his father's wealth. An appointed daughter is said to be equal to him. All the others are stated to have a claim to maintenance (only).

The son given, the son cast off, the son bought, the son made, the son by a sudra wife; these when pure by caste and irreproachable as to their conduct, are considered sons of middle rank.* Vrihaspati, XXIV. 12, 14; XXV. 33-35, 40

* Vrihaspati further says "The other sons beginning with the Kshetraja shall take a fifth, a sixth and a seventh part." Ch. 25, v. 39.

The following text of Virhaspati is also quoted on the Ujjvala.

अभ्रातृकाभ्रातृभार्य्यागृहणं चातिदूषितम् ।
कुलिकन्याप्रदानं च देशेष्वन्येषु दृश्यते ॥

षड्वन्धुदायादाः साध्यां स्वयमुत्पादितः।
क्षेत्रजः पौनर्भवः कानीनः पुत्रिकापुत्रः॥
गूढोत्पन्नश्चेति बन्धुदायादाः। दत्तः क्रीतोऽपविद्धः सहोढः स्वयमुपागतः सहसादृष्टश्चेत्यबन्धुदायादाः।

रत्नाकरधृतहारीतवचनम्।

Six are kinsmen and heirs:* the son begotten by a man, himself on the chaste wife, the Kshetraja, Paunarbhava, Kanina, Putrikaputra, and Gudhotpanna. The Dattaka, Krita. Apabiddha, Sahodha, the self-given and the son suddenly seen (the son made) are not kinsmen but heirs.

Harita, cited in the Ratnakara.

षट्सु दायादेषु विकल्पः। औरसः क्षेत्रजः पुत्रिकापुत्रः पौनर्भवः कानीनो गूढोत्पन्नश्चेति षट्पुत्रा बन्धुदायादाः पितृपितामहानामेकगोत्राः ऋक्थपिण्डौ सापिण्ड्यञ्च।

शङ्खलिखितौ।

The adjustment of shares among the six Dayadas: the Aurasa, Kshetraja, Putrikaputra, Paunarbhava, Kanina, Gudhotpanna—these six are Bandhudayadas; they are of the same gotra with the father and the paternal grandsires; the heritage, the funeral oblation and the sapinda relationship belong to them.

Sankha-Likhita, cited in the Ratnakara.

संस्कृतायां च भार्य्यायां स्वयमुत्पादितो हि यः।
औरसः नाम पुत्रः स्यात् सर्वैः प्रोक्तस्तु वंशधृक्॥

कल्पतरुधृतदेवलवचनम्।

The son begotten by one'self on the wedded wife is called the Aurasa, and is declared by all to be the perpetuator of the family.

Devala, cited in the Kalpataru.

आनुलोम्येन पुत्रस्तु पितुः सर्व्वस्वभाग् भवेत्।
निषाद एकपुत्रस्तु विप्रस्वस्य तृतीयभाक्॥

पराशरमाधवधृतदेवलवचनम्।

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* गोत्रभाक्त्वेन बन्धुत्वमिति रत्नाकरः—

"Being a Bandhu means participating the gotra" is the commetary of the Ratnakara on Bandhudayada.

A son born of a wife in regular order of a wife of an infirior caste takes the father's entire estate. But the only son by a Sudra wife of Brahmana only takes one third of the estate.

Devala cited in the Parasara Madhava

एते द्वादश पुत्रास्तु सन्तत्यर्थमुदाहृताः ।
आत्मजाः परजाश्चैव लब्धा यादृच्छिकास्तथा ॥
तेषां षड्बन्धुदायादापूर्व्वेऽन्ये पितुरेव षट् ।
विशेषशापि पुत्राणामानुपूर्व्व्या विधिष्यते ॥
सर्व्वे ह्यनौरसस्य ते पुत्रा दायहराः स्मृताः ।
औरसे पुनरुत्पन्ने तेषां ज्येष्ठ्य न विद्यते ॥
तेषां सवर्णा ये पुत्रास्ते तृतीयांशभागिनः ।
हीनास्तमुपजीवेयुः ग्रासाच्छादनसंस्कृताः ॥

वीरमित्रोदयधृतदेवलवचनानि ।

These twelve sons are declared as made for lineage, born of one's self, born of another, or obtained at pleasure. Of these, the first six are kinsmen and heirs,* and the others are only sons of the father. The distinction between sons is that those mentioned before are superior to those mentioned after.

Of one without an Aurasa son, all these sons are takers of wealth. When there is an Aurasa son, the others cannot have the right of the eldest: of these, they that are of the same caste take a third share; the inferior ones are maintained by the Aurasa son.

Devala, cited in the Vira-Mitrodaya.

पुत्रास्तु द्वादश प्रोक्ता मुनिभिस्तत्त्वदर्शिभिः ।
तेषां षड्बन्धुदायादाः षड्दायादवान्धवाः ॥

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* From this text (बन्धुदायादाः) *Bandhudayada* has been explained as meaning heirs to kinsmen, and on it the whole right of adopted sons to inherit the estate of relations in the adopting family is based. How this meaning could be given to it in the face of the accepted interpretations of the word in the text of Manu, Narada and the other law-givers, is one of the curiosities of modern law.

Bandhu means participator of the gotra as the Ratnakara puts it. The meaning is that the first six become of the same gotra and heirs; but the last six are only heirs of the father, but not partakers of the gotra.

स्वयमुत्पादितस्त्वेकी द्वितीयः क्षेत्रजः स्मृतः ।
तृतीयः पुत्रिकापुत्रो ज्ञातिधर्मविदो विदुः ॥
पौनर्भवश्चतुर्थस्तु कानीनः पञ्चमः स्मृतः ।
षष्ठे च गूढ उत्पन्नः षडेते पिण्डदायिनः ॥
अपविद्धः सहोढश्च दत्तः क्रत्रिम एव च ।
क्रीतश्च पञ्चमः पुत्रो यश्चोपनयते स्वयं ॥
इत्येते सङ्करोत्पन्नाः षडदायादबान्धवाः ॥

दत्तकचन्द्रिकाधृतयमवचनानि ।

Twelve sons are mentioned by the truth-seeing sages. Among them six are heirs of their kinsmen, and the other six are kinsmen but not heirs. The son begotten by one-self is first, Kshetraja is second, the Putrikaputra is the third, Paunarbhava is the fourth, Kanika is the fifth, Gudhotpanna is the sixth. These offer the pinda. The Apabiddha, Sahodha, Dattaka (adopted son), the Krita, and the son who offers himself, these six are of mixed caste and not heirs but kinsmen.

Yama, cited in the Dattaka-Chandrika.

दत्तकश्च स्वयन्दत्तः क्रत्रिमः क्रीत एव च ।
अपविद्धाश्च ये पुत्रा भरणीयाः सदैव हि ॥
भिन्नगोत्राः पृथक्पिण्डाः पृथग्वंशकराः स्मृताः ।
सूतके सूतकी वापि चाद्धाशौचस्य भागिनः ॥
अपि वस्त्रान्नदातृणां चैववीजवतान्तथा ।
शूद्रो दासः पारशवो विप्राणां विद्यते क्वचित् ॥
राज्ञां तु शापदग्धानां नित्यं क्षयवतान्तथा ।
अथ संग्रामशीलानां कदाचिद् वा भवन्ति ते ॥
औरसो यदि वा पुत्रस्तथा पुत्रिकासुतः ।
न विद्यते तत्र तेषां विज्ञेया क्षेत्रजादयः ॥
एकादश पृथग्भावा वंशमाचक्षते तु ते ।
श्राद्धादि दासवत् सर्व्वे तेषां कुर्व्वन्ति नित्यशः ॥
गूढोत्पन्नश्च कानीनः सहोढः क्षेत्रजस्तथा ।
पौनर्भवश्च वैश्यानां राजदण्डभयादपि ॥
वर्जिता पञ्च धनिनां शेषा सर्व्वे भवन्त्यपि ॥
शूद्राणां दासवर्गीणां परपिण्डोपजीविनाम् ।

परायत्तशरीराणां न क्वचित् पुत्र इष्यपि ॥
तस्माद्दासस्य दास्यां च जायते दास एव हि ॥

ब्रह्मपुराणवचनानि ।

The son given, the son self-given, the son made as well as the son purchased, and the deserted son, are always to be maintained. They belong to a different gotra or family. Their funeral oblations are separate, they perpetuate a different lineage, and they are liable to pollution for three days on the occasions of birth and death among the relations of the adoptive father who gives food and raiment, as well as of the natural father to whom the seed and the soil belong. The Brahmans have rarely a Parasava son of the Sudra class. But persons of the royal class (Kshatriyas) that is labouring under a curse and is gradually perishing, and is always engaged in warfare, have sometimes these. If there be neither the legitimate son nor the Putrikaputra, then they may have sons beginning with the Kshetraja. These eleven sons being of a different gotra merely perpetuate the lineage; all of them perform like a slave their Sradha, &c. The secretly born son, the maiden-born son, the son received with a pregnant bride, the wife's son and the son of the twice married woman, these five the wealthy Vaisyas cannot have, for fear of punishment from the king; they may have all the rest. The Sudras, whose occupation is service, and who are maintained by others, and whose bodies are under the control of others, can have no son anywhere; therefore of a male slave and a female slave none but a slave can spring.

Brahma-Purana, cited in the Apararka, Vira-Mitrodaya, etc.

देवरेण सुतोत्पत्तिः * *
दत्तौरसेतरेषान्तु पुत्रत्वेन परिग्रहः *
निवर्त्तितानि कार्य्याणि व्यवस्थापूर्व्वकं बुधैः ॥

आदित्यपुराणवचनम् ।

The Niyoga * *, and the taking as sons other than the Aurasha and the Dattaka * *, are prohibited in the Kali age by the wise. Aditya-Purana.*

* This is attributed to Shaunaka in the Apararka.

SECTION II.

The Adopted and Kritrima Sons.

Early history of adoptions

The custom of adoption was one of the ancient costoms of the Indo-European races. In India we find, that Atri Prajapati, one of the most ancient of Rishis, adopted, and so did the famous Rishi Visvamitra of the Rik Veda. As metioned in the last chapter, the peculiar doctrine of the great necessity of having sons for placing upon them the several temporal and spiritual debts of a man was the origin of the custom of adopting sons. But the adopted son seems originally to have occupied a very low place among the sons. But in course of time the immoral practices involved in getting some of these sons led the lawgivers to prohibit all the eleven kinds of subsidiary sons. It appears, however, that when all the other sons fill into disuse, the Dattaka maintained its ground. The Kritrima was also recognized in some provinces, and by some of the commentators, as an approved kind of son. Parasara, the lawgiver of the Kali-yuga, recognises only the Dattaka and the Kritima sons.

In the case of the Kshetraja, one not begotten by the nearest Sapinda or by a Sagotra was invalid. It was similiary not allowable to take one in adoption out of one's gotra. All the commentators say, that the adoption of another, while the brother's son is available, is invalid. The reason given by the Mitakshara and other commentaries for the prohibition, is, that a nephew is a son and a person cannot be called sonless whn he has got a nephew. Our courts have held, that the rule was

only recommendatory. It must however, be said in favour of this opinion that whatever might have been the original law in the case of boys being available from one's own gotra, long established custom allowed adoption from another gotra. From what has been stated above, it would appear clear that adoption could not have its origin in slavery, as mentioned in Babu Golap Chandra Sircar's learned book on the subject.

Daughters could be adopted in ancient times.

It appears also, that a daughter could be adopted in ancient times. Kunti the mother of the Pandavas, was adopted, and Santa, the daughter of Dasharatha, was adopted by Lomapada.

Who could adopt in ancient times.

Only persons without a son, grandson or great-grandson could adopt. From this it follows, that there cannot be two adoptions one after the other or simultaneously. It should however, be mentioned here, that in early times a man could adopt, even if he had a son. Visvamitra had many sons and still he adopted Sunahsepha, and setting aside his other sons gave him the rights of the eldest.* Atri, who is supposed to be the first Rishi who laid down the law of adoption, himself adopted Uttanapada,† and then gave many children in adoption to Aurva.

The widow could adopt only with the permission of the husband.

Public character of adoptions in ancient times

The ceremony of adoption was a very solemn one. The king or the lord of the village had to be

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* Aitereya Brahmana, VII. 13-18. See Muir's Original Sanskrit Texts, Vol. I., pp. 355-358.

† उत्तानपादं जवाह पुत्रमत्रि: प्रजापति: ।
Harivansa, Ch. II., 7.

informed and all the near relations had to be invited. The law of the Romans was very similar in this respect in considering the act as of a public character. The similarity of ideas is further shown by the maxim of Roman Law, "adoptio enim naturam imitatur" (adoption imitates nature). In India, latterly a pleasant fiction grew up that the son should be like one's own son. This fiction is not found in the authoritative Smritis. It had its origin in a book attributed to Saunaka and in certain passages of the Kalika-Purana of doubtful authenticity. The boy must be one whose initiatory ceremonies had not been performed in the natural family, so that as far as religious ceremonies were concerned he should wholly belong te the adopter's family. The ceremony of Putresti had to be performed. In fact every appearance of the boy being the son of the body had to be kept up. But there is no foundation for this in the other Smritis. The restrictions as to the age, relationship, and the previous performance of ceremonies are founded on a fiction invented by certain modern writers, and cannot be considered obligatory except in the sense that they are sanctioned by custom.

Fiction of the similarity to legitimate son

It should be mentioned here that upon the authority of a certain text of Shakala, the daughter's son, the sister's son, and the mother's sister's son are prohibited. A certain text of Vriddha Gautama prohibits the daughter's son. But as these texts are not cited in any of the older commentaries, their authenticity is doubtful. In any case they were, never considered binding by the Mitakshara, the Chandrika, the Saraswati-Vilasa, the Ratnakara and the Dayabhaga.

Prohibition to adopt sister's son &c

The prohibition as regards the daughter's son is the strangest thing that one meets in the history of Hindu law. The daughter's son could be made Putrikaputra according to all the lawgivers. We find, therefore, a text of Yama, that in adopting the daughter's son and the brother's son no ceremonies are required. This is another instance, how the original law of the Hindus, which was a very natural system, has been made unnatural and unreasonable by the pundits and judges who interpreted them.

Prohibition to adopt daughter's son unfounded.

It appears, that so late as the time of Medhatithi, and the Kalpataru sons from castes other than that of the adoptive father could be adopted, but, as the rules of caste became more rigorous, that was prohibited.

Sons of different castes could be adopted in ancient times.

We next come to the question. Who can give in adoption. The father had the disposal of the person of his son in ancient times. The right was taken away by express injunction of the lawgivers. The gift and sale of sons is prohibited in the Smritis. Apastamba forbade adoption of sons. But as adoption became a recognized practice in India, it was made allowable to give in adoption when the parents were in distress. Giving a son in adoption was very unpopular in this country, and unless in extreme distress, no respectable parents would part with their sons. Hence in times gone by it was difficult even for a very wealthy man to get a child for adoption from any respectable, family. Most adopted sons had to be purchased. Now the times are changed, and men are more inclined to part with their sons for a pecuniary advantage than before. 'Distress', in the text of Manu, means the

Who can give in adoption.

poverty of the parents giving in adoption, though Apararka and some other commentators say it means the childlessness of the adopter. The old idea of the nature of adoption having changed, it is now allowable to give in adoption, even when not in distress. The father alone could give in adoption, and the mother with the permission of the father. As Yajnavalkya and Parasara say that either the father or the mother may give, the rule is that after the death of the father, the mother may give in adoption even without his permission. The old rule that the power to give a child in adoption should be exercised in times of distress is one which should be enforced in these modern times with some modification. It would be very hard, if a mother foolishly gave away a son in adoption to a poor man, depriving him of his rights in paternal property. As the law administered stands, such a result is possible.

Position of the adopted son under the Smritis

The adopted son leaves his father's gotra and cannot take his estate, nor does he offer pinda to him. He takes the gotra and the wealth of the adopter, and gives the pinda to him, for 'the pinda follows the gotra and the wealth.' But notwithstanding all the make-believes invented by Saunaka and others, he never takes the same position as the son, with respect to the observances of impurity or Sapindaship. Sapinda relationship in his case extends only up to the third degree. According to some authorities there can never be Sapinda relationship with the adopted son. The rule of Sapindaship up to the third degree in the adopter's family is aplicable in case of marriage of the adopted son. The adopted son continues to be the Sapinda of his natural parents, and the prohibited

degrees in marriage are applicable, as if he had not been adopted.

He enters the gotra, but does not become a Sapinda, is the rule. According to Harita he is not even a kinsman. It is difficult to see how he could be the heir of any person other than the adopter. We have already seen that according to the rule of Gautama, after one's Sapindas, the Sapindas of the mother's father are heirs. We have also seen who the Bandhus are. There is no warrant in Hindu law for the proposition, that adopted sons become the heirs of relations of the adopting family. The Courts have held, on the interpretation of the word 'Bandhu-Dayada' as meaning heirs to kinsmen,—an interpretation based on the ingenuity of certain modern pundits which is against the authority of all the commentators,—that adopted sons inherit the property of all relatives like Aurasa sons. An adopted son cannot even be a Bhinnagotra Sapinda and thus a Bandhu, according to the widest definition given to the term. I refer to the texts in the preceding chapter bearing on the question, and they will leave no doubt on the mind of the reader that the Courts have gone wrong here. It should also be observed that according to some of the Rishis. the adopted son is only entitled to maintenance. According to the Burmese Manu however, he takes equally with the brothers,* showing that the right of the adopted son to take property was well established in India in ancient times, notwithstanding those texts.

The adoption of an only son is prohibited by

* See Burmese Manu, p. 283,

Prohibition to adopt an only son is mandatory according to the commentators

the lawgivers. The commentators are unanimous, that an only son cannot be adopted. By certain fanciful rules of interpretation, some modern writers have contended, that the rule is a recommendatory one. Their opinion has been upheld by the Privy Council. How the express words of the Smritis and the unanimous opinion of the commentators have been overriden on the strength of certain rules of interpretation, which never occurred to the old commentators as applicable to the case, will always remain one of the curiosities of legal literature. It is said that the rule lays down, that an only son should not be given or taken in adoption, but it does not say, that if given and taken, the adoption is invalid. Under the old Roman law no adoption could take place, until proper arrangements had been made for the celebration of the Sacra or the performance of the sacrifices and ceremonies in honour of the deceased ancestors of the natural father of the boy to be adopted. Under the law of the Rishis an only son could not be adopted for the same reason 'for the obsequies of his father would fail.' The commentators make the matter clear. The Vira-Mitrodaya in the chapter on gifts, a chapter not translated by Babu Golap Chandra Sircar and to which his attention had not apparently been drawn, takes the trouble of refuting the position that such a gift is only immoral. So do the Smriti-Chandrika, the Parasara Mádhava, the Apararka and the Vivada Chintamoni, in the chapter on gifts which deals also with the gift of sons. They quote the texts of Manu (which will be found in this chapter) laying down, that those that receive a thing which should not be given, commit an act of theft, and should be

punished accordingly, and sum up the argument by saying, that such gift and acceptance are wholly invalid and ineffectual. The Privy Council, acting on the opinion of Babu Golap Chandra Sircar, the late Mr. Mandlik, and some European savants came to the conclusion that the word अदेय may mean a thing the gift of which is either immoral or invalid. Unfortunately none of these authorities had considered the chapter on दत्ताप्रदानिक (Resumption of gifts) of the Smritis, and apparently not cared to read the commentaries on that chapter, as they are not translated. The words देय (*Deya*) or 'what can be given' and अदेय (*Adeya*) or 'what cannot be given' have got technical meanings, according to the Smritis and all the commentators. *Deya* is defined in the chapter, and so is *Adeya*. There is no room for speculation or the supposed rules of interpretation in ascertaining the meaning of the word *Adeya*. The Vira-Mitrodaya, the Dattaka Mimansa, and other commentaries expressly say, that in the Smritis where a son is declared *Adeya* it means an only son. It is quite clear, that according to the Smritis and the commentators the gift of a thing which is Adeya (अदेय) is simply invalid.

That the eldest son should not be given in adoption is the opinion of the commentators, based upon a text whose authorship is unknown. If that is a genuine text, as it probably is, the adoption of the eldest son is also immoral if not invalid, according to Hindu law. But it should be observed, the commentators in the chapter on gifts mention only that the gift of an only son is invalid, and do not say, that the gift of an eldest son is so. They say,

Adoption of the eldest son.

that the prohibition in the latter case affects only the giver.*

Age of the boy to be adopted according to the Smrities.

As to the age of a boy to be adopted, there is no restriction mentioned in the Smritis. A passage of the Kalikapurana is however, cited to show that after the ceremony of tonsure had been performed, there can be no adoption. The authenticity of the text is very doubtful, and it will not be wise to hold that it lays down the true Hindu law on the subject.

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* It is said by the learned advocates of the adoption of an only son, that the commentators do not expressly say, that the adoption of an only son is invalid. The Smriti-Chandrika, dealing with the question of adoption, says, it is dealt with in the chapter on gifts. There, after having laid down that it is *Adeya* (अदेय) and cannot be given or taken, it deals with the effect of the gift of things that are *Adeya*. It says that in Narada *Adatta* means and includes *Adeya* (अदत्तग्रहणमदेयस्याप्युपलक्षणार्थं) and therefore "the king should cause the thing given to be returned; this is meant by the mention of the words *Adatta adeya*. By the gift of what is *Adatta* or what is *Adeya*, the gift does not take effect, and there is no accrual of the right of another (*i. e.* of the donee)" गृहीतस्यपरावर्त्तनमपि भङ्गीचिता कार्यमदत्तादेयग्रहणाद् गम्यते। अदत्तेनादेयेन च दानसिद्ध्यभावात् परस्वत्वानुत्पत्तेः।

The Vira-Mitrodaya follows the Smriti-Chandrika, and very nearly repeats what it says. According to it, a thing that is *Adeya*, if given, must be return ed, and the gift of it is ineffectual, and passes no property to the donee (अदेयग्रहणमदत्तस्याप्युपलक्षणार्थम् * * अदत्तादेयग्रहणाद्गृहीतस्य परावर्त्तनमपि कार्यमिति गम्यते। अदत्तग्रहणे दाने च दानसिद्ध्यभावात् परस्वत्वानुत्पत्तेः।)

The Vira-Mitrodaya, while dealing with things that are *Adeya* says that by the rule that sons are Adeya is meant that an only son is *Adeya*.

The Mayukha dealing with things that are Adeya says एतद्दाने न केवलं व्यवहारासिद्धिः किन्तु प्रायश्चित्तमपि, &c., *i. e.*, in making these g fts not only is the act ineffectual in law but penance also must be performed.

The Dattaka-Mimansa says, that by the prohibition of the gift of sons the prohibition of the gift of an only son is meant, and further apparently refuting the argument, that what should not be given may yet be taken, says "since the word 'gift' means the establishing of another's property after the previous extinction of one's own and another's property cannot be established without his acceptance, the author implies this also" (Sec. IV. 3). The clear meaning is, that in what is declared as should not be given and should not be

The adoption of Shunashepa by Visvamitra shows the rule was unknown in ancient times.

As regards the ceremonies necessary for adoption, they are mentioned by Baudhayana and Saunaka. The Homa is necessary for the three twice-born castes. The Smritis do not speak of the Sudras. They cannot perform the Homa, and in an adoption by them the Homa cannot be necessary, giving and taking being only necessary in their case. Giving with a libation of water and acceptance are necessary in all cases.

Homa indispensable in case of twice born as well as gift with libation of water.

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taken, there cannot be any transfer of ownership from the donor to the donee The Vivada-Chintamoni says, "The gift of a son and a wife (see Vivada-Chin tamoni) without their consent * * are void," and further lays down that an only son should not be given even when he consents. It also lays down, that the gift of a thing that is Adeya is invalid. All the commentators in the chapter on gifts say, that by the text that a son cannot be given, is meant, that an only son cannot be given. They do not say, that an eldest son is meant.

The Apararka says that the *Adeya* when given may be taken back (अदेयं त्यपहार्यम्) The Mitakshara defines *Adeya* as what is unfit for a gift either because of the want of ownership of the donor or because of legal prohib tion (अस्वामित्वतया निषिद्धतया दानानर्हम्) When speaking of adoptions, it lays down the true rule of interpretation which is wholly ignored by writers who knowing little of the rules of Mimansa are always trying to apply them in ways which would have excited the smile of the ancient commentators. The Mitakshara makes a distinction between a prohibition applicable to the donor and a prohibition applicable to the donee. When there is only a prohibition to give and no prohibition to take the gift may or may not be invalid. It then proceeds to say that in respect to an only son there is not only a prohibition to give but a prohibition also to take. It stops there but the meaning is clear that the adoption of an only son is invalid. The wording is the same as in the case of the prohibition in the case of a female to adopt without the permission of the husband in the Keshava Vaijayanti cited in this chapter.

Jagannatha and the author of the Dattaka Nirnaya, both Bengal writers of the English period, are the only persons who support the adoption of an only son.

Position of an invalidly adopted son under the Smritis.

When a son has been adopted against the rules, or without the necessary ceremonies, he is entitled to get the cost of marriage from the adoptive father, but cannot inherit his property. He continues to be the son of his natural father and his heir. Decisions to a contrary effect are not according to Hindu law, and make it seem unreasonable and cruel, which it certainly is not.

Share of the adopted son when there an after-born son, according to the Smritis.

The question as to what portion of the inheritance the adopted son is entitled to, if an Aurasa son is born after adoption, is not free from difficulty. According to Apastamba, Vrihaspati, and Harita, the adopted son is only entitled to maintenance. The Kshetraja only could get a sixth or fifth of the inheritance. According to Vasistha and Baudhayana, the adopted son gets a fourth part. The difficulty has arisen on account of a text of Katyayana which is differently read by different commentators. But as the Mitakshara, the Parasara-Madhava and the Parijata read one-fourth, probably that is the correct reading. But it should be mentioned, that there is a text of Devala, giving the adopted son a third share. However as the law of adoption is mainly based on the authority of Vasistha and Baudhayana, the rule of one-fourth is the true rule The Saraswati-Vilasa citing a text to the effect. that the adopted son takes a fifth share, interprets the text of Baudhayana and Vasistha as meaning that the adopted son's share is one-fourth that of the Aurasa son. That is probably the correct interpretation. Having regard to the text of Manu, giving the Kshetraja only a fifth share, the adopted son could not take more. The Burmese Manu also gives the adopted son only a fifth

share. This divergence only shows that the adopted son, having been prohibited by Apastamba, had fallen into disuse, and the law on the subject consequently fell into some confusion.

Now we go to the commentators. An exhaustive enumeration of commentaries supposed by our Courts to be applicable to the different provinces is to be found at pp. 17-20. Here however, the opinions of the commentators that are of undoubted authority are given.

Rules of Medhatithi and Kalpataru

According to Medhatithi a boy of a different caste may be adopted. He is of the same opinion as Vrihaspati, that 'the substituted sons 'cannot confer the same benefit as the Aurasa son" and are only entitled to maintenance when there is an Aurasa son According to the Kalpataru also, one of a different caste, even a Sudra, may be adopted.

Rule of the Mitakshara.

The law of adoption as contained in the Mitakshara is as follows : The father or the mother with the consent of the father, or when the father is dead or gone to a distant country may give a boy in adoption. No restriction as to age is mentioned. No mention is made of the power of the widow to adopt. The boy should not be given away, except in distress. The prohibition oniy affects the giver. An only son should not be given nor taken. When there are many sons the eldest should not be given. The mode of adoption is as follows :— "A person being about to adopt a son should take an unremote kinsman or the relation of a kinsman, having convened his kindred and announced his intention to the king, having offered a burnt offering with recitation of holy words in the middle of his dwelling.' The adoption of one very

distant by country and langnage is forbidden. The same ceremonial applies in the case of Kritrima sons. When there is a brother's son, he should be adopted, if available and no other, as a man having a nephew is a man with a son. When there is an afterborn son the adopted son takes one fourth of the inheritance. The adopted son is both heir and kinsman. The Mitakshara says no more.

Opinion of the Saraswati Vilasha.

The Saraswati-Vilasa follows the Mitakshara, excepting that it says that when there is an afterborn son the adopted son takes one fifth of the inheritance.

Opinion of the Smriti Chandrika.

The Smriti Chandrika says, that all subsidiary sons except the adopted son, are prohibited in the Kali-yuga. The gift of the son must be made with a libation of water. The adopted son must be of the same caste with the adopter. He cannot claim the Gotra or the estate of his natural father. He takes the Gotra and estate of the adopter. He takes a fourth of the estate when there is an afterborn son. When there is a brother's son, there cannot be adoption of another. When there are several brothers, and some have Aurasa sons and some adopted sons, the partition is according to their respective fathers.

Opinion of the Mayukha.

The Mayukha lays down that a female cannot be adopted ; the prohibition not to give in adoption the eldest affects only the giver ; daughter's and sister's sons cannot be adopted except by Sudras. A widow can adopt with the permission of the husband in his lifetime, and after his death, even without such permission, but only with the assent of her father or her kinsmen. A Sapinda as near as it is possible to get should be adopted. Even a man

married and having a son may be adopted, if he be of the same Gotra. The prohibition as to adopting one whose tonsure has been performed mentioned in the Kalika-purana relates to persons of a different Gotra. When there is an afterborn son, the adopted son takes a fourth of what the former takes, According to the Mayukha, "the Sapinda relationship of the adopted son extends in his adoptive father's family to seven degrees on the father's side and five degrees on the mother's side" for the purposes of marriage.

Opinion of the Vivada Chintamani.

According to the Vivada Chintamani, the widow can never adopt. When there is an afterborn son, the adopted son takes a fourth share only when the former is 'void of good qualities;' otherwise he is only entitled to maintenance. An only son cannot be adopted.

Opinion of the Dayabhaga.

The Dayabhaga says, that when there is an afterborn son the adopted son takes a third share.

Shulapani opinion.

Shulapani says that when there is a brother's son, the subsidiary sons are not heirs.*

Opinion of the Keshava Vaijayanti.

Nanda-Pandita in the Keshava-Vaijayanti says that a woman cannot give or take in adoption without the permission of the husband. In distress means in famine, &c. Except in distress the giving of the son is prohibited. When there is a son, there can be no adoption, nor is an only son an object of gift, nor the eldest son; Bandhudayada means the heir of sonless paternal uncles and the like.†

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* आद्यपुत्रसद्भावे तु चेत्रजादयः प्रतिनिधिपुत्रा नाधिकारिण इति शूलपाणि-कृतदीपकालिकायाम्।

† न तु स्त्री पुत्रं दद्यात् प्रतिगृह्णीयाद्वा अन्यत्रानुज्ञानाद्भर्तुरिति * * आपदि दुर्भिक्षादौ अनापदि दातुः प्रतिषेधः * * सपुत्रत्वे तु तस्यैव प्रतिषेधः। एकस्य पुत्रो न देयः * * तथा ज्येष्ठस्य बन्धूनां अपुत्रपितृव्यादीनां दायमा-ददातीति बन्धुदायाद इति कौस्तुभवैजयन्त्याम्।

Authority of the Dattaka Mimansa and Dattaka Chandrika.

We next come to the Dattaka-Mimansa and the Dattaka-Chandrika. These two treatises were translated and published by Mr. Sutherland in 1821. As the lawyers of those times knew little of original books on Hindu Law, these two books, being the only two translated books on adoption, came soon to be recognized as of paramount authority in India. The Dattaka Mimansa by one Nanda Pandita, though little known in Benares and unknown in Bombay, is considered as laying down the law in all the provinces governed by the Mitakshara, excepting Madras. Bengal and Madras are supposed to be governed by the Dattaka Chandrika. The latter book is generally supposed to have been fabricated by a Pundit named Raghumani to help the plaintiff in the famous case of Gopee Krista *v.* Radhakant. The first and last letters of the two last lines of the book if taken together read रघुमणि, and that is supposed to be the name of the author. The author, however, calls himself Kuvera, and describes himself as the author of the Chandrika. From this latter fact, though there are several Chandrikas, the book is supposed to be the work of the author of the famous Smriti Chandrika of the southern Presidency, and thus of paramount authority in that Presidency. The author of the Smriti Chandrika, who says that a Kritrima son is not allowable, and that the adopted son when there is an afterborn son takes only a fourth part, cannot be the author of the Dattaka-Chandrika which lays down the contrary in the first case and a different rule in the second case. Mr. Sutherland coolly substitutes Devanda Bhatta for Kuvera in the concluding paragraph, and in

a note says: "The printed copy as well as the manuscripts, reads Kuvera. As however, the author avows himself to be the writer of the Smriti Chandrika, which is known as the production of Devanda Bhatta, the name has been substituted." The assurance of Mr. Sutherland is suprising, but what is more suprising is, that his statement was accepted and the book considered of paramount authority in Madras (where it was unknown) and also in Bengal. In Allahabad also, it has been accepted as a work of high authority. (1)

The Dattaka Mimansa lays down the following rules :—

Rules of the Dattaka Mimansa.

(1) Only a man without a son, grandson and great-grandson can adopt.

(2) A widow cannot adopt.

(3) The Kritrima son is recognized as included within the term son given.

(4) A son should be adopted from the Gotra of the adopter, and failing such, from a different Gotra.

(5) One of a different caste cannot be adopted.

(6) Among Sapindas, if there is a brother's son, he should be adopted even though he be the only son of his father. When a brother's son can possibly be adopted, the adoption of another is forbidden.

(7) A sister's son and a daughter's son can be adopted by a Sudra.

(8) A daughter's son, a sister's son and a mother's sister's son cannot be adopted by one of a regenerate class.

(9) An only son cannot be given, being in-

(1) Damodarji *v.* The Collector of Bandu, 7 All. L. J. 927.

alienable according to the texts, which by the word 'son' mean an only son where the son is mentioned among inlienable things, and since "the word gift means the establishment of another's property after the extinction of one's own," an only son can not be taken also.

(10) A boy, whose Chudakaran ceremony has been performed, or who is more than five years old, cannot be adopted by one of a regenerate class. If he is so adopted he becomes a Dwyamusyayana.

(11) When there is a legitimate son, an adoped son cannot inherit a kingdom. In other cases, he gets only a fourth part in competition with a legitimate son.

(12) "The filial relation of adopted sons is occasioned only by the (proper) ceremonies. If gift, acceptance, a burnt sacrifice, and so forth should either be wanting, the filial relation even fails." The ceremonies must be performed in case of Kritrima sons also. The marriage only of one adopted without the proper ceremonies should be performed, but he has no rights of inheritance.

(13) The adopted son cannot inherit his natural father's or natural mother's father's property.

(14) A daughter may be adopted.

(15) A boy may be given in adoption by a woman with the assent of her husband, and without his assent, if he is dead.

(16) An adopted son retains the Sapinda relationship in his natural family which extends to seven degrees on the father's and five degrees on the mother's side. He only gets the Gotra of the adoptive father. But as Sapinda relationship is

of two kinds, one based on consanguinity and the other on the capacity to perform Sraddhas, the adopted son gets the Sapindaship in the latter sense with the adoptive father and mother, and that extends only to three degrees.

Rules of the Dattaka Chandrika.

The Dattaka Chandrika follows the Dattaka Mimansa so closely that one cannot help thinking that the author had that book as the model before him. It agrees with the Dattaka Mimansa excepting that it lays down the following rules.

(1) A widow may adopt with the assent of her husband.

(2) A boy may be adopted till he is invested with the sacred thread in the case of regenerate classes, and till he is married in the case of Sudras.

(3) The adopted son presents oblations to the adoptive mother and her ancestors, (the Dattaka Mimansa also is of the same opinion).

(4) The adopted son takes a third part of the inheritance when there is an afterborn son.

(5) In case of Sudras the adopted son takes equally with an afterborn son (this is the dictum for which, it is generally believed, the book was composed).

(6) The adopted son of one excluded from inheritance does not take a share of the family property.

(7) In case of partition, a grandson if adopted, takes only such share, as his father, if he were himself an adopted son, would take.

(8) By agreement a boy may be a son of two fathers.

(9) Both the Dattaka Mimansa and the Dattaka

Chandrika say, that a son can be adopted in the Dwyamusyayana form.

The Dattaka Chandrika and the Dattaka Mimansa both give the astounding interpretation on the word पुत्रच्छायावह "reflection of a son" as meaning "the capability to have been begotten by the adopter through appointment, and so forth."

Opinion of Jagannath

According to Jagannath, a boy whose age exceeds five years and whose tonsure has been performed cannot be adopted and the adoption of an only son is only immoral.

Opinion of Balambhatta.

Balambhatta says that in giving a son in adoption the assent of the mother is necessary and that a wife may give in adoption without the assent of the husband, if the distress is urgent.

Opinion of the Vira-Mitrodaya.

The Vira-Mitrodaya and Balambhatta say that a widow may adopt if she has got the authority of her husband. The Vira-Mitrodaya also says, that one having a stepson cannot adopt, except with the permission of the husband.

Law according to decisions.

We next come to the law as settled by the decisions of our Courts.

One having no qualified son, adopted son, grandson and great-grandson can adopt.

We have already seen, that the text of Atri says that the sonless man should adopt a son. That was clearly an injunction upon the sonless man and an enabling rule. According to the commentators and text-writers, a man without a son, grandson or a great-grandson can only adopt. There is no reported case confirming the rule, but inasmuch as that is the opinion of Mr. Mayne, Dr. Siromani, Babu Golap Chandra Sircar, and other writers, there is no doubt that the rule will be followed, if a case arises. It has been held that a person having

an adopted son living cannot adopt again. (1) A man, having a disqualified son or a son who is *Patita* on account of a heinous offence or change of religion, can adopt. As long as a man has no son capable of inherting his property, there is no reason why he should not be able to adopt. The observations of the Dattaka Mimansa, II. 62, go to support this view. It has also been held that an adoption by a man while his wife is pregnant is valid. (2)

But whether a man, having a brother's son can adopt is a question of some difficulty. There is no doubt that according to the Mitakshara, the Vira-Mitrodaya, the Dattaka Mimansa, and the Dattaka Chandrika he cannot adopt. Such an adoption stands on the same footing as an adoption by a person having a natural-born son, and is not only immoral but invalid according to all the Hindu writers. But the Privy Council have held that the rule is only recommendatory and that such an adoption is not invalid. (3)

Adoption valid when there is nephew.

It has been held, that an unmarried man can adopt, (4) and it follows that a man can adopt without the concurrence of his wife. (5)

Unmarried man and a man without the concurrence of his wife can adopt.

The Indian Majority Act has not modified the Hindu Law on the question of minority in respect of marriage and adoption. (6) A minor, who has attained years of discretion, it

(1) Rungama *v.* Atchma, 4 Moore I. See 12 Moore 437, 26 I. A. 161.

(2) Hanmant Ram Chander *v.* Bhimacharya, 12 Bom. 105. Nagabhusanam *v.* Sheshamagaru, 3 Mad. 180. Doulat *v.* Ram, 29 All. 310.

(3) Wooma Daee *v.* Gocoolanund, 3 Cal. 587.[See Dattaka Chandrika, I. 20, Dattaka Mimanasa, II. 67.

(4) Gopal Anant *v.* Narayan Go'esh, 12 Bom. 329. (22) See 4 Moore 2.

(5) 4 Moore 2.

(6) Bai Golab *v.* Thakorlal, 17 I. C. 86.

Majority Act not applicable and a minor who has attained years of discretion can adopt.

was held by the late Justice Dwarkanath Mitter, could make a valid adoption. (1) The Privy Council have held, that a minor of the age of 15 or 16 can give a valid permission to his wife to adopt.(2) Mr. Mayne has interpreted the judgment of Mr. Justice Mitter on this matter to hold that a boy between the years of 10 and 16 can adopt. But the act of taking in adoption is not only a religious act but a legal transaction व्यवहार, and one who has not attained the sixteenth year is incapable of validly entering into such a transaction under the Hindu Law. (See Narada XIII., 32—36).

Adoption by a ward of Government.

The legislature has recognised the power of a minor ward to adopt, or to give permission to adopt, but has declared an adoption made or permission given without the consent of the Lieutenant-Governor, either before or after, to be invalid. (3) In Bombay, however, it has been held, that the Government alone, and no other person, can call an adoption into question on this ground. (4)

Adoption by idiots, dying man, etc.

A lunatic or an idiot cannot adopt, or a dying man or a man dangerously ill, whose mind is in a disturbed condition. (5)

Whether a disqualified heir can adopt.

There is no case whether a man blind, deaf, mute, Pangu, or leper can adopt. In Bengal it has been held that a Sudra

(1) Rajendra Narayan *v.* Sarada Sunderi Debi, 16 W. R. 548. Pate Vandravon *v.* Mani Lal, 15 Bom. 565.

(2) Jamuna Dasya *v.* Bama Sunderi Dasya, 1 Cal. 282.

(3) Sec. 61, Act 9 of 1879. It is the same in Madras and Bombay Sec. 25, Mad. Reg. 5, Sec. 74, Act 35 of 1858. Sec. 6, Cl. 2 of Act 2 of 1863, Bombay.

(4) Vasudevanant *v.* Ram Krishnâ, 2 Bom. 529.

(5) Tayammaul *v.* Sashachalia, 10 Moore 429. Bullubh Kani *v.* Kissen Prea, 6 Sel. Rep. 270.

eper may adopt. (1) The judges say:—"The law appears to be that a leper cannot perform any religious ceremony, but as no such ceremonies are necessary for an adoption among Sudras, a Sudra leper may adopt a child by purely civil rites." In the Punjab it is said, that such disqualified persons can adopt. (2) In an old case, cited by Mr. MacNaghten, it was held that a leper after performing the necessary expiatory ceremonies could adopt. (3)

Woman living in concubinage could not adopt.

The Calcutta High Court in a later case held that a widow living in concubinage could not validly perform religious ceremonies, and was thus not entitled to adopt. (4)

Expiatory ceremonies how far enable.

In Bombay non-performance of the expiatory ceremonies was considered as a mere matter of religion, which was not of the essence of the adoption. (5)

Agreements not to adopt how far binding.

It is a question of some difficulty whether an agreement not to adopt is valid. In a case where an agreement of this kind between two brothers was sought to be enforced against the son of one, the Privy Council made these observations: "It is unnecessary for their Lordships to determine whether that agreement was or was not binding between the parties who made it. It is clear that the father of Gangadhar could not bind his son, who was then in existence, not to adopt, or legally stipulate that

(1) Sukumary *v.* Ananta, 28 Cal. 168.

(2) Punjab Customary Laws, II. 154.

(3) MacNaghten's Hindu Law, Vol. II. p. 201, Case No. 21.

(4) Shyam Lal *v.* Saudamini, 5 B. L. R. 362. See 22 Cal. 347.

(5) Laksmibai *v.* Ram Chandra, 22 Bom. 590. Ravji Vinayaka *v.* Lakmibai, 11 Bom. 381. See Ramalinga *v.* Sadasiva, 9 Moore 506, where the question, whether a person within the period of impurity could dopt, was considered.

if he should adopt, the son so adopted should no inherit. The words are: "In case of the failure of the self-begotten male issue." These words meant an indefinite failure of issue, and that an adopted son should not ever take by descent from his father. It appears to their Lordships that that would be entirely altering the law of descent and contrary to the principle laid down in the Tagore case." (1) It has been held in Bombay, that contracts in restraint of adoption are void. (2)

In Bengal and Nothern India widow can adopt only with permission of the husband.

We next come to adoptions by widows. In Bengal and Northern India it has been held that a widow cannot adopt without the express permission of her husband, notwithstanding the rule of the Dattaka Chandrika that permission may be presumed where no prohibition is proved, and the maxim *quod fieri non debuit factum valet* is inapplicable in such cases. (3)

A prostitute widow can not adopt.

The Calcutta High Court has held that a widow living in concubinage cannot adopt nor a prostitute. (4)

In Mithila widow cannot adopt but can take a Kurta Putra.

Under the Mithila Law it has been held that a widow cannot adopt at all. (5) But she can take a Kurta Putra to herself.

In Bombay it has been held, that the widow of an unseparated coparcener can adopt when she is

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(1) Suryia Ram *v.* The Raja of Pitapore, 9 Mad. 499.

(2) Rambhat *v.* Lakshman, 5 Bom. 630. Assur Purshottam *v.* Ratanbai, 13 Bom. 56. See 5 Bom. 635.

(3) Tulsi Rum *v.* Behary Lal, 12 All. 328, F. B. Jamoona Dasi *v.* Bama Sunderi, 1 Cal. 289. Raja Haimun *v.* Rumar Ghanesham, 5 W. R. 69, P. C. See 14 Cal. 401. Raja Harmun Chull Sing *v.* Kumar Gunsham Sing, 2 Knapp, P. C. 203.

(4) Shyam Lal *v.* Yandamini, 5 B. L. R. 362. Narendra Nath Bairagi *v.* Dinanath Das, 36 Cal. 824.

(5) Jairam *v.* Musandhami, 5 S. D. 3.

authorized by her husband, and also without such authority, if all the other co-parceners who would be divested by such adoption consent. (1) But when the husband is separate, the widow can adopt without express authority, (authority, being implied when there is no prohibition) and without the consent of Sapindas. (2) The propriety of the motive for adoption in such a case cannot be enquired into. (3) The widow of a predeceased son has been held to be entitled to adopt with the consent of her mother-in-law in whom the estate had vested. (4) A son adopted without express authority of the husband or of the co-parceners may on principle take the separate property of the husband, even in a joint family.

Widow's power to adopt in Bombay without authority and without consent of Sapindas in case of separation.

In Madras and Bombay in case of joint families a peculiar law has been established on account of a strange misconception of the Hindu law. In Madras it was held that the law of adoption was a development from the old principle of actual begetting by a brother or Sapinda. Strictly speaking, therefore the judges said, "the assent of any one of the Sapindas will suffice," but treating the entire body of the Sapindas as a judicial person, held that the consent of the majority of the Sapindas

Adoption by widow of a separated co-parcener in Madras.

(1) Ramji *v.* Ghaman, 6 Bom. 428, F B. Gopal Balkrishna *v.* Vishnu, 23 Bom. 250.

(2) Rukhmabai *v.* Radhabai, 5 Bom. H. C. 188 A. C. J. Ramji *v.* Ghaman, 6 Bom. 498 F. B. Ramchandra *v.* Mulji, 22 Bom. 558 F. A. Damara *v.* Damara, 30 I. C. 108. See 13 Bom. 160.

(3) Ramchandra *v.* Mulji, 22 Bom. 558.

(4) Shedappa *v.* Ninganganda, 38 Bom. 724. Payapa *v.* Appana, 23 Bom. 327.

was necessary. (1) The Privy Council affirmed the decision holding in that case that the consent of the mother-in-law and of a Samanodaka was sufficient. They said: "The power to adopt, when not actually given by the husband, can only be exercised when a foundation is laid for it in the otherwise neglected duty, as understood by Hindus. Their Lordships do not think, there is any ground for saying, that the consent of every kinsman, however remote, is essential. The assent of kinsmen seems to be required by reason of the presumed incapacity of women for independence rather than the necessity of procuring the consent of all those whose possible and reversionary interest in the estate would be defeated by the adoption. In such a case, therefore, Their Lordships think, that the consent of the father-in-law to whom the law points as the natural guardian and 'venerable protector' of the widow, would be sufficient. It is not easy to lay down an inflexible rule for the case in which no father-in-law is in existence. Every such case must depend on the circumstances of the family. All that can be said is, that there should be such evidence of the assent of kinsmen as suffices to show, that the act is done by the widow in the proper and *bonâ fide* performance of a religious duty, and neither capriciously, nor from a corrupt motive." The assumption of the power to adopt however "cannot be inferred when a prohibition by the husband either has been directly expressed by him, or can

(1) Collector of Madura v. Srimatu Mattu Vijaya, 2 Mad. H. C. 231.

be reasonably deduced from his disposition of his property, or the existence of a direct line competent to the full performance of religious duties, or from other circumstances of his family."(1)

In the next case called the Berhampore case, the High Court of Madras again held, that the law of adoption was founded on the doctrine of Niyoga, and thus the assent of a divided Sapinda was sufficient when there was a non-consenting divided brother. The Privy Council on appeal held that the doctrine of Niyoga was inadmissible as a ground for judicial decision, and expressed their opinion, that "the requisite authority is, in the case of an undivided family, to be sought within that family," and that the widow cannot "at her will, travel out of that undivided family and obtain the authorization required from a separated and remote kinsman of her husband." (2) The Privy Council in the above case, approvingly mentions a decision of the Travancore Court where it was held, that the authority must in the first instance be sought from the father-in-law, failing him, the eldest surviving brother. (3) The assent of the managing member of a joint undivided family, it has been held, may be sufficient but an adoption is invalid if the consent of one of two nearest divided kinsmen has not been given, even if asked for. (4) In a recent case however, the Madras High Court have held that the assent of the nearest Sapindas is

Assent of undivided coparceners necessary.

(1) Collector of Madura *v.* Mootoo Ramalinga, 12 Moore 442. The Ramnad case.

(2) Sri Verada Protapa Raghunadha *v.* Brozo Kishore, 1 Mad. 69 P. C.

(3) Ramaswami Iyer *v.* Bhagati Ammal, 8 Mad. Jur. 58.

(4) Suryanarayan *v.* Vencata Romana, 26 Mad. 681.

not indispensable. (1) Indeed if the rule is as is supposed to be that adoption is a meritorious act necessary for the spiritual benefit of the husband, no assent of anybody is necessary. The Bombay Shastris were certainly right in their view that the text of Katyayana cited to show that such assent is necessary can have no application to adoption. (2) But all this is speculating about principles not to be found in the Smritis or the principal commentaries.

Question of motive discussed.

The observations of the Privy Council in the Ramnad case that the act of adoption must be done by the widow in the proper and *bonafide* performance of religious duty were considered by the same tribunal in a later case known as the Guntur case. (3) Overruling the High Court, their Lordships laid down the following principle :—"Their Lordships think it would be very dangerous to introduce into the consideration of these cases of adoption, nice question as to the particular motives operating on the mind of the widow, and that all that this Committee in the former case meant to lay down was, that there should be sufficient to support the inference that the adoption was made by the widow not from capricious or corrupt motives, or in order to defeat the interest of this or that Sapinda, but upon a fair consideration by what may be called a family council, of the expediency of substituting an heir by adoption to the deceased husband." Later cases have laid down both in

(1) Subrahmayam *v.* Vencamina, 26 Mad. 627.
(2) The text is cited in this Section.
(3) Vellanki *v.* Venkata, 1 Mad. 174.

Madras and Bombay, that the discussion of the motive of the widow is irrelevant. (1)

In a later case, the Privy Council set aside an adoption on the ground that the consent of the managing member had been obtained by a false representation by the widow that she had obtained the permission of her deceased husband. (2) The Madras High Court have held that the consent of a Sapinda given for a consideration is bad, and makes the adoption invalid. (3) The Privy Council have held that a consent given with the object of gaining some material profit out of the adoption is improper, (4) as the consent of the Sapindas is intended to show the propriety of the adoption. (5) The Madras High Court has recently held that in a joint family the widow can adopt with the authority of the husband or of the Sapindas, as by a text of Yajnavalkya * she should always be under the protection of the agnates. (6) A general authority to adopt by all the Sapindas has been held to be good. (7).

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(1) Balasu Gurulinga Swami *v.* Ram Lakshmamma, 26 I. A. 113. Ram Chandra Bhagaban *v.* Mulji Nanabhai, 22 Bom. 558 F. B.

(2) Karunabdhi *v.* Ratnamaiyer, 7 I. A 173. See Vencata Lakshmammima *v.* Narasayya, 8 Mad. 545. Subramanyam *v.* Vencamina, 26 Mad. 627.

(3) Rami Raddi *v.* Rengamma, 11 Mad. L. J. 20. Danokoti *v.* Balasundara, 36. Mad. 19.

(4) Gonesa Rarnamaiyar *v.* Gopala, 2 Mad. 270, 7 I. A. 173.

(5) Vencamma *v.* Subramannam, 30 Mad. 50 P. C.

(6) Adusumalli *v* Adusumalli, 32 I. C. 256.

(7) Nagarampalli *v.* Nagarampalli, 24 I. C. 257. Contra Suryanarayum *v.* Vencataraman, 26 Mad. 681. See 36 Mad. 145.

* दद्यात् कन्यां पिता विद्वां पतिं पुत्रस्तुवार्धके ।
अभावे ज्ञातयो दद्यात् न स्वतन्त्रता क्वचित् स्त्रियः ॥

In the latest case on the question the Privy Council have held that the widow could not adopt if she did not consult one out of three kinsmen. (1)

When the husband was separate from his Sapindas, it has been held in Madras that a widow can adopt when there is permission of the husband or without such permission with the consent of the Sapindas and that in such a case the *bonâ fide* consent of one divided member is sufficient, where the nearest or other Sapindas withhold their assent unreasonably from improper motives. (2) However, the consent of one or two of the nearest divided kinsmen, when there are many, is not sufficient. (3) The assent of the nearest Sapinda is necessary (4) but is not indispensable, (5) and when he refuses his consent on the ground of his losing his right of inheritance, the consent of remoter Sapindas is sufficient to make the adoption valid. (6) But he can properly withhold his consent, if the widow unjustifiably refuse to adopt his son. (7)

It has been held that when a Sapinda gave his consent taking an agreement that the adopted son should not claim a share of the joint

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(1) Vencamma *v.* Subramaniam, 30 Mad. 50, P. C. Donakoti *v.* Balasundara, 36 Mad 19.

(2) Parasara *v.* Rangaraja, 2 Mad. 202.

(3) 26 Mad. 681.

(4) Mani *v.* Subbaraya, 36 Mad. 145

(5) 26 Mad. 627.

(6) Kallipalli *v.* Kallipalli, 26 I. C. 888. Vencataramana *v.* Aunapurnama, 23 Mad. 486.

(7) Subramanyam *v.* Vencaminn, 26 Mad. 627 affd. 30 Mad. 50 P. C.

family property but should get only the adoptive mother's property, such consent was good. (1) The result of this decision and the latest Privy Council decision (30 Mad. 50) mentioned above would be to bring about the legitimate consequence of the anomalous rule of Bombay and Madras and make adoptions, which would divest or deprive the kinsmen of their reversionary right, impossible and make such adoptions like the Kritrima adoptions of Mithila.

Adoption with the condition that the adopted son would get only adoptive mother's estate.

The only case in which an adoption, where there is no authority from the husband, is possible, as has been shown above, is when the father-in-law is living and gives his assent out of affection. In such a case, in Madras as well as in Bombay, it has been held, that the adoption is a valid one. (2) In Bengal also the father who is the full owner of the family property has every right to dispose of his interest to any body he pleases, and a son adopted with his consent by a widowed daughter-in-law, whether the adoption is valid or not, ought to be entitled to the family property as if it were given to him by the grandfather. It should also be presumed in such a case that there was a valid permission and a valid adoption, and distant Sapindas should not be permitted to question it. Under the Mitakshara law the matter is more difficult, when the property is ancestral. Ordinarily there would be no difficulty, for when the father wishes to give an adopted son to his deceased son's widow, the other sons will

Adoption with the consent of the father-in-law valid in Bombay and Madras and should be in Bengal.

(1) Srinivasa *v.* Rangasami, 30 Mad. 450.
(2) Vithoba *v.* Papu, 15 Bom. 110.

also agree. But in case of disobedient sons, the father has got his own share, and his assenting to an adoption against the wishes of the surviving sons should be considered as separation of his interest and a gift of the same to the adopted son, to take effect after his death. Ordinarily a Bengal or Mitakshara father, used to the modern Law Courts, will take care to ensure the property to the adopted son by deeds of partition and gift or will. But that is no reason why the act of a simple man who does not know the intricacies of law will have no effect. This view of the law will reconcile all the different schools, and make one uniform law for all Hindus, except in the Mithila country and in Bombay when the husband has separate property.

Effect of authority—power to two widows.

It has been held that when the power of adoption is given to two widows, the senior alone is entitled to adopt and if she refuses to do so, the junior can adopt and a prior adoption by the junior widow is invalid when the senior widow adopts subsequently (1) The decision is based upon two texts of Vishnu and Daksha * which only say that a person should perform religious ceremonies in conjunction with his senior wife only. There are also other texts more to the point, which are not cited by the judges, which say that religious ceremonies performed with the junior wife only are fruitless. But these texts are no authority for the

(1) Bejoy Krishna *v.* Ranjit 38 Cal. 694. Rakhmabai *v.* Radhabai, 5 Bomb H. C. App. 181.

* There are other texts of Vishnu not cited in the Digest or by the judges which are more explicit. All the texts on the subject are to be found in the Chapter on Marriage.

proposition that the junior widow cannot perform the religious ceremony of adoption after the death of the husband. Still the decision is reasonable. The Privy Council however have held that a joint power to two widows to adopt may be good in Western India where when adoption has not been forbidden by the husband the power falls to the widows jointly and the law provides for the case of disagreement, but in other parts of India such a custom is not recognized. (1) In the most recent case on the question however their Lordships have held that there are considerations why a joint authority is bad but from that "it does not follow as a matter of necessity that a power to more than one wife to adopt must be an invalid power. In many matters custom solves difficulties which appear to be insoluble." The judges declined to decide whether a joint power was invalid but held that an adoption by the surviving of two widows in pursuance of it was invalid as there could be no joint exercise of the power. (2) In Madras and Bombay it has been held that a junior widow cannot adopt except with the consent of the senior widow, even though the Sapindas assent. (3) But a senior widow can adopt without such consent. (4) It has been held in Calcutta and Madras that a power to two widows should be construed as a several power and the surviving widow could thus exercise it. (5)

A permission to the wife to adopt may be

(1) Maharani Indra Kunwar *v.* Maharani Jaipal Kunwar, 15 I. A. 127. (2) Vencata Nara-Simha *v.* Parthasarathi, 41 I. A. 51, 37 Mad. 199, See 12 Moore. 350, 29 Mad. 382 P. C.

(3) Kakerla *v.* Kakerla, 27 I. C. 775, 16 Mad. L. J. 612. Padajirao *v.* Ramrao, 13 Bom. 160. Raja Damara *v.* Damara, 30 I. C. 160.

(4) Narayansami *v.* Mangammal, 28 Mad. 315.

(5) Saroda Prosad Pal *v.* Ramapati, 17 C. W. N. 319.

oral or by a deed. (1) In the latter case it must be on a stamped paper of Rs. 10 and registered.

It has been held in Bombay that probate of a will containing a power of adoption was conclusive as to the power. (2)

There may be an authority to adopt several sons in succession. (3)

Effect of authority to adopt one son,

It has been held that an authority to adopt one son is not exhausted by the death of the son adopted and the widow can adopt again. (4) The contrary was held in some earlier cases. (5) The Privy Council in a very recent case has held that a general oral authority to adopt was not exhausted even by two previous adoptions. (6)

Effect of conditional authority.

The authority may be a conditional one, but must be strictly followed. (7) It has been held in Madras that when there is authority to adopt a particular boy, the widow cannot adopt another, if the boy specified is not available. (8) A contrary view has rightly found favour in Bombay and in a later Madras case. (9) When the widow is authorised with the consent of five trustees and does so with the consent of four of them, the fifth having declined, the adoption is valid. (10) It has been

Effect of authority to adopt a specified boy.

(1) Sunder Koomari v. Gudadhur, 7 Moore. 54. Muttasuddi v. Kundun Lal, 28 All. 377. affd 33 I. A. 59. (2) Brenduri v. Sundaribai, 38 Bom. 272. (3) Ramsunder v. Surbani, 22 W. R. 121. Vellanki v. Vencata, 1 Mad. 174. (4) Suryanarayan v. Vencataramana, 26 Mad. 681. Madan v. Purusatham, 38 Mad. 1195. (5) Purnanund v. Umakant, 4 Sel. Rep. 404. Gournath v. Arnapurna, B.S.D. 1849, p 332. Sreemuty Dasee v. Tara Charan, 1 Bourke 48. (6) Ramdharam Kunwar v. Bulwant, 39 I. A. 142, 34 All. 398. See 33 I. A. 143, 15 C. W. N. 524. (7) Chowdhury Pudun Singh v. Koer Oodey Sing, 12 Moore 356. Soorendra Keshub v. Doorga Sunderi, 19 Cal. 513 P. C. 19 I. A. 122. Mutsuddi Lal v Lundan Lal, 33 I. A. 59, 29 Mad. 382. Suryanarayana v. Vencataramana, 29 Mad. 382, 33 I. H. 145. Dharam Kumar v. Balwant Singh, 34 All. 398. (8) Amirthayyan v. Ketharamaypan, 14 Mad. 65. In Mohendra v. Rookminee (1 Croyton 42) it was even held that an authority to adopt if the son to be born died was uneffectual when a daughter instead of a son was born. (9) Lakshmibai v. Rajaji, 22 Bom. 696. Suryanarayyna v. Vencataramana, 26 Mad. 681. M. Chenga Reddi v. Vasudeva, 29 I. C. 770. (10) Balgangadhur Tilak v. Srinivasa, 42 I. A. 135.

held in Calcutta that a restriction in an authority that the widows shall adopt "from the nearest representatives, but the widows will adopt whomsoever they will select" was meaningless and the widows could adopt any one they liked. (1) It has also been held that a widow is entitled to adopt a boy in furtherance of her husband's general intention in lieu of another indicated by him but who is not available. (2)

Effect of authority given to two widows

When permission was given to two widows to adopt three sons in adoption, the senior widow only was held to have the power of so adopting and the junior widow was not entitled to adopt without the consent of the senior. (3) A power to two widows jointly to adopt is not void and should be considered as giving the right to the senior widow first to adopt and if she refuses, to the junior widow to do so. (4)

Authority to adopt with advice of third party.

An authority to adopt with the *Sadyukti* and *Paramarsha, i. e.*, with the good advice of a third party, when there was no penalty provided if the direction was not complied with, was held not to invalidate an adoption made without the consent of the said third party. (5) But where there was a provision in the will that on failure to get consent to the adoption, the property would pass over to

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(1) Sarada Prosad *v.* Ramapati, 16 I. C. 817.

(2) Veeraperumal *v.* Narrain, 1. Mad. H. C. (notes of cases) 78. Lakhmibai *v.* Rajaji, 22 Bom. 996. Contra, Gaurnath *v* Arnapurna, S. D. 1849, 331.

(3) Ranjit Lal *v.* Bejoy Krishna, 39 Cal. 582.

(4) Sarada Prosad *v.* Ramapati, 16 I. C. 817.
Sri Raja Vencata *v.* Sri Raja Rangayya, 29 Mad. 437.
Ramji *v.* Ghamba, 6 Bomb. 498. Padaprav *v.* Ramrav, 13 Bomb. 160.

(5) Surendra Nandan *v.* Sailaja, 18 Cal. 391.

another, an adoption without such consent was bad. (1)

Authority to widow and executors bad.

It has recently been held by the Privy Council, that an authority given by one to his widow and his executors is wholly invalid. (2) The decision is based on the English law of powers, but it is difficult to see how such authority is wholly invalid according to Hindu Law, having regard to the duty cast upon a sonless man to adopt, which, according to the Dattaka-Chandrika will entitle a widow to adopt, when there is no prohibition by the husband.

Presumption in favour of authority.

It has been held that there is a presumption in favour of the existence of a permission to adopt. A delay of ten years and the conduct of the parties in making arrangements on the basis of adoption were held not to be sufficient to rebut such presumption in favour of authority. (3) The decision is correct according to the rule of the Dattaka-Chandrika.

Estoppel against the widow adopting and her representatives.

When a widow made an adoption representing that she had authority and induced the adopted son to leave his natural father's family, she and all persons claiming under her were held to be estopped from questioning the validity of the adoption (4).

When the widow makes an adoption and the adopted son dies after marrying or leaving a child,

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(1) Beemcharan Sen *v.* Heera Lal Seal, 2. I. J. N. S. 225.
Veera Pereemal *v.* Narayan, 1 Strange 78 See 16 I. C. 819.
(2) Amrita Lal Dutt *v.* Surnomoyee Dasi, 27 I. A. 128.
(3) Kunamalapudi, *v.* Immadi Setti, 11 I. C. 334. 2 Mad. W. N. 350.
(4) Ganga Prasad *v.* Budh Sen, 11 I. C. 27. Dharam Kunwar *v.* Balwant. 30 All. 549.

her power is exhausted. (1) But it has been held in Calcutta that if the adopted son dies unmarried and childless, she can adopt again as she divests only herself by such adoption. (2) In Bombay and Madras however, a different rule has been laid down and it has been held that her power is at an end, as soon as the estate vests in the adopted son and is not revived, even if she succeeds to him. (3) All these cases should now be considered as overruled. In the latest case on the question, the Privy Council upheld an adoption by a widow in pursuance of a power given by her husband on the death of a previously adopted son, who had died unmarried. (4)

Whether authority is exhausted.

A Jaina widow can make successive adoptions without the permission of her husband or of his kinsmen, notwithstanding conversion to Vaishnavism. (5) But in Madras, it has been held that the custom of the Jainas of the right of the widow to adopt without permission must be proved like any other custom' (6) for unless a custom is proved to the contrary, they should be held to be governed by the Mitakshara. (7)

No permission required for Jaina widow.

In the Punjab, the practice in the different

(1) Manikyamala *v.* Nundkumar, 33 Cal. 1306. Bhooban Moyee *v.* Ram Kishore, 10 Moore 279. Keshav *v.* Gobindgonesh, 9 Bom. 94. Tara Charan *v.* Suresh, 17 Cal. 122 P. C.

(2) Padma Kumari *v.* The Court of Wards, 8 Cal. 302. Mondakini *v* Adinath, 18 Cal. 69. Thayammal *v.* Venkata, 10 Mad. 204.

(3) Ramakrishna *v.* Shamrao, 26 Bomb. 526. Adivi Suryaprakasa *v.* Nidamarty, 33 Mad. 228.

(4) Venkatanarayan *v.* Subbammal, 20 C. W. N. 254, 32 C. 373.

(5) Manick Chand *v.* Jaggut Setaul, 17 Cal. 578, Harnabh Prosad *v.* Mandil Dass, 27 Cal. 372. Shoe Sing *v.* Musmut Dakho, 1 All. 688. Lakmi Chand *v.* Gutto Bai, 8 All. 319 Manohar Lal *v.* Banarsi Das, 29 All. 495.

(6) Peria Ammatta *v.* Krishna Sami 16 Mad. 182.

(7) Mandel Koer *v.* Phool Chand, 2 C. W. N. 164, Bhugwan Das *v.* Rajmal, 10 Bom. H. C. 241.

In the Punjab there may be adoption with permission or with the consent of kinsmen.

districts is not uniform, but generally, it seems to be that a widow may adopt, either with the husband's permission or by consent of his kinsmen, but not when there is an express prohibition by him. (1)

Adoption of several sons Invalid.

Neither the widow nor a man in conjunction with two wives can adopt more than one son at the same time or when another son is living. (2)

In Burma two sons can be adopted.

Under the Buddhist Law, it has been held by the Burma Chief Court that two sons can be adopted at the same time. (3)

Widow not bound to exercise authority.

The widow is not bound by law to exercise an authority to adopt. There is no time limit within which she must exercise that power and she does not forfeit her right to her husband's estate, if she does not exercise it at all. (4)

Permission of Government not necessary.

It was for sometime supposed that the consent of the Government was necessary for an adoption. But it has been held that it is not necessary. (5) By Lord Canning's proclamation the right to adopt by Jagirdars and feudal chiefs without the permission of the Government has been recognized. (6) It has been held recently that the consent of the Government or of kinsmen, *Bhaiband*, is not necessary for the validity of an adoption. (7)

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(1) Punjab Customs, 83.

(2) Surendra Keshub v. Doorga Sundari, 19 I. A. 108, 19 Cal. 513. Bawa Pekchand v. Musammat Gopal Devi, 13 I. C. 421. 46 Punj. R. 1912.

(3) Ma Shweyin v. Ma Shwe Nyun, 11 I. C. 776 4 Burm. L. R. 158.

(4) Umasunderi v. Souravinee, 7 Cal. 288. Ram Sunder v. Survai, 22 W. R. 121. Giriowa v. Bhimji, 9 Bom. 58. Mutasaddi v. Kundan, 28 All. 377.

(5) Narha Govind v. Narayan, 1 Bom. 607. Rungubai v. Bhagirathibai, 2 Bom. 377.

(6) Rangubai v. Bhagirathibai, 2 Bom. 377. Ramchandra v. Timaji, 7 Bom. H. C. App. 26. (7) Balaji v. Datta, 4 Bom. L. R. 762.

Who may give in adoption.

We next come to the consideration of the question, who may give in adoption.

Only parents can give in adoption.

It has been held that no one but the parents of a boy can validly give him in adoption. (1) The father alone can give a boy in adoption, even without the consent of his wife.

When can mother give in adoption.

The mother can give away her son after the death of the father or when he is permanently absent from home by becoming a mendicant and the like or has lost his reason, but not a step-mother nor a grand-father. (2) It has been held, in a recent case in Calcutta, that she can give in adoption even in the absence of authority from her deceased husband. (3) In Bengal in an old case, it was held that the mother could not give her only son in adoption, and in Bombay it had been held that without the express authority of her husband. she could not give away her son in such a case. (4) But, as the Privy Council has now laid down, that the adoption of an only son is valid, in a recent case (5) it has been held in Bombay, that there can be no such restriction. In a recent case in Bombay it has also been held that a re-married woman can give her son by the first husband in adoption. (6)

(1) Vaithilinga *v.* Munigan, 15 I. C. 299. 1 Mad. W. N. 1127. Subbaluvammal *v.* Ammakuti, 2 Mad. H. C. 129. Balvantrao *v.* Bayarari, 6 Bomb H. C. 83 (O. C. J.). Bashatrappa *v.* Shivlinuppa, 10 Bomb. H. C. 268.

(2) Alank Manjuri *v.* Fakir Chand, 5 S. D. 418. Chitko Roghunath *v.* Janaki, 11 Bom. H. C. 199, 3. See S. D. 387, 10 Bom. H. C. 235, 1 Mad. 384.

(3) Jogesh Chunder Banerjee *v.* Nritya Kali Debi, 30 Cal. 965.

(4) Debee Dial *v.* Hur Hor Sing, 4 S. D. 310. Lakhmappa *v.* Ramava, 12 Bom. H. C. 764. Somashekhara *v.* Subhodramaji, 6 Bom. 524.

(5) Krishna *v.* Paramsri, 25 Bom. 537.

(6) Putalbai *v.* Mahadu, 33 Bomb. 107. Contra Panchappa *v.* Sangabasua, 24 Bomb. 89.

A boy cannot give himself away in adoption.(1)

Though it is only the parents who can give in adoption, the physical act of giving may be performed by a person authorized by them, though they may have renounced Hinduism. (2)

Power of the father and the mother to give in adoption.

It should be observed here that there is a distinction between the power of the father and the power of the mother to give in adoption where there is paternal property. The father has the right to deprive his son of his property. But after the death of the father, the property vests in the son and it is an unwarrantable exercise of power by the mother, not sanctioned by Hindu law or reason, to give him in adoption, and thus deprive him of his own property. The Smritis speak of the giving away of the son in a time of distress. When there is paternal property, the mother has therefore absolutely no power to give her son in adoption.

An adopted son cannot be divested of ancestral property already vested in him.

In a recent case, Mr. Justice Amir Ali, relying on the case of Kalidas *v.* Krishna (2 B.L R., F.B. 103), held that under the Dayabhaga School, if a person is given in adoption, after inheriting the property of his father, he cannot be divested of such property by the fact of the adoption. (3) But the power to give in adoption was not questioned. Under the Mitakshara also it has been held in Madras that a boy adopted after inheriting ancestral property can not be divested of it (4). Thus when a son gets a right by birth

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(1) 2 Mad. H. C. 129, 10 Bom. H. C. 268.

(2) Subbarayar *v.* Subbammal, 21 Mad. 497. Sham Sing *v.* Santa Bai, 25 Bom. 551.

(3) Behary *v.* Kailas, 1 C. W. N. 121.

(4) Narasimha *v.* Rangayya, 29 Mad. 437.

it is difficult to give him in adoption and to deprive him of his ancestral property. But even under the Mitakshara the rule is clear that an adopted son loses all rights in the property of his natural family. The rule that giving in adoption is allowable in distress is the only solution.

Who can be adopted.

The next question is what are the qualifications required of a boy who can be validly adopted.

A boy of a different caste can not be adopted,(1) A fatherless and motherless boy can not be adopted, as only the parents can give in adoption. (2)

Restrictive rules considered.

Restrictive rules, not found in the authentic Smritis, are laid down in the Dattaka-Mimansa and the Dattaka Chandrika based on certain texts of Saunaka, the Vriddha Gautama and the Kalika-purana, which are not cited in any of the older Commentaries. Why the Privy Council and the Courts of this country should have travelled beyond the Mitakshara, the Dayabhaga and the Smriti-Chandrika for the law of adoption and set aside the law as laid down in them, in favour of rules, which are the offspring of a prurient fancy, it is difficult to understand. There is a text of Saunaka to the effect that the adopted boy must bear the reflection of a son (पुत्रच्छायावहः), and the Dattaka-Mimansa and the Dattaka-Chandrika say that it means "the capability to have been begotten by the adopter through Niyoga and so forth." It was supposed that the adopted son took the place of the son by Niyoga and the Madras Hight Court in the Ramnaad case based their judgment on this supposed historical fact. But it is wholly an un-

(1) Narain Singh *v.* Shiam Kali, 25 I. C. 45. (2) Vathilinga *v.* Natisa, 37 Mad. 529. Govind *v.* Chandrabhaga, 34 I. C. 675.

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A boy of a different caste can not be adopted.(1) A fatherless and motherless boy can not be adopted, as only the parents can give in adoption. (2)

Restrictive rules considered.

Restrictive rules, not found in the authentic Smritis, are laid down in the Dattaka-Mimansa and the Dattaka Chandrika based on certain texts of Saunaka, the Vriddha Gautama and the Kalika-purana, which are not cited in any of the older Commentaries. Why the Privy Council and the Courts of this country should have travelled beyond the Mitakshara, the Dayabhaga and the Smriti-Chandrika for the law of adoption and set aside the law as laid down in them, in favour of rules, which are the offspring of a prurient fancy, it is difficult to understand. There is a text of Saunaka to the effect that the adopted boy must bear the reflection of a son (पुत्रच्छायावहः), and the Dattaka-Mimansa and the Dattaka-Chandrika say that it means "the capability to have been begotten by the adopter through Niyoga and so forth." It was supposed that the adopted son took the place of the son by Niyoga and the Madras Hight Court in the Ramnaad case based their judgment on this supposed historical fact. But it is wholly an un-

(1) Narain Singh *v.* Shiam Kali, 25 I. C. 45. (2) Vathilinga *v.* Natisa, 37 Mad. 529. Govind *v.* Chandrabhaga, 34 I. C. 675.

historical and erroneous supposition. The adopted son existed together with the Kshetraja son from the very beginning, and because the son by Niyoga was prohibited in the Vedas, it does not follow that the adopted son took his place. The old Rishi Apastamba prohibited adoption at the same time as he prohibited Niyoga. In the Smritis there is no mention of Niyoga in connection with adoption, and it is surprising to find that this unwarrantable interpretation of the so-called authoritative books on adoption has found favour with our Courts, ascribing impure ideas to the Rishis, who were after all not impure at all.

No justification for the rules being based on Niyoga.

In a recent case (1) the Chief Justice of Allahabad cited with approval the opinion expressed in this book but his colleague guardedly laid down that the doctrine was not applicable to the case of a widow adopting but was applicable to the case of a male adopting. Since then, the Privy Council have held that the Dattaka-Mimansa should not be preferred to the Smritis and that the rule of Niyoga is inadmissible and a widow can adopt her brother's son or grandson. (2) An opinion however, was expressed that the rule that a legal marriage must have been possible between the adopter and the natural mother of the adopted boy refers to their relationship before marriage. Recently in Bombay the doctrine of Niyoga has been held to be wholly inadmissible and a step-brother held eligible. (3) A widow can adopt her sister's daughter's son, (4) and in Bombay,

Doctrine of Niyoga not applicable according to recent decisions.

(1) Jaisingpal *v.* Bijaypal, 27 All. 417. (2) Puttalal *v.* Musaumut Parbati Kumar, 42 I. A. 55. Bhagwati Nandprosad, 33 I. C. 596 P. C. (3) Gojanan Balkrishna *v.* Kashinuth, 39 Bom. 410. contra Sriramulu *v.* Ramayya, 3 Mad. 15. Baboo Ramjeet Sing *v.* Baboo Obhye Narayun, 1817, Sel. Rep. 315. (4) Ragavenda *v.* Jayaram, 20 Mad. 283

it has been held that she can adopt her brother's son. (1)

Rule that no one can be adopted whose mother could not be married further considered.

Again the rule has been broadly laid down that no one can be adopted whose mother the adopter could not have married. It is upon this rule and upon certain texts cited in this section that it has been held that in the case of the twice-born classes, a brother, a step-brother, or an uncle or the son of a sister, daughter or aunt, (2) cannot be adopted. But it has also been held, that a brother's son or a grand-nephew may be adopted, (3) though their mother could not be married by the adopter. So also may a wife's brother or his son, (4) or the son of a wife's sister, (5) or of a maternal aunt's daughter. (6) In Madras the adoption of an uncle's son was declared valid, because it was thought to be sanctioned by custom. (7)

Mr. Mayne in his invaluable book very rightly says that the restrictive rules are of Brahmanical origin and mentions that adoptions, irregular according to them, are common in several districts. He says: "In the Punjab such adoptions are common among the Jats, and this laxity has spread even to Brahmanas and to the orthodox Hindu inhabitants of towns such as Delhi. (8) They are

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(1) Bai Nani *v.* Chunilal, 22 Bom. 973.

(2) Gopal Narhar *v.* Hanmunt, 3 Bom. 273. Bhagirathbai *v.* Radhabai, 3 Bom. 298. Sundar *v.* Parvati, 12 All. 51, P. C. Bhagaban Sing *v.* Bhagaban Sing, 26 I. A. 153. Minakshi *v.* Ramanada, 11 Mad. 49.

(3) Moran *v.* Bejoy, W. R. Sp. 122. Jaisingpal *v.* Bijay, 2 All. L. J. 36.

(4) Sriramulu *v.* Ramavyya, 3 Mad. 15.

(5) Baee Gunga *v.* Baee Sheokoovur, Bom. Sel. Rep. 73, 76.

(6) Vencata *v.* Subhadra, 7 Mad. 548.

(7) Virayya *v.* Hanumanta, 14 Mad. 459.

(8) Punjab Cust. 79-83. Punjab Customary Law II., III, 154, 205 210.

also permitted among the Jainas, (1) and in Southern India, even among Brahmanas, such adoptions are undoubtedly very common. It was decided so late as 1873 that the practice had not attained the force of a legal custom. (2) But in 1881, the High Court pronounced, that in Southern India such adoptions were valid among Brahmanas. A similar practice among the Nambudri Brahmanas of Malabar has also received judicial sanction. (3) In the North-West Provinces the adoption of a step-brother is allowed among the unregenerate classes, (4) and among the Borah Brahmanas, sister's sons may be adopted. (5) In Pondicherry the rule, as a general principle, is not recognised. A man may adopt his daughter's or his sister's son, or any one of his wife's relations, but he may not adopt his own brother. (6) In western India also such adoptions appear to be permitted. It is also said, that in Deccan a younger brother may be adopted, and, though the adoption of uncles is forbidden, a different reason is alleged for the prohibitions." (7) As regards the twice-born castes, the exceptions to the rule as mentioned in the above passage are not correctly stated. In justice to the learned author it should be stated that in an earlier passage he laid down the correct law in the follow-

(1) Sheo Sing *v.* Musmut Dakho, 1 All. 688. Hassan Ali *v.* Nagamal, 1 All. 288. Lakhmi Chand *v.* Gatto Bai, 8 All. 319.

(2) Gopalayyan *v.* Roghupatiyyan, 7 Mad. H. C. 250.

(3) Vayidinada *v.* Appu, 9 Mad. 44. Vishnu *v.* Krishnan, 7 Mad. 3. See 11 Mad. 55.

(4) Phunda *v.* Janginath, 15 All. 327.

(5) Chain Sukh Ram *v.* Parbati, 14 All. 53.

(6) Sorg H. L. 130 Co Con 377.

(7) Steele 44, Huebut Rao *v.* Govind Rao, 2 Bom. 85, V. N. Mandlik 474, W & B 887.

ing words, while speaking of the prohibition to adopt a daughter's son, a sister's son, and a son of the mother's sister: "The rule so laid down (in the five digests the Mimansa, &c.) was stated by Mr. Sutherland, both the MacNaghtens and both the Stranges, as limited to the three regenerated classes. It has been affirmed by a singularly strong series of authorities in all parts of India as forbidding the adoption of the son of a daughter, or of a sister, or of an aunt." Indeed the Privy Council in the very recent decision on the question, have laid down, that the rule of the Dattaka-Mimansa and the Dattaka-Chandrika applies to the twice-born castes generally, unless a custom to the contrary is clearly established, and that the adoption of the sister's son and the mother's sister's son is invalid. (1) It has been held that a mother's sister's son, who is also the father's brother's son can not be adopted (2).

Adoption of the sister's son in Bombay Punjab.

In a recent case, it has been held in Bombay that by custom the adoption of the sister's son is valid among Saraswat Brahmins. (3) It should not be forgotten that the Sankara Kaustava and the Nirnaya Sindhu both uphold the adoption of the sister's son and the daughter's son. It has been held in the Punjab that among non-agricultural Hindu Khatris the adoption of a sister's son is allowed (4). In South East Punjab also such an adoption is allowable. (5)

(1) Bhugwan Sing *v.* Bhugwan Sing, 26 I. A 153.

(2) Walbai *v.* Heerbai, 11 Bom. L. R. 1172.

(3) Manjunath *v.* Kavaribai, 4 Bom. L. R. 140.

(4) Sohana Mal. *v.* Nanak Chand, 16 Punj L. R. 1911.

(5) H.H. The Maharaja Brij Indar *v.* Bansi 17 I.C. 36. 88 Punj R. 1912 Harnaman *v.* Atmaram, 24 Punj. R 1900 F. B.

We have seen that the doctrine of Niyoga can have no application to the law of adoption. The rule broadly laid down that no one can be adopted whose mother the adopter could not have married is also not supported by the Smritis and the Commentaries like the Mitakshara, the Smriti-Chandrika, the Vivada Chintamani, the Parasara Madhava and the Dayabhaga. The rule would mean that the son of a female within seven degrees on the father's side and within five degrees on the mother's side is ineligible and that practically no Sapinda of a different Gotra is eligible. The absurdity of the rule is apparent from the mere statement of it. No relation of any nearness excepting an agnate, can be adopted. What becomes then of the only text on the subject, which lays down that "the nearest among his relatives" should be adopted? The words "bearing the reflection of a son" can not have the meaning attributed to it. It only means that a boy, who can be regarded in the light of a son on account of age or relationship, should be adopted. It has the same significance as the words in the rule of Aswalayana cited in Ch. VI. which prohibits marriage with a girl, when such marriage would be unseemly on account of relationship between the parties. It thus means that no one who bears a relationship which is inconsistent with the position of a son should be adopted. Thus an uncle or a brother should not be adopted. To go further would land us in absurdity. The rule of Shakala which contains the only rule of prohibition about relations in adoptions, says that all persons of a different Gotra may be adopted, except the sister's son, the daughter's son and the mother's

Rule that no one can be adopted whose mother the adopter could not have married.

sister's son. There is no authority for extending the scope of the rule.

Since the above was written the above view has been adopted by the Bombay High Court, which has refused to follow Nanda Pundit in preference to the Smritis, and it has been held that the rule of Hindu Law about Viruddha Sambandha that "no one can be adopted whose mother the adopter could not have legally married" is confined to the specific instances of the daughter's son, the sister's son and the mother's sister's son (1); and that a father's sister's son can be adopted (2) The Allahabad High Court also has held that notwithstanding the said rule a step-mother's brother's grand-daughter's son can be adopted (3)

Latest decisions negative the rule.

The Talukdars of Oudh have by special legislation got the right to take in adoption the daughter's son. Indeed according to all the Rishis, the daughter's son of the sonless man is a Putrika-putra by intention, and hence it is that Yama lays down that in the case of the daughter's son and the brother's son no ceremony is required for adoptions, thereby clearly asserting that these two can be made "substitutes for sons," above all others. It takes one's breath away to find our text-writers and judges giving a different interpertation to the text and laying down that the daughter's son can never be adopted, because in opposition to the texts of all the Rishis about Putrikaputra and

Adoption of the daughter's son.

(1) Ramchandra Krishna Joshi *v.* Gopal 32 Bomb 69 Yamnava Luxuman 36 Bomb 53.

(2) Ramkrishna Gopal *v.* Chimnaji 2 I. C 34.

(3) Raghubar *v.* Rasu Kunatar 14 I. C, 48.

the express text of Yama allowing such adoption, there is a solitary text of Shakala which is not cited by any of the ancient commentators which forbids it. A full Bench of the Madras High Court, it should be mentioned here, decided that the adoption of the daughter's son is valid. (1)

In a recent Punjab case, the Privy Council made the observation that the general rule that a daughter's son is ineligible for adoption can not be disputed but it may be varied by family custom and is often so varied in the Punjab and when such a point is raised at a late stage of the hearing of a case it can not be entertained. (2)

A Sudra it has been held can adopt his daughter's son (3).

Rule that no one can be adopted whose father could not marry the adoptive mother negatived.

Another and a still more surprising rule was supposed by modern lawyers to regulate adoptions. It was that the boy should be so related that his natural father could not marry the adoptive mother. The rule was given effect to in some early cases. (4) But more recent cases have established, that it has no foundation in Hindu Law. (5)

No restrictions in case of Sudras.

As regards a Sudra, it has been held that he can adopt any body he likes, there being no restriction in his case. (6).

It has been held, that a stranger may be adopted, even though there is a brother's son, though

(1) Vayidinada *v.* Appu, 9 Mad. 44.

(2) Lala Rup Narain *v.* Gopal Devi. 36 Cal. 180.

(3) Lala *v.* Nahar Sing, 16 I. C. 181.

(4) Musmut Battas *v.* Luchman Sing, 7 N.-W. P. 117. Digambaree *v.* Taramoney, F. MacNaghten, 170 App. 10.

(5) Sriramulu *v.* Ramayya, 3 Mad. 15. Bani Nani *v.* Chunilan, 22 Bom. 973. 2 All. L. J. 36. 20 Mad. 283.

(6) Sreemati Joymoni *v.* Sreemati Siba Sundery. Fulton's Rep. 75. Rajkumar Lall *v.* Bisseswar Lyal, 10 Cal. 688. Phundo *v.* Jangi Nath, 15 All. 327. Chinna Nagayya *v.* Pedda Nagayya, 1 Mad. 62.

according to all the authoritative commentaries such an adoption is invalid. (1)

In Bombay it has been held that an orphan having neither father or mother to give him away cannot be validly adopted. (2)

We have already seen that the Dattaka-Mimansa has laid down, that among the twice-born castes a boy above the age of five years or whose tonsure or Upanaya has been performed cannot be adopted. Jagannath was of the same opinion. The Dattaka Chandrika however, says that it is only when the Upanayana has been performed that a boy cannot be adopted, and among Sudras, only a married man cannot be adopted. Though the Dattaka-Mimansa is supposed to be the law of Northern India and the Chandrika of Bengal and Southern India, the rule of the Mimansa about age though followed in some early cases in N.-W. Provinces, has been held to be not binding in more recent cases. (3) But having regard to the observations of the Privy Council in the recent case of Bhagwan Sing about the authority of the Dattaka Mimansa, it is impossible to say what the Courts will hold in future in cases under the Mitakshara school. In Bengal and Madras, it is quite established, that among the regenerate classes, the Upanayana, and among Sudras, marriage is the only bar to adoption. (4)

Upanayana among twice-born castes only bar.

(1) Wooma Daee *v.* Gocoolanund, 3 Cal. 587, P. C. Darma Dagu *v.* Ramkrishna, 10 Bom. 80.

(2) Shrinivas Saryerao *v.* Balvant Vencatesh, 20 I. C. 182. 37 Bom. 513.

(3) Thakoor Oorao Sing *v.* Thacoorani Mehtal Koonwar, N.-W. P. H. C. R. 1868, 103 *a.* Ganga Sahai *v.* Lekhraj Sing, 9 All. 253.

(4) Bullabakant *v.* Kissenprea, 6 S. D. 219. Nitradayee *v.* Bholanath, S. D. 1853, p. 553. Bhuban Moyee *v.* Ram Kishore, 10 Moore 279. Vythilinga *v.* Vyiathammal 6 Mad. 43. Pichuvayyan *v.* Subbayyan, 13 Mad. 128. Papamma *v.* Appa Rau, 16 Mad. 384.

Upanayana no bar when of the same Gotra.

In Madras it has been held, that when the boy is of the same Gotra, even the Upanayana is no bar. (1)

Among Nambudri Brahmans a married man can be adopted in the Kritrima form. (2)

Marriage among Sudras bar in Madras and Allahabad.

In Allahabad, it has been held, following the opinion of the Dattaka Chandrika, that among Sudras a boy can be adopted till he is married (3). In Madras and Allahabad it has been held that among Sudras marriage is a bar to adoption. (4)

Marriage no bar among Sudras in Bombay.

In Bombay, it has been held that among Sudras even marriage is no bar, only the boy should not be older in age than the adoptive father. But it is no bar if he is older than the adoptive mother. (5)

No restrictions among Jainas.

Among Jainas it has been held that a married man and also a daughter's son can be adopted (6) The Privy Council have laid down that "among the Jainas adoption is no religious ceremony and under the law or custom there is no restriction of age or marriage among them" (7)

Eldest son can be adopted.

It is now quite settled by authority, that an eldest son as well as an only son can be adopted. (8)

We have already seen that according to the

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(1) Viraragava *v.* Ramalinga, 9 Mad. 148.

(2) 11 Mad. 176.

(3) Damodarji *v.* The Collector of Banda 7 All L. J. 927.

(4) T. V. Janakiram *v.* V. P. Venkiah, 11 I. C. 383 10 Mad. L.J. 21. Pechuvagyan *v* Subbagyan, 13 Mad. 128. Jhunka Prasad *v.* Nathu 11 All. L J. 293. 18 I. C. 960.

(5) Dharma Dagu *v.* Ram Krishna, 10 Bom. 80. Gopal Balkrishna *v.* Vishnu Raghu Nath, 23 Bom. 253.

(6) Manohar *v.* Banarsi, 29 All. 495, Maharaja Govynd Nath Roy *v.* Gulab Chand (1833) S. D. A. 276.

(7) Rupchand *v.* Jambu, 32 All. 495 P. C.

(8) Janakie *v.* Gopaul, 2 Cal. 365 Affd. 10 I. A. 32. Kashibai *v.* Tatia, 7 Bom. 221. Jamnabai *v.* Raichand, 7 Bom. 225.

Rishis and the commentators, the adoption of an only son is not only immoral and sinful but wholly invalid. In Bengal, it had been regarded as quite settled by authority that such an adoption was invalid, and so in Bombay. (1) In Allahabad and Madras, however, there were conflicting decisions, the more recent decisions favouring such an adoption. (2) A decision of the Privy Council has affirmed two judgments of the Madras and Allahabad Courts upholding such an adoption, (3) but in as much as it purports to declare the law of the Hindus, it will perhaps be considered binding in the other Presidencies also. Indeed a Full Bench of the Bombay High Court has since held that it was settled that under the Mitakshara there the adoption of an only son is valid and it has further decided that under the Mayukha also such an adoption would be upheld. (4)

Only son can be adopted.

One of the reasons given by their Lordships of the Privy Council for their decision in the above mentioned case is that it "inclines in favour of the law which gives freedom of choice." About the same time however, the Privy Council decided that the rule prohibiting the adoption by a Hindu of the twice-born classes of the mother's sister's son (the sister's son and daughter's son are on the same footing as the mother's sister son), though

(1) Upendra Lal *v.* Rani Prosannamoyee, 10 W. R. 347. Manick Chunder *v.* Bhuggobutty, 3 Cal. 443. Ramchandra *v.* Vithoba, W & B 120. Waman Raghupati *v.* Krishnaji, 14 Bom. 249 F. B. Rai Jadav *v.* Bai Mathura, 19 Bom. 658

(2) Hanuman *v.* Cherai, 2 All. 164, F. B. Chinna Gaundan *v.* Kumra Gaundana, 1 Mad. H. C. 54.

(3) Balasu Gurulingaswami Ram *v.* Lakshmamma. Radha Mohun *v.* Hardai Bibi, 26 I. A. 113, 22 Mad. 398. Vyas Chumanlal *v.* Ramchandra, 24 Bom. 367.

(4) Vyas Chumanlal *v.* Ramchandra, 24 Bomb 367 F. B.

contained in some doubtful texts, was a binding one. (1) An ordinary Hindu would probably think that it would have been better to have declared the former rule as binding and the latter as recommendatory.

Customs in Punjab.

In the Punjab, it has been held that the non-agriculturist Hindu Khatris do not follow the strict Hindu Law in matters of adoption and the adoption of a sister's son is generally allowed. (2) It has also been held that among Lohars of the Amritsar District a kinsman of any age married or unmarried can be adopted even in the presence of a nearer kinsman and the restrictions as to age &c. are merely recommendatory and not mandatory. (3)

Son of a Brahmo may be adopted.

It has been held in Calcutta, that the son of a Brahmo may be adopted by a Hindu, on the ground that a Brahmo may revert to Hinduism and his minor son can also do so with his consent. (4)

We next come to the question what ceremonies are essential for a valid adoption.

Ceremonies of adoption.

The Privy Council upon this matter laid down the following rule :—"All that has been decided is, that amongst Sudras no ceremonies are necessary in addition to the giving and taking a child in adoption. The mode of giving and taking a child in adoption continues to stand as Hindu law and usage, and it is perfectly clear that amongst the

(1) Bhagwan Singh *v.* Bhagwan Singh, 26 I. A. 153. Lali *v.* Murlidhar, 24 All. 195.

(2) Sohna Mal *v.* Nanak Chand, 49 Punj. R. 1911, 9 I. C. 36. Chuttun *v.* Ram Chand, 86 Punj. R. 1904. Sohmun *v.* Ramdyal, 79 Punj. R. 1901. Harnaman *v* Atma, 24 Punj. R. 1960.

(3) Chinda *v.* Akbar, 49 Punj. R. 1909, 2 I. C. 91.

(4) Kusum Kumary *v.* Satyaranjan, 31 Cal. 999.

twice-born classes there could be no such adoption by deed, because certain religious ceremonies, *the datta homam* in particular, are in their case requisite." (1) The rule has been followed in Calcutta, Allahabad and Bombay. (2) But as regards the twice-born castes, there were some early decisions in Madras denying the necessity of the Datta Homa. (3) But by later decisions, it has been settled that the rule exists. (4) It has been however, held by that Court that the ceremony may be performed subsequent to the gift and acceptance, even after the giver and the taker are dead. (5) Datta Homa.

It should however, be mentioned that in Madras, it has been held that in the case of an adoption from the same gotra no Dattahoma is necessary. (6) In Bombay and Allahabad (7) also, it has been decided that in the case of the brother's son and the daughter's son, no such ceremony is necessary, according to the text of Yama. It is probably not necessary in the case of all agnates.

In Bombay, it has been held that an untonsured widow may adopt and depute a third party to

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(1) Mohashai Shosinath *v.* Srimati Krishna Sundary, 7 I. A. 250, 6 Cal. 381.

(2) Bhairab Nath Sye *v.* Mohesh Chandra Bhaduri, 4 B.L.R.A.J. 162. Luchman *v.* Mohun, 16 W R. 179. Thakur Omrao *v* Thakooranee, N.-W.P. H.C. 1868, 103. Ravji Vinayakrav *v.* Lakshmi Bai, 11 Bom 393. Huebut Rao *v.* Govindrao, 2 Bor. 75, 87. See however Ayma Ram *v.* Madho Rao, 6 All. 276, where a different opinion was expressed by some of the Judges.

(3) Singamma *v.* Ramanuja Charlu, 4 Mad. H. C. 165. Chandra Mal *v.* Mukta Mala, 6 Mad. 20. Shaukaran *v.* Kesharan, 15 Mad. 7.

(4) Vencata *v.* Subhadra, 7 Mad. 548. Subbarayar *v.* Subbammal, 21 Mad. 497. Govindayyar *v.* Dorasammi, 11 Mad. 5.

(5) Subbaragyar *v.* Subbammal, 21 Mad. 497. Vencata *v.* Subhadra, 7 Mad. 548.

(6) Govindayyar *v.* Dorasami, 11 Mad. 5.

(7) Huebut Rao *v.* Gobind Rao, 2 Bor. 75. Ayma Rama *v.* Madho Rao, 6 All. 276.

perform the Datta Homa. (1) In Bengal, an unchaste widow was held incompetent to adopt because she could not perform the ceremonies (2).

Where the adopted son has been recognized as such for many years, the due performance of the ceremonies may be presumed. (3)

Jaina Law.

Among Jainas it has been held that a widow can adopt without any permission from her husband, and no ceremonies are necessary but due publicity is indispensable. (4) Hem Chandra the leading authority on Jaina Law lays down the following rules on the subject.

"The widow having no male issue should establish as master of her husband's estate in the presence of five witnesses, after having taken him by the rules of adoption, the brother's son (of the husband), in his default, the son of a member of the family whether his initiatory ceremonies have been performed or not, in his default, the son of the daughter, in his default, the son of a Bandhu, in his default, a boy of the same Gotra and in his default, the younger brother of the husband seven years old.

"If a childless man or woman takes an adopted son (he or she should) get a deed executed by his mother, father and the like, attested by his relations and properly stamped with the seal of the King, and should invite the relatives and agnates with respect; and should with songs by women having

(1) Lakshmibai *v.* Ram Chandra, 22 Bom. 590.

(2) Sayamala *v.* Saudamini, 5 B. L. R. 362.

(3) Vyas Chemal Lal *v.* Vyas, 25 Bom. 473. Sabo *v.* Nahagun, 2 B. L. R. 51 App.

(4) Srimandarji *v.* Fatehchand, 20 I. C. 553 (Punjab) Punjab customs 82. Lakmi Chand *v.* Gatto Bai, 8 All. 310.

husbands living and music and other benedictory ceremonies go to the temple of the Jina and make before the Jina the Swastika and make presents according to ability to Guru and having bowed and having made good gifts in charity should return to his own house ** and then should cause the birth ceremony of the adopted son to be performed by the invited Guru.

"If a legitimate son by a wife of the same caste be born subsequently, the adopted son becomes entitled to a fourth share. The sons by wives of different castes become entitled to food and raiment.

"The legitimate son and the adopted son are the two principal sons. The son purchased, the younger brother and the daughter's sons are subsidiary sons. These are the five kinds of sons allowed by the Shastras of the Jainas. These sons are declared heirs." (1)

"And another son born of good family should be established. A son can be taken from all castes for good name." (2)

In a recent case it has been held that though the rules of Hindu Law apply to Jaina adoptions, by custom a widow can adopt without authority and a daughter's son and a married man can be adopted. (3)

In the Punjab, custom is very often difficult to ascertain. Among Agarwala Banias of Sira, it has been held that there can be adoption without strictly

(1) Arhanmti Sec. 54-70. Vol. II. p. 310-311.

(2) Arhanmti Sec. 89. Vol. II. p. 312.

(3) Ashrafi Kunwar *v.* Rubchand, 30 All. 197. Lakhmi *v.* Gatto, 8 All. 319. See 29 All. 519.

following Shastric rules about the ceremonies. (1) The hitherto unpublished book on Jaina Law which is translated and published in the second volume of this book for the first time will, it is hoped, make the law applicable to Jainas easily ascertainable.

Burmese Law.

Among the Burmese no formal ceremony is necessary for adoption but due publicity of the act is necessary and must be adequately proved. An adult may also be adopted among them. (2)

No ceremonies necessary for Sudras.

We have already seen that in the case of Sudras, it has been held that no ceremonies are necessary. (3) The late Dr. Siromany contended with great force that, according to both the Mimansa and the Chandrika, it could not be held that no ceremonies were necessary. The Homa can never be required. Other ceremonies may be performed and are usually performed, and they consist in giving and taking and making gifts to Brahmins. The matter has been fully dealt with in the Chapter on Sudras. It has been held that even in the case of Sudras, there cannot be an adoption simply by the execution of deeds. There must be an actual handing over of the child by its natural parents to the adopter. (4)

Gift by an agent.

As regards the mode of giving, we have already seen that a gift may be made through an agent. (5) If the father had actually made over the child in his

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(1) Jewan Mull *v.* Harichaul, 11 Punj L. R. 1909.

(2) Ma Yivel *v.* Ma Me, 36 Cal. 976, P. C.

(3) Indramany Choudhùrani *v.* Behary Lall Mullick, 5 Cal. 770, P. C. Thangathani *v.* Ramu, 5 Mad. 358.

(4) Mahashoya Soshinath Ghose *v.* Krishna Sundari, 7 I. A. 236 6 Cal. 381.

(5) Vyai Ṛangam *v.* Lakshman, 8 Bom. H. C. 244. Jamna Bai *v.* Ray Chand, 7 Bom. 225.

lifetime, the formal gift at the ceremonies of adoption may be made after his death by a brother. (1)

Doctrine of Factum Valet.

The doctrine of Factum Valet, which is unknown to Hindu Lawyers, excepting Gimutavahana, has been adopted in case of adoption in certain matters. But its application, the Allahabad High Court says, "should be confined to questions of formalities, ceremonies, preference in the matter of selection and similar points of moral or religious significance and which relate to what may be termed the modus operandi of adoption but do not affect its essence. Minor points of form and the like not affecting the essence of the transaction can properly be the subject of the application of the doctrine." (2) Sir Michael Westropp C. J. also observed: "In the maxim quod fieri nondebit factum valet, factum must not be understood to mean a transaction which is a mere nullity nor on the other hand should debit be read as if it were *potuit*." (3) Mr. Mayne says that "the principle is only applied where a legal precept has been reduced by independent reasoning to moral suggestion" and "can not sanction for instance the right of an undivided brother to dispose of more than his share or an adoption by widow without the authority of her husband." We have already seen that the commentators have clearly laid down what adoptions are valid and what are not and there is little room for speculation about the applicability of the doctrine. Even in the matter of forms and cere-

(1) Vencata *v.* Subhadra, 7 Mad. 584.

(2) Ganga *v.* Lekhraj, 9 All 293.

(3) Lakshmappa *v.* Ramara, 12 Bomb. H. C. 384.
Gopal *v.* Hanmant, 3 Bomb. 373.

monies those which are essential have been declared by the commentators. Certain adoptions, which are invalid according to the commentators, have been declared valid by the decisions of our Courts, and certain forms and ceremonies have been declared non-essential. They are all described in detail in these pages. It is submitted that it is not allowable to invoke the aid of the doctrine to validate adoptions other than those described above, which can not be supported according to the commentators. Adoptions according to custom are governed by less stringent rules.

Receipt of consideration how far invalidates adoption.

When a boy is given for a price or in consideration of an allowance, the adoption is invalid. (1) But in Madras, it has been held that though the receipt of a consideration by the natural father is illegal and opposed to public policy, the adoption is separable from such transaction and is thus not void. (2) This is not in accordance with the rules of the commentators but there is much to recommend it on grounds of equity as regards the boy adopted. In the latest case on the question, the Madras High Court has held that the acceptance of a valuable consideration for giving one's consent necessary to validate an adoption, vitiates the adoption. The judges cite the case of Mayappa *v.* Nagappa mentioned above without approving it but without expressly dissenting from it. (3)

Adopted son has all the rights of legitimate son.

The adopted son has all the rights of a legitimate son. He becomes a co-owner, from the day of adoption, with the father and the other

(1) Eshan *v.* Hurrish, 21 W. R. 381.
(2) Marayappa *v.* Nagappa, 29 Mad. 164.
(3) Danakoti Ammal *v.* Balasundara, 36 Mad. 19.

members of the family in ancestral property under the Mitakshara law, (1) has the same rights of survivorship as the legitimate son, and acquires a right to ancestral property from the time of his adoption, (2) and can demand partition against the father's wishes, (3) and the adoptive father cannot alienate ancestral property without his consent after adoption, (4) though he cannot question any alienation made before his adoption. (5)

Effect of testament disposition giving widow life-interest.

It has been held that dispositions of a testamentary nature, intended to take effect after the adopter's death such as giving the widow a life-interest and the like interest are valid, if made with the consent of the natural father. (6) If however, a life-interest is devised to the wife and by the deed of permission it is provided that the widow should remain in possession during her life-time, it is reasonable, and it has been so held, that the son adopted after the death of the husband should only take a remainderman's interest (7).

Agreement with natural father curtailing rights of adopted son how far valid.

It is a difficult question whether by an agreement with the natural father at the time of adoption, the rights of the adopted son may be curtailed. The Madras High Court in some cases held that they could not be so curtailed. (8) The Bombay

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(1) Bachu *v.* Kushaldas, 4 Bom. L. R. 883.

(2) Ayyava *v.* Niladatchi, 1 Mad. H. C. 45.

(3) Rambhat *v.* Laksman, 5 Bom. 630

(4) Rungama *v.* Atchma, 4 Moore I, See. 11 W. R. 436.

(5) Rambhat *v.* Lakshman, 5 Bom. 630.

(6) Lakshmi *v.* Subramaniya, 12 Mad. 40. Vinayek Narayun *v.* Govindrao, 6 Bom. H. C. 224. Narayan Sami *v.* Ramasami, 14 Mad. 172.

(7) Bepin Behary *v.* Brojo Nath, 8 Cal. 357.

(8) Lukshmana *v.* Lakshmi Ammal, 4 Mad. 160 Jagannandha *v.* Papamma, 16 Mad. 400.

High Court have held otherwise. (1) In a recent case, in Madras, it has been held that an agreement by the natural father executed at the time a boy is given in adoption, to the effect that the adopting widow should enjoy the property for life, is good and binding on the son. (2) The Privy Council, in an early case held that such an agreement was not absolutely void and "was at least capable of ratification when the son comes of age," (3) but in a more recent case, the opinion was expressed, that the conditions might be void but they would not make the adoption invalid. (4)

In Bombay a Full Bench (5) have recently approved of the rule laid down by the case of Vencappa *v.* Fakergowda (6) that stipulations made on the occasion of adoption, between the natural parents and the adoptive mother whereby the latter was invested with a power to make a gift of her husband's property to her brother, were not binding on the adopted son and also of the rule laid down in Ravji Vinayek Rao's case (7) that if the stipulations of an agreement contemporaneous with an adoption were unreasonable, such as giving to the widow an absolute power of disposition over the property, they should be rejected as *ultra vires.* But the actual point decided was that the gift of a small portion of the property to an unmarried daughter assented to by the natural father of the adopted son

(1) Chitko Raghunath *v.* Janaki, 11 Bom. H. C. 199. Venayakrav *v.* Lakshmi Bai, 1 Bom. 381. Antaji *v.* Dattaji, 19 Bom. 36.

(2) Visalakshi *v.* Sivaram, 27 Mad. 577.

(3) Ramaswami *v.* Vencataramaiyan, 6 I. A. 1

(4) Bhaiya Rabidat *v.* Inder Kuar, 16 I.A. 53; 16 Cal. 537.

(5) Vyasacharya *v.* Venkarbai 14 Bom. L. R. 1109. F. B.

(6) 8 Bom. L. R. 346.

(7) 11 Bom. 381.

was not binding on the latter. It is difficult to see why a widow cannot give effect to the undoubted rights of a maiden daughter to a portion because of a subsequent adoption.

In a recent case in Calcutta, it has been held that when the adoptive father at the time of adoption makes a will giving his wife a life-interest after his death and the natural father assents to it, the devise is binding on the adopted son. (1) According to strict Hindu Law any bargaining at adoption is not allowable, but there can be no objection to making any arrangement for proper management of property during the minority of an adopted son. It should be remembered that this difficult question can arise only when the property is ancestral under the Mitakshara law and the adopted son gets an interest by law on adoption, but when the parties are governed by the Dayabhaga law or the property is self-acquired, the adoptive father has every right to dispose of his estate in any way he likes.

Inherits both adoptive father's and mother's properties.

An adopted son holds precisely the same position, as a son born, in respect of inheritance both as regards the adoptive father and the adoptive mother and his status is similar to that of a son born also, as regards the performance of obsequial ceremonies, excepting as to the period of performing the Adya Sraddha. (2) According to the Nirnaya Sindhu an adopted son, unlike the Aurasa son, when uninvested with the sacred thread, can not perform the Adya Sraddha. (3)

Rights as to Sraddha.

(1) Harendra Nath Avasti *v.* Shib Sundari Debi 3 I. C. 376.

(2) Radha Prasad Mullick *v.* Rani Mani Dassee, 33 Cal. 947 F. B. Umasanker Maitra *v.* Kali Kamal, 10 I. A. 138. Poddokumari *v.* Jaga Kishor Acharya, 5 Cal. 615. (3) Nirnaya Sindhu, p. 347.

Inherits Stridhana.

He also inherits the Stridhana of the adoptive mother like an Aurasa son. (1)

An adopted son may be disinherited but is entitled to maintenance and expenses of marriage.

An Aurasa son can be disinherited, and is not even entitled to maintenance, except when he is an infant, but in the case of an adopted son, disinherition was considered by Mr. Macnaghten to be inequitable. He may be in the same position as the Aurasa son, but he is certainly entitled to maintenance. The Privy Council, however, have held that he has no rights higher than that of the Aurasa son, and that there cannot be "an implied contract not to make a will, the consideration for it being the giving of the son by the natural father." (2)

A devise to a widow of a life-interest and after her death, to an adopted son provided he be of good character and obedient to the widow has been upheld in the Calcutta High Court in a Dayabhaga case. (3) It must be said however that the condition about good character and obedience is not capable of ascertainment according to a fixed standard and may lead to vague and indefinite charges.

The rights of the adopted son can thus be curtailed by agreement and he may be wholly disinherited under the Dayabhaga or in respect of self-acquired property under the Mitakshara. (4) But in any event, he has certainly the right to maintenance and expenses of marriage which every discarded adopted son has got under the Smritis.

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(1) Tinkouree *v.* Dinonath, 3 W. R. 49. Gunga Prasad *v.* Budh Sen, 11 I. C. 27.

(2) Sree Raja Rao Vencata *v.* Court of Wards, 26 I. A. 83.

(3) Surendra Nath Ghose *v.* Kalachand Banerji, 12 Cal. W. N. 668.

(4) 12 C. W. N. 668, 3 I. C. 376.

An adopted stepson and a natural born stepson take equally, not as sons but as Sapindas of the husband, the Stridhan of a stepmother.(1)

Adopted son succeeds collaterally to paternal and maternal relations.

An adopted son succeeds collaterally *exparte paterna*, even to the estate of an agnate removed more than three degrees, (2) and is also entitled to inherit *exparte materna*, just like a legitimate son. (3)

Share of the adopted son when there is an afterborn son in Bengal.

Under the Dayabhaga, the adopted son takes one-third of the entire estate, when there is one Aurasa son, but half the share of a legitimate son, when there are more than one. (4)

The rule in Benares, Orissa, Bombay and Madras and among Jainas.

Under the Benares school, it was held in some cases that the adopted son takes one-third of the share of an afterborn son (5) This is the opinion of Mr. Mayne and Babu Golap Chunder Sircar, but is not correct.

In a recent case, from Orissa in Calcutta, it was held that under the Saraswati Vilasha, as well as under the Mitakshara, the adopted son is entitled to a fifth part of the entire estate. (6) In Bombay both under the Mayukha and the Mitakshara, and in Madras, it has been held that the adopted son takes a fifth of the estate. *i.e.*, one-fourth of the share of an afterborn son. (7) This rule applies to all the

(1) Gungadhur *v.* Haralal, 43 Cal. 941.

(2) Mukund *v.* Bykunt, 6 Cal. 289 Taramohun *v.* Kripamoyi, 9 W. R. 423. (3) Puddokumary *v.* The Court of Wards, 8 Cal. 362, P. C. Kelikuamar *v* Umasunker, 10 Cal. 232, P. C. Radha *v.* Rani, 33 Cal. 947 F. B. Sumbho Chunder Chowdhury *v.* Narain, 3 Kuapp 55 P. C. (1835). Nagendra *v.* Banku, 20 C W. N 702, see 18 B. L. R. 172 32 I. C. 401. Joykishore *v* Punchoo, 4 C L. R. 455 (4) Tara Mohun *v.* Kripamoyee, 9 W. R 423, Birbhadra *v* Kalpataru, 1 Cal. L. J 388.

(5) Preag Singh *v.* Ajoodhea Sing, 7th Dec. 1825, S.D. A. V. p 96.

(6) Birbhadra *v* Kalpataru, 1 Cal. L. J. 388.

(7) Giriapa *v.* Ningapa, 17 Bom. 100 Narayan *v* Nana Monohur, 7 Bom H. C A C J. 153 Karuturi *v* Karuturi, 29 Mad. L J. 710 Rukhab *v* Chuni, 16 Bom. 347 (in this case Jainas were held to be governed by the Mitakshara but the share of the adopted son was erroneously held to be one fourth.)

Provinces where the Dattaka Mimansa prevails and even in the case of Sudras.

Shares of the adopted son and Aurasa son among Sudras

According to the rule of Dattaka-Chandrika, among Sudras, the adopted son takes equally with an afterborn son. The rule was given effect to in Madras (1) and also in some cases in Bengal. (2) Sir F. M. Macnaghten, Shama Charan Sircar Jogendra Nath Siromoni and Golap Chunder Sircar were of a different opinion (3) The Madras High Court in the most recent case on the question has held that such an adopted son takes one-fifth and not half (4) and has further held that the authority of the Chandrika cannot override the undoubted authority of the Rishis, as held by the Privy Council (5) Sir A. T. Mukherjee in a recent case, where he doubts the necessity of Datta Homa, has questioned the authenticity of the Dattaka Chandrika itself. (6)

Impartible estate taken by Aurasa son alone.

In an impartible Raj, the rule is clear, and it has been followed in our Courts, that the *aurasa* son alone takes. (7)

Adopted son of junior member entitled to maintenance.

An adopted son of a junior member of the family of a holder of an impartible property, it has been held, has the same rights to maintenance as an *aurasa* son, (8) and thus it is clear that the adopted son is entitled to maintenance even where there is an *aurasa* son.

Adopted son of daughter takes equally with daughter's Aurasa son.

It has been held in Calcutta that the adopted son of one daughter takes equally with the Aurasa

(1) Raja *v.* Subbaraya, 7 Mad. 253. (2) A. O. D. No. 148 of 1882. Bramanund Mahanty *v* Chowdhury (unrep.) Asita *v.* Nerode, 20 C. W. N. 901. (3) Macnaghten's Considerations on Hindu Law, 233. Vyavastha Darpana, 913-915. See Siromoni's Hindu Law, Sircar's Adoption.

(4) Karuturi *v.* Karuturi, 31 I C. 574, 29 Mad. L. J 710. Ayyavu *v.* Niladatchi, 2 Mad. H. C. 45. (5) Sarivalasu *v.* Sarivalasu, 26 I. A. 113; Puttu Lal *v.* Parbati, 42 I. A. 155. (6) Kakti *v.* Lakpati, 20 Cal. L. J. 319, 27 I. C. 39. (7) Ramasami *v.* Sundaralinga Sami, 17 Mad. 455.

(8) Sri Abhinya Purna Priya *v.* Arni Rangasawmy, 15 I. C. 412.

son of another. (1) The decision is open to doubt. The Aurasa son of the daughter of a sonless man is a *Putrikaputra.* The adopted son can never attain to that position and strictly, is neither a Sapinda nor a Bandhu. The Smritis give the Aurasa son of the daughter only as a Putrikaputra the right to perform the Sraddha of the maternal grandfather.

Rights of son of an adopted son.

It has been held in Calcutta that on partition in a Mitakshara family, an adopted son and the son of an adopted son, though members of a joint family, stand exactly in the same position and take the share proper of an adopted son, *i.e.*, half of the share of the Aurasa son, notwithstanding their being members of a joint Mitakshara family. The decision is based on Dattaka-Chandrika, Sec. V., paras. 24-25, the translation of which, as was pointed out in Shama Charan's Vyavastha-Darpana, is incomplete. The passage, according to the translation adopted by the judges, runs thus: "Therefore by the same relationship of brother and so forth, in virtue of which the real legitimate son would succeed to the estate of a brother or other kinsman, *the adopted son of the same description obtains his due share. And in the event of the ancestor having other sons, a grandson by adoption whose father is dead obtains the share of an adopted son.* Where such son may not exist, the adopted son takes the whole state even." "Since it is a restricting rule that a grandson succeeds to the appropriate share of his own father, the son given, when his adopter is the real legitimate son of the

(1) Surjakant Nundi *v.* Mohesh Chunder, 9 Cal. 70. Radha Prosad *v.* Ranee Mani, 33 Cal. 947 F. B.

paternal grandfather, is entitled to an equal share even with a paternal uncle who is also such description of son: therefore a grandson who is an adopted son, may (in all cases) inherit an equal share even with an uncle. This must not be alleged (as a general rule). For there would be this discrepancy: where the father of the grandson were an adopted son, he would receive a fourth share: but the grandson, if he, were such son (of him) would receive an equal share (with an uncle in the heritage of the grandfather). And accordingly, whatever share may be established by law for a father of the same description as himself, to such appropriate share of his father does the individual in question (viz.: "*the adopted son of one adopted*") succeed. Thus, what had been advanced only is correct. The same rule is to be applied by inference to the great-grandson also." (1) The judgment may be correct in the main, but how the adopted grandson was held to be entitled to one-half the share to which he would be entitled if he were *Aurasa* it is difficult to see. Under the Mitakshara law and the Dattaka-Mimansa he would be entitled to one-third of such share, and not half. The judges apparently applied the Bengal rule in the case. The Madras High Court has doubted the correctness of the interpretation of the texts mentioned above by the Calcutta High Court. (2) In a later case the Calcutta High Court has dissented from the earlier decisions and held that the adopted son of a natural born son is

(1) Ragahavanud *v.* Saddu Charan Das, 4 Cal. 425 Dinanath *v.* Gopal 9 C. L. R. 379.

(2) Raja *v* Subbaraya, 7 Mad. 353.

entitled to the whole of his father's share on a partition of the grandfather's estate. (1) The Bombay High Court in a recent case followed the earlier Calcutta decision, holding that even in Bombay the Dattaka Chandrika was a leading authority. (2) The Privy Council have set the matter at rest by holding that the adopted son of a natural born son took equally with the Aurasa son of another natural-born son. (3)

Under the Mitakshara the son adopted by a separated or a joint coparcener becomes at once a member of a joint family with his father and a will by the latter is ineffectual.(4)

The adopted son loses all rights of inheritance in the estates of his natural parents and their relations and also all his coparcenary rights in ancestral property under the Mitakshara, when he leaves his natural family. (5)

Adopted son severed from natural family and loses all rights to family property.

In Madras, it has been held that the adopted son would not lose what would be termed his self-acquired property, such as property derived from a maternal relation or property inherited from the natural father when he was separate and dead. (6) But in Bombay, the contrary has been decided and it has been held that a son given in adoption by his mother would lose the separate property of his father inherited by him. (7) In Calcutta it has been held that under the Dayabhaga a boy on whom property had vested before can not be

Can't lose separate property vested in him.

(1) Baramanund Mahanti *v.* Chowdhry Krishna Charan, 14 Cal. L. J. 183. (2) Bachoo Harkison Das *v.* Nagindas Bhagwan Das, 23 I. C. 912, 43 I. A. 56 on the question of the authority of the Dattaka Chandrika. See WamanRaghupati Bova *v.* Krishnaji, 14 Bom. 259 F. B. (3) Nagindas *v.* Bachoo, 43 I. A. 56. (4) Vencatanarayana *v.* Subbammal, 38 Mad. 412. (5) Sri Raja Vencata *v.* Sri Raja Rangaya, 29 Mad. 447. (6) 29 Mad. 447.

(7) Dattatraya *v.* Govind, 18 Bom. L. R. 258, 34 I. C. 423.

divested of it by subsequent adoption. (1) There is no provision in the Hindu Law prescribing to whom the property of the son would go in such a case and the Madras and the Calcutta rule is surely more reasonable and equitable.

Rule in the Punjab.

In the Punjab the adopted son loses his rights in the paternal property, only when there is another brother but he can succeed to his uterine brother.(2) It has also been held there that the adopted son is included within the term 'male lineal descendant' and not within the term 'heir appointed.' (3)

Adopted son divests widows.

A son adopted by a widow under authority from the husband, divests not only his adoptive mother but also her co-widow from the date of adoption. (4) A widow, who inherits the property of a deceased son and then adopts, also divests herself of such property in favour of the son adopted. (5)

Adopted son divests mother only who has no power to adopt again.

An adopted son can only divest the adopting mother (6) If, on the death of the last male owner, or on death of another adopted son, the estate has vested in a person, male or female, other than the widow, and such widow adopts, the son so adopted cannot take the estate, (7) nor is the adoption valid, though there may be authority from the husband.(8)

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(1) Behary Lal Laha *v.* Kailash Chandra Laha, 1 C. W. N. 121.

(2) Jiwan *v.* Det, 13 I. C. 549. Rupun Din *v.* Musammat Muriam, 6 Punj. R. 1898. Ghela *v.* Haidar, 59 Punj. R. 1906. Jhanda *v.* Kesar, 37 Punj. R. 1910. Mukhram *v.* Notram, 100 Punj. R. 1906.

(3) Duni Chand *v.* Musammat Padman, 14 I. C. 40 F. B.

(4) Mandakini *v.* Adinath, 18 Cal. 69. See 4 Mad. 160; 16 Mad. 400; 16 Cal. 556, P. C.

(5) Rai Jatindra Nath *v.* Amrita Nath Bagchi, 5 C. W. N. 20.

(6) Bhubaneswara *v.* Nilcomol, 12 Cal. 18.

(7) Chandra *v.* Gojara Bai, 14 Bom. 463. Keshavaram *v.* Govind Ganesh, 9 Bom. 94. Anandibai *v.* Kashibai, 28 Bom. 461.

(8) Manikyamala *v.* Nundkumar, 33 Cal. 1306.

Widow can adopt if the estate has ultimately vested in her.

In Calcutta the rule has been laid down that a widow eventually succeeding to the estate, either on the death of a childless son or adopted son or of the widow of such son, can make an adoption if she had authority. (1) The Privy Council in the most recent case on the question has laid down the same rule (2) and the Bombay and the Madras cases to the contrary (3) should be considered as overruled.

Adopted son divests a joint coparcener.

It has also been held by the Privy Council in the case of an impartible estate in Madras, which had vested in the brother of the last holder, that a son adopted by the widow of the said holder will divest the brother. (4) It has also been held by the Privy Council that an adoption by the widow of a coparcener in a joint Mitakshara family, in pursuance of a permission from the husband, is good even when the property had vested in a posthumous son of another coparcener. (5) Under the rule of Gautama a posthumous son divests joint coparceners. In a recent case, the Madras High Court held that the theory that the adoption should be made to the last male owner (6) does not apply to joint Mitkshara families and by subsequent adoption a coparcener in whom the estate had

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(1) Mondakini *v.* Adinath, 18 Cal. 69. See Bhoobun Moyee *v.* Ram Kishore, 10 Moore 279 (Chundrabulli's case). Raja Velanki *v.* Vencata, 4 I. A. 1. Thayammal *v.* Vencatarama, 14 I. A. 67. Tara Churn *v.* Suresh Chundra, 16 I. A. 166. Bhubaneswari *v.* Nilcomal, 12 I. A. 137. Faiyuddin *v.* Tincowri, 22 Cal. 565.

(2) Vencatanarayan *v.* Subammal, 38 Mad. 412 P. C.

(3) 26 Bom. 526 F. B., 17 Bom. 164, 37 Bom. 598, 33 Mad. 228, 22 Mad. L. J. 85.

(4) Srivirada Protapa *v.* Sri Brojokishore, 4 Mad. 69.

(5) Bachoo *v.* Mancorebai, 31 Bom. 373 P. C.

(6) Sinnachami *v.* Ramasami, 22 Mad. L. J. 85.

vested by survivorship could be divested. (1) In Bombay the widow of a predeceased son can adopt with the consent of her mother-in-law in whom the estate has vested. (2) Indeed in a joint Mitakshara family a son subsequently adopted under authority from a deceased coparcener must divest the surviving coparceners, if adoptions are at all allowable.

Whether adopted son has all the rights of a posthumous son.

This brings us to the question whether the adopted son is to be considered as having the rights of the posthumous son. A child begotten has, if subsequently born, all the rights of a child in existence. (3) In some early cases it was decided, that the adopted son had such rights. But the Privy Council have held that the mere fact of there being authority given by the husband to adopt a son did not before an adoption had actually taken place supersede and destroy her personal rights as a widow. (4)

How far bound by alienations by the widow.

It is now settled that though the adopted son has the right to question unauthorized acts of the widow, he cannot be considered as a posthumous son, so that the rights of the widow or other heirs should be in abeyance till adoption, and he is bound by an alienation made by the widow, with the consent of the next reversioner (5). and limitation runs against him from the

(1) Madana Mohun *v.* Purushthama, 24 I. C. 999. See Vencappa Bapu *v.* Jivaji Krishna, 25 Bom. 306. Surendra Nandun *v.* Sailaja Kant Das Mahapatra, 18 Cal. 396.

(2) Shedappa *v.* Ningpa, 38 Bom. 724. Payappa *v.* Appana, 23 Bom. 327. See 32 Bom. 496, 22 Bom 551 F. B., 33 Mad 228.

(3) Mangli *v.* Sobha Singh, (1913) Punj., W. R 607. See 16 Mad. 76, 14 I. C. 60.

(4) Bamundoss *v.* Musmut Tarinee, 7 Moore 169. See 5 Cal. 251; 5 Bom. 637; 11 Bom. 609; 19 Bom. 36 809. Contra. 18 Bom. L. R. 954.

(5) Rajkristo *v.* Kishore, 3 W.R. 14. Bijoygopal *v.* Nilratan, 30 Cal. 900. Contra. Moti Raiji *v.* Laldas, 18 Bom. L. R. 954.

date of adoption. (1) But an adopted son can avoid an unjustified alienation by a widow who adopted him from the date of his adoption. (2)

It has been recently held in Calcutta dissenting from some earlier cases that when a widow adopts a son and then makes an alienation and after that adopts a second son the first having died and this second son dies leaving a widow, the reversioners of such widow are barred if the suit is brought after twelve years from the date of the second adoption (3) as the cause of action accrued on that date. The judges doubted the correctness of the decision in the case of Prosono Nath Ray v. Afzalunnesa (4) but on a careful examination it will be found that the decision in that case, namely that a reversioner who was a minor at the date of an alienation by a widow during the life time of her son who died a minor and on whose death a son was adopted, who also died leaving no other heirs, might sue within 3 years of his attaining majority, does not seem to be open to question.

We have already seen that the adopted son is heir to the adoptive mother. (5) There were conflicting decisions in Bombay about it but since in the recent case mentioned below the Privy Council have held that the adoptive mother has the legal status of the natural mother(6), the Bengal decision should be held to have laid down good law. The adoptive

Adoptive mother has rights of succession like mother.

(1) Moro Narayun *v.* Balaji, 19 Bom. 809.

(2) Ramkrishna *v.* Tripurabai, 33 Bom. 88.

(3) Amrita Lal Bagchi *v.* Jotindra Nath Chowdhury, 32 Cal. 162. See Gobind Nath Ray *v.* Ramkanay, 24 W. R. 183.

(4) Prosonno Nath Ray *v.* Afzalonnesa, 4 Cal. 323.

(5) Tincowree *v.* Dinanath, 3 W. R. 40.

(6) 26 I. A. 246.

mother also succeeds to the estate of a deceased adopted son in preference to the adoptive father under the Mitakshara (1).

Mutual rights of succession of adopted son and cowives of adoptive mother.

When a person having more than one wife adopts a son in conjunction with one of them only, the other wives do not acquire the same legal status with respect to the adopted son as the wife who joins her husband in making the adoption and cannot succeed to his estate in preference to an agnatic heir and can be no heir at all under the Bengal school being in the position of a step-mother. (2) The Privy Council in a recent case have held that the Bengal decision mentioned above is correct and that the adoptive mother is entitled to succeed in preference to the wives of the adoptive father who were not associated with him in making the adoption. (3) Under the Bengal and Mitakshara schools of law therefore such wives of the adoptive father are no heirs of the adopted son but if they are to be considered as step-mothers they may come in under the Bombay school after the grandmother and before the paternal uncle's son's son (4), and in Madras after the Sagotras. (5) It is difficult to see how, if these females are no heirs, the adopted son can be their heirs or heirs of their father's family. But if the fiction of law is complete and these females be considered as step-mothers the adopted son may inherit their Stridhana as a step-son under the Dayabhaga school. Dr. Siromani was of opinion (6) that

(1) Anandi *v.* Mari Sata, 33 Bom. 404.
(2) Kasheesharee *v.* Grish Chandra, W. R. 1804. P. 71.
(3) Annapurni *v.* Forbes, 26 I. A. 246.
(4) Russoobi *v.* Zooleka, 19 Bom. 707.
(5) Kessarbai *v.* Veran, 5 Mad. 29.
(6) Siromani's Hindu Law, P. 197.

there can be no relationship between the adoptive mother's co-widow and the adopted son "as the primary son of one of several wives is a secondary son of his mother's co-wives Manu IX. 163," and "there cannot be an *atidesh* from an *atidesh*."

That the ingenuity of modern commentators and pundits is responsible for the supposed unreasonableness in the law of the Rishis when as a matter of fact it does not exist, is exemplified by the conflicting decisions of our Courts about the status of an invalidly adopted son. That an invalidly adopted son cannot lose his right in his natural family is a proposition so clear that one is astonished at the conflict of opinion on the matter. In Madras and Bombay and in the Punjab the correct view of the law has been taken. (1) But in Bengal the opinion has been expressed that an informally adopted son loses his rights in the natural family.(2) The difficulty has arisen from a text cited in the Dattaka-Mimansa to the effect that a son adopted without observing the rules ordained is entitled to the expenses of marriage and from some other texts which lay down that he is only entitled to maintenance. The Madras Court has held that an invalidly adopted son is not entitled to maintenance because he retains his rights in the natural family and the Bengal High Court is of opinion that he is entitled to maintenance because he loses his rights in the natural family.

Rights of the invalidly adopted son in his natural family.

(1) Bawani *v.* Ambabay, 1 Mad. H. C. 363. Ayyavu *v.* Neladatche, 1 Mad. H. C. 307. Laksmappa *v.* Ramova, 12 Bom. H. C. 397. Vaithaling *v.* Munigan, 15 I. C. 299. Dhoorjeti *v.* Dhoorjeti, 30 Mad. 209. Bawa Tekchand *v.* Musamut Gopal, 13 I. C. 482.

(2) Eshan Kishor *v.* Haris Chandra, 21 W. R. 381. Sreemutty Raj Coomaree *v.* Nobocoomar, 1 Boulu 137. Ayyou Muppanar *v.* Neladatchi Ammal 1. Stokes p. 7.

But it will appear clear to an ordinary mind that a man by acts of others can gain new rights but cannot lose those which he has, unless the law expressly takes them away. If a boy is informally adopted and kept in the house of the adopter and is thus deprived of the affections of his natural family, it is reasonable that the adopter should get him married and provide for his maintenance, but it is not reasonable that he should be deprived of his rights to his ancestral property while he gains no such rights in the adopting family. This is the law of the Rishis, which the Calcutta High Court overlooked.

When a married man having a son is adopted, as among the Jainas, the son does not lose his rights in his grandfather's family. (1)

Who can bring a declaratory suit.

A declaratory suit is maintainable for impugning an adoption and such a suit may be brought by a contingent reversionary heir, but as a general rule it must be brought by the presumptive reversionary heir, and a more distant reversioner can maintain such a suit, only if those nearer in succession are in collusion with the widow or have precluded themselves from interfering; (2) but such circumstances must be alleged in the plaint. (3)

Decree discretionary in declaratory suit.

In a suit against an adopted son for a declaration that his adoption is invalid, it is discretionary with the Court to grant or refuse a decree. In a case where the son's widow in possession sued

(1) Kalgavda *v.* Somappa, 33 Bom. 669.

(2) Rani Anundkunwar *v.* The Court of Wards, 7 Cal. 772. Thayammu *v.* Venkatnrama, 7 Mad. 401. Gurulingaswami *v.* Ramalakshamana, 18 Mad. 53. Kooer Goolab Sing *v.* Rao Karnam Sing, 14 Moore 176.

(3) Avula Garuvaya *v.* Avula Vancanna, 18 I. C. 212.

for a declaration that an adoption by her mother-in-law was void, the Privy Council refused to interfere on the above ground. (1)

Even in a suit for rent, the question of the validity of adoption may be raised by the tenant. (2) Tenant can question adoption.

A person adopting is as a general rule estopped from denying it, (3) and so are the legal representatives of an adoptive mother who claim her Stridhan as such. (4) But where the adoption is made under a mistaken view of law, (5) or is tainted by fraud, or undue influence or incapacity, a suit even at the instance of the adopter is maintainable. (6) When a third party actively participates in an adoption and by his acts signifies his acquiescence, he is estopped from questioning it. (7) It was held that when a reversioner acquiesced in an adoption under a mistake of law, he was not estopped. (8) The Privy Council however, disapproving two Full Bench decision of the Allahabad and Madras Courts, (9) observed: "Their Lordships would have great difficulty in holding, as the High Court did, that a series of acts by which an adoption is professedly made and subsequently recognised constitute a representation of law only and not of fact." (10) This is a just rule. Estoppel by conduct in adoption.

(1) Prithi Pal Kunwar *v.* Guman Kunwar, 17 Cal. 933 P. C. Sreenarain Mitter *v.* Kissen Soondry, 11 B. L. R. 171 P. C. Ram Dharam *v.* Balwant, 39 I. A. 142. Kannammal *v.* Virasami, 15 Mad. 486.

(2) Akhoy Chandra Bagchi *v.* Kalapahar Haji, 12 Cal. 406 P. C.

(3) Sukbasi Lal *v.* Guman Sing, 2 All. 366. Dharam Kanwar *v.* Balwant Sing, 30 All. 549 affd. 34 All. 398 P. C. See 6 Cal. 381. P C.

(4) Ganga Prasad *v* Budh Sen, 11 I. C. 27. See 30 All. 549.

(5) Pichuvayyan *v.* Subbayyan, 13 Mad. 128. Gopilal *v.* Chandraboli, 19 W. R. 12. P C Govind, *v.* Chandrabhaga, 34 I. C. 675. Tekchand *v.* Gopaldevi, 13 I. C. 482, 46 Punj R. 1912

(6) Thayammul *v.* Sesachala, 10 Moore 429. Soma Sekhara *v.* Subbadra, 6 Bom. 524. (7) Sadashiv *v.* Hari, 11 Bom. H. C. 190.

(8) 7 Mad. 3 (9) Ganga Sahai *v.* Hira, 2 All. 809 F. B. Vishnu *v.* Krishnan, 7 Mad. 3

(10) Sarat Chander *v* Gopal, 20 Cal. 296 P. C. Luchmun *v.* Kalicharn, 19 W. R. 292 F. B.

Burden of proof.

The next question is whether there is a presumption in favour of an adoption. The Privy Council without denying the force of "the presumption which arises from the religious duty which is upon every childless Hindu to adopt," say that it is of a very weak character. (1) A valid authority where it is necessary and also the fact that the boy was properly given away and that the adoption was made according to law must be proved. (2) And the onus is primarily on the party alleging adoption. (3)

When should authority and due performance of ceremonies be presumed.

The authority to adopt may be presumed, when the fact of the adoption and the due performance of ceremonies are admitted and the next reversioners acquiesce in it for a long time. (4) Where the adopted son has been in possession and been recognized as validly adopted for a series of years, formal proof of the performance of ceremonies may be dispensed with. (5) The Privy Council have recently held that when there is an absence of proof on account of great lapse of time, there may be a presumption in favour of an adoption set up for a long time but "to justify such a presumption there should be established an initial probability that the adoption was likely to have been validly made and that the conduct of the parties cognizant of the facts has been at least consistent with such an hypothesis." (6)

(1) Nilmadhub *v.* Bissumbhar, 12 W. R. P. C. I.

(2) Chowdhury Pudumsing *v.* Koer Odeysing, 12 W. R. P. C. I. Har Shaker *v.* Lal, 29 All 519 P. C. (3) Rajagopal *v.* Natta Govinda, 9 I. C. 342. Vencata *v.* Papaya, 9 Mad. L. J. 128.

(4) Rajendra *v.* Jogendra, 15 W. R., P. C. 41. Grishchandra *v.* Ramlal, I. W. R. 145. Anund Rao *v.* Gonesh, 7 Bom. H. C., p. 33. Guruprosonno *v.* Nilmadhub, 21 W. R. 84. Brojokishore *v.* Srinath, 9 W. R. 463.

(5) Sabo *v.* Naba, 11 W. R. 380. Chowdhury Heera *v.* Brojo Sunder, 18 W. R. 77 D. Vencata *v.* D. Papaya, 21 I. C. 737, 9 Mad. L. J. 128.

(6) Har Shanker Propap *v.* Lal Raghuraj, 29 All. 519 P. C.

In case of an admitted adoption, the question of its validity cannot be raised in proceedings for certificate for collecting debts. (1)

When the adoption is admitted but incapacity of the adopted son is alleged, the onus of proof is on the person who sets up such incapacity. (2)

An injunction for restraining an adoption has never been granted by our Courts. (3)

Adoption pending litigation.

It is a question of some difficulty, whether, when a son is adopted, pending a litigation by the widow, he is bound by the result. There was one case with regard to an impartible estate descendible to males only, when the widow was in wrongful possession and adopted only when she was sued by the rightful heir, in which the question of the right of the son so adopted was discussed. It would seem that the pendency of a suit cannot affect the right of the son adopted to the inheritance.

Decree against widow how far binding on adopted son.

It has been held in Bengal, that a decree obtained against the widow may be executed against a son adopted pending the suit, (4) he being bound by the result of the suit. (5) When a widow sets up a title adverse to the adopted son and executes a mortgage by which the estate is benefited, it has been held in Allahabad that a decree obtained on such mortgage cannot be executed against the adopted son. (6) When the decree is obtained by

(1) Nanku Singh *v.* Purmdhan Sing, 12 W. R. 356. See also 15 Cal. 585; 3 Bom. 292.

(2) Kusumkumary *v.* Satya Ranjan, 30 Cal. 999.

(3) Assur *v.* Ratan Bai, 13 Bom. 56 Run Bahadoor *v.* Lucho Koer, 4 C L. R. 270.

(4) Satish Chandra Lahiri *v.* Nilcomol Lahiri, 11 Cal. 45. Rambhat *v.* Lakmun, 5 Bom. 630.

(5) Harisaran Moitra *v.* Bhubaneswari, 15 I. A. 195.

(6) Ambica *v.* Dwarka, 4 All. L. J. 795. See 27 Bom. 390.

the widow who adopts pending the suit, she is accountable to the adopted son for any benefit derived under the decree, if it is in respect of the estate of her husband. (1)

Two questions of some difficulty remain to be considered. The first is whether an adopted son whose adoption is invalid under the law can succeed as a *persona designata.* The second is, what is the period of limitation for a suit by or against an alleged adopted son.

Adopted son why Persona designata.

Upon the first question the Privy Council in the case of Nidhumani *v.* Saroda Pursad, (3 I. A. 253) held that where a Hindu by his will directed as follows : " And as I am desirous of adopting a son I declare that I have adopted Koibullo Persad * * * when he comes to maturity the executor shall make over every thing to him to his satisfaction," it was a gift to a designated person who took, even if the adoption failed. In the case of Fanindra Deb *v.* Rajeswar Das, (11 Cal. 463) it was held that an Angikar-patra in favour of an invalid adopted son by name did not pass the property, when it was a gift to him as an adopted son. The decision was considered in later cases, and the Privy Council have since held that in Fanindra Deb's case the Angikar-patra might be construed either as a disposition of property or as a declaration of the consequences flowing from adoption, and that on the peculiar language of the deed, it was not held to be the former and therefore did not pass the property to the invalidly adopted son. It has also been held that

(1) Dharmlal *v.* Musumut Sham Shundari, 3 Moore 229.

"where a testator recited that he had been keeping a minor as his adopted son and thereby gave properties to him absolutely, describing him as adopted, the gift was not conditional upon the adoption having been completed" or upon its being good in law. (1) It has even been held that where the gift was to one by name, but described as a legitimate son when he was not so, it was not good. (2) The Allahabad High Court in a recent case have held that in the particular case before them, an Wajibularz was a testamentary disposition, and though the gift was to one described as an adopted son, who could not be legally adopted, that fact was a mere misdescription ; and that the intention of the testator should be looked to in such cases, the question being whether the assumed fact of the adoption is not the reason and the motive of the gift. In a recent case where the bequest was to a daughter and on her death to her daughter's son who was described as her adopted son, it was held that the bequest to the daughter's son was good, though he was wrongly described as the adopted son. (3)

We next come to suits by and against adopted sons. A declaratory suit will always lie, either by or against an adopted son, to declare an adoption valid or invalid. Such suits must be brought within six years, in the first case, from the time when the rights of the adopted son are interfered with, and

Limitation in suit by and against adopted son.

(1) Subbaryaer *v.* Subbammat, 27 I. A. 162. See Manjamma *v.* Sheshgire, 26 Bom. 496. Bireswar Mukurji *v.* Ardha Chunder, 16 I. A. 101. Surendra Keshub *v.* Doorga Sundar, 19 I. A. 108.

(2) Sree Raj Vencata *v.* The Court of Wards, 26 I. A. 83.

(3) Murari Lal *v.* Kundan Lal, 31 All. 337.

in the second case when the alleged adoption becomes known to the plaintiff.

The period of limitation for a declaratory suit is always six years. The difficulty arises when the suit is for possession of land by or against an adopted son.

The leading case on the question is that of Jagadamba *v.* Dakhina, (1) in which it was held that a suit for possession of land by reversioners within 12 years, but after 6 years, after the death of the widow who had adopted the defendant who was in possession, was barred by Art. 129 of Act 9 of 1871. Their Lordships distinguished the case from that of Raj Bahadoor *v.* Achumbit Lal (2) in which the following observations had been made: "their Lordships are clearly of opinion, that this provision relating to adoption, though it might bar a suit brought only for the purpose of setting aside the adoption, does not interfere with the right, which but for it a plaintiff has of bringing a suit to recover possession of real property within 12 years from the time when the right accrued." Their Lordships said that it was a case in which there was no real adoption, but an attempt at adoption by the widow by executing only a deed of adoption. The case of Mohesh Narain *v.* Taruck Nath (3) was also a case under the old act, and the rule laid down in Jagadamba's case was followed, but an observation was thrown out, that "it would be more than doubtful" whether the new Act of 1877 would make any difference. In a later case on the question before

(1) 13 I. A. 84; 13 Cal. 308. See Thakuraya *v.* Sheo, 2 All. 872, Zulfikar Villuna, 3 All. 148.

(2) 6 I. A. 83.

(3) 20 I. A. 30; 20 Cal. 487.

the Privy Council, it was held, that when there is no knowledge of adoption, or no possession by the adopted son, or when the adoption was by the widow to herself and not to the husband, six years' limitation did not apply. (1)

In a recent case for possession by the next heir where the invalid adoption was by a lady having absolute proprietary right as an Oude Talukdar, the Privy Council held that Jagadamba Chowdhrani's case was under the Act of 1871 and it was admitted by Mr. Cohen. Counsel for the defendant before the Board that "if the Act of 1877 applied his client was out of Court." (2) In the latest case before the Privy Council on the question, where however the parties were Muhammadans among whom no adoption in law could take place, the Judicial Committee held that the "omission to bring within the period prescribed by Art. 118 of the second Schedule of the Indian Limitation Act 1877 a suit to obtain a declaration that an alleged adoption was invalid or never in fact took place is no bar to a suit like this for possession. Their Lordships need only refer to Tirbhuwan Bahadur *v.* Rameshar Baksh Singh" (33 I. A. 156). But there is a distinction mentioned by the Board just after the passage quoted above. They say: "Under the general Muhammadan Law an adoption can not be made; an adoption if made in fact by a Muhammadan could carry with it no right of inheritance." (3)

(1) Luchmi *v.* Kanhye, 22 I. A. 51. 22 Cal. 609. See Malkarjun *v.* Narhari, 25 Bom. 337 P. C.

(2) Thakur Tirbhuwan *v.* Rameshar Baksh, 33 I. A. 156, 28 All. 727 P. C.

(3) Muhammad Umar Khan *v.* Muhammad Mazuddin, 39 Cal. 418 P.C.

Decisions in Bombay.

A Full Bench of the Bombay High Court have held, that under Art. 118 of Act 15 of 1877, a suit for possession in which the defendant pleads adoption to the knowledge of the plaintiff or his predecessor, is barred by six years' limitation. (1)

In the latest reported case on the question, the Bombay High Court has followed the Full Bench decision mentioned above after a full consideration of the case of Tirbhuwan Bahadur, holding that the twelve years' rule applied only to cases where there could be no apparent adoption to the deceased husband of a widow under the law. But where there was such an adoption by a widow the six years' rule applied even under the Act of 1877. (2)

Decisions in Madras.

A Full Bench of Madras High Court have laid down the same rule. (3)

In a suit by an adopted son for recovery of property in the possession of a sister under a gift by the adoptive mother, the same Court held that Art. 119 of the Act of 1877 applied. (4) In the most recent case in that Court, the judges on a consideration of the case of Thakur Tirbhuwan Bahadur held that a suit for possession by the next reversioner against a person invalidly adopted by the widow was within time under the Act of 1877 if instituted within 12 years of the death of the adopting mother. (5) In the new Limitation Act 9

(1) Srinivas *v.* Hanmant, 24 Bom. 260, followed in Barot Naran *v.* Barot Jesang, 25 Bom. 26.

(2) Shrinivas *v.* Balvant, 37 Bom. 513, 20 I. C. 162.

(3) Ratnamasari *v.* Akilandammal, 26 Mad. 291, see also 13 Mad. L. J. 145, 20 Mad. 140.

(4) Punnammal *v.* Ratnamasari, 13 Mad. L. J. 144.

(5) Velaga Mongamma *v.* Bandlamodi, 30 Mad. 308.

of 1908, Arts 118, 119, and 141 are identical in words with the said Articles in the Act of 1877.

Decisions in Calcutta and Allahabad.

The Calcutta High Court have held that Art. 118 of Sch. 2 of Act 15 of 1877, did not apply to a suit for possession of immoveable property, though it may involve the question of the invalidity of an adoption, and that such a suit by a reversioner on the death of a Hindu widow is governed by Art. 141. (1) The Allahabad High Court have approved of the Calcutta decision, and held that Art. 119 of the Limitation Act did not apply to a suit for possession of immoveable property by an alleged adopted son, whose adoption had been denied and his rights interfered with more than six years before suit. (2)

Whether right to declaration that adoption invalid survives.

It has been held in Madras that on the death of the plaintiff in a suit to declare an adoption invalid the right to sue does not survive to the more remote reversioner (3), on the analogy of a suit to declare an alienation invalid. (4) The Calcutta High Court has however held that the right to declare an alienation invalid survives to the next reversioner (5) and the ruling by analogy would apply to a suit to declare an adoption invalid. But this leads to the more difficult question whether a judgment in a fairly contested suit by a reversioner would bind the more remote reversioner. The Madras High Court has expressed the opinion

(1) Ram Chandra Mukerjee *v.* Ranjit Sing, 27 Cal. 242. Jagannath Prosad *v.* Ranjit Sing, 25 Cal. 354. Baikanta Chandra *v.* Kali Charan, 9 C. W. N. 22.

(2) Lali *v.* Murlidhar, 24 All. 195. Chandania *v.* Salig, 26 All. 40.

(3) Arunachellam *v.* Villaya, 15 I. C. 461.

(4) Chiruvolu *v.* Chiruvolu, 29 Mad. 390 F. B.

(5) Chaudrani *v.* Preonath, 23 Cal. 636.

that on principle the more remote reversioner would be bound by such a judgment. (1) If the interest were a vested one, such a judgment would certainly bind but when it was an interest contingent the death of a widow, the question would be one difficult of solution. On grounds of public policy in order to avoid a multiplicity of suits and to give certainty to titles once found good by a proper Court, such a judgment should be binding on all reversioners.

Dwyamushyayana.

A form of adoption called the Dwyamushyayana, is known to lawyers. In the authentic Smritis and the older commentaries the term was applied to the son by *niyoga*. (2) The Dattaka-Mimansa and the Dattaka-Chandrika however, cite certain texts and interpret them to mean that a boy may be so adopted as to retain his duties and rights in both families, and that this happens when he is the nephew or when he is taken from a different family after his tonsure had been performed. But it is forgotten by the said authors and their followers that the Dattaka can never take the property of his natural father and thus never can be a Dwyamushyayana. Mr. Mayne rightly observes that in the older sense the Dwyamushyayana is obsolete. He also says that this form in the sense mentioned in the Dattaka-Mimansa and the Dattaka-Chandrika, "seems now to be obsolete," and at all events he knows of no decided case affirming its existence, and that was also the opinion of the late Mr. Mandlik. The new form seems to be a creation of the learned authors of the Dattaka-Mimansa and the Dattaka-Chandrika, and has

(1) Arunachellam *v.* Villaya, 15 I. C. 461.

(2) Baudhayana, 11, 2, 12, Narada XIII. 23.

no foundation in the Smritis. However in some recent cases, the form has been recognized in Bombay, where it has been held that it is a good form, and is allowable, not only as between brothers, but also as between others, that not only the fathers but mothers also can give and receive in such form of adoption, that all the ceremonies prescribed for it are the same as in the case of *Suddha-Dattaka*, and that the boy takes the property of both the adoptive and natural fathers. (1)

In a recent case at Allahabad, the Dwymushyayana has been recognized and it has been held that its efficacy depends on the stipulation entered into at the time adoption between the natural father and the adopting father and not upon any ceremony by the father. It has also been held that the natural mother of such a son does not lose her rights of succession to her son in the absence of nearer heirs. (2)

In Madras it has been held, that the Dwyamushyana is obsolete except among Nambudri Brahmans, among whom the custom prevails of adopting a person without restriction of age, who retains his rights in both families. (3)

Kritrima adoption.

The Kritrima form of adoption is good only in Mithila, the Punjab, Kashmir, and among Nambudri Brahmans in Madras. In Mithila, as we have seen, the commentators have laid down, that there can be no adoption by a widow. The result has been that a custom of adopting in the Kritrima form has sprung up.

(1) Krishna *v.* Paramsri, 25 Bom. 537. Chinapa *v.* Basangavda, 21 Bom. 103. Masava *v.* Linganda, 19 Bom. 428.

(2) Babulal *v.* Shiblal, 26 All. 472

(3) Vasudevan *v.* The Secretary of State, 11 Mad. 157.

The practice is supposed to be founded on the following passage of the Dvaita-Nirnaya of Vachaspati-Misra :—"Its purpose is, for the man, that he may be excluded from the hell denominated *put*; for the woman, that some one may exist capable of performing her rite of Sapindikarana. Should individuals, capable of promoting these objects exist, a son must not be adopted. Accordingly, from the resemblance, to the condition of being parents of male issue, where the son of a whole brother may exist in case of a man, other persons,—and, where the son of a rival wife may exist, by a female, sons made, and so forth, must not be affiliated. To this doctrine conform, Asahaya, Udyotkara, the Kalpataru, the Parijata, the Ratnakara, and other works." Mr. Colebrooke says, that "the practice of adopting sons, given by their parents, was abolished there (in Mithila) by Sridatta and Pratihasta, although the latter had been himself adopted in that manner. Their motive was, lest a child already registered in one family, being again registered in another, a confusion of families, and names should thence ensue. A son adopted in the forms so briefly noticed in the present section (Kritrima) does not lose his claim to his own family, nor assume the surname of his adoptive father : he merely performs obsequies, and takes the inheritance." Sridatta and Pratihasta, however, in their written works did not prohibit the Dattaka, as is pointed out by Mr. Sutherland, and though the Dattaka is rare in Mithila, it would be rash to say that it is illegal.

The Mitakshara, the Saraswati-Vilasa and the Madana Parijata lay down that the Kritrima son should be an orphan (मातृपितृविहीनः) The Dvaita-

Nirnaya lays down, that the Kritrima is not in any way related to the father of the adopter, from which it will follow that he cannot take collaterally.

According to many text-writers and to some old authorities, the Kritrima form is not confined to the Tirhoot district and is not invalid or unknown in the other districts of Behar and Benares. But it must be said that it is an invalid form according to the Aditya Purana and is valid in Mithila only on account of a special custom (1), which must be proved in the case of other districts, if it is sought to be enforced there. It has been held that it is not recognized among Jainas. (2) In the Punjab, Kritrima has been recognized as good according to established custom among non-agriculturists. (3)

Where Kritrima recognized.

In theory, the husband or the wife or both together may take a Kritrima son, who is called Kurtaputra, and such son is only heir to the person adopting him. (4) Ordinarily however, it is the widow, who adopts a Kritrima son, and she can do so without any authority from the husband. (5) But the son, so taken, is not the heir of the husband, but is the heir only of the widow, (6) and he does

(1) Lakhmi Chand *v.* Gatto, 1, All. 688. See 29 All. 517.

(2) Golap Chundra Sircar's Hindu Law, p. 448.
Sarbadhicary Tagore Lectures, p. 526.
Vyavastha Chandrika Vol. 2. Art. 240.
Select S. D. A. Vol. 3, p. 370. (Behar).
W. R. for 1864, p. 133. (Patna Case).
25 W. R. 256. (Gya Case).

(3) 67 Punj. L. R. 1911, 113 Punj. L. R. 1908 53 Punj. W. R. 1908.

(4) Sreenarayan *v.* Bhya Jha, 2 Sel. Rep. 29.

(5) Shibo Korree *v.* Joogun Sing, 8 W. R. 155.

(6) Sree Narayun *v.* Bhya Jha, 2 Sel. Rep. 29. Lachman Lal *v.* Mohun Lal, 16 W. R. 179.

not, like the adopted son, lose his rights of heirship in the family of his birth. (1) A Kritrima son cannot inherit collaterally. "He does not become a member of the adopting family so far as collateral heirship is concerned, the relation of Kritrima for the purposes of inheritance extending to the contracting parties only." (2) His sons also cannot have the right to question an alienation by the adopter. (3)

The Kritrima son must be of the same caste with the adopter, but there is no restriction on the ground of age, or on the ground of relationship, (4) and the daughter's son, the sister's son, or the only son of a father may be adopted. (5)

The consent of the son adopted is necessary, and beyond the ceremony of taking with a libation of water, which amounts to saying that beyond the formality of giving and receiving, no other ceremony is necessary.(6) Rudradhara in the Suddhi-Viveka prescribes the following ceremony for adopting in the Kritrima form : "At an auspicious hour the adopter, of a son having bathed, and having given the boy some acceptable present, should say—"Be thou my son," and he should answer,—"I am become your son." The offer of a present is a customary form,

(1) The Collector of Tirhoot *v.* Huro Persad Mohunt, 7 W. R. 500. See 9 Punj. L. R. 354.

(2) Shibo Koeree *v.* Joogun Sing, 8 W. R. 155. Jiwan *v.* Jamna Das, 10 I. C. 822, 67 Punj. L. R. 1911. Baijnath *v.* Shamboo Nath, 113 Punj. L. R. (1908) 53 Punj. W. R. 1908.

(3) Babu Juswant Sing *v.* Doole Chand, 25 W. R. 255.

(4) Ooman Dutt *v.* Kunhia Sing, 3 Beng. Sel. Rep. 145.

(5) Chowdhury Parmeswar Dutta Jha *v.* Hanuman Dutt, 6 Sel. 192.

(6) Lachman Lal *v.* Mohun Lal, 16 W. R. 179.

though not indispensable. The agreement of both parties is indispensable." (1)

It has been recently held by the Privy Council that in Burma the Keitima (kritrima) adoption of a daughter is valid (2) Keitima children are thus described in the law of the Dhammathat, Book 10, p. 305 :—"The son and daughters of another person who shall be publicly taken and brought up (in order or with the understanding) that they should be made children to inherit, they are called Kritrima that is notoriously adopted children." Publicity is thus an essential element in such adoptions. Kritrima in Burma.

In ancient times, there was a custom of adopting daughters and we read of such adoptions in the Ramayana and the Mahabharata. The mother of the Pandavas was an adopted daughter. In the Manu as carried from India to Burma, such adoptions are recognized. But in India, the Smritis we have got recognize the adoption of sons only who were necessary for giving the Pinda. For more than a thousand years in India during Bhuddhistic domination, the efficacy of the Pinda was scouted and adoptions of sons and daughters were consequently on the same footing. With the revival of Hinduism the old theories again possessed the Indian mind in aggravated forms and the adoption of daughters was ignored. Adoption of daughters.

We have already seen that according to the Smritis a Hindu has every right to appoint a daughter whose son as Putrikaputra would take Putrikaputra how far valid.

(1) 3 Sel. Rep. at p. 198.

(2) Ma Me Gale v. Ma Sa. Ye, 32 Cal. 216 P. C.

his property like a son. In an early case it was held that the adoption of the daughter of a brother with the condition that the eldest son shall be Putrikaputra of the adopted was legal but it was essential that the adoption should take place before marriage. (1) In a later case it was held that the Putrikaputra was obsolete in the present day (2) The Privy Council in a still later case expressed the opinion that this was a custom of Hindu Law which if not obsolete, as appears to be the opinion of text-writers, is one which in modern times does not seem to have been brought under the consideration of courts and their Lordships therefore held that assuming the custom to exist, in as much as it breaks in upon the general rules of succession, must be strictly proved. (3) But it should be obeserved that the rights of the sons of the appointed daughter are not based on any special custom but on a rule of Hindu Law laid down by all the Rishis. A rule of law does not become obsolete because it has never been brought under the consideration of the Courts. The ignoring of the rights of the Putrikaputra is owing to a misapprehension and want of proper knowledge of the law of the Rishis and the Commentators.

We have seen before that by Act I of 1869 among Oude Talugdars a daughter's son, if treated as a son, and his male descendants can succeed in default of direct male issue. It is difficult to see why this rule which is nothing but the old rule

(1) Nowal Rai *v.* Bhugwuttee Coowar, 6th January, 1835 6 Sel. Rep. Cal. p. 5.

(2) Nursing Narain *v.* Bhutton Lall Suth. Rep p. 1941.

(3) Thakoor Jeebuath Sing *v.* The Court of Wards, 2 I. A. 163, 23 W. R. 409

of the Putrikaputra should not apply to Hindus in general. It should be remembered here that according to Vrihaspati there can be no adopted son, if there be a Putrika, and that is also the opinion of Kullaka Bhatta.

Son purchased how far valid.

The Krita or the son by purchase is invalid in the present day and the Courts have declared that the adoption of a son after paying a price for him is invalid. (1) But in a recent case in Madras, it has been held that receipt of money by the father does not make the adoption invalid. (2)

Illatom adoption.

Among the Motati Kapu or Reddi caste, a man may take what is called an Illatom son-in-law; who succeeds like the son and takes an equal share with an afterborn son or adopted son, but can not be regarded as forming a joint family with a son, and has not got any right of survivorship and does not lose his rights of inheritance in his own family. (3) The existence of a son is no bar to an illatom adoption, though it is opposed to Hindu Law (4) When the marriage takes place after the death of the adopting mother, the adoption is still good. (5)

Adoption of daughter under the Alayasabtana law.

Under the Aliyasantana Law prevalent among some Canarese tribes, according to a book, called Bhutala Pandya's Aliyasantana Kuttukathlagalu

(1) Eshan *v.* Hurrish, 21 W. R. 381. Guroomall *v.* Mooneesamy cited in the goods Ameavor Chingliu Moodeliar, 1 Str. N. M. C. 71. See Yechereddy Basapa *v.* Yechereddy Gowdappa. Southerland's Privy Council cases, p. 41.

(2) Marugappa Chetty, 29 Mad. 164.

(3) Hanumantamma *v.* Rama Reddi, 4 Mad. 272. Chenchamma *v.* Subbaya, 9 Mad. 114. Balarami Raddi *v.* Pera Raddi, 6 Mad. 267.

(4) Nullury *v.* Kamopalli, 26 I. C. 54.

(5) Krishna *v.* Sambasiva, 11 I. C. 24. Hanumantamma *v.* Rama Reddi, 4 Mad. 272.

supposed to have been promulgated by Bhutala Pandya, a former ruler of Canara, a person, cannot adopt a son without adopting a daughter at the same time. The High Court of Madras however, has held that according to the Aliyasantan custom a male could adopt his own son and could do so without adopting a daughter at the same time. (1)

Adoption of daughters by dancing girls how far valid.

The Bengal and Bombay High Courts have held that the adoption of daughters by dancing girls is illegal. (2) In Bombay however, it has been recently held that a prostitute may validly adopt a daughter, when she is not attached to a temple and when she adopts not for purposes of prostitution but with the object of having some one to perform the funeral ceremonies and to inherit her property. (3) The custom of adopting girls for training up as dancing girls or for purposes of prostitution is so clearly opposed to Hindu law and to all principles of morality and public policy that no court should recognize it.

In Madras, among certain castes and among dancing girls, certain customs have been recognized by the Courts, which, as we have seen before, have no foundation in anything in Hindu law.

It has been held that the adoption of a daughter by a dancing girl for purposes of prostitution is invalid but if it is not for that purpose it is good, though she be designated Abimanaputhri.(4) Such adoptions have been held to confer rights of succession

(1) The Secretary of State *v.* Santaraja Shetty, 21 I. C. 432.

(2) Hemcowar *v.* Hanscowar, 2 Morl. 133. Mathura *v.* Esu, 4 Bom. 545. See Ghasita *v.* Umrao Jan, 21 Cal. 156. Hera Naiken *v.* Radha Naiken, 37 Bom. 116.

(3) Manjamma *v.* Seshgirirao, 26 Bom. 491. Ram *v.* Bhanrao, 4 Bom. L. R, 315. (4) Nagamuthu *v.* Dasi Sundaram, 32 I. C. 743.

to the girls adopted, (1) and that more than one girl may be adopted, and we have seen how nice questions of survivorship have been discussed with great show of learning, in this connection.

It is a matter of satisfaction that the Madras High Court have at last in a very recent case disapproved of the rule laid down in Venca v. Mahalinga and have held the adoption of daughters by dancing girls is not only invalid but is illegal (2). In Bengal it has been rightly held that a prostitute cannot adopt even a son to herself. (3)

In case of aboriginal tribes there is no presumption, that they are governed by Hindu law. In their case it must be proved that by custom they have the right to adopt. (4)

(1) Vencu *v.* Mahalinga, 11 Mad. 393. Muttukannu *v.* Paramasam 12 Mad. 214.

(2) Guddati Reddi, *v.* Ganapati 23 Mad. L. J. 463, 17 I. C. 422.

(3) Narendra *v.* Denanath 36 Cal. 824.

(4) Fanindra Dev Raiket *v.* Rajeswar, 11 Cal. 463., 12 I. A. 72.

ADOPTION.

SECTION II.

न हि यभायारयः सुशेवोऽन्योदर्यो मनसा मंतवाउ ॥

ऋग्वेदः ७ म ४ सू ८

The son of another of a different family though very agreeable should never be acknowledged as a son even in the mind.

Rigveda, 7 M. 4 S. 8.

अत्रिरददादौर्वाय पुत्रकामाय स रिरिचानो मन्यत निर्वीर्य श्रियिली यातयामा * * ततोवैतस्य चत्वारो वीरा आजायन्त ।

तैत्तिरीयसंहिता, ७ का १ प्र: ८ ।

Atri gave his son to the son of Urva who desired a son; childless he thought that he was without power, weak, and without substance * * by that (sacrifice) he got four heroic sons.

Taittiriya-Sanhita' 7-1-8.

नापुत्रस्य लोकोऽस्ति ।

ऐतरेयब्राह्मणम् ७ । ३ । १ ।

There is no place for the man destitute of male offspring.

Aitareya-Brahmana. VII. 3, 1

ज्येष्ठेन जातमात्रेण पुत्री भवति मानवः ।
चेचजादीन् सुतानेतानेकादश यथोदितान् ।
पुत्रप्रतिनिधीनाहुः क्रियालोपान्मनीषिणः ॥
भ्रातृणामेकजातानामेकश्चेत् पुत्रवान् भवेत् ।
सर्व्वांस्तांस्तेन पुत्रेण पुत्रिणो मनुरब्रवीत् ॥
माता पिता वा दद्यातां यमद्भिः पुत्रमापदि ।
सदृशं प्रीतिसंयुक्तं स ज्ञेयो दत्रिमः सुतः ॥
उपपन्नो गुणैः सर्वैः पुत्रो यस्य तु दत्रिमः ।
स हरेतैव तद्रिक्थं संप्राप्तोऽप्यन्यगोत्रतः ॥
गोचरिक्थे जनयितुर्न हरेद्दत्रिमः क्वचित् ।

गोत्ररिक्थानुगः पिण्डो व्यपैति ददतः स्वधा ॥
एकै एवौरसः पुत्रः पित्र्यस्य वसुनः प्रभुः ।
श्रेषाणामानृशंस्यार्थं प्रदद्यात्तु प्रजीवनम् ॥
षष्ठन्तु चैषजस्यांशं प्रदद्यात् पैतृकाद्धनात् ।
औरसो विभजन् दायं पित्र्यं पञ्चममेव वा ॥
औरसश्चैषजौ पुत्रौ पितृरिक्थस्य भागिनौ ।
दशापरे तु क्रमशो गोत्ररिक्थांशभागिनः ॥
सदृशं प्रकुर्य्यादयं गुणदोषविचक्षणं ।
पुत्रं पुत्रगुणैर्युक्तं स विज्ञेयश्च कृत्रिमः ॥
क्रीणीयाद् यस्त्वपत्यार्थं मातापित्रोर्यमन्तिकात् ।
सक्रीतकः सुतस्तस्यसदृशोऽसदृशोऽपिवा ॥

मनुः ९ । १०६, १८०, १२२, १६८, १४१, १४२, १६३—१६५, १६९, १७४ ।

No sooner the eldest son is born the one becomes a man with a son.

These eleven, the son begotten on the wife, and the rest as enumerated (above), the wise call substitutes for a son (taken) in order (to prevent) a failure of the (funeral) ceremonies.

If among brothers, sprung from one father, one have a son, Manu has declared them all to have male offspring through that son.

That (boy) equal (by caste) whom his mother or his father affectionately gives, (confirming the gift) with (a libation of) water, in times of distress* as his son, must be considered as an adopted son (Datrima.)

Of the man who has an adopted (Datrima) son possessing all good qualities, that same (son) shall take the inheritance, though brought from another family.

An adopted son shall never take the family (name), and the estate of his natural father; the funeral cake follows the family (name) and estate, the funeral offerings

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* Dr. Buhler interposes here the words 'to a man.' This is not in the original and the interposition is not justifiable. It would make the adoption by a widow impossible.

of him who gives (his son in adoption) cease (as far as that son is concerned.)

The legitimate son of the body alone (shall be) the owner of the paternal estate; but, in order to avoid harshness let him allow a maintenance to the rest.

But when the legitimate son of the body divides the paternal estate, he shall give one-sixth or one-fifth part of his father's property to the son begotten on the wife.

The legitimate son and the son of the wife (thus) share the father's estate; but the other ten become members of the family, and inherit according to their order (each later named on failure of those named earlier).

One of equal caste and cognizant of merit and demerit (of performing Sraddhas and the like) and having the qualities (of serving the parents) of a son, who is made a son, is known as the Kritrima son.

He who is purchased from his parents for a price for the purpose of making a son, whether he is of the same caste or of a different caste, is the Krita son.

Manu, IX. 106, 180, 182, 168, 141, 142, 163-165, 169, 174. See also Manu, IX. 158-160 cited at p. 639, 640.

अविधाय विधानं यः परिगृह्णाति पुत्रकम् ।
विवाहविधिभाजं तं न कुर्याद्धनभाजनम् ॥

He who adopts a son without observing the rules ordained should make him participator of the rites of marriage, but not sharer of the wealth.

A text cited as Manu's in the Dattaka Mimansa and the Dattaka-Chandrika but not found in the Manu Smriti.

तस्मिन् जाते सुते दत्ते न कृते च विधानके ।
तत्स्व तस्यैव वित्तस्य यः स्वामी पितुरस्वसा ॥

The son being born and the Dattaka not being adopted according to rules, the wealth is his only who is justly master of the father's wealth.

A text cited as Manu's in the Dattaka-Chandrika. In the Dattaka-Kaumudi it is declared to be a text of Vyasa·

अदेयं यश्च गृह्णाति यश्चादेयं प्रयच्छति ।
तावुभौ चौरवच्छास्यौ दाप्यौ चोत्तमसाहसम् ॥

He who gives what should not be given (अदेय) and he who receives what should not be given, they both are to be punished as thieves, and should be made to pay the highest amercement.

A text, cited as Manu's in the Vira-Mitrodaya; probably it is a text of Vrihaspati.

दत्तक्रीतादिपुत्राणां बीजतस्तु: सपिण्डता ।
पञ्चमे सप्तमे तद्वत् गोत्रं तत्पालकस्य च ॥

बृहन्मनु: ।

Sons given, purchased, and the rest retain the Sapinda relationship with the natural father to the fifth and seventh degrees (in the mother's and father's sides respectively), but enter the gotra only of the adopter.

Vrihat-Manu.*

सगोत्रेषु कृता ये स्युर्दत्तक्रीतादय: सुता: ।
विधिना गोत्रतां यान्ति न सापिण्ड्यं विधीयते ॥

बृद्धगौतम: ।

The sons given, purchased, and the rest whose ceremonies have been performed in the adopter's gotra, enter the gotra by the observance of the ceremony, but the Sapinda relationship is not thereby created.

Vriddha-Gautama.†

राजाच ग्रामस्वामी बृद्धगौतमस्मरणात् ।

दत्तकमीमांसाधृतबृद्धगौतम वचनम् ।

Raja (in the ceremonies of adoption) means the lord of the village.

Vriddha-Guatama, according to the Dattaka-Mimansa.

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* Cited in the Dattaka-Siromani and other books, but declared to be spurious in the Mayukha.

† Cited in the Dattaka-Mimansa and other books, but declared to be unfounded in the Mayukha.

ब्राह्मणादि त्रये नास्ति भागिनेयः सुतः क्वचित् ।

वृद्धगौतमः ।

Among the three castes beginning with Brahmanas the sister's son can never be an (adopted) son.

Vriddha-Gautama cited in the Dattaka-Mimansa.

दत्तपुत्रे तथा जाते कदाचिदौरसो भवेत् ।
पितुर्वित्तस्य सर्व्वस्य भवेतां समभागिनौ ॥

वृद्धगौतमः ।

After an adopted son has been made, if a legitimate son of the body be born, they (both) take equally the father's wealth.

Vriddha-Gautama, cited in the Dattaka-Chandrika.*

अथादायादबन्धूनां सङ्गीढ़ एव प्रथमः । दत्तको द्वितीयः । यं मातापितरौ दद्याताम् ।

यस्य पूर्व्वेषां षण्णां न कश्चिद्दायादः स्यादेते तस्य दायं हरेरन्निति ।

श्रोत्रियशुक्रसम्भवः पुरुषो भवति मातापित्रनिमित्तकः ।

तस्य प्रदानविक्रयत्यागेषु मातापितरौ प्रभवतः ।

न त्वेकां पुत्रं दद्यात् प्रतिगृह्णीयाद्वा ।

स हि सन्तानाय पूर्व्वेषां ।

न स्त्री पुत्रं दद्यात् प्रतिगृह्णीयाद्वान्यत्रानुज्ञानाद्भर्तुः ।

पुत्रं प्रतिग्रहीष्यन् बन्धूनाहूय राजनि च निवेद्य निवेशनस्य मध्ये व्याहृतिभिर्हुत्वा दूरबान्धवं बन्धुसन्निकृष्टमेव‡ प्रतिगृह्णीयात् ।

सन्देहे चोत्पन्ने दूरे बान्धवं शूद्रमिव स्थापयेत् ।

विज्ञायते स्त्रैणेन बहूं स्त्रायत इति ।

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* The Dattaka-Chandrika says, that this text refers to Sudras. It is very likely spurious, like many of the texts cited in this chapter, which cannot be found in the old digests.

† ज्येष्टम् is the reading of the Ujjaala

‡ The Kalpataru, the Aparark, the Saraswati-Vilasa, and the Ratnakara read असन्निकृष्टम् for बन्धुसन्निकृष्टम् । It would mean 'not very near.'

तत्रिंशेत् प्रतिगृह्णीत चौरसः पुत्र उत्पद्यते चतुर्थभागभागी स्याद्दत्तकः।
यदि नाभ्युदयिकेषु युक्तः स्यात्।

वसिष्ठः १७। २६, २८-३०, ३९; १५। १—१०

Now among those (sons) who are not heirs butt kinsmen, the Sahodhaja is the first. The second is the adopted son. He whom his father and his mother give in adoption.

These (last mentioned) six (sons) shall take the heritage of him who has no heirs belonging to the first mentioned six classes.

Man formed of uterine blood and virile seed proceeds from his mother and his father (as an effect) from its cause.

(Therefore) the father and the mother have power to give, to sell, and to abandon their (sons).

But let him not give or receive (in adoption) an only son. For he (must remain) to continue the line of the ancestors.

Let a woman neither give nor receive a son except with her husband's permission.

He who desires to adopt a son, shall assemble his kinsmen, announce his intention to the king, make burnt offerings in the middle of the house, reciting the Vyahritis, and take (as a son) a not remote kinsman, just the nearest among his relatives.

But if a doubt arises (with respect to an adopted son who is) a remote kinsman, (the adopter) shall set him apart like a Sudra.

For it is declared in the Vedas, "Through one he saves many."

If after an adoption has been made, a legitimate son be born, the (adopted son) shall obtain a fourth part.

Provided he be not engaged in (rites) procuring prosperity.

Vasistha, XVII. 26, 28-30, 39: XV. 1-10

अन्यशाखीयवी दत्तः पुत्रश्चैवोपनायितः।
स्वगोत्रेण स्वशाखोक्तविधिना स स्वशाखभाक्॥

दत्तकमीमांसाधृतवसिष्ठवचनम्

Sprung from one following a different Sakha (or branch of the Vedas) the given son even when invested

with the characteristic thread under the family name of the man himself, according to the form prescribed by his peculiar Sakha, becomes participant of the duties of such Sakha.

A text of Vasistha, cited in the Dattaka-Mimansa.

दानं क्रयधर्म्यापत्यस्य न विद्यते ।

आपस्तम्बः प्र २ । प १ । अ १३ । सू १० ।

The gift (or acceptance of a child) and the right to sell (or buy) a child are not recognized.

Apastamba, P. 2, P. 6, K. 13, S. 10.

मातापितृभ्यां दत्तोऽन्यतरेण वा योऽपत्यार्थे परिगृह्यते स दत्तः ।

औरसं पुत्रिकापुत्रं क्षेत्रजं दत्तकृत्रिमौ ।

गूढजं चापविद्धं च रिक्थभाजः प्रचक्षते ॥

बौधायनः प्र २ । अं २ । क ३ । सू २०, ३१ ।

He (is called) an adopted son (datta) who being given by his father and his mother or by either of the two, is received in the place of a child.

They declare the legitimate son, the son of an appointed daughter, the son begotten on a wife, the adopted son and the son, made, the son secretly born. and the son cast off (to be entitled to share the inheritance.)

Baudhayana, P. II. A. 2 S. 20, 31.

पुत्रपरिग्रह विधिं व्याख्यास्यामः ।

श्रोत्रियस्यक्षत्रसम्भवः मातापितृनिमित्तकस्तस्य प्रदानपरित्यागविक्रयेषु मातापितरौ प्रभवतः । नत्वेकं पुत्रं दद्यात् प्रतिगृह्णीयाद्वा । सहि सन्तानाय पूर्व्वेषां । न तु स्त्री पुत्रं दद्यात् प्रतिगृह्णीयाद्वान्यत्रानुज्ञानाद्भर्तुः । प्रतिगृह्णीयन्नुपकल्पयते ह वाससी ह कुण्डले अहतीयकक्षाचार्य्य वेदपारगं कुशमयं बर्हिः पर्णमयमिध्मिति अथ वध्यूनाह्वय निवेशनमध्ये राज्ञि चावेद्य परिषदि वागारमध्ये ब्राह्मणानन्नेन परिविष्य पुण्याहं स्वस्ति ऋद्धिमिति वाचयित्वा । अथ दैव यजनीक्षेण प्रभृत्या-प्रणीताभ्यः दातुः सनत्यं गत्वा पुत्र मे देहीति भिक्षेत । ददामीतीतर आह तं परिगृह्णाति धर्म्माय त्वा परिगृह्णामि सन्तत्य त्वा गृह्णामीत्यथैनं वस्त्रकुण्डलाभ्या-महतीयक्षेण त्वालङ्कृत्य परिधानप्रभृत्यग्निमुखात् कृत्वा पक्वान्नं जुहोति यस्त्वा हृदि क्रीरिणा मन्यमान इति पुरोनुवाक्यामनूच्य रिविल्ला यस्येवं सुकृते जातवेद इति

याज्यया जुहोत्यथ व्याहृती र्हूत्वा खिष्टकृत् प्रभृतिसिद्धमाधेनुवरप्रदानाद्दक्षिणां ददात्येते एव वाससी एते एव कुण्डले एतच्चाङ्गुलीयकं यद्येवंकुलीरसः पुत्र उत्पाद्यते तुरीयभागे सम्भवति इति ह्याह बौधायनः।

बौधायनगृह्यपरिशिष्टे (७ प्रश्न ५ अध्यायः)*

We shall explain the rule for the adoption of a son.

Man, formed of virile seed and uterine blood proceeds from his mother and father (as an effect) from its cause.

(Therefore) the father and the mother have power to give, to abandon, or to sell their (son).

But let him not give nor receive (in adoption) an only son.

For he (must remain) to continue the line of the ancestors.

Let a woman neither give nor receive a son except with the permission of her husband.

He who is desirous of adopting (a son) procures two garments, two earrings, and finger ring, a spiritual guide who has studied the whole Veda, a layer of kusagrass and fuel of Patasa wood and so forth.

Then he convenes his relations, informs the King (of his intentions to adopt); in their presence, feeds the (invited) Brahmans in the assembly, or in his dwelling and makes them wish him "an auspicious day" "hail and prosperity."

Then he performs the ceremonies which begin with the drawing of the lines on the altar and end with the placing of the water-vessels, goes to the giver (of the child) and should address (this) request (to him) "give me thy son."

The other answers 'I give (him).'

He receives (the child with these words): I take thee for the fulfilment of (my) religious duties; I take thee to continue the line (of my ancestors).

Then he adorns him with the (above mentioned two garments, the two ear-rings, and the finger-ring, performs the rites which begin with the placing of the (pieces of wood called)

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* This is the text as published by Dr. Buhler in the Journal of the Asiatic Society of Bengal, vol. 35, p. 162.

paridhis (fences round the altar) and end with the Agnimukh and offer (a portion) of the cooked (food) in the fire.

Having recited the Puronuvachya (verse) " He who thinking of thee with a discerning mind," &c. he offers an oblation, reciting the Yajya (verse) ' To which performer of good deeds, thou, 9 Jatavedas, ' &c.

Then he offers (oblations, reciting) the Vyahritis;—(the ceremonies) which begin with the oblation to Agni Svishtakrit and end with the presentation of a cow, as a fee (to the officiating priests are) known;

And presents (to the spiritual guide) a sacrificial fee, those two dresses, those two ear-rings, and that finger-ring (with which he had addressed the child.)

If after the performance of these (rites) a legitimate son of his own body is born (to the adopter, then the adopted son) receives a fourth (of the legitimate son's) share.

Thus says Baudhayana.

Baudhayana, Grihya Parisishtha.

Prasna VII. Adhyaya V.

दद्यान् माता पिता वा यं स पुत्रो दत्तको भवेत्।

* * * क्रत्रिमः स्यात् स्वयं कृतः।

औरसाश्चेत्रजास्तेषां निर्द्दोषा भागहारिणः।

याज्ञवल्क्याः २। १३५, १३६, १४६।

The son whom his father or mother gives becomes Dattaka. * * * The Kritrima is one made a son by one's self.

(Of the disqualified heirs,) sons legitimate and Kshetrrja (only) are entitled to allotments, if free from defect. *

Yajnavalkya, II 135, 136, 146.

स्वजातीयः सुतो ग्राह्यः पिण्डदाता स रिक्थभाक्।

तदभावे विजातीयो वंशमात्रकरः सुतः॥

दत्तकचन्द्रिकाधृतबृहद्याज्ञवल्क्यवचनम्।

A son of the same caste should be taken in adoption.

* From this it follows, that the adopted sons of disqualified persons are not heirs.

He is an offerer of the pinda and heir. Failing him an (adopted son) of different caste (also is only) perpetuator of the lineage. Vriddha-Yajnavalkya, cited in the Dattaka-Chandrika.

दत्तकश्चाष्टम: । स च मातापितृभ्याम् यस्य दत्त: ।

विष्णु: १५ । १८, १९ ।

The adopted son (Dattaka) is the eighth.

And he belongs to him to whom he is given by his mother and father.*

Vishnu, XV. 18-19.

धर्म्मार्थं वर्द्धिता: पुत्रास्तत्क्षेत्रेषु पुत्रवत् ।

अंशपिण्डविभागित्वं तेषु कैवल्यमिष्यते ॥

नारद: ।

Sons reared for religious merit in the several gotras as begotten sons, become merely participators in a share and the oblations or the funeral cake.

Narada.†

द्व्यामुष्ययणका दद्युर्द्वाभ्यां पिण्डोदकं पृथक् ।

रिक्थादर्द्धांशमादद्युर्बीजिचेत्रिकयोस्तथा ॥

दत्तकचन्द्रिकाधृतनारदवचनम् ।

Let those, being sons to both fathers, present separately to each, oblations of food and water; they take half of a share in the estate of the contributor of the seed (natural father) and owner of the soil (adopting father).

Narada, cited in the Dattaka Chandrika.

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* 'Mother or father' is the translation by Dr. Jolly. But *and* not *or* seems more correct.

अप्रजस्तात् कानीनमूढोत्पन्नसहोढजा: ।

पौनर्भवश्च मैवैते पिण्डरिक्थांशभागिन: ॥

is a text of Vishnu not found in the Vishnu, Smritii, but cited as such in the Mitakshara, the Madana-Parijata, and the Vira-Mitrodaya.

† Cited in the Saunkara-Kaustubha, but declared in the Mayukha to be spurious.

सपिण्डानां सुतो मुख्य स्तदभावेऽपि गोत्रज:।
तदभावेऽन्यगोत्रोऽपि दत्तक: परिगृह्यते॥

दत्तकनिर्णयधृतनारदवचनम्।

The son of a Sapinda is the principal, failing him one born of the same gotra, failing the latter, one of another may be taken in adoption.

Narada, cited in the Dattaka-Nirnaya

यद्येकजाता बहवो भ्रातरस्तु सहोदरा:।
एकस्यापि सुते जाते सर्व्वे ते पुत्रिण: स्मृता।
ज्येष्ठजाद्या स्मृता स्तन्ये पञ्चषट्सप्तभागिन:॥

बृहस्पति:।

When there are many uterine brothers sprung from one (father) and a son is born even to one of them only, they all are declared to have offspring (through that son.)

The other sons beginning with the son begotten on a wife (Khetraja) shall respectively take a fifth, sixth and a seventh part. Vrihaspati, V. 99; XX. 39.

पुत्राभावे क्रियालोपात् वंशसंरक्षणात् तथा।
पुत्रप्रतिनिधिर्दत्त: कलौकर्त्तव्य उच्यते॥

बृद्धबृहस्पति:।

When there are no sons, to prevent the failure of religious ceremonies and for the preservation of the family in the Kali-Yuga, should the substitute of a son, the Dattaka (adopted son) be made.

Vriddha-Vrihaspati, cited in the Dattaka-Mimansa.

अपुत्रेण सुत: कार्य्य: यादृक् तादृक् प्रयत्नत:।
पिण्डोदकक्रियाहेतो: नामसङ्कीर्त्तनाय च॥

बृहस्पतिशातातपौ।

A son of any description must be anxiously adopted by a sonless man for the sake of the funeral cake, water and religious rites, and for the celebration of the name.

Manu, according to Dattaka-Mimansa. But it is not a text of Manu, but of Vrihaspati as mentioned in the Kalpataru. According to the Dattaka-Tilaka, it is a text of Vriddha-Shatatapa.

औरसः क्षेत्रजश्चैव दत्तः कृत्रिमकः सुतः ।
दद्यान्माता पिता वाऽपि स पुत्री दत्तको भवेत् ॥

पराशरः ४ । १९ ।

The Aurasa, the Kshetraja, the Dattaka, and the Kritrima are the (four) sons. He whom the father or the mother gives becomes Dattaka.

Parasara, IV. 19.

अपुत्रस्य पितव्यस्य तत्पुत्री भ्रातृजो भवेत् ।
स एव तस्य कुर्वीत श्राद्धपिण्डोदकक्रियाम् ॥

बृहत्पराशरः ।

Of the sonless uncle his brothe'r s son becomes the son. He it is who performs his sraddha and the ceremonies of giving the pinda and water.

Vrihat-Parasa, Ch. IV

पितुर्गतस्य कैवल्यौरसस्य विपौरुषम् ।
सर्व्वत्रानेकगोत्रासमिकोद्दिष्टं त्रयेऽहनि ॥

दत्तकमीमांसाधृतपराशरवचनम् ।

A funeral repast by the legitimate son, for a father who has departed his life, on all occasions is in honor of three ancestors*. For those of a different general family is the rite consecrated to a single person on the anniversary of the day of death.

Parasara, cited in the Dattaka-Mimanas.

विक्रयश्चैव दानञ्च न देयाः स्युरनिच्छवः ।
दाराः पुत्राश्चसर्व्वस्वमात्मन्येव तु योजयेत् ॥†
आपत्काले तु कर्त्तव्यं दानं विक्रयमेव च ।
अन्यथा न प्रवर्त्तेत इति शास्त्रार्थनिश्चयः ॥

मयूखदायभागरत्नाकरधृत-व्यासवचनम् ।

* The translation is Mr. Sutherland's. According to some writers the first hemistich means, when the father has been joined with the *Pitris* by the Sapindikarana ceremony.

† This verse attributed to Vyasa and Daksha in the Hemadri according to the Nirnaya-Sindhu, which, upon this, bases the opinion that after the fifth year the boy can be adopted if willing, and not otherwise.

A wife or a son or the whole of a man's estate shall not be given away or sold without the assent of the persons interested; he must keep them himself but in extreme necessity he may give or sell them; otherwise he must attempt no such thing.

Katyayana, cited in the Mayukha, Dayabhage, and Ratnakara.

नारीस्वत्वननुज्ञाता पित्रा भर्त्रा सुतेन वा।
विफलं तद्भवेत्तस्या यत् करोत्यौर्द्धदेहिकम्॥

मयूखधृतकात्यायनवचनम्।

Whatever spiritual acts (or acts relating to the future state) a woman performs, without the permission of the father, the husband or the son, to obtain a benefit after death, it shall become fruitless, &c.

Katyayana, cited in the Mayukha.*

उत्पन्ने त्वौरसे पुत्रे चतुर्थांशहराः सुताः।
सवर्णा असवर्णासु ग्रासाच्छादनभाजनाः॥

मिताक्षरापराशरमाधवादिधृतकात्यायनवचनम्।

If a legitimate son be born, the rest are takers of a fourth share, provided they belong to the same class, but if of a different class, they are entitled to food and raiment only.

Katyayana, cited in the Mitakshara, Parasara-Madhava, Parijata, and Saraswati-Vilasa.†

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* It is upon this text that the Bombay Pundits interpret that the texts about the dependence of women refer to certain particular acts only and base the law prevailing there that a widow can adopt without the husband's permission, after his death.

† The Mitakshara, the Parasara-Madhava, the Madana-Parijata, the Saraswati-Vilasha, the Vira-Mitrodaya, the Mayukha, and the Dattaka-Mimansa read चतुर्थांशहराः; but the Kalpataru, the Dayabhaga, the Vivada-Ratnakara and the Dattaka-Chandrika read तृतीयांशहराः।

It is upon this divergence that the difference of law in the different provinces is based.

दौहित्रे भ्रातृपुत्रे च होमादिनियमो न हि ।
वाग्दानादेव तत्सिद्धिरित्याह भगवान् यमः ॥†

दत्तकमिरीमसिंधृतयमवचनम् ।

The ceremonies of Homa and the like are not requisite in the case of the daughter's son and brother's son. Such adoption is completed (by gift) by word of mouth. Thus says Yama.

Yama, cited in Dattaka-Darpana.

औनकोऽहं प्रवक्ष्यामि पुत्रसंग्रहमुत्तमम् ।
अपुत्री सुतपुत्री वा पुत्रार्थं समुपोष्य च ॥*
वाससी कुण्डले दत्त्वा उष्णीषं चाङ्गुलीयकम् ।
आचार्यधर्म्यसंयुक्तं वैष्णवं वेदपारगम् ॥
वह्निं कृशमयं चैव पालाशं चेध्ममेव च ।
एतानाहृत्य बन्धूंश्च ज्ञातीनाहूय सत्तमः ॥
बन्धूनग्रेन सम्भोज्य ब्राह्मणांश्च विशेषतः ।
अग्न्याधानादि यत्तन्त्रं कृत्वाज्योत्पवनान्तकम् ॥
दातुः समर्चं गत्वा तु पुत्रं देहीति याचयेत् ।
दाने समर्थो दाताऽस्मै ये यज्ञेनेति पञ्चभिः ॥
देवस्यत्वेति मन्त्रेण हस्ताभ्यां प्रतिगृह्य च ।
अङ्गादङ्गात्पुत्रं जह्यात्वा चाघ्राय शिरसूर्ध्वनि ॥
वस्त्रादिभिरलङ्कृत्य पृच्छायावहं सुतम् ।
नृत्यगीतैश्च वाद्यैश्च स्वस्तिशब्दैश्च संयुतम् ॥
गृहमध्ये समादाय चरुं हुत्वा विधानतः ।
यस्ते हृदेत्यृचा चैव तुभ्यमग्ने ऋचैकया ॥
सोमोददद्दित्येताभिः प्रत्यृचं पञ्चभिस्तथा ।
खिष्टकृदादि होमं च कृत्वा शेषं समापयेत् ॥
ब्राह्मणानां सपिण्डेषु कर्त्तव्यः पुत्रसंग्रहः ।

* This text was cited by the Bombay Sastris in 1821 in the case of Haebut Rao (2 Bom. 8), and also in the case of Aymaram *v.* Madho Rao, 6 All. 276. The Dattaka-Kaumudi says, it is cited in the Sarawati-Vilasa as a text of Devala, but I have not found it in that book.

† बन्ध्यो मृतप्रजोवापि is another reading according to the Dattaka-Mimansa. It means 'barren or one whose children are dead.'

तदभावेऽसपिण्डो वा अन्यच्च तु न कारयेत् ॥
क्षत्रियाणां स्वजातौ वा गुरुगोत्रसमोऽपि वा ।
वैश्यानां वैश्यजातिषु शूद्राणां शूद्रजातिषु ॥
सर्व्वेषामेव वर्णानां जातिष्वेव न चान्यतः ।
दौहित्रो भागिनेयश्च शूद्राणां विहितः सुतः ।*
ब्राह्मणादिषु नास्ति भागिनेयः सुतः क्वचित् ।†
नैकपुत्रेण कर्त्तव्यं पुत्रदानं कदाचन ।
बहुपुत्रेण कर्त्तव्यं पुत्रदानं प्रयत्नतः ॥
दक्षिणां गुरवे दत्त्वा यथाशक्ति द्विजोत्तमः ।
नृपो राष्ट्रार्द्धमेवापि वैश्यो वित्तशतत्रयम् ॥
शूद्रः सर्व्वस्वमेवापि अशक्तौ तद्यथाबलम् ॥

शौनकः ।

I, Saunaka, will now declare the best adopttion.

One having no male issue or one whose male issue has died, having duly fasted for a son, having given a pair of c lothes, a pair of earring, a turban, a ring to an Acharya (priest) religiously disposed, a follower of Vishnu and thoroughly read in the Vedas, having brought a barhi (a layer of Kusa grass) and an idhma (a bundle of small sticks) of the palasha tree, having invited kinsmen, and relations, having feasted the kinsmen and especially the Brahmans, having performed the rites, commencing with that of adhvana (or) of placing the Samidh (stick) over the consecrated fire, and (ending with) that of Utpavana or purifying of the clarified butter and having advanced before the giver, should (thus) beg, 'give a son.' The giver being capable of the gift (should

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* दौहित्रो भागिनेयश्च शूद्राणां वापि दाप्यते is the correct reading according to the Dattaka-Didhiti. शूद्रस्यापिदौयते is another reading. It appears in the manuscript of the Shaunaka Smriti of the Asiatic Society of Bengal.

† This line prohibiting the adoption of the sister's son is not to be found in the copy of Saunaka Smriti existing in the library of the Asiatic Society of Bengal. Vayidinada Dikshattar a celeberated commentator of Southern India has also omitted this passage. The Sanskara-Kaustubha and Nirnaya-Sindhu approve of the adoption of sister's and daughter's sons, failing a Sapinda.

give) to him, with the recitation of the five prayers, the initial words of the first of which are 'ye yajnena.' (The acceptor) having taken him by both hands with recitation of the prayer commencing with 'Devasyatva' having inaudibly repeated the mystical invokation, beginning with ' Angadangat' and smelt the forehead of the child, having with clothes and the like adorned the boy bearing the reflection of a son and accompanied with dancing songs, music and benedictory words, having brought him into the middle of the house, having according to ordinance offered to the sacred fire an offering of boiled rice (to each incantation) with recitation of the mystical invocation 'Yastvahrida' of the single prayer from the Rig Veda, commencing with 'Tubhyamagre,' and the five prayers the initial words of the first of which are Soma dadat,' and having performed a sacrifice with the holy texts, beginning with Svistakrit," should close the remaining ceremony of the sacrifice. Amongst Brahmans, the adoption of a son should be made from amongst the Sapindas ; or in their absence, an a-sapinda (one not a sapinda) may be adopted, otherwise one should not be adopted ; amongst Kshatriyas, one from their own class or one whose gotra is the same as that of the (adoptor's) preceptor may be adopted ; amongst Vaisyas, from amongst those of the Vaisya class, amongst Sudras, from among the Sudra class ; amongst all classes from amongst their respective classes only, not from others. But a daughter's son and a sister's son are affiliated by Sudras. For the three superior tribes a sister's son is nowhere mentioned as a son. By no man having an only son is the gift of a son to be ever made. By a man having several sons, such a gift is to be made by all means An excellnet Brahmana should bestow gratuity on the officiating priest according to his ability, a king (should grant) even one-half of his dominion, a Vaisya three hundred pieces of money, a Sudra even the whole of his property ; if indigent, to the extent of his means.

Shaunaka.

अपुत्रेणैव कर्त्तव्यः पुत्रप्रतिनिधिः सदा।
पिण्डोदकक्रियाहेतोः यस्मात्तस्मात् प्रयत्नतः॥

अत्रि.—५२।

By a man destitute of a son only should a substitute of a son be made for the sake of the funeral cake, water and religious rites from any place or from any source, with great care.

Atri V. 52, cited in the Dattaka-Mimansa and other books.

विभजिष्यमाण एकविंशं कानीनाय दद्यात्, विंशं पौनर्भवाय एकोनविंशं द्व्यामुष्यायणाय, अष्टादशं क्षेत्रजाय, सप्तदशं पुत्रिकापुत्राय, इतरानौरसाय।

हरदत्तधृतहारीतवचनम्।

On division one-twentieth share should be given to the Punarbhaba, one-nineteenth to the Dwayamushyayana, one seventeenth to the Kshetraja, one-seventeenth to the Putrikaputra, and the rest to the Aurasa.

Text of Harita, cited by Haradaatta tn the Ujjivala

जीवति क्षेत्रजमाहुरक्षातत्त्वात्मृते द्व्यामुष्यायणम् अगुप्तबीजत्वात्।

दत्तकचन्द्रिकाधृतहारीतवचनम्।

When the father is living, the son is called *Kshetraja* on account of the want of control of the begetting father If he is dead, such son is called Dwamushyayna, for then there is no concealment as to the begetting.

Harita, cited in the Dattaka-Chandrika.

सर्व्वे ह्येतेऽसमर्थे पुत्रा दायहराः स्मृताः।
औरसे पुनरुत्पन्ने तेषु ज्येष्ठत्वं न तिष्ठति॥
तेषां सवर्णा ये पुत्रा ते तृतीयांशभागिनः।
शेषास्तमुपजीवेयुः यावच्छादनसंभृताः॥

हरदत्तधृतदेवलवचनम्।

All these (eleven) sons take the inheritance of the man without an Aurasa son.

If an Aurasa son be afterwards born, the others are not entitled to the rights of the eldest son. Among them,

those sons that are of the same caste take one-third share. The rest live upon him (the Aurasa son) getting food and raiment.

Text of Devala, cited by Haradatta and in the Dattaka-Chandrika and the Dayabhaga

प्रत्यब्दं पार्वणेनैव विधिना चैवजौरसौ।
कुर्यातामितरे कुर्युरेकोद्दिष्ट सुता दश॥

जातुकर्णः।

Annually let the son of the wife and legitimate son perform obsequies according to the *parvana* form, the other ten sons should perform only the Ekoddista.

Jatukarna, cited in the Dattaka-Mimansa.

यावन्तः पितृवर्गाः स्युस्तावद्भि दत्तकादयः।
प्रेतानां योजनं कुर्युः स्वकीयैः पितृभिः सह॥
ताभ्यां सहाथ तत्पुत्राः पौत्राख्येन तत्समम्।
चतुर्थे पुरुषे छन्द स्तत्सादेषा त्रिपौरुषी॥

हेमाद्रिमयूखधृतजातूकर्णजिनिवचनम्।

As many ancestor as there may be (in both the families) their Sapindikarana (or uniting them with the ancestors) should be performed by the adopted sons and the rest with their own fathers, &c.; their sons (should perform it) with two fore-fathers, and their grandsons with one. As for the fourth descendant it is (to be) done at his pleasure. Accordingly the Sapinda relationship (of these sons is mentioned) as up to the third degree.

Karshanajini, cited in the Hemadri and from that in the Mayukha.

सपिण्डापत्यमेव सगोत्रजमथापि वा।
अपुत्रकी द्विजो यस्मात् पुंस्त्वेपरिकल्पयेत्॥
समानगोत्रजाभावे पालयेदन्यगोत्रजम्।
दौहित्रं भागिनेयञ्च मातृस्वसृसुतं विना॥

दत्तकमीमांसाधृतशाकल्यवचनम्।

The sonless twice-born man should adopt a boy, who is the son of a Sapinda, or of the same gotra. Failing a boy of the same gotra, he should adopt one

from another gotra, except the daughter's son, the sister's son, and the mother's sister's son.

Sakala, cited in the Dattaka-Mimansa.

न ज्येष्ठं दद्यात् ।

दत्तकदीधितिधृता स्मृतिः ।

The eldest son should not be given in adoption.

The text of some unknown Smriti cited in the Dattaka-Didhiti.

पञ्चमांशहरादत्तक्रृत्रिमादिसुताः पुनः ।

सुरस्वतीविलासधृतस्मृतिवचनम् ।

The (subsidiary) sons, Dattaka (adopted), Kritrima, and others take a fifth part of the inheritance.

A text of some unknown Smriti cited in the Saraswati-Vilasa.

अथचेद्दत्तकक्रीतपुत्रिकापुत्राः परपरिग्रहेणागतैर्यास्ते द्व्यामुष्यायणा भवन्तीति यद्येषां स्वासु भार्यास्वपत्यं न स्याद्रिक्थं हरेयुः पिण्डं चैभ्यस्त्रिपुरुषं दद्युरिति ।

मयूखधृतपैठीनसिवचनम् ।

Now since sons, who are either adopted, purchased, or born of an appointed daughter, have no pravara (for themselves) owing to their having been taken by another, they are (considered to be) Dvyamushyayana (sons of two fathers.)

If there be no (offspring) of those (adopters) by their own wives, they (the said secondary sons) should take the heritage and give the funeral oblations to three ancestors.

Paithinasi, cited in the Mayukha.*

दत्ताद्या अपि तनया निजगोत्रेण संस्कृताः ।
आयान्ति पुत्रतां सम्यगन्यबीजसमुद्भवाः ॥
पितुर्गोत्रेण यः पुत्रः संस्कृतः पृथिवीपते ।
आचूडान्तं न पुत्रः स पुत्रतां याति चान्यतः ॥
चूडाद्या यदि संस्कारा निजगोत्रेण वै कृताः ।
दत्ताद्यास्तनयास्ते स्युरन्यथा दास उच्यते ॥

* The reading of the Dattaka-Chandrika of the text is incorrect, and the translation of Mr. Sutherland is consequently nearly meaningless.

ऊर्द्धन्तु पञ्चमाद्वर्षात् न दत्ताद्याः सुता नृप ।
गृहीत्वा पञ्चवर्षीयं पुत्रेष्टिं प्रथमं चरेत् ॥

कालिकापुराणवचनानि ।

Sons adopted and others having had ceremonies performed on them in one's own gotra become fully sons, though born of another's seed.

O King! That son who is initiated under the family name of his natural father up to the ceremony of tonsure does not become the son of another man.

If the ceremonies beginning with the Chudakarana are performed in (the adopter's) own gotra the son adopted and others are sons; otherwise (if those ceremonies had been performed before adoption) they are considered slaves.

After the fifth year the subsidiary sons, Dattaka and others are not sons, O King.

Taking (in adoption) a boy of five years (one should first perform the ceremony called Putresti.

Kalika-Purans.*

चेचज्ञादौलनयान् न राजा राज्येऽभिषेचयत् ।
पितृणां साधयेन्नित्यमौरसे तनये सति ॥
औरसः चेचलश्चैव दत्तः क्रत्रिम एव च ।
गूढोत्पन्नोऽपविद्धश्च भागार्हाल्लनया इमे ॥
कानीनश्च सहोढश्च क्रीतः पौनर्भवस्तथा ।
स्वयन्दत्तश्च दासश्च षडिमे पुत्रपांशुलाः ॥
अभावे पूर्व्वपूर्व्वेषां परान् समभिषेचयेत् ।
पौनर्भवं स्वयन्दत्तं दासं राज्ये न योजयेत् ॥†

कालिकापुराणवचनानि ।

* The authenticity of these passages of the Kalika-Purana, which are quoted in the Dattaka-Mimansa, the Vaijayanti, the Nirnaya Sindhu and the Udvahatattwa of Raghunandana, is questioned by the authors of the Mayukha and the Dattaka-Chandrika. They are not found in many copies of the Kalika-Purana, as mentioned by the said authors as well as by Mr. Sutherland. In the copy existing in the library of the Asiatic Society of Bengal the passages appear in the order in which they are cited here. The order slightly varies with that of the Dattaka-Mimansa, but agrees with that of the Udvahatattwa.

† The last four stanzas are cited in Dattaka-Chandrika as श्रूयते which is translated by Mr Sutherland as "thus it is ordained in the Vedas." They are found in the Kalika-Puran and not in the Vedas.

Let not the king invest in the empire the wife's son and the rest; nor cause to be completed through such sons the solemnities for his forefathers, a legitimate son existing.

The legitimate son, the son of the wife, the son given the son made, the son of concealed birth, and the son rejected take shares of the héritage. The son of an unmarried girl, the son of a pregnant bride, the son bought, the son of a twice married woman, the son self-given and the slave's son; these six are contemptible as sons; on failure of the first in order respectively, let him invest the next with filial rights. But let him not appoint to the empire the son of a twice married woman, nor a son self-given, nor one born of a female slave.

Kalika-Purana.*

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* The following texts about the right to perform Sraddha are interesting.

पिचोरनुपनीतोऽपि विदध्यादौरसः सुतः।
उर्ध्वदेहिकमन्ये तु संस्कृताः श्राद्धकारिणः॥

निर्णयसिन्धुधृत स्कन्दपुराणवचनत्।

नाभिव्याहारयेन्मन्त्रं यावन्मञ्जीनिबध्यते।
मन्त्राननुपनीतोऽपि पठेदेवैक औरसः॥

निर्णयसिन्धुधृतसुमन्तुवचनम्।

क्रतचूडस्तु कुर्वीत उदकं पिण्डमेव च।
स्वधाकारं प्रयुञ्जीत वैदीकारं न कारयेत्॥

निर्णयसिन्धुधृतव्याघ्रवचनम्।

The following text about the performance of Homa is interesting.

पुत्रिकायाः प्रदाने तु स्थालीपाकेन धर्मवित्।
अग्निं प्रजापतिं चेष्ट्वा पुत्रदाने तथैव च॥

अपरार्कधृतजाबालिवचनम्।

It appears that up to the time of Yaska adoption was not allowable. The ollowing passage occurs in the Nirukta 3.

स्त्रीषांदानविक्रयातिसर्गा विद्यन्ते न पुंसः पुंसोऽपीत्येके शौनःशेपेदर्शनात्।

SECTION III.

ILLEGITIMATE CHILDREN.

According to Hindu law, an illegitimate child is not the child of the father but only of the mother, and can thus have no relations or rights of inheritance except to the mother's property. Certain rights were however, given to children by slave women. There was a time when the twice-born classes used to take Sudra wives. This practice was prohibited at the time when the Smritis we have got, were composed, and the son of a Sudra wife was sometimes called Nishada and sometimes Parashava, that is, a corpse. But it is difficult completely to do away with the just rights even of slaves. In ancient times, these sons were entitled to share the paternal property. The Smritis cut down their share of the paternal property to one-half of that of the sons by the Aryan wife, and then further cut it down, so that it might never exceed one-tenth of the entire inheritance, and lastly made even this tenth share optional with the father to give or not. Dasiputra and Sudraputra were very often synonymous, as Dasa and Sudra were synonymous. Dasi does not mean a slave girl of any caste other than the Sudra. At last, the son of the Sudra wife, according to the rule of Vrihaspati, had only a right to maintenance. The history of the Sudraputra having been forgotten, some modern lawyers have come to the conclusion that under the Hindu law illegitimate sons had certain rights of inheritance. Here again the poor Hindu Law-

Rights of illegitimate sons and sons of Sudra women in ancient times.

givers have been made to appear black by ignorance. Illegitimate sons had no rights whatsoever and the Sudra wife having been prohibited, the texts about Dasiputra should be considered as obsolete.

Rights of illegitimate sons of Sudras.

With regard to Sudras however, the law is different. Their illegitimate sons are not entitled to partition during their father's lifetime, but are entitled to such share as the father may allot to them. After the death of the father however, they are entitled to half a share, when there are brothers, sisters or sister's sons. As the widow takes before the daughter, she also takes like her, when there is an illegitimate son. Failing the widow, the daughter and the daughter's son, the illegitimate son takes the whole. According to the Dayabhaga, illegitimate sons take equally with daughter's sons "for no special provision occurs." The view of the Dayabhaga is opposed to that of the Apararka, the Vivadatandava and the Mitakshara According to them, the illegitimate son takes one half of what the legitimate son or daughter's son takes.

What renders a child legitimate according to the decisions.

Under the Hindu law, it has been held that "it is not necessary that in order to render a child legitimate, the procreation as well as the birth, should take place after marriage" and that "the Hindu Law is the same in that respect as the English Law" (1). But it is possible that if the text of Apastamba cited in this Section had been before the judges, this strange decision would not have been arrived at. It has also been held that where there is a marriage *de facto* and recognition by the father, the strongest evidence will

(1) Pedda Amani *v.* Zemindar of Marungapuri, 1 I. A. 282. Contra Chinnammal *v.* Varadarajulu, 15 Mad. 307.

be required to show that the law denied to the children their presumable legal status on the ground of their mother's incapacity to contract a valid marriage (1). When there was no proof of divorce but merely of birth during abandonment, the presumption of the law as to parentage would prevail, unless it could be shown that the parties to the marriage had no access to each other (2). In the Tippera Raj, it has been held, that there is a valid custom of legitimatizing a child by subsequent marriage (3).

The illegitimate son of a holder of an impartible estate of the Sudra caste, when there was a legitimate son, was held by the Privy Council to be entitled to maintenance but it was left undecided whether his maintenance was a charge on the estate or not. (4) It was also held in that case, as the son was recognized by his natural father, it was not essential to his title to maintenance that he should have been born in the house of his father or of a concubine possessing a peculiar status therein.

Rights of illegitimate sons of holders of impartible propery.

According to the Smritis, illegitimate sons are entitled to offer the Pinda to the begetting fathers but cannot take their wealth. This is another instance showing, that the Bengal rule that the offerer of the Pinda is entitled to the inheritance is not always a good rule. But if Gimutavahana's book is to be considered as of greater authority in Bengal than that of the Rishis, as has been held in

(1) Ramani *v.* Kulanthal, 7 W. R. P. C. I.
(2) Bhima *v.* Dhulappa, 7 Bomb. L. R. 95.
(3) Chukrodhuj *v.* Beerchunder, 1 W. R. 194.
(4) Muthusawmy Jagavera *v.* Vencataswara, 12 Moore 203.

several instances, illegitimate sons are heirs. However that may be, illegitimate sons are heirs of their mothers, according to the Smritis, and the English rule that illegitimate children have no heritable rights whatever can have no application to Hindus.

It has been held by our Courts, that illegitimate children of the three regenerate classes have no heritable rights, but are only entitled to maintenance. (1)

The Oude Chief Court in a recent case has held that among illegitimate sons of one of the twiceborn classes, one brother succeeds to another, and also the illegitimate daughter is heir to her mother. The judges say: "Agnation and consanguinity are relations which arise out of marriage and which cannot be claimed by any person born out of wedlock but an illegitimate son is related to his mother and to his brother by that mother and on this ground it seems impossible to deny to the right of one illegitimate brother to inherit to another." (2) When the judges deny consanguinity between the brothers it is difficult to understand the conclusion. The old Roman and Hindu fictions of a woman married according to certain forms passing into the husband's family or Gotra from the father's family have been at the root of all these modern ideas about agnation and consanguinity. Considerations of public policy and morality ought to determine the question of inherit-

(1) Chuturya Run Murdun Sein *v.* Saheib Purhala, 7 Moore 18. Shome Shankar *v.* Rajesar, 21. All 99, Bacha *v.* Chatarpal, 9 O. C. 352

(2) Sitla Baksh Singh *v.* Gajraj Singh, 14 O. C. 227, 12 I. C. 767. Maharana *v.* Thakur Persad, 14 O. C. 234, 12 I. C. 776, 12 I. C. 767. Myna Bai *v.* Utturam, 2 Mad H. C. 197, 2 Mad. 196.

ance in these cases irrespective of the old fictions and superstitions. I have shown at p. 369, that the illegitimate sons offer Pindas to their mother and are thus related according to law to her and to one another and have thus also rights of inheritance to the estate of the mother and also of one another. There are no doubt several decisions denying such relationship and right (1) But the texts cited in this book were not before the judges and it also must be said that there is very great force in the observations of the Oude Court, in the case mentioned above that such rights should be allowed on grounds of natural justice. The law which makes every erring woman and her poor innocent children outcasts and denies them all right of inheritance even among themselves, cannot be considered as consistent with common humanity and natural justice.

There is a great divergence of opinion as to the rights of illegitimate children of Sudras. * The

(1) 12 Mad. 277, 21 Cal. 697.

* The passage of the Dayabhaga on the subject runs as follows—शूद्रस्य पुनरपरिणीतादास्यादिशूद्रापुत्रः पितुरनुमत्या पुत्रान्तरतुल्यांशहरः:Colebrooke translated it as follows : " But the son of a Sudra by a female slave or other unmarried Sudra woman, may share equally with other sons, by consent of the father. The late Justice Dwarka Nath Mitter held that the translation was not quite correct and that " the passage if correctly translated would run thus : "But the son of a Sudra by an unmarried female slave &c., may share equally with other sons, by consent of the father" (1 Cal. 5.) Babu Golap Chunder Sirkar is of opinion, that Colebrooke's translation is correct. The literal translation of the passage is " Again the son of a Sudra by an unmarried female slave and the like Sudra woman" &c. The words " and the like" are explained by what follows. They mean the slave girl and the wife of a slave. दास्यान्वा दासदास्यान्वा has been translated as "upon a female slave or the female slave of a slave." But a slave can have no slaves. The wife of a Sudra is also called a Dasi. Yajnavalkya mentions only the slave girl. The passage refers to the law that the wife of a slave was also the property of the master. The whole passage refers to household slaves and not to concubines, as Justice Mitter correctly held. The Kalpataru says so

Calcutta High Court have held that an illegitimate son whose mother was not a slave, cannot succeed. (1) But in the other provinces, a different rule has been laid down, and it has been held that a continuous concubine or a kept woman is a *Dasi* and her son can therefore succeed.(2)

In Bombay, it has been held, in a recent case, that among Sudras the sons of the illegitimate sons of a person by a kept mistress are entitled to share with the sons of legitimate sons. (3) In that case, the question arose, whether if the kept mistress was the wife of a person living at the time, her sons would succeed, but the decision of the question was avoided by the Judges. The decision would probably have shown that the Bombay rule would lead to strange results.

In the latest case in Madras, it has been held that though the rule is that the illegitimate son of a Sudra by a woman who was unmarried and a continuous concubine could inherit, because such a woman was a substitute for a wife, still a dancing girl attached to a temple though a continuous concubine could not be a *Dasi* and thus a substitute for a wife (4). Hindu Law speaks of substitutes for a son, but the idea of a substitute for a legal wife is nowhere to be found.

A Divisional Bench of the Calcutta High

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(1) Narain Dhara *v.* Rakhal, 1 Cal. 1. Kripal Narain *v.* Sukurmani, 19 Cal. 91. Ramsaran *v.* Tekchand, 28 Cal. 184. See All W N (1908) 229.

(2) Bindavana *v.* Radhamoni, 12 Mad. 6, Hurgobind *v.* Dharam Sing, 6 All. 329, Sarasuti *v.* Munna, 2 All. 134. Suidu *v.* Baiza, 4 Bom. 37, Inderun *v.* Ramasawmy, 13 Moore 14. Ram Kali. *v.* Jamna, 30 All. 559 Meenakshi *v.* Appakeste, 33 Mad 226.

(3) Fakirappa *v.* Fakerappa, 4 Bom. L. R. 809.

(4) Sundaram *v.* Meenakshee, 16 I. C. 787.

Court in the latest case on the question, differing from the earlier decisions, has adopted the Bombay rule and held that the son of a permanent continuous exclusive concubine of a Sudra under the Mitakshra can be an heir (1) The decision does not purport to change the rule under the Dayabhaga and its authority must be considered to be weak having regard to the earlier decisions which it cannot set aside.

In Madras, it has been recently held that the continuous concubine must be an unmarried girl and the illegitimate son by a continuous concubine, who had been previously married but whose husband was not dead, could not be an heir (2)

The law should be made uniform in all the Provinces. It should be remembered that no son of even a continuous concubine can be entitled to a share in the case of the three twiceborn classes. The rule was different with Sudras in former times, because as we find in the text of the Brahma Purana, cited with approval by the commentators, that there can be no legal marriage of Sudras in any event. That old degraded status of the Sudras has passed away and the judges, even if they have to administer the law of the Smritis, should construe it strictly. There should not be two rules in such cases, one for the higher classes and another for the Sudras.

The rules of morality should be considered as equally applicable to all classes and Sudras should not be held by modern courts as governed by a lower code.

(1) Chutturbhuj Patnaik *v.* Krishna, 16 Cal. L. J. 335, 17 I. C. 276.
(2) Annayan *v.* Chennan, 33 Mad. 366, see 16 I. C. 787.

The Privy Council in the case of Jogendra Bhupati (1) have approved of the decision in the case of Saidu *v.* Baiza, and held that among Sudras an illegitimate brother is entitled to succeed by right of survivorship to an impartible Raj under the Mitakshara Law. The Madras High Court has held that "the conception of coparcenership presupposed sapinda relationship and a legal marriage" and therefore an illegitimate son could succeed to his father but could not exclude the right by survivorship of his father's undivided brothers (2) or of their legitimate sons, but was only entitled maintenance in such cases. (3) In the most recent case on the question the Madras High Court has approved the old rule. (4)

Rights of Sudra's illegitimate sons.

The Calcutta High Court has considered the decision in Jogendra Bhupati's case and held that an illegitimate son of a Sudra by a female slave "does not on his birth acquire a joint interest with his father in the ancestral property," and if the father during his life-time alienates the property by sale or gift, he can have no rights whatsover. (5) An illegitimate son of a Sudra however, can enforce partition against legitimate sons, (6) but cannot succeed collaterally to his brothers (7). It has also been held, in the case of an impartible Raj, that he is excluded by the widow (8). The legitimate son of the illegitimate

(1) 18 Cal. 51.
(2) Krishnayyam *v.* Muttusami, 7 Mad. 407.
(3) Ranoji *v.* Kandoji, 8 Mad. 557.
(4) Visvanath Swamy *v* Kamu, 21 I. C. 724, 24 Mad. L. J. 271.
(5) Ram Saran *v.* Tekchand, 28 Cal. 194.
(6) Thangam Pillai. *v.* Suppa Pillai, 12 Mad. 401. Saidu. *v.* Baiza, 4 Bom. 44. Kuruppanna *v.* Bulokam, 23 Mad. 16.
(7) Shome Shankar *v.* Rajesar, 21 All. 99.
(8) Parvati *v.* Theramalai, 10 Mad. 344, See 7 Mad. 407.

son of a Sudra is entitled to succeed to his grandfather in preference to his divided bothers just as his father would have done.

The legitimate son of a Sudra is bound by law to allow a half-share not only to his illegitimate brother but also to his sons and grandsons.

There is some divergence of opinion about the meaning of half-share and about the extent of the share of the illegitimate son, when there is a legitimate son. Mr. Mayne and Babu Golap Chunder Sircar are of opinion that he is entitled to half the share to which he would have been entitled if he were legitimate *i.e.* one-fourth. But Medhatithi expressly says that he is entitled to a third that is half of what his legitimate brother gets. The Mitakshara adopts a different view but a proper construction of the text of the Smriti on which the rule is based would support the opinion of Medhatithi, which is also shared by Apararka, Madhava and Mitra Misra. The Madras High Court has recently held that the illegitimate son in such a case is entitled to one third of the estate. (1)

The illegitimate son of a Sudra also succeeds as coheir with the widow, daughter and daughter's son, taking half-share and failing them, takes the whole (2). In an earlier case, it was held in Madras, that "if there be a widow and daughters or daughter's son and an illegitimate son, the latter takes half the estate, leaving the other half to

(1) Chellammal *v.* Ranganathan 34 Mad. 277, see Ramalinga *v.* Pavadai 25 Mad. 521. Parvati *v.* Kerumaloe 10 Mad. 334, Kuruppanna *v.* Bulokan, 23 Mad. 16.

(2) Ramalinga *v.* Pavoda 11 Mad. L. J. 399., Meenakhi *v.* Appakuti, 33 Mad. 226, 4 I. C. 297.

be enjoyed as woman's estate by the widow and daughters or daughter's son in succession." (1) This is against the clear meaning of the text, in which half share means half of what a son or daughter's son would get, as otherwise, if there were two or more legitimate sons, each of them would get half or less of what the illegitimate son would get.

Illegitimate son entitled only to maintenance in joint family.

The illegitimate son is however, only entitled to maintenance when his father was a member of a joint family as he has no claim by right of survivorship against his fathe's coparceners by *jus representationis*. (2)

It has been held in Bombay that an illegitimate daughter of a Sudra can not be preferred to a divided brother's son. (3)

Right to maintenance of illegitimate sons of all castes.

Illegitimate sons of the twice-born classes, as well as of Sudras, are entitled to maintenance under the Hindu Law and this right is not the creature of the Code of Criminal Procedure Code, as was held in some early cases and this right can be enforced in the Civil Court, notwithstanding an adverse order under Sec. 488 C. P. C. (4) This right is only personal and heritable, and the children of illegitimate sons have got no such right. (5) But it must be said that the distinction is not based on any rule of the Smritis.

It has been held that the issue of a chance

(1) Chinnammal *v.* Varadarajo, 15 Mad. 314 see 10 Mad. 334 8 Mad. 557, 14 Bomb. 282.

(2) Krishnaiyam *v.* Muthusami, 7 Mad. 407 Thangum Pillai *v.* Suppa Pillai, 12 Mad. 401.

(3) Bhikya *v.* Babu Mrad, 32 Bomb. 562.

(4) 32 Cal. 479 27 Mad. 13, 32.

(5) Roshan Sing *v.* Balwant Sing, 27, I. A. 51.

connection is entitled to claim maintenance from the putative father. (1) It has however been held in Madras that the illegitimate son of a Hindu by a non-Hindu woman is not entitled to maintenance, except under Sec. 448 C. P. C. (2) The reason of the rule is difficult to understand.

It has been held, in Madras and Oude that the illegitimate son of a Kshatriya by a Sudra woman, is by caste a *Ugra* (3). But in Allahabad it has been held that the son of a Thakur by a Kaharin is a Sudra (4)

Marriages of illegitimate sons.

It has also been held in some cases that illegitimate sons of the twice-born classes can contract valid marriages with girls of the pure blooded caste of their father, if they are recognized as members of the same caste. (5) It has been held in Allahabad in a recent criminal case that there can be a valid marriage between a Bania and the illegitimate daughter of a Brahmin father and Bania mother, as the prohibition of marriages between members of different castes did not apply to persons born of mixed marriages. (6)

For the law relating to children of prostitutes and the rights of illegitimate children *inter se*, see pp. 367-370.

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(1) Ghana Kantha *v.* Gereli, 32 Cal. 479 Contra 20 W. R. 18 All. 29.

(2) Lingappa *v.* Esudasan, 27 Mad. 13.

(3) Brindabun *v.* Radhamoni, 12 Mad. 72, Daryai Sing *v.* Narpat 13 O. C. 375.

(4) Ramkali *v.* Jamna, 5 All. L. J. 629.

(5) In the matter of Ramkumari, 18 Cal. 264. Dariya Sing *v.* Narpat Sing, 7. I. C. 70 See Banerji's Marriage and Stridhana, p. 73.

(6) Madan Gopal *v.* Emperor, 16 I. C. 513.

SECTION III.

ILLEGITIMATE CHILDREN.

अनियुक्तसुतश्चैव पुत्रिण्याप्तश्च दैवरात् ।
उभौ तौ नार्हतो भागं जारजातककामजौ ॥
य एते ऽभिहिताः पुत्राः प्रसङ्गादन्यबीजजः ।
यस्य ते बीजतो जातास्तस्य ते नेतरस्य तु ॥
नान्योत्पन्ना प्रजास्तीह न चाप्यन्यपरिग्रहे ॥
दास्यास्वा दासदास्यास्वा यः शूद्रस्य सुतो भवेत् ।
सोऽनुज्ञातो हरेदंशमिति धर्म्मो व्यवस्थितः ॥

मनु ९ । १४३, १८१ । ५ । १६२ ; ९ । १७९ ।

The son of a wife not appointed (to have issue by another), and he whom (an appointed female already) the mother of a son bears to her brother-in-law are both unworthy of a share (one being) son of an adulterer and (the other) produced through lust. Those sons, who have been mentioned in connection with the (legetimate son of the body) being begotten by strangers belong in reality to him from whose seed they sprang, not to the other man who took them.

Offspring begotten by another man is here not (considered the woman's offspring) nor does offspring begotten on another man's wife (belong to the begetter.)

A son of a Sudra who is begotten on a Dasi or on the Dasi of a Das, if permitted by his father, takes a share of the inheritance : thus the law of inheritance is settled.

Manu V. 162 ; IX. 179.

सवर्णामपूर्वां शास्त्रविहितां यथर्तु गच्छतः पुत्रास्तेषां कर्म्मभिः सम्बन्धः ।
दायेनाव्यतिक्रमश्चीभयोः ।

आपस्तम्बः २ प्र । ६ पं । १२ । १ । २

Those begotten by a man who approaches in the proper season a woman of equal caste who has not belonged to another, and who has been married legally are sons. They have a right to (follow) the occupations of their caste), and to (inherit) the estate.

Apastamba, 2-6-13-1.

जातोऽपि दास्यां शूद्रेण कामतोंऽशहरो भवेत् ।
मृते पितरि कुर्य्युस्तं भ्रातरस्तुर्यभागिनम् ।
अभ्रातृकोहरेत् सर्व्वं दुहितृणां सुताहृते ॥

याज्ञवल्क्यः २ । १३३-१३४ ।

Even the son begotten by a Sudra on a Dasi shall have such share as (the father) may allot. (But if there be no partition till) after the father's death, then the brothers are to assign him half a share ; if there be no brothers nor daughter's sons, he takes the whole. Yajnavalkya, II. 133-134.

जात्याजातः सुतोमातुः पिण्डदः स्यात् सुतोपि च ।
जनकस्य न किञ्चित् स्यादर्थात् कामप्रवर्त्तनात् ॥

बृहत्पराशरः ५ अ । ३५६ ।

The (illegitimate) son begotten by one of equal caste is the offerer of the Pinda to the mother and is also a son to her, but he is nothing to the begetter as he is born of lust. Vrihat-Parasa, V. 356.

जायन्ते त्वनियुक्तायामेकेन बहुभिस्तथा ।
अरिक्थभाजस्ते सर्व्वे बीजिनामेव ते सुताः* ॥
दद्युस्ते बीजिने पिण्डं माता चेच्छुल्कतोहृता ।
अशुल्कोपहृतायां तु पिण्डदा बीजिनोरेव† ॥

अपरार्कनिर्णयसिन्धुधृतनारदवचनम् ।

Illegitimate sons who are born of a not appointed woman by one or several men, are all nonparticipators of wealth. They are sons of the begetter. They offer *pinda* to the begetter, if the mother had been obtained by payment of a price. When the mother had not been obtained by the payment of a price they are offerers of *pinda* of the husband of the mother.

Narada cited in the Apararka, the Madana Parijata and the Nirnaya-Sindhu.

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* The Commentary of the Vivada Ratnakara on this is अनियुक्तायां स्वैरिण्याम् । अविक्थभाजः चेच्चिकरिक्थं न लभन्ते । मातृचेच्चिकमातामहानां न रिक्थं भजन्ते इति तु प्रकाशकारः ।

† अनियोगात् सुतीयस्तु शुल्कतो जायतेत्विह ।
प्रदद्याद्बीजिने पिण्डं चेच्चिणी तु ततोऽन्यथा ॥ कूर्म्मपुराणवचनम् ।

CHAPTER VI.

MARRIAGE.

The Vedic idea of the marriage tie.

Marriage in very early times had not that sacred character which it assumed among Hindus and early Christians. Among Hindus, it assumed that character as early as the Rig-Veda. The Rig-Veda speaks of the married pair being associated in religious observances, and we find that Yajnas had to be performed by man and wife together. We find in later Vedic Sutras that the charge of the sacred fire was in the hands of the wife, and when she died she had to be burnt with that fire and with the sacrificial implements. After that, the widower could rekindle the household fire and take another wife. Polygamy was not allowable according to the spirit of the law, but it was very generally practised, though the second wife could not be associated in religious sacrifices, and was styled a wife not for duty but for lust. Polyandry was unknown among all Aryan nations, and the story of the Pandavas stands as a solitary example, for which even the fruitful brain of Vyasa could find only a lame explanation.

Purity of Aryan customs.

I have shown before that the laws of the Hindus had been settled before the time of the Rig-Veda. The identity of the marriage rules of the Vedic time with those of the present time, is conclusive on the matter. The rules of inheritance depend on the rules of marriage. I have quoted the texts of the Rig-Veda on the subject which will prove my position. Even marriage by purchase had come to be considered as not proper

among the higher classes. On the contrary, it was obligatory on the father to give the daughter ornaments and a portion. The earliest record of Aryan customs is thus of not much use in building up theories about the original customs of the primitive man. The early Aryan had very pure ideas of marriage.

Marriage in one's own *gotra* seems to have been forbidden among the ancient Aryans. If we find Europeans practising it, it is owing to their having given up the joint family system and to their having adopted the customs of Semitic peoples with whom they came in contact in their migrations.* We find however, from an ancient text of the Veda, that first cousins of another family, namely, father's sister's daughter and mother's sister's daughter, were eligible for marriage, and that there was a time when marriages between such cousins were enjoined as natural by custom, and such as always took place as a matter of course. The extension of the idea of family relationship, however, put a stop to such marriages. There was a time when persons of the same *gotra* only were considered of the same body or *Sapinda*, and marriages were not allowable among them. In early times, it was thought that no relationship existed between one and his mother's family. But these ideas, in course of time, gave way to others more civilized and natural, and persons connected by blood, though belonging to other

Marriage in one's Gotra.

* Among the ancient Persians marriage between brothers and sisters was allowable. The Rig-Veda reprobates the custom. It was a Semitic custom as evidenced by its being prevalent among the Egyptians, Assyrians, Babylonians and the Burmans. The Persians conquered the old Babylonians, and from them probably adopted the custom.

families, began to be considered as *Sapindas* and relations, and marriages between them also became prohibited. But it was in comparatively modern times *i.e.* in the Kaliyuga, that the Aditya Purana says, marriage with mother's Sapindas came to be prohibited. Sapinda relationship however, through a female was weaker than through a male; and sometimes it was considered to extend to the sixth degree, sometimes to the fourth degree, and sometimes to the second degree. The law-givers however, came very nearly to a unanimous decision on the matter, making it extend only to the fourth degree, while Sapinda relationship in the agnatic line extended to the sixth degree. But marriage in one's own *gotra* even beyond the sixth degree was never allowed.

Exogamy among Aryans

Prohibition of marriage between kindred or what is called exogamy has been supposed to have its origin (1) in infanticide, (2) in the idea of the honor of having wives by capture, (3) and in the supposed custom prevailing in man's primitive state that all the men of a tribe were married to all the women (4). But all these theories are based more on the fancy of scholars than on fact, as has been very clearly shown by professor Westermarck. The true reason is the unwillingness of men to marry their sisters and mothers and such women as they consider in the light of sisters and mothers. All the daughters of the father and of the father's brother, when they lived under the same roof, were considered in the light of sisters. Daughters

(1) McLenan's Studies in Ancient History, p. 160.
(2) Spencer's Principles of Sociology, vol. 1, pp. 619-621.
(3) Lubbock's Origin of Civilization, p. 135.

of the same household were thus ineligible for marriage. In ancient times six or seven generations lived together, who were considered as Sapinda which means both "those partaking of the same body" and "those having their food in common." Among the Romans, marriages between persons under the same *patria potestas i. e., Cognati* related within the sixth degree were *nefariæ et incestuæ nuptiæ.* These prohibitions were gradually relaxed. They were so relaxed in 49 A. D. that a man might marry even his brother's daughter but not his sister's daughter. At the end of the sixth century, the prohibition was extended even to the sixth degree. In the year 1215, it was reduced to the fourth degree by the Lateran council under Innocent III. The history of the Roman law is very interesting from its great similarity and original identity with Hindu Law in many respects. In ancient India, it was usual for six generations to live together. The word Gotra means descendants of one person and probably, originally meant those who lived in the same mess under the same head or chief. The meaning of the prohibition of marriage with a girl related within six degrees thus becomes clear. The South Slavonians even now live in house communities like the Hindus. The Greeks, the Germans, the Persians and some other Aryan races on account of the exigencies of the conditions of the countries to which they migrated, gave up the joint the family system and with it, the very strict rule of prohibited degrees which once prevailed. As a matter of fact, we find the rule of prohibition of marriage between kindred more extensive among those who retained the family system than among

those who gave it up*. Among the Hindus, who are slowly giving up the old joint family system, the relaxation of the old rule will be more beneficial than otherwise. In any case, they might very well now go back to the rules which prevailed before the Kaliyuga, according to the Aditya Purana.

Vedic forms.

In the Rig-Veda we find mention of marriages for love, for a price paid and also of marriages by way of gift and as part of sacrifices. During the time of the Rig-Veda, sacrifices had come to be celebrated with great pomp and expenditure, and sometimes the sacrificer gave his daughter away in marriage to the sacrificing priest. In the original home of the Aryans as is evidenced by the customs of Greeks and Persians, early marriage, *i.e.*, marriage of girls before fifteen was the rule. But it was not unusual for girls to marry at a maturer age and there was also the custom of girls choosing their husbands. This custom was sometimes observed by great kings in case of their having beautiful daughters, by way of a magnificent ceremony called the Swayambara, which however, in all cases described in the Ramayana or the Mahabharata, as also in modern times, as in the case of the Swayambara, of the daughter of Jaya Chandra the King of Kanauj described by the bard Chand, led to grievous dissensions, and which in the last mentioned instance, was one of the direct causes leading to the establishment of the Mahomedan power in India. In Buddhistic books we read of a practice among Kshatriyas which required the bridegroom to excel in martial exercises in a

* Westermarck's History of Human Marriage, p. 326.

tournament held for the purpose of arranging a marriage. The girl thus married was considered as purchased with valour, वीर्य्यशुल्का. A wife had always to be purchased either with money or with valour. There is no justification for supposing that marriage by capture was the original of the institution of marriage in any country at any time. "Marriage by capture" says Westermarck, "must have been very common at that stage of social development when family ties had become stronger and man lived in small groups of nearly related persons, but when the idea of barter had scarcely presented itself to his mind. Marriage by capture was succeeded by marriage by purchase, as barter in general has followed upon robbery."* It is impossible however to conceive of any organized society, in which alone there can be the institution of marriage, which could have tolerated marriage by capture. Purchase was the original form in India. Indeed, in ancient times, the most common form of marrige was that by purchase, † It is called *Manusha* by the Rishis, *i.e.*, what prevails among men.

We find also in the Rig-Veda mention of widows remarrying, and also of widows getting children by their husbands' younger brothers, though the latter custom is reprobated.

We find it stated by the law-givers that in ancient times, women were educated like men, wore the sacred thread, had to undergo the same

* The History of Human Marriage, p 546.

† Strabo says that "Indians marry many wives purchased from their parents giving a yoke of oxen." Marriage by purchase, was the common form among the ancient Romans and Persians also.

Brahmacharyya training and recited the Vedas. At the time when the Persians and the Indians parted company, Aryan women wore the sacred thread, and the custom lingered among the former till they were conquered by the Arabs. As a reminder of those good old times, the bride was invested with the sacred thread during the marriage ceremony. Among Indian Aryans, women seem to have enjoyed an amount of independence and a status of equality with men, which was rare among ancient nations. They lost it however, to a certain extent, with the growth of the religious ideal of life and the idea of the paramount necessity of the preservation of chastity among women.

Marriage among ancient Aryans.

That remarriage of widows, divorce and afterwards remarriage in certain cases were allowable is indicated by the lawgivers.

Widow marriage and divorce.

Side by side with these ideas, there was also the custom of a widow ascending the funeral pyre with her dead husband. This was an old Aryan custom, found among the ancient Indo-European races and mentioned in the Atharva Veda as primæval custom. But it was forgotten in India that the custom was a barbarous one, based upon the idea that the male lord should be placed in a position to command his wives, horses, servants, &c., after death. The custom lingered in India and was invested with such a halo of sanctity by a newly invented ideal of superhuman chastity and love as made women, who became *Satis*, glorified beings, more divine than human. But there were very few real *Satis*. Many of the widows, who in their paroxysm of grief, or forced by their relatives, became *Satis*, had to be burnt with

Sati among Indo-Europeans.

such barbarous cruelty as would shock the most hardened mind. In Rajputana and in Nepal, on the death of a prince, it was not unusual for fifty or sixty women who were his wives and *concubines* to burn themselves on the funeral pyre as *Satis*.* Blessed be the rule of the British which has put a stop to this cruel practice based upon a false ideal invented by a fanatical priesthood.†

Forms of marriage according to Rishis.

We next go to the law of marriage as laid down by the lawgivers. The eight so-called forms of marriage are described by Manu. Many of the Rishis omit the Paisacha or rape, and all of them declare it to be unlawful and very sinful. The Rakshasa, called also Khatra, or marriage by force of arms, was allowable only to the Kshatriyas, and we find that marriage by capturing remarkably beautiful girls by wars, sometimes attended with the most disastrous consequences, was not uncommon. But it was illegal in the case of all other castes. It does

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* Several such instances are mentioned in Tod's Rajsthan. It is said that about ninety women burned themselves with the celebrated Rana Jung Bahadoor of Nepal It shows that the custom was based upon the desire of the male lord to be accompanied after death by his women married and unmarried.

† According to the Rishis however, in the case of a Brahmin widow *Sati* is forbidden She is to lead the life of the ascetic, which alone leads to salvation. Madhavacharyya laid down, that notwithstanding text, "*Sati*" in all cases, is against the plain injunction of the Veda (प्रत्यक्षश्रुतिविरुद्धः),

सृतानुगमनं नास्ति ब्राह्मण्या ब्रह्मशासनात् ।
इतरेषां तु वर्णानां स्त्रीधर्मोऽयं परः स्मृतः ॥ पैठिनसिः ।
न द्वितीयं समं भर्त्रा ब्राह्मणी श्रोकमोहिता ।
प्रव्रज्यागतिमाप्नोति मरणादात्मघातिनी ॥ व्याघ्रपाद ।
या स्त्री ब्राह्मणजातीया मृतं पतिमनुव्रजेत् ।
सा स्वर्गलाभघातेन नात्मानं न पतिं नयेत् ॥ अङ्गिरा ।
अनुवर्त्तेत जीवन्तं न तु यास्यन्तं पतिम् ।
जीवेद्ब्रह्मचर्यं कुर्य्यान्मरणादात्मघातिनी ॥ विराट् ।

not seem to have been allowed, except in the case of mighty princes. Among the patrician Romans and the Spartans, but not among the Athenians, there was a custom according to which the bride had to be taken possession of with some show of force (1). They probably considered themselves as Kshatra or military classes. The custom is supposed to be a relic of the ancient practice of marriage by capture but some show of force was probably necessary in carrying away even an unwilling purchased girl. It may also be that youths of the military classes were required by fashion to make some show of courage and force at the time. In any case, the Rig-Veda the most ancient record of Aryan customs, mentions only of civilized forms of marriage. The Gandharva or marriage by choice for love was, as we have seen, not uncommon in the Vedic times. In later times it was allowable only to Kshatriyas and princes. But even in the cases of the Rakshasa and the Gandharva forms, the marriage had to be celebrated with religious ceremonies. We next come to the Asura or Manusha (human) marriage or marriage by purchase. It was the most common form of marriage in very ancient times, but with the growth of the religious ideal of life among Hindus by which the wife became a necessary partner in the performance of sacrifices, this practice was forbidden. "A purchased girl is a slave and cannot be a wife" says Kasyapa "nor can she be associated in sacrifices." Marriage by purchase, however, was allowable in the case of Vaisyas. Religious ceremonies

(1) O'scar Seyffert's Dictionary of Classical Antiquities, p. 376.

were of course necessary in this form. There only remain the four (according to some, three) higher forms of marriage. They only were lawful for Brahmanas. Now by long established custom there is only one form, namely the Brahma form of marriage, allowable for all castes. The Gandharva, if ratified with religious ceremonies, is also considered by some to be a form which is lawful for the Kshatriyas. All the others are unlawful. It will thus appear, that Mr. Mayne and some other writers on Hindu law, English and Hindu, were not justified in stating that the marriage rules were of a very loose character among ancient Hindus. Nothing could have been farther from the truth.

Ceremonies of marriage among Indo-Europeans alike.

Whether marriage was originally by purchase or by gift, it has been established by modern scholarship that the form of marriage was nearly settled when the Indo-European races parted from each other. Leist is of opinion that "there are three stages in an Indo-European marriage: (1) betrothal (2) contract, *panigraha* or clasping of hands, carrying thrice round fire and water, from right to left, offering of butter and rice on the hearth of the bride's father, sitting on the bull's hide; (3) completion,—Indian, lighting the wedding fire which is conveyed by the bridal procession from the house of the bridegroom's father to the new dwelling, offerings of food,—Latin, *domum deductio* "offering of home."* We find that the marriage ceremonies as described in the Grihya Sutras were very similar to the above. Most of the rules mentioned

* Schrader's Prehistoric Antiquities, p. 384.

in the Grihya Sutras are taken from the Rig-Veda which speaks of the Barana or seeking by friends of the girl *i.e.*, the betrothal, of the untying of the bond with the father's family and tying the bond with the husband's family, of the taking by the hand or the Panigraha, of the presents by the father before the fire, of the gift by the father or the brother of the girl, of the eating together of bride and the bride-groom and of the carrying away of the bride to the bride-groom's house in a carriage borne by two bullocks. (Rig-Veda 10 M. S. 58).* These and the other ceremonies described below show that the ceremonies of marriage among Aryan races before they parted company had been firmly settled and continued alike even in their new homes.

Ancient Hindu ceremonies.

Though various forms are mentioned in the Smritis, in all the Grihya Sutras there is only one form for the twice-born classes with slight variations and it is thus described : We find first, that one of the twice-born class, after his return from the Teacher's place, should seek a wife. He first sends friends to select the bride, and they settle with the bride's father.† This is called Barana and also gift by word of mouth or betrothal. After that, comes the ceremony of joining hands. Narada says:

* Among Greeks and the Romans as among Hindus the betrothal preceded the actual marriage. In this ceremony, the bridegroom gave the bride earnest money as in other cases of contract, or a ring in its stead. In the Homeric age, the bridegroom had to pay the bride's father a certain number of oxen or other objects of value. The daughter on her side received a suitable provision from her father as among Romans and Hindus. Among the Greeks, the wedding torch kindled at the hearth of the bride's father had to be carried with her. The wedding torch had to be carried in Roman marriage processions also. The girl had to be carried among Greeks, Romans and Hindus in a carriage drawn by bullocks. Oscar Seyffert's Dictionary of Classical Antiquiiies, p. 376.

† Rig-Veda, 10 M. 85 S. 23.

"The first does not constitute marriage, but the second is the permanent token of marriage." This last ceremony is thus described in the Grihya Sutras: The bridegroom goes with his friends to the bride's house.* At the wedding, fuel has to be put into the fire to the east of the house on a place besmearsd with cowdung Then one of the people who assist at the wedding fills a cup with "firm" water, and having walked with the waterpot round the fire on its front side silent, wrapped in his robe, stations himself to the south (of the fire) fancing north. Another person with a goad, walks in the same way, and stations himself in the same place. They place roasted grain mixed to the amount of four handfuls in a winnowing basket behind the fire, "and an upper millstone." The girl is then brought out washed and having put on a new garment given by the husband and wearing the sacred thread over her left shoulder "The bridegroom having accepted her who is given away by her father," the bridegroom and the bride then sit on a rush mat and offer oblations of clarified butter to the fire, the last oblation being offered together. The bridegroom then seizes the joined hands of the bride in which fried grain is put, and makes her stand on a stone and throws the grain with butter into the fire. The bridegroom then leads the bride round the fire and the waterpot three times with their right side turned towards it, and the girl again stands on the stone and sacrifies with fried

* In very ancient times, the bridegroom would carry with him the fire from the house of his father in the procession among all Aryan Nations.

grain and butter, which are placed in her hand by the father or brother, who sacrifices with a sword's point on her head, reciting the verse "Be thou queen of thy father-in-law's household." (Rig-Veda, X. 85,46). Then to the west of the fire, the bridegroom makes her step forward in an easterly or northerly direction, the (seven) steps of Vishnu. At each step he says, "May Vishnu go after thee. Mayst thou not be seperated from my friendship." After the seven steps he makes her stand (in that position) and murmurs:—"With seven steps we have become friends (सखा), may I attain to friendship with thee, may I not be separated from thy friendship." Then the husband seizes with his right hand the right hand of the wife and repeating the Mantra: "I seize thy hand" carries her away from her father's house in a vehicle to his own house,* and the nuptial fire is carried behind the newly married couple. When they come to the house, they put down the fire in the hall, and make the husband and the wife "sit on a red bull's hide" silently until the stars appear, and the husband then sacrifices and takes the wife out and shows to her the polar star and Arundhati, and makes her repeat the formula; "Firm art thou, may I become firm in the house of my husband." From that time for three nights they should lead a life of abstinence. On the fourth day the *Chaturthi homa* is performed, and "he should prepare a mess of cooked food of which they both eat together,"† and in the night the marriage

* This will explain the meaning of the Adhyavahanika Stridhana. See Reg-Veda, 10 M. 85 S. 20.

† Compare Roman *Confarreatio*. Mackenzie's Roman Law, p. 101.

is consummated.* "Thus he will gain a valiant son."

Marriages of youthful maidens only† were allowed in ancient times, and consummation was thought necessary, for we find texts of Likhita, Vrihaspati aud Harita, showing that only on the expiration of the fourth night and on the performance of the *Chaturthi homa* the wife becomes one with the husband and takes his *gotra*. Consummation necessar in ancient times.

The ceremonies mentioned above are even now followed with certain modifications.

Accotding to the Smritis, it is clear that the *homa* is necessary for the twice-born castes, and that marriage is completed on the performance of the seventh step ceremony, after which the wife takes the *gotra* of the husband, and is affected with impurity in case of birth and death, in the same way as he, and there is community of religious ceremonies and of property.‡ Homa and the seventh stepindispensable among twice-born castes.

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* Hiranyakeshin Grihya Sutra, 1 P. p. 6, S. 20, 21. S.B. E.S. Vol. 30. pp. 192, 193, 200. Paraskara, 1 K. 4 K. 15. Rig Veda 10 M. 85 S.

Gobhila Grihya Sutra, P. II. K.I.S. 12—16. S.B.E.S. Vol. 30. pp. 43-44.

Sankhayana Grihya Sutra, I. 13-1. S. B. E. S. Vol. 29, p. 35.

† See the note on the text of Vrihaspati and on the word Nagnika, to be found in the Sanskrit portion of this Section.

‡ Mahamahopadhyaya Chandra Kanta Tarkalanka in his Commentary on Gobhila's Sutra, after reviewing all the texts on the subject, says, that the change of *gotra* takes place, only after the *homa* of the fourth night. As a matter of fact, the *homa* of the fourth night is now performed on the night of marriage or on the day after, and is omitted by many. When the Brahmacharya at Guru's house fell into disuse and Brahmins fell from their high estate, the practice of marrying mere infants became the rule and the old rules about the duties of the fourth night became out of place and were omitted in the later Smritis. It is quite possible that the texts of Vrihaspati, Likhita and Harita, about the change of *gotra* on the fourth night, were more ancient than the text of Manu on the same subject. Vrihaspati is only another version of the original Manu. The Madana Parijata quotes a text of Narada, and says, that consummation is necessary to

Stridhan should be given at marriage.

According to the Smritis, the bride should always be given Stridhana on marriage by her parents and brothers.

Consent and marriage after maturity.

According to Hindu Law, the consent of the girl is not necessary, except in the case of the Gandharva marriage. According to orthodox modern practice, she should be given in marriage before she attains maturity. But marriage after maturity is not invalid.

Who can give in marriage according to the Smritis.

The daughter is one over whom the father alone has complete control, and he alone can make a gift of her. Gift is essential for marriage. Gift by one having no power is invalid. The father is one who has full power over his children and the paternal grandfather has equal authority. After them, the brother or any other agnatic relation, who takes the share of the deceased father of the girl in a joint family and succeeds to the headship of the family, has authority. After him, the mother and the maternal grandfather and the maternal uncle are entitled to give away a girl in marriage.

The Mitakshara does not mention the maternal grandfather and the maternal uncle. But Raghunandana supplies the omission, and the rule of the Rishis is, that these two come before the mother, as will appear from the texts of Vishnu, Narada, and Katyayana, cited in this Chapter.

Prohibitory rules according to the Rishis.

The following rules about prohibited degree appear from the Grihya-Sutras and the Smritis of Manu and Apastamba.

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constitute marriage. There is much reason to suppose, that it was so considered in ancient times. Hence we find, that a virgin widow, in whose case marriage had not been consumated, might be re-married, according to the Rishis.

(1) A girl of the same *gotra* and *pravara* is not eligible for marriage.

(2) Nor is a girl eligible who is a *sapinda* of the mother.

(3) Father's sister's daughter, mother's sister's daughter and mother's brother's daughter are not eligible. Mothers include step-mothers in this rule.

(4) Marriage is prohibited when there is such a relationship between the youth and the damsel as would make them like parent and child to each other, *e.g.*, as between one and his wife's sister's daughter or his father's brother's wife's sister *

(5) A girl is eligible who is separated by three gotras, *e.g.*, a daughter of a daughter of an agnate is not eligible, but her daughter is eligible. It is the same thing as saying one who is not connected by funeral oblations is eligible. Mother's maternal grandfather is not considered, according to the Sraddha rules, as one who is entitled to *pinda*. According to Mr. Justice Banerjee, however, three daughters should intervene. Some other writers are of opinion that four should intervene.

Originally marriages between Brahmins and Kshatriyas were allowable. According to the Smritis intermarriage between a man of a superior caste and a woman of an inferior caste, called the Anulome, was valid. The marriage between a man of an inferior caste and a woman of a superior caste, called the Pratitiona, was reprobated and their children declared practically outcaste. A Sudra woman could be married but she could never attain

Intermarriage between castes.

* Marriage with the daughter of a pupil or of a Guru who instructs in the Vedas, is prohibited according to some texts.

to the status of the lawful wife of a twiceborn man. These rules continued to be force till even the time of the Mitakshara. But later, the rule of the Aditya Purana prohibiting intermarriages altogether has, by the universal consant of Hindus, become binding law.

Intermarriages as between members of sub-divisions of the same caste were not prohibited. Sub-castes, formed by intermarriages in former times or otherwise, and regarded as such, should be considered as distinct castes. English judges have fallen into the error of considering these as sub-divisions of the same caste.

Rule about the prohibited degrees considered.

As regards the prohibited degrees, it does seem clear that the old rule, as indicated in Manu, was that girls of the same Gotra and daughters of the agnates of the maternal grandfather up to the third degree could not be married. The father's sister's daughter and mother's sister's daughter were eligible in ancient times and they are still eligible in certain parts of southern India. But Manu expressly prohibits the marriage of these two and stops there. It will be found that, if Manu's rule is given effect to, all near relations worth the name are avoided, applying the rule that a relation, when a female, is in eligible as wife to a boy, is, when a male, also ineligible as husband to a girl. According to this rule, the following persons are excluded :—daughters of the three maternal ancestors and of their male descendants, daughters of the father's sister and mother's sister, and daughter's daughters of all agnates up to the fourth degree. Supplement the rule of Manu and Gobhila by the rule of

Aswalayana embodied in rule 4 mentioned before and all reasonably near relations are excluded. To go beyond is to go to an unreasonable length.

However that may be, commentators, citing the texts of Gautama, Vasista, Yajnavalkya and other Rishis, have established that the descendants up to the sixth degree, through males or females, of paternal ancestors up to the sixth degree and descendants up to the fourth degree of the maternal ancestors up to third degree are excluded. This is the view of the Mitakshara and the Parijata. But Raghunandana and other commentators exclude relations on both sides by one degree more and that is the opinion of Mr. Justice Banerjee also. It should be here observed that the rule of the Rishis has been interpreted in the Mitakshara as meaning that all Sapinda relations are excluded. In that view Vijnaneswara's calculation is correct. Again it has been laid down by several Commentators, Raghunandana, Madhava, Kamalakara and others, that descendants up to the sixth degree and to the fourth degree, of the technical Bandhus in the paternal and maternal line respectively, are excluded. Now the word Bandhus in the text of Vasista has been interpreted by his commentator Krishna Pundit, as meaning agnates and he is correct, for the texts of Vasista and Gautama only say that the seventh from the father's Bandhus and the fifth from the mother's Bandhus are excluded. The text does not mention any other relation. Therefore it is clear that the word Bandhu there at least means agnates, as otherwise daughters of agnates of the father and the mother cannot be excluded.

Whether impotent, insane, disqualified heirs can marry.

We come next to the question, whether impotent and insance persons, as as well as those who are from birth deficient in an organ of sense or action, and those who are lepers or incurably diseased can marry. Under the strict Hindu Law, these persons are incompetent to take part in the Vedic ceremony of marriage, and marriages with them are invalid. So far as the Smritis are concerned, they declare that if a girl is married to a person so affected without knowledge, she should be married again. Some say that the texts refer only to the case of betrothal, but Katyayana makes it clear by expressly stating "even if married." But the girl would be a Punarbhu, i. *e.*, a twice married woman. A betrothed girl, it should be remembered, if married to a person other than the person to whom she is betrothed is, according to some texts, a Punarbhu. Again Madhava says that without the performance of the Homa, the legal status of wifehood (भार्यात्वम्) cannot arise. As persons insane impotent and the like are incapable of performing the Homa, they cannot contract a valid marriage. Modern custom and the opinion of modern Hindu lawyers have however, established the cruel and unreasonable rule that if a girl is married with Mantras to an insane or an impotent person, the marriage is irrevocable. The Hindu lawgivers were, the reader will be glad to find, more reasonable. As it now stands however, without legislation, as in the cass of remarriage of widows, remarriage of unfortunate girls placed within the cruel meshes of the so called Hindu Law is not possible.

Marriage by force or fraud invalid.

It is maintained by some learned writers that marrriage by force or fraud is valid. The reader

will find that fortunately that also is not Hindu Law.

Remarriage of widows was allowable in ancient times, as the texts of Narada, Vasista, Katyayana, Parasara, Devala, the Mahabharata and the Agni-purana show. But afterwards it was enjoined that the remarriage of virgin widows only was allowable. Rishyasringa says that the Sraddha of all females have to be performed with the Gotra of their first husband but in the case of virgin widows it is to be performed with the Gotra of their second husband, showing that for all spiritual purposes, their second marriage is as good as the first. (See p. 74). Modern custom has prohibited re-marriage in any case. The British legislature did well in validating the remarriage of widows by Act XV of 1856, and thus restoring the law of the Rishis.

Remarriage of widows if allowable.

Mr. Mayne has rightly observed, that there has been a deliberate omission of part of the original text in connection with Manu IX, 76, which enjoins a wife to wait 8, 6 or 3 years, and does not say what she is to do afterwards. The text must be considered as corresponding with the texts of Narada on the same matter, which clearly say that she may remarry after that period. The same deliberate omission is to be observed in connection with Gautama, Ch. 18, *v.* 15. Haradatta the commentator here says that the wife after six years may get a son by Niyoga. Similarly we find that in the text of Yajnavalkya, whose chapters on Law agree word per word with the chapters of the Agnipurana on the same subject, the verse of the Agnipurana about the second marriage of widows is

omitted. It is thus abundantly clear that the second marriage of widows and women married to persons insane, impotent or outcaste or to persons who had renounced the world was allowed. Side by side with it the ancient custom of Niyoga prevailed, and to some degree superseded it. After a woman had passed into her husband's family, the latter had full control over her, and prevented a remarriage, but allowed Niyoga. We have already seen how Niyoga fell into disuse, from pecuniary considerations, supplemented by growing ideas of strict purity, and with it the second marriage of widows also became obsolete. But in the case of virgin widows, who were very often under the control of their fathers, there was nothing to prevent a second marriage, and the lawgivers expressly enjoin their remarriage. But in cases where they had passed into the family of the husband, the father-in-law sometimes got her remarried to her husband's younger brother, and this is enjoined in Manu. But this latter practice also was considered as Niyoga and became obsolete with it. Thus second marriages of women have become obsolete. But the Smritis undoubtedly allow it. The Mahabharata says that on the death of the husband, a widow marries the husband's younger brother as if it were a matter of course.* It would not be reasonable to say that the Adipurana prohibits the remarriage of widows in the *Kaliyuga*, when Parasara, whose Smriti is admittedly intended for the *Kaliyuga*, expressly allows it.

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* पत्यभावे तथैव स्त्री देवरं कुरुते पतिम् ।
आदिपर्व ७२ अ १२ ।

If the circumstances under which it has become obsolete be considered, and the history of the law on the subject studied, no reasonable man will hesitate to give effect to the old law of the Rishis. In case of virgin widows at least, the injunction of the Smritis is clear, and there is no consideration, human or divine, which in any way militates against it. But ignorance and prejudice make men unreasonable and cruel, even to their own daughters.

Remarriage allowable by custom among lower castes.

Colonel Tod in his Annals of Rajasthan says that among the original Rajput families of Rajputana the custom of remarriage of widows prevailed in ancient times and among some, it still exists. Among the lower classes of Hindus, except among those who have adopted the customs or pretend to be twice-boru castes, the remarriage of widows is allowable by custom as a general rule. But the marriages of these people are never celebrated with the rites prescribed in the Dharma Shastras.

Object and sanctity of marriage.

The objects of marriage are the getting of children and the proper performance of religious ceremonies, according to Hindu Law. By marriage the wife becomes of the same Gotra with the husband. The husband and wife become associated with each other in religious ceremonies, in religious merit and in the enjoyment of worldly possession. There can be no partition between the husband and the wife. After death, the wife can participate in the *pinda* only in conjunction with the husband. There can be no second marriage for a woman. There can be no proper or strictly lawful second wife for a Brahmana, while one wife is living. 'A wife is received

from the gods, and not by one's own will.' I do not know of any higher ideal of marriage laid down in any other society. Now in India this ideal was not one to be found only in the Smritis but it was actually realized in life.

Let us proceed to the consideration of the law as laid down in our Courts. The only form of marriage which is now supposed to be prevalent is the Brahma form, not only among Brahmins but also among Sudras. (1) All other forms are considered as obsolete, except as mentioned below. There is always a presumption in a Hindu marriage, even among Sudras, that it has been performed according to an approved form. (2) But it should be remembered here that among lower classes of Hindus for whom no good Brahmins will officiate as priests, marriages are performed according to customary and not Shastric ceremonies.

All forms except Brahma considered obsolete.

The Gandharva form was allowable, according to the Smritis, to all the castes, but it was commendable only in the case of Kshatriyas. It is not generally recognized among any caste now-a-days. Among certain Rajas and Chiefs it has been considered to be allowable in Tippera, Orissa and Madras. (3) Among the Orissa chiefs it is called the Foolbibahi marriage. But the Calcutta and Allahabad High Courts have held that such

(1) Colebrooke, Dig. V. 499. Sivaram Casia Pillay *v.* Bagaban Pillay, Mad. Dec. of 1859, p. 44. Jaikessondas *v.* Harkesson Das, 2 Bom. 14.

(2) Jagannath *v.* Ranjit, 25 Cal. 354. Jadunath *v.* Busunt, 19 W. R. 264. Masamumt Chandra Bhaga *v.* Vishwanath, 20 I. C. 559. S. Anthekeshavalu *v.* Ramanujam, 32 Mad. 572, Meru *v.* Haji, 30 Bom. 197.

(3) Chukradhur Thakoor *v.* Beer Chandra Joobaraj, 1 W. R. 194. Ramasami *v.* Sundarabala, 17 Mad. 422.

marriages are not legal. (1) The Madras High Court has taken the right view, namely, that such marriages may be valid, if contracted with a virgin, and if the nuptial rites with *homa* are subsequently performed. (2) In the most recent case on the question, the Madras High Court has held that when a certain caste has long given up the Gandharva form of marriage and consistently adopted other and more regular forms, the Courts should not recognize the validity of the Gandharva in that caste (3)

As regards the Asura form, it is said to be allowable only among Tamils and some other castes in Madras, and among Garos and the like. It is certainly not allowable, according to the Smritis, to receive a price for the bride, and when the only consideration for the contract of a marriage is money, it is void, though an exchange marriage, when there is nothing against it, would support such a contract. (4) But when a marriage has taken place, even if it be for money, it is not reasonable or just to the girl to say that it is invalid. But among lower classes of Indians even in Bengal, girls are more often than not, given in marriage on receipt of what is called *sulka*. But even among Brahmins some times a present of money is given which is meant for the bride, and this, it has been held, does not make the marriage an Asura marriage. (5) That is the opinion of the commentators also.

Asura form how far allowable.

(1) Bhaoni *v.* Maharaj Sing, 3 All. 73.
(2) Brindavana *v.* Radhamoni, 12 Mad. 72. See 13 Moore 506.
(3) Visuanath Swamy *v.* Kamu, 21 I. C. 725, 24 Mad. L. J. 271.
(4) Amirchand *v.* Ram, 4 Punjab.
(5) Gopal Das *v.* Hurkissen Das, 2 Bom. 15.

The consequences of receiving bride price.

In a recent case in Bombay, it was held that where the guardian giving in marriage received money from the bridegroom, the marriage was in reality an Asura marriage, though all the ceremonies of a Brahma marriage had been performed. (1) In Madras however, it has been held that there is always a presumption that a marriage is in the Brahma form and that even for Sudras, Asura is not an approved form. (2) In a later case, the Bombay High Court has laid down the principle after reviewing earlier cases in Bombay and Madras that whenever there is any payment of money for the bride the marriage is an Asura marriage, whatever ceremonies may be performed. (3) It is submitted that however reprehensible may be the practice of taking money from the bridegroom or the bride's father, to hold that marriage when money is thus received, though performed with Brahma rites is a marriage in a disapproved form degrading the status of the wife is going too far. Such a rule would be greatly prejudicial to the innocent girlwife for she would not be the heiress of her husband, if she is sonless, according to some authorities and would also labour under many legal and ceremonial disabilities. There is very little justification for such a rule in the Smritis and even if there be any, under present circomstances, it should be disregarded. Every legally binding marriage properly celebrated should be considered as of approved form, irrespective of caste, as

(1) Chunilal *v.* Bhagilal, 33 Bom. 433.
(2) S. Authekesavulu *v.* Ramanujan, 32 Mad. 512.
(3) Hira *v.* Hansji Pema, 17 I. C. 949.

among all civilized nations, giving the wife equal rights in all cases. The time has gone by when Sudras should be considered as inferior human beings among whom any form of marriage is good.

A contract which entitles the parents to be paid money or a monthly allowance in consideration of marrying a daughter is void as opposed to public policy. (1)

It is now settled that only on the completion of the seventh step ceremony is a marriage complete, and the ceremonies of Briddhi-Sraddha and Nandi-mukha are not indispensably necessary. (2)

Saptapadi and Homa necessary for marriages of twice-born castes.

In Bombay and Madras, it has been held that the marriage Homam and Saptapadi ceremonies are essential for a Hindu marriage. (3) This cannot be true of marriages of Sudras who cannot perform the Homa, nor of sectarians who by custom have omitted the Homa from a long time past.

In a recent case, the Madras High Court have held that the ceremonies of Grihapravesha and Rithusanti are ceremonies "essentially connected with disposal in marriage of a girl of the Brahmin caste." (4) But the actual question before the Court was whether the expenses connected with such ceremonies were recoverable by the mother from the surviving uncle. There is no justification for holding that the non-performance of such ceremonies would make a marriage invalid.

(1) Dholi Das *v.* Fulchand, 22 Bom. 658. Baldeo *v.* Jumna, 23 All. 5 Visvanathan *v.* Saminathan, 13 Mad. 83.

(2) Brindabun *v.* Chundra, 12 Cal. 140.

(3) Authikesavalu *v.* Ramanujam, 32 Mad. 512. Chunilal *v.* Bhogilal, 33 Bom. 433.

(4) Vaikuntham *v.* Kallaperam, 13 Mad. L. J. 25.

Presumption of performance of ceremonies.

When some of the ceremonies are proved to have been performed, the rest are presumed to have been performed also. (1) But in a suit for restitution of conjugal rights mere proof of a marriage of some sort is not sufficient but proper proof of the performance of ceremonies is not necessary. (2)

Long living as husband and wife and recognition by relatives and proof that some ceremonies had been performed are sufficient to establish a valid marriage. (3) When a woman was living under the control and protection of a man, who generally lived with her and let the public know that she was his wife and also acknowledged and treated her sons as his own sons, it was held that there was a strong presumption of a valid marriage, which however could be rebutted by proof that no marriage could have taken place between them on account of some legal bar, and if none of the relatives were produced to support the marriage, by proof that none of them had been invited to the supposed marriage. (4)

Who can give in marriage according to decisions.

The father is certainly entitled to give his daughter in marriage. It has however been held that among the Kulin Brahmins of Bengal, it is possible that the mother is the natural guardian and can give away the daughter in marriage (5), and in all cases she can give in marriage, if the

(1) Brindabun *v.* Chundra, 12 Cal. 140. Bai Dewali *v.* Moti Karson, 22 Bom. 509. Inderun *v.* Ramasawmy, 12 W. R. 41 (P. C.)

(2) Surjamoni *v.* Kalikant, 24 Cal. 327. See, however, 12 Cal. 140 and 6 Mad. 466.

(3) Mauji Lal *v.* Chandrabati, 15 C. W. N., 109 P. C.

(4) Chellammal *v.* Ranganathan, 34 Mad. 277.

(5) Madhusudan *v.* Jadub Chunder, 3 W. R. 194.

father neglects his duty. (1) But the fact that the father has been convicted of theft does not take away from him the power of giving his daughter in marriage. (2) The brother, it has been held, is entitled to give away in marriage, in preference to the mother, (3) but not the separated brother of the father. (4) It has been held that the word mother, for the purpose of giving away in marriage, does not include the step-mother, and the paternal grandmother is to be preferred to the latter. (5) A guardian may delegate his power to another. (6) But all these rulings would seem meaningless if the doctrine that is now well established by the decisions, is correct, namely, that the absence of the consent of the guardian in marriage would not invalidate a marriage otherwise legally contracted and performed with all the necessary ceremonies, without force or fraud. (7) Dr. Banerjee citing the case of Anjana Dassee *v.* Prolhad Chunder (8) in favour of his opinion, doubts the correctness of the above rule, which according to him is opposed to Hindu Law. (9)

Accordingly to the Smritis, the father, grandfather and brother are certainly entitled to dispose of a girl in marriage, and in a joint family, when

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(1) Khusal Chand *v.* Bai Mani, 11 Bom. 247.

(2) Nanabhai *v.* Javardan, 12 Bom. 110.

(3) Exparte Janki Prosad Agarwala. Vyavastha Darpan, 655.

(4) S. Navasevayam *v.* Annammai, 4 Mad. II. C. 339.

(5) Maharanee Rambunsee *v.* Maharanee Soobh Koonwari, 7 W.R. 321.

(6) Golamee *v.* Juggeswar, 3 W. R. 193.

(7) Madhoosoodan *v.* Jadab Chunder, 3 W. R. 194. Brindaban *v.* Chandra, 12 Cal. 140. Venkata Charyulu *v.* Ranga Charyulu, 14 Mad. 386. Mulchand *v.* Bhudhia, 22 Bom. 812. Ghazi *v.* Sukree, 19 All. 515.

(8) 14 W. R. 403.

(9) The Hindu Law of Marriage and Stridhana, p. 52.

the widow is not entitled to her husband's share, the nearest agnatic relation has the right and the duties that go with it. The expenses of the marriage had to be met and the girl had to be given portion. It is reasonable therefore that he who takes the family property should give in marriage. In a divided family, when there is no son, the mother takes the property and she has got the disposal of the daughter. But when there is no mother, and the girl herself is the heiress of her father's property, a difficult question arises, for the nearest agnate has got an interest adverse to that of the girl. In such a case the rule of Narada may be followed and the maternal grandfather and the maternal uncle may come in after the brother and before the agnates. But as the rule accepted by all the commentators is that they come after the agnates, the latter should be preferred.

Powers of guardian and right to injunction restraining marriage.

All the difficulty arises when the girl has got property. In such cases, the Court appoints a guardian and it is not bound to appoint the nearest agnate, if he is not fit. Under the Guardian and Ward's Act, though it does not deal of marriage, as the guardian has the custody of the person of the minor, no marriage can take place without his consent. There is thus little chance of injustice now. If a marriage is celebrated against the wishes of the proper guardian, it must be with force and fraud. But it is only voidable at the instance of the proper guardian before consummation. It has been held that a guardian in marriage is entitled to ask for an injunction restraining a contemplated marriage (1),

(1) Brohmomoyee *v.* Kashi, 8 Cal. 266. Harendra *v.* Brinda, 2 C. W. N. 521.

but the Court may impose conditions upon the exercise of the right of such guardian in the interests of the girl. (1)

The doctrine of *Factum Valet* has been applied to marriages also. It has been held that when a girl is married by the mother without the consent of the father, the marriage is nevertheless not invalid. (2) It has also been held that the texts relating to guardianship in marriage are only declaratory and not mandatory (3) and that even when a marriage has taken place in disobedience to the Court's order on a mother directing her to make over her daughter to the uncle for the purpose of marriage, the marriage is good. (4) In the most recent cases on the question, it has been held in Bombay and Madras that the mother as the natural guardian has the right to give in marriage in preference to her father-in-law or to an uncle, even when there is a will by the father authorizing the uncle to get her married. (5) This probably is going too far but the marriage if completed is certainly not void. In a recent case, it has been held in Madras that the maternal uncle of a girl of marriageable age, whose parents are dead and whose paternal grandfather and paternal uncle have abandoned her, is entitled to give her in marriage and to recover the expenses of the marriage from

Factum Valet in marriage.

(1) Sridhar *v.* Hira, 12 Bom. 480.

(2) Baee Balajat *v.* Jeychand. Bellasis Rep. Sel. Bom. 247. See 14 Mad. 316.

(3) 14 Mad. 316, 19 All. 515.

(4) Bai *v.* Moti, 22 Bom. 507.

(5) Bai Ramkore *v.* Jamnadas, 17 I. C. 95. Sridhar *v.* Hiralal, 12 Bom. 480. S. Namasivayam *v.* Annasammai, 4 Mad. H. C. 339. Acha *v.* Acha, 21 Mad. L. J. 600.

the family property in the hands of the paternal uncle. (1) It was also held in that case that a marriage is not void because it was celebrated during the period of pollution. In Allahabad also a marriage celebrated by the maternal uncle against the wishes of the paternal uncle, who wished to make profit, has been upheld on the doctrines of Factum Valet. (2)

Betrothal not binding and no specific performance demandable.

We have already seen that though betrothal was always considered nearly equal to actual marriage by the Rishis, its binding effect was practically ignored by their declaring that marriage is completed only on the performance of the seven steps ceremony. Now-a-days betrothals are broken without any compunction. Under the Specific Relief Act there can be no specific performance of a contract of marriage. But compensation for any pecuniary loss, and also for any injury to character or prospects in life, which may naturally arise in the usual course of things from such breach may be recovered. (3)

Minors and marriage.

Minors are not prohibited by law from marrying and the Indian Majority Act has not modified the law on the subject. (4) In such a marriage, the consent of the guardian is necessary but a marriage legally contracted without such consent is not invalid. But it must be observed that marriage

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(1) Vencadam *v.* Siva Subramania, 13 I. C. 985, 22 Mad. L. J. 49. Acha *v.* Acha, 11 I C. 570, 21 Mad. L. J. 600.

(2) Kasturi *v.* Cheraji, 11 All. L. J. 272.

(3) Shaik Bhujun *v.* Shaik Rumjan, 24 W. R 380. Muljid *v.* Goomti, 1 Bom. 412. Rambhat *v.* Tunmaya, 16 Bom.672. Pursshottam Das *v.* Pursshottam Das, 21 Bom. 23. Amirchand *v.* Ram, 4 Punj. 398.

(4) Juggeswar *v.* Nilambar, 8 W. R. 217. Bai Gulab *v.* Thakorlal, 17 I. C. 86.

could take place only after the *samavartana* and the Rishis never contemplated the marriage of uneducated minors.

In an early case, it was held that the marriage of a lunatic was valid. (1) But it is quite clear, and Mr. Justice Banerjea is of the same opinion, that under the Hindu Law, the act of receiving the gift of the bride as well of participating in the religious ceremonies of marriage, cannot be performed by a lunatic and his marriage is quite void. The Privy Council in a recent case did not expressly decide whether the marriage of an insane person is valid but held that in any case the decision of the question depends on the degree of mental capacity and an ordinary degree of mental infirmity is not sufficient. (2)

Marriage of the insane whether valid

Persons who are deaf, dumb, blind or are afflicted with incurable diseases, it has been held, can contract a valid marriage but cannot enforce restitution of conjugal rights (3), and Mr. Justice Banerjea is of opinion that the marriage of impotent persons is valid. I have already shown that such persons cannot participate in the ceremony of marriage and their marriages are invalid. That is the opinion of the Saraswati Vilasha and the celebrated author of the Kalpataru. It is said that the certain texts of Manu contemplate such marriages. All that Manu says is 'if by some means or other such marriages take place,' and no more. But Narada, Katyayana and Parasara allow remarriages in such cases.

Marriages of deaf dumb, blind how far valid.

(1) Nanda Lal *v.* Tapeedas, 1 Morl. 287. Modhoosoodan *v.* Jabud Chander, 3 W. R. 194.

(2) Mouji Lal *v.* Chandrakuti, 15 C. W. N. 790, 11 I. C. 502.

(3) Baj Premakuvar *v.* Bhika Kalliani, 5 Bom H. C. A. C. J. 209.

Indeed the marriage in such cases is voidable at the instance of the girl.*

Consummation not necessary.

It has been held that consummation is not necessary to make a marriage complete and valid.(1)

Puberty no bar.

As regards the girl, the rule now followed by strict Hindus, is that she must be married before the age of puberty. But it is a rule disregarded all over India by all castes, except in Bengal and the Mahratta country, where Brahmins and some of the higher castes try to act up to the strict rules of the books. But as Mr. Justice Banerjea says, marriage after the age of puberty is not void, though some degree of blame is always attached to it. The time is fast approaching when on account of the keen struggle for existence, the marriage of mere boys will become rare and as a consequence, the marriage of mere girls also, and the old rule of ancient Hindus will be re-established.

Marriage with a woman with child whether valid.

The old Smritis speak of the Sahodha son but such a son does not seem to have been ever recognized as valid in historical times. Legal marriage can be contracted according to the Lawgivers only with a female who had not been enjoyed by another. Thus the marriage of a girl, who was with child or had a child by another person who was living, could not be considered valid. But there is nothing

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* It is stated by a learned writer on the question of marriage that if re-marriage was allowed in such cases, it would entail great hardship on the girl. It is difficult to understand this position. The marriage in such cases is one that should be considered as voidable at the option of the girl and her parents. Until she is remarried, her rights to property are absolute as in the case of the widows. In any case there is nothing in the law to defeat her right to maintenance.

(1) Administrator General *v.* Anandachari, 9 Mad. 466. Dadaji *v.* Rukmabai, 10 Bom. 301.