

THE POSITION OF HINDU LAW





सत्यमेव जयते

PREFACE.

Of late years much stress has been deservedly laid in all branches of historical enquiry upon the original sources. The text of this thesis is generally based on original research ; but I have not hesitated to avail myself of the results achieved by previous writers on Hindu law. Indeed the writer on any one branch of Hindu law is the debtor of all those who have gone before him in his particular sphere. I have noted my obligations to these writers in their appropriate positions. An idea of the sources from which my information is taken may be gathered from a reference to the index of authors and writers quoted in the text (pages xxix to xxxii). I claim as original those portions of the thesis which set forth before the reader the new light thrown by the aphorisms of the sage Jaimini on the status and proprietary position of women (pages 56—133 ; pp. 432—46c). The aphorisms of the sage Jaimini have not hitherto been accessible in an English form. I have translated these aphorisms and the comment of Sabar Swami thereon so far as they bear on the subject of this thesis. I have attempted while dealing with the status of women in Chapter II to refute the generally accepted doctrine of the perpetual tutelage of women in Hindu law and this discussion, I believe, is original. Other portions of the thesis which are claimed as original have been indicated in the foot-notes. For instance, at page 240, I have shown that Hemadri whose authority is respected in the Bombay Presidency throws considerable light on the question of the validity of inter-marriage between different sub-divisions of the same caste—a question upon which there is conflict of judicial opinion and which is involved in much difficulty.

My research has been conducted independently. My investigations appear to me to advance the study of law in the following respects :—Women's position in Hindu Jurisprudence is so unique that it justifies a separate treatment in detail. The subject of this thesis in its entirety has never before been thoroughly explored and elucidated. It is believed that the investigations in the following pages attempt to trace historically the various stages in the development of the position of women in Hindu law. In unfolding the principles of Hindu law on the subject I have also found it instructive to refer occasionally to the principles of Roman law which is regarded as the highest embodiment of the juridical reason of the ancient world.

CALCUTTA,

Dwarka Nath Mitter.

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CHAPTER VI.

PROPRIETARY RIGHTS OF WOMEN— STRIDHAN.

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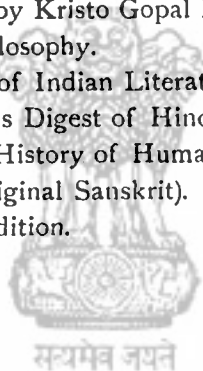
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A THESIS ON THE POSITION OF WOMEN IN HINDU LAW.



CHAPTER I.

INTRODUCTORY.

In these chapters an attempt will be made to show not only what the position of women in Hindu law is, but also how it came to be what it is. The latter part of our enquiry is apt to be regarded by the practical lawyer as unprofitable, for he will probably say that such an enquiry cannot claim to have anything more than an antiquarian interest. To such as are inclined to this mood of mind it might be sufficient to say, in the words of Chief Justice Holmes, that the history of what the law has been is necessary to the knowledge of what the law is. We might also tell them that in the field of law, as in other fields of enquiry, the present is an outcome of compromises which the past alone can explain, and that if Hindu law has grown, as we will show hereafter that it has, then in order to understand any branch of that law it has to be studied in relation to the pro-

cesses of its development. Viewed in this light an enquiry into the legal position of women in the past cannot fail to be of value to the student of Historical Jurisprudence, which, it has been said, holds fast the thread which binds together the modern and primitive conceptions of law and seeks to trace the line of connection between them. The value of such an enquiry, however, is not confined to the field of pure legal theory. It must now be recognized that, apart from its theoretical utility, the study of legal history serves the practical purposes of the lawyer. In matters of Hindu law questions of detail have not unfrequently arisen in the courts which could only be solved by the light thrown by these antiquarian enquiries. Of the numerous decisions of the different High Courts in India which illustrate this, reference might be made to the early case of *Lallubhai vs. Mankuvar Bai* (a) in which Mr. Justice West of Bombay discusses the bearing of the vedic rule as to the inheritance of women on modern Hindu Law, and to a very recent case (b) in the Calcutta High Court in which Mr. Justice Asutosh Mookerjee, in considering the validity of a gift by a widow

(a) I. L. R. 2 Bom, 388.

(b) *Churanion vs Gope*, I. L. R. 37 Cal, 1.

for the Dwiragaman ceremony of her daughter, alludes to the vedic practice of the marriage of girls after attainment of puberty.

In such a thesis as this, the first word must explain precisely what determines the position of a person in the law ; in other words, the scope of the subject must first and foremost occupy our attention.

The position of an individual in any legal system is determined with reference to his *estate* and *status* therein. Every independent State, says Foote (*a*), assumes by its laws to regulate the *status*, the acts, property, of those who are subject to it. The terms *estate* and *status*, which are in their origin the same, now convey two opposite notions, and the process of their differentiation in legal meaning forms one of the interesting topics in the history of English law (*b*). Both of these are complex terms and require to be analysed into their simpler elements in order that we may properly understand the scope of the subject of our thesis.

Scope of the subject.

Position in law consists of *estate* and *status*.

By the term *estate* when used with reference to a person is signified the aggregate of such person's proprietary rights.

Estate.

(*a*) Foote's Private International Jurisprudence, third edition, page xxvii.

(*b*) Pollock & Maitland, History of English Law, pages 10 & 78.

Proprietary rights, in a limited sense, mean the extension of the power of a person over portions of the physical world. But there is a wider sense in which the term "rights" includes both "jus in rem" and "jus in personam". In this sense a man's proprietary rights would include not only his rights to land but also his rights to the shares and debts due to him.

Status, however, is a term which is used in a variety of different meanings, and modern writers on Jurisprudence have found no little embarrassment in fixing the precise significance of the term with perfect clearness. As Mr. Hunter beautifully puts it, in his work on Roman law (*a*):—"Status is a word that in jurisprudence has been much given to wandering at large." It is commonly used to denote a man's legal condition so far as his personal rights and burdens are concerned to the exclusion of his proprietary relations (*b*). A person's status in this sense means the sum total of his personal rights, duties and liabilities. Thus, for instance, when we speak of the status of a wife we mean all the personal rights and obligations of a woman which are involved in and flow from the marriage relation. And throughout this thesis we shall use the

(*a*) Roman Law, (Hunter), page 138.

(*b*) Salmond on Jurisprudence, page 211.

word status, in this its more usual sense. We may as well mention that in its widest sense the term status means and includes both personal and proprietary conditions of any kind and would thus seem to include a person's general position in the legal scheme. Lord Justice Brett, for instance, says (a) that the status of an individual used as a legal term means the legal position of the individual in or with regard to the rest of the community. But the use of the term in its most comprehensive sense is rare, and modern Jurists limit the term status to include personal condition only. Sir Henry Sumner Maine in his now celebrated dictum about the movement of progressive societies from status to contract apparently uses the word status to mean both proprietary and personal legal conditions except such as are imposed by the agreement of parties. But, as has been observed above, status is more frequently applied to mean personal condition only, consisting of the sum total of a man's personal rights, duties, and disabilities, and as such is opposed to estate. This may be made clearer by an example. A man's right of personal liberty and of reputation and of freedom from bodily injury are personal. The rights of a husband

(a) Niboyet --vs.--Niboyet. L. R. 4 P. D. p. 1.

with respect to his wife, those of a father with respect to his children are personal rights. It is the sum total or aggregate of rights such as these that constitutes a person's status in the law. The distinction between personal and proprietary rights is to be kept apart from the distinction between personal and real rights as understood by English jurists. A real right corresponds to a duty imposed on persons generally, a personal right corresponds to a duty imposed on determinate individuals. A real right is available against the world at large, whereas a personal right is available only against particular persons. The distinction between real and personal rights corresponds to the distinction between rights in rem and rights in personam. But a personal as opposed to a proprietary right may be a right in rem as well ; for instance, the personal right of a woman to have her reputation for chastity untarnished is available against the world at large, and no one has a right to injure the good opinion that other persons may have of her. It is to be regretted that English jurists should use the same expression *personal* to indicate two different kinds of rights. But it is the context in which the terms are used that saves much confusion of thought likely to result from the same expression being used in

different senses. It is to be noticed that although the term estate includes only rights, the term status includes not only rights, but also duties, liabilities and disabilities. So that the value of any claims which others may have against a person, being his proprietary liabilities, can not be said to be his estate.

From what precedes it is manifest that a person's position in the law is the sum total of his proprietary rights and personal duties and liabilities as well as rights. The present thesis is an attempt to set forth and explain the proprietary and personal condition of women in Hindu Law at different periods of its growth and development.

Let us now pass on to consider whether there was any notion corresponding to that of status, in the limited sense defined above, in Hindu law. The nearest parallel to the conception of status is to be found in the writings of the sage Jaimini whose Purva Mimamsa contains the principles of interpretation of the Vedic law. In the sixth book of the Sutras the sage describes Adhikara Vidhis which are the rules regarding personal capacity or right. Jaimini there deals with the question as to the class of persons who are entitled to enjoy the benefit of the Vedic law and its institutions, as also with the reasons for the defective status of those who are not

Notion of
status in Hin-
du Law.

so entitled. The word Adhikara according to the Sanskrit grammarian Panini involves the idea of authority (right) with obligation (*a*). According to the Sahitya Darpan, Adhikara means the right to obtain the fruits of actions, and Adhikari means one who has the capacity to have such right (*b*). We shall see in a later chapter how the question of the competency of women to join in the duty of performing sacrifices enjoined by the Vedas is discussed in the sixth Book of the Mimansa, and further what bearing that question has on the status of women in Hindu law.

Hindu Law recognizes distinction between *estate* and *status*.

It may also be affirmed here that Hindu law does not ignore the broad distinction between the rules of property and the rules governing personal status.

The need of discussing the nature of Hindu Law.

A person's rights both proprietary and personal determine, as has been observed above, his or her whole position in the law. But what is it in virtue of which a person has legal rights? In modern times it is usually in virtue of his submission, absolute or partial, to the sovereign of the country in which he happens to reside, that a man is capable of acquiring all rights which are comprised under the Private law of the state

(a) अधिरीत्यै स्वरितेन अधिकारः अनभिहिते ।

(b) अधिकारः फलं स्वाम्यं अधिकारी चतत्प्रभुः ।

साहित्यदर्पण ।

within whose limits he is domiciled. We find therefore that the words *right* and *duty*, when used in a modern book on Jurisprudence, imply that there must be a human authority by whom rights are created and duties are enjoined. The modern conception of law is that it is an essentially human institution and that there can be no law apart from the state. In order to realize the strangeness of this view, so essentially modern, to the ancient Hindu mind, a brief notice of the nature of Hindu law becomes necessary. Besides, the subject of our thesis being the Hindu law relating to the position of women, a discussion regarding the nature of that law will not be foreign to our enquiry. On the other hand, it may be useful to enquire what Hindu Law is and has been, if not for any other purpose, at least for the purpose of indicating the difficulties with which the treatment of the subject of our thesis is surrounded. Such a discussion will also aid us in another direction. It will disclose to us the sources from which we must seek to derive materials for the treatment of the subject of our investigation.

In a text of the Vedas translated by Sir William Jones, according to the gloss of Sankara, we have the following (a) :-

Vedic conception of law

(a) Sathpatha Brahmana 14, 4, 2, 23. Brihat Aranyaka Upanishada 1, 4, 14.

“God, having created the four classes had not completed his work, but in addition to it, lest the royal and military class should become unsupportable through their power and ferocity, he produced the transcendent body of law, since law is the king of kings far more powerful and rigid than they; nothing can be mightier than law by whose aid as by that of the highest monarch even the weak may prevail over the strong.” As we shall see later the Vedas are undoubtedly, at least in theory the primary source of Hindu law, and the passage cited above conveys the notion that to the Hindu mind, Law and not the State or visible Ruler is supreme. This reverses the modern conception of positive law which is associated with the name of Austin, for according to that distinguished jurist, although the state or sovereign may be bound by law, it can change the law at will, and hence in a very real sense, is superior to it. The Vedic conception of law reminds one of the forcible criticism of the Austinian theory of sovereignty by a modern writer. “How”, says Mr. Watt, “is the enforcement of law to be regulated? By the law itself. The force is exercised in fact according to law. Even when its exercise seems arbitrary there must be some legal method behind it. It is the law, then, and not the force which is supreme.

Differs from
the Austinian
conception of
law.

The law by which the ruler rules can not be the outcome of its ruling" (a). The text of the Vedas cited above also brings into prominence the idea that law is ordained by a divine ruler and is not a mere matter of human institution ; it also presents in a striking manner the contrast between Hindu law and positive law, for every positive law exists as positive law through its position or institution given to it by a sovereign government (b). It is thus clear that the Hindu conception of law differs from the Austinian conception in the essential points of source and sanction. Sir Gooroo Das Banerjee while dealing with the authority on which Hindu Law was originally based has with great clearness pointed out the distinction between the Hindu and Austinian conception of law in a luminous passage : "In the second place" says Dr. Banerjee, in his Tagore lectures, "the notion that every law is a command of the sovereign, so fully developed in the analysis of Austin, was never associated with the Hindu's idea of law. The Hindu regards his law as commands not of any political sovereign but of the Supreme Ruler of the universe—commands which every political sovereign is

Dr. Banerjee's
view.

(a) Legal Philosophy, page 18.

(b) Austin's Jurisprudence, Vol. II., page 534.

most imperatively enjoined to obey." Positive law, according to Austin, rests on force and owes its formal validity to the command of the sovereign power. When the principles of Hindu law began to be enforced by British Courts of Justice, it then assumed the character of positive law in the modern sense of the term. Was there then no law of the Hindus before the advent of British rule? Law undoubtedly there was, but much of it fell short of the conditions which analytical jurists hold essential to law. The idea of law backed by irresistible force with which Austin has made us familiar was absent from the Hindu mind.

Idea of law in
the Smritis.

Coming to later times we find in the Smritis the same view of the character and origin of Hindu law as we find in the Vedas. Manu, the first and principal of the sages or lawgivers who composed the Smritis says :—"The immutable Power having enacted the code of laws himself taught it fully to me in the beginning ; afterwards I taught Marichi and the nine other holy sages" (a). "Let the king" (b) says the same sage, "decide causes justly observing primeval law," thus implying that law is not made by the sovereign but exists independently of him. In the Institutes of Yajnavalka we

(a) Manu, I, 58.

(b) Ibid, Chapter VIII.

find the same idea underlying the following text (a):—"The king divested of anger and avarice and associated with the learned Bramhins should investigate judicial proceedings conformable to the sacred code of the laws." Hindu law was not made by the king. It was made for him to obey and to see that it is obeyed. The Roman Emperor could say "for though the laws do not bind us yet we live in obedience to them" (b). The Hindu king could not have said the same thing for he was as much under an obligation to obey the law as any of his subjects.

If there be any primitive theory of the nature of law it seems to be that laws are the utterance of some divine person who reveals or declares as revealed to him that which is absolutely right and this desire to attribute laws to a Divine Being from whose statutes and ordinances it would be impiety to depart, is satisfied with excessive minuteness in the Brahminical recensions of early Hindu law. Whenever and wherever such notions prevail the distinction between legal and moral duty can at best be but imperfectly realised. So long as the people believe in the divine origin of

Primitive
theory of the
nature of law.

Agrees with
the Hindu
theory.

(a) Yajnavalka, cited in Mitakshara Chapter I.

(b) Moyle's Translation of Justinian, p. 78.

Mingling of
moral and le-
gal injunctions
in writings of
sages and com-
mentators.

laws, the legal and moral sanctions would act with equal force on their minds and they fail to recognize the distinction between the two. This brings us to another striking characteristic of Hindu law as embodied in the writings of Sages and lawgivers viz, that moral and legal injunctions are blended together therein. In the code of Manu which has always been treated by Hindu Sages and commentators from the earliest times as being of paramount authority, we have a mixture of positive law, morality and religion. In the writings of other sages likewise the distinction between moral and legal duties is not always kept in view. The conscious separation of law from morals and religion has been a slow and gradual process for we find the later commentators like even the ancient sages mix moral rules with rules of positive law. Their Lordships of the Judicial committee of Privy Council in a recent case made some pertinent observations in this behalf. "All these text books and commentaries" say their Lordships "are apt to mingle religious and moral considerations not being positive laws, with rules intended for positive laws. In the preface to the valuable work on Hindu Law, Sir William McNaughten says, 'It by no means follows that because an act has been pro-

hibited it should therefore be considered as illegal. The distinction between *vinculum juris* and *vinculum pudoris* is not always discernible” (a).

It may be observed here however that the sage Jaimini, the author of the Mimansa aphorisms (sutras) noticed the distinction in his writings between obligatory precepts and the precepts which are not so obligatory. A study of Jaimini's aphorisms where he discusses the difference between KratuDharma and Purusha Dharma (b) would tend to show that the distinction between legal and moral precepts is an old one for the distinction between Kratu Dharma and Purusha Dharma would correspond to the distinction between positive law and moral precept. It is true Jaimini's aphorisms deal with Vedic law and its object is to interpret the Vedic law in so far as that law related to religion and religious precepts. But as Colebrooke pointed out years ago, “the logic of the Mimansa is the logic of the law ; the rule of interpretation of civil and religious ordinances,” (c) and

Distinction
by Jaimini
between obli-
gatory and di-
rectory pre-
cepts.

(a) Rao Balwant vs. Rani Kishori I. L. R. 20 All 267, Sc. 25 I. A. 54.

(b) Jaimini B. III, Chap. IV, Adhi. 2, 18 : Ibid B II. chap. IV, Adhi. 1.

(c) Colebrooke's Miscellaneous essays, vol. I, p. 317.

therefore the same modes of reasoning that would apply to the elucidation of the distinction between the obligatory and optional injunctions in matters that relate to religion would assist us in appreciating the distinction between mandatory and directory injunctions in considering the texts of Smṛiti and Śruti that relate exclusively to jurisprudence. In a recent text-book (a) dealing with the Mīmāṃsā rules of interpretation it is pointed out that the Mīmāṃsā sūtras make another division of the Vedic Law viz., Vedic Law relating to individual culture and Vedic Law relating to duties of man as a member of the Vedic Community. The latter are of a positively obligatory character while the former are of the nature of religious precepts. The later commentators like Vijnāneswara, the author of the *Mitākshara*, or Jīmūtvahana, the author of the *Dayabhaga* draw a sharp and clear line of distinction between what is positive law and what is a mere moral religious precept, and the view has therefore prevailed in some quarters that the distinction originated with them. But in point of fact that is not so. The distinction is a much older one. When the sage Jaimini pronounced the aphorisms, civil law was dependent on the religious law and the

Distinction
clearly recog-
nized in *Daya-
bhaga* and
Mitākshara.

(a) K. L. Sircar's Tagore Lectures. (1905) Page 52.

tendency of civil law to disintegrate itself from the religious law had not manifested itself. But at the time when the later commentaries such as Mitakshara and Dayabhaga were written the disintegration had been almost complete. Neither is the distinction confined to the Bengal School as some scholars think (a). In the case of *Wooma Dae* (I. L. R. 3 Calcutta, p. 587 P. C.) it is pointed out that the distinction seems to obtain in the Mitakshara School also.

A discussion regarding the nature of Hindu law involves an enquiry into the history of its growth and development. Ihering, a writer of great vigour and originality has in his book on Roman law described the totality of the law to be an organism. Savigny, the founder of the Historical School maintains that law is an organic growth which comes into being by virtue of an inward necessity and con-

Hindu Law a growth.

(a) A Hindu Lawyer, who is also a great Sanskrit scholar has gone the length of stating that the distinction between legal and moral obligations is hardly known outside the Bengal School and that it was invented by this school in order to make that wide departure from the general body of the Hindu law, the departure which consists in giving absolute power to the father over ancestral property.

K. K. Bhattacharjya's Tagore Lecture, 1885, pages 281, 282.

tinues to develop in the same way from within by the operation of natural forces. The researches of Sir Henry Sumner Maine have demonstrated that legal ideas and institutions have a real course of development as much as the genera and species of living creatures. Hindu law forms no exception to the rule of evolution to which all legal systems are subject. "The law grows," (a) it has been well said, "as the nation grows" and Hindu law has assuredly grown with the growth and development of Hindu society. It has however been the fashion in some quarters (b) to speak that society in India is not progressive and the fact that there is no other nation on earth which can vie with the Hindus in preserving much of its antiquity in tact has undoubtedly given rise to this erroneous opinion. But society in India has never been stationary, and the fact is now recognized that even the East does change, though slowly.

This fact however seldom realized.

The importance of the fact that Hindu law has grown is unfortunately seldom realized. The notion that Hindu religion is exclusively the source of Hindu law, to

(a) Mr. Carter's History of English Legal Institutions, p. 3.

(b) Macnaughten's Hindu Law. Vol I page XX.

no small extent accounts for this (a) ; for when law is attributed to a Divine origin you can not fail to associate with it the idea of rigidity and conservatism. According to the Vedas (Sruti) and the Smritis Hindu law is Divine law—the command of God imposed on men. It is the eternal law as having existed from the commencement of the world and is immutable or unchangeable. It is not allowable to alter or derogate from it. It seems to me that it is due to the existence of this line of thought amongst the numerous followers of Hindu faith that the British Government have not legislated for the Hindus in regard to their personal status and inheritance. In the first report of the Commissioners appointed to prepare a body of substantive law for India, it has been stated that the Hindu law and the Mahomedan law derived their authority from Hindu and Mahomedan religions respectively and that therefore it follows that as British legislature can not make Hindu or Mahomedan religion so neither can it make Hindu or Mahomedan law. And the justification for this wise inactivity on the part of the British Govern-

(a) The greatest impediment in the way of progress of Hindu Jurisprudence was offered by the theory of its Divine origin which stamped a stationary character on it. Tagore Lectures on Adoption, (1888), page 84.

ment apparently seems to be that Hindu law being religious law purporting to rest on some ancient and infallible revelation, all who profess the religion must be assumed to wish the law to remain unchanged.

In theory,
Hindu law in-
capable of
Growth.

Not so in
reality.

In theory at least Hindu law is incapable of growth and development but the most superficial student of Hindu law will not fail to observe that in reality its history has been otherwise, and he will easily discover an occasional want of harmony between the ideas of the nation of the present day and the spirit of the sacred ordinances of the Vedas and the Smritis. British courts of justice in India have taken up the same view as the Indian legislature and the result has been that Hindu law has in one sense ceased to be a living law with the institution of judicial tribunals in the country.

History of the
development.

The institution of British Courts of justice arrested the indigenous development of Hindu law. As far as modern nations are concerned, the development of the living law must of necessity be carried on in the main by legislation. But, as has been observed above, Hindu law has not been altered or modified generally, with the fewest possible exceptions, in the slightest extent by British legislation out of deference

to Hindu sentiment. It will however appear that until the advent of British rule and the simultaneous institution of British courts of justice Hindu law has been a living law and has kept pace with the progress of society.

Development of Hindu Law before British rule.

The assertion can be made certainly without rashness that legislation by the Mahomedan rulers had nothing to do with this progress and development. The Mahomedan rulers were so pre-occupied with the collection of taxes and the imposition of Zazia that in legal matters they followed the line of least resistance and left Hindu jurisprudence untouched.

What then are the agencies by which Hindu law has been brought into harmony with the necessities of a growing national life? It has not been legislation, which, Sir Henry Sumner Maine rightly considers to be one of the chief agencies by which law is brought into harmony with society. To our mind, custom or usage has been one of the main instruments of legal development; It has destroyed part of the primitive Hindu law as contained in the texts of the sages, and has created new law. These usages or customs have grown side by side with the revealed law and have tended to modify imperceptibly the law as expounded therein.

Agencies which contributed to such development.

Custom, chief of such agencies.

Manu regards
custom as
source of law.

Custom is mentioned in the code of Manu as one of the sources of Hindu law. "Immemorial custom," says Manu, "is transcendent law approved in the sacred scripture and in the codes of Divine legislators ; let every man therefore of the three principal classes who has a due reverence for the supreme spirit which dwells in him diligently and constantly observe immemorial custom" (a). The position assigned to custom as one of the sources of law in the code of Manu has facilitated the reception of the customary doctrine into the law, for Manu is indisputably the oldest of the law-givers and the most authoritative of the sages. Vrihaspati says that a text in the code of Manu prevails over any contrary text of the other sages. The later Smṛiti-writers must have been greatly impressed by Manu's text regarding the force and efficacy of custom and they felt no hesitation in recording in their writings the changes of custom that took place from time to time and thus incorporated much of the customary law therein. In fact, the author of the Viramitrodaya in his disquisition on the temporal nature of proprietary right points out that all commentators consider Smṛitis on Vyavahara (Civil law) as simply reciting customs recognized by

Later Smṛiti-
writers influ-
enced by
Manu's view.

(a) Manu, Chap. I., 108.

the people. Mr. Mandlik, to whose sagacity and research we owe the admirable edition of the Institutes of Yajnavalka, maintains that custom has always been the main source of Aryan law from the earliest times. It is said that as the different Smritis were compiled they served merely to record the changes in the customs of the people that took place from time to time. The view that the different Smritis (recensions) are the reflex of the development of Hindu law at different periods or ages was carried to such length that we find it stated in the Parasara Dharma Sastra that the different *Smritis* are for different ages. In the Satya Yuga the laws of Manu must be observed, in the Treta those of Gautama, in the Dwapara those of Sankha and Likhita and in the Kali age those of Parasara (a). But this view has not been accepted by some of the writers on Hindu Law. It has not found favour with Messrs West & Buhler (b). The later commentators have under the colour of interpretation aided in the development of

Smritis incorporated custom.

So did the commentaries.

(a) कृते तु मानवा धर्म्या स्वेवायां गीतमस्य च ।

हापरे श्रद्धलिखिताः कलो पाराशरक्यता ॥

Parasara Smhita, Jibananda Vidyasagar's Edition, Page 55.

(b) See West and Buhler ; Introduction to Hindu Law p. 15.

Origin of
schools of
Hindu law.

Hindu Law. To them is due in no small degree, the credit of accomplishing the task of bringing Hindu Law into harmony with the requirements of life. These commentators have interpreted the text according to their own views of justice and expediency and according as their views have been accepted in one place and rejected in another have grown the different schools of Hindu Law.

These commentaries were all written either by Kings (*a*) or Prime Ministers or Brahmins, who on account of their great learning and high order of intelligence always occupied a commanding position in Hindu society. Their views were formed in accordance with the current public opinion which they had ample opportunity of gauging. It was the reflection of this general sentiment of right which found expression in their writings and which is the real basis of customary law. They twisted and tortured a text of the Smriti according to their own views of justice and practical utility, and those views were but the expression of the general sentiment of the people living in the particular tract where the commentator lived and flourished. What has been said above may be made clearer by an instance.

(*a*) King Aparaka of Konkan completed his well-known gloss of Yajnavalka Smriti.

Vijnaneswara, the author of the Mitakshara, which is a running commentary on the Institutes of Yajnavalka when discussing the text prescribing unequal shares for sons according to their priority of birth, lays down the general principle that practices expressly inculcated by the sacred ordinances may become obsolete and should be abandoned if opposed to public opinion. So also Nilkantha, the author of Mayukha in discussing the right of Sudras to adopt expressly refers on the authority of his own father, to custom as justifying him in the particular interpretation put by him on the following text of Saunaka :—"But a daughter's son and a sister's son are affiliated even by Sudras." Again relying on custom he comes to the conclusion that a boy can be adopted even after marriage. "According to my venerable father," says Nilkantha, "even one married and the father of a male issue is fit for adoption. And this is proper since there is nothing opposed to it." Mr. Justice Ashutosh Mookerjee has in a recent decision (*a*) noticed a passage in the Viramitrodaya where Mitramisra, the author of Viramitrodaya refers to custom as justifying him in the particular interpretation put by him on the text of the Smritis regarding re-union. That

(*a*) Basanta. vs Jogendra I. L. R. 33 Cal. pp. 374.

passage gives the view of the author of Viramitrodaya as to the person with whom re-union is permissible and therein the author maintains that he can not agree with the view of Mitakshara on the question, as to do so would be to hold that the re-union with daughter's son and the like which is recognized by the practice of the people would be improper. There cannot be therefore any doubt that these treatises and commentaries were intended to incorporate new customs and they actually did so. It was in this wise that slowly and cautiously, portions of the customary law were worked out and tested and finally incorporated into the organism of Hindu law. Such was the course of development of Hindu law before the British rule. After the institution of British courts of justice another instrument of development which affected the growth of Hindu law consisted in judicial decisions.

Development of Hindu law after British rule.

Judicial decisions contributed to such development.

When the administration of the country passed into the hands of the English people, Hindu law was allowed to remain as the personal law of the Hindus. By regulation IV of 1793 it was enacted that the Hindus were to be governed by their own law as regards succession, inheritance, marriage, religious institutions and caste. And so far as the Supreme Courts of Calcutta, Madras,

and Bombay were concerned, all matters of contract between Hindus were directed to be governed by the law and usages of the Hindus. (See 21 George III C. 70 S, 17). When therefore cases involving a dispute in regard to any one of these matters had to be decided by British courts of justice, Hindu law was made applicable. But much of the law was contained in Sanskrit texts which were inaccessible to European Judges who had to administer justice. These Judges accordingly had to seek the assistance of Pundits who gave their opinion on the disputed questions of law and these opinions were implicitly followed by them. These Pundits, like the commentators of old, twisted and tortured the texts so far as to make them harmonise with their general view of expediency and justice, which view was again coloured by the prevailing usages or customs of the time. So long therefore as the opinion of the Pundit was invariably followed, the indigenous development of the law continued. But then European scholars like Sir William Jones, Colebrooke and Sutherland turned their attention to the translations of the texts of the sages on which the Pundits rested their opinion. With the publication of these translations the Judges did not any more credulously follow the opinion of the Pundits;

Opinion of
Pundits.

but tested their accuracy by light of these translations. They sometimes rejected their opinion when the original texts did not seem to support them. But in other cases these opinions were allowed to influence the decision of Judges. In the case of the Collector of Madura vs. Moottoo Ramlinga Sathupathy (12 M. I. A. 438) their Lordships of the Judicial Committee condemned the summary treatment of the opinion of the Pundits by the Judges of the Madras High Court. Their Lordships said "these opinions at one time enjoined to be followed, and long directed to be taken by the Courts, were official and could not be shaken without weakening the foundation of much that is now received as Hindu Law in various parts of British India. Upon such materials the earlier works of European writers on the Hindu Law and the earlier decisions of our courts, were mainly founded. The opinion of a Pundit which is found to be in conflict with translated works of authority may reasonably be rejected; but those which are consistent with such works should be accepted as evidence that the doctrine which they embody has not become obsolete, but is still received as part of the customary law of the country."

When the translations made the remoter sources of Hindu law available to European

Judges there was a natural tendency to decide a case on the texts of the sages irrespective of the fact whether such opinion was or was not accepted by the Pundits or by the commentaries which represented the prevailing usage current in the part where the Pundits lived or commentators flourished (a). This was a course which was considered inadvisable by the Judicial Committee for European Judges to pursue in administering Hindu law. In the case last cited their Lordships pointed out that the duty of the Judge was to adhere to the law contained in commentaries prevalent in that part of the country where the question arose for decision. Even the wisest of legislators cannot foresee all possible contingencies that may arise. And the commentaries were silent in matters of detail. The Judges had consequently to supply these omissions according to their own views of Hindu Law. If the commentary of one school was silent on a particular point the Judges did not hesitate to borrow the law on the point from a digest or a commentary which was authoritative in another school and which contained a reference to the point in dispute (*Bishen Chand vs. Asmaida Koer*, L. R. 11. I. A., 164 S. C. 6 All. 560 at p. 574). Then again Courts have

(a) Mayne on Hindu law 7th Ed. page 44.

sometimes applied the principles of one school to determine the rights of a party governed by a different school. As we shall show hereafter the proprietary rights of women under the Mitakshara have been curtailed by the application of the principle of the Bengal School to them. Moreover certain principles of English law like *stare decisis*, and "*communis error facit jus*" have been introduced by English Judges in the decision of cases governed by Hindu law (see Bhagwan Singh vs Bhagwan Singh 21 All 412 and Jagdish vs Sheo Partab 28 I. A 100, S. C. 23 All 369).

Sources of
Hindu law.

An enquiry into the nature of Hindu law involves the enquiry regarding the sources of that law. The phrase "sources of law" has diverse meanings in jurisprudence. In one sense God is the one source of Hindu law just as sovereign is the source of law in modern European jurisprudence. But it is not here used in the sense of the fountain-head of law, but in the sense of the quarter from which we derive our knowledge of law. From what has been said already regarding the development of Hindu law in the preceding pages, it has been sufficiently indicated that the sources of Hindu law are (i) the Vedas (ii) the Smritis (iii) Commentaries (iv) Judicial decisions and (v) Customs.

But there are a few more besides these which will appear from the sayings of sages to be quoted presently. Manu says : "The Veda, the Smriti, approved usage and what is agreeable to one's conscience where there is no other guide have been declared by the wise to be the four-fold direct evidence of Dharma or law (a). Yajnavalka Says :—(b) The Sruti, the Smriti, approved usage, what is agreeable to one's soul, a good conscience and desire sprung from due deliberation, are ordained the foundation or evidence of Dharma. The same Sage tells us (c) that there are fourteen sources of knowledge and law. They are the four Vedas, the six Vedangas, the Dharma Shastras or codes of law, the Mimansa or disquisitions on the rules of Scripture, the Nyaya or science of reasoning and the Puranas or records of antiquity. Sruti which literally means "hearing" indicates that which was directly heard by or as we should say revealed to the holy Sages of old. The Srutis, which consist of the Vedas being the direct word of revelation are the primary source of Hindu law. But, although the Srutis represent the first phase in the evolution of Hindu jurisprudence, they do not contain much matter that

Sruti, or
Vedas pri-
mary source
of Hindu law.

(a) Manu II 12.

(b) Yajnavalka, verse 7 ;

(c) *ibid.* Verse 3.

may be said to pertain to jurisprudence and therefore they are practically of little importance as source of law. The Vedas are four in number Viz. Rig, Yaju, Sam and Atharvan. The first three above were at first recognised as canonical scriptures, being in the next stage of Vedic literature spoken of as the three-fold knowledge (trayee vidya). The fourth collection, the Atharva Veda attained to this position after a long struggle. The Rig Veda which is the oldest consists of lyrics mainly in praise of different Gods. The Sama Veda consists of stanzas taken from the Rig Veda and arranged solely with reference to their place in Soma sacrifice. The Yajur Veda is a book of sacrificial prayer. The Atharava Veda is in the main a book of spells and incantations and deals with witchcraft. But in all these Vedas there are incidental allusions to rules of law. These rules of law have also sometimes to be inferred from analogies or metaphors in which they are veiled. In the Rig Veda, for instance, as we shall see hereafter on the chapter which deals with marriage occurs the following hymn :—

As a virtuous (maiden) growing old in the same dwelling house with her parents (claim from them her support) so come I (to thee for support) (a).

(a) Rig Veda 6th Chap. Anuvak II. Sukta VI. Vers. 7.

From this, two rules of law may be inferred *viz.* that infant marriages were not considered imperative, and that the marriage of girls was not compulsory in the Vedic age ; and secondly, that the life-long maiden was in any event, entitled to be maintained out of her father's estate under certain conditions, if not entitled to a portion of the paternal estate.*

The Vedas consist of two portions—the Mantras and the Brahmanas. The former consist mainly of hymns which are sung by priests at sacrifices in praise of Gods. These belong to the creative period of the Vedas. The era of creative genius was followed by an epoch in which there seemed to be no necessity for offering new prayers to the Gods but it was considered more meritorious to repeat those hymns that were handed down by tradition. The main importance of old Vedic hymns and formulas lay now in their application to the details of sacrifice. The Brahmanas explained the mutual relation of the sacred text of the Vedas and the ceremonial, and contained theological speculations on the symbolical meanings of these sacrifices. The latter portion of these Brahmanas are called Aranyakas and the final portion of

Vedas composed of two parts—
(1) Mantras.

(2) Brahmana

* I believe that the passage commencing from "In the Riga Veda" &c....to "estate" is original.

these Aranyakas again deal with high philosophic themes and are known as the Upanishads.

(ii) Smritis.

Leaving the sources of law which belong to the sphere of revelation we descend to the Smritis (Memory or what is remembered) which embody the tradition derived from ancient sages to whom the Divine commands had been directly communicated. They are of practical value as sources of law as they contain much that pertains to civil law and usage. The Smritis represent the second phase in the evolution of Hindu jurisprudence. The Judicial Committee in a recent case said "the Smritis are held by orthodox Hindus to have emanated from the Deity, and to have been recorded, not like Sruti in the very words uttered by that Being but still in the language of inspired men; they 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 process of reason" (a). As we have said already, they do not contain matters exclusively appertaining to jurisprudence but

(a) Sri Balusu Gurulingaswamy vs. Sri Balusu Ramakshamma I. L. R. 22 Mad. 398. S. C. I. L. R., 21 All. 460.

mingled matters of religion, cosmogony, law, ritual and morals. These Smritis fall into two divisions *viz.* (1) the Sutras which are in prose (2) the Dharmasastras which are in verse. Research has shown that the Sutras are earlier than the Dharmasastras. The Sutras deal with Vedic ritual on the one hand and customary law on the other. As their very name shows, (Sutra—thread), these Sutras are in the form of strings (aphorisms) and aim at extreme conciseness. These Sutras again fall into two classes, *Viz.* (1) the Srauta Sutras (2) the Grihya Sutras and Dharma Sutras. The former are based on Sruti or revelation. The latter are based on Smriti or tradition. The Grihya Sutras deal with the household ceremonies. The Dharma Sutras as their name implies deal with Dharma or law. As a type, the Grihya manuals must be somewhat later than the Srauta for they regularly presuppose a knowledge of the latter (a). As the Srauta Sutras deal mainly with the sacrificial ritual we need not say anything more about them. Of the Grihya Sutras we need say nothing more than this, that they were attached to different Vedas and followed their doctrines. The Cankhayana Grihya Sutra, the Cambhya Grihya and the

Two divisions
of Smritis.

(a) Sutras.

Acvalayana Grihya belong to the Rig Veda. The chief Grihya Sutra of the Samveda is that of Gobhila. The Grihya Sutra of the white Yajur Veda is that of Parasara which is also known as Kateya or Vajasaneya Grihya Sutra. There are seven Grihya Sutras of the black Yajur Veda ; only three of them have as yet been published. The second branch of the Sutra literature based on tradition or Smritis consists, as we have already seen, of the Dharma Sutras, which deal with the customs of every day life. "They are," says Professor Macdonell, "the earliest Indian works on law, treating fully of its religious and briefly of its secular aspect. The term Dharma Sutra is strictly speaking applied to those collections of legal aphorisms which form part of a body of Sutras belonging to a particular branch (Shakha) of the Veda" (a). Only three of such Dharma Sutras have been preserved, all of them attached to the Taittiriya division of the black Yajur Veda. These are the Dharma Sutras of Apastamba, of Hiranya Kesin and of Baudhayana. The whole body of Vedic works composed in the Sutra style is according to the Indian traditional view divided into six classes called Vedangas (members of the Veda) which are referred to as one of the fourteen

(a) Macdonell's History of Sanskrit Literature, P. 258.

sources of knowledge and Dharma in the text of Yajnavalka cited above.

Next we come to the second class of Smritis, those which are in verse. They are known in common parlance by the name of Dharma Sastras. They are posterior to the Sutras (a). Sayana in commenting on a passage of the Taittiriya Aranyaka (b) observes that Manavadi Sastra derives its origin from assumed Sruti. Sayana would derive Manu and others from the Vedas. The orthodox view is that to every Smriti there corresponded a Sruti which is now lost. Professor Max Muller considers the Dharma Sastras in verse to be more modern versifications of ancient Dharma Sutras. Thus he regards the code of Manu (Manava Dharma Sastra) not to be the work of Manu but a metrical redaction of the Dharma Sutra of the Manavas, a Brahmanical School attached to one branch (Sakha) of the black Yajur Veda (c). That the Sutras or the Grihya Sutras were the sources of Smritis is also the opinion of Professor Weber (d). Mr. Muir (e) and Mr. Monier

(b) Dharma-sastras.

Origin of Smritis.

(a) See Dr. Jolly's Tagore Lectures, 1883, p. 41.

(b) See Calcutta edition of Taittiriya Aranyaka P. 9.

(c) See Professor Max Mullers' History of Ancient Sanskrit Literature, 206-208.

(d) Weber's History of Indian Literature.

(e) Muir's Sanskrit Texts Vol. III, p. 26.

Their large
influence on
Hindu Law.

Number of
Smritis.

Williams (a) take the same view. Whatever their origin, there can be no doubt, these metrical Smritis or Dharma Sastras have exercised an immense influence on the development of Hindu Law and have attained more universal authority than the Sutras. Thus the Code of Manu, with its numerous commentaries, have been studied all over India whereas the Dharma Sutra of Apastamba is not read anywhere except in certain parts of southern India. Yajnavalka mentions the name of twenty sages as having compiled the Dharma Sastras. They are Manu, Atri, Vishnu, Harita, Yajnavalka, Usanas, Angiras, Yama, Apastamba, Sambarta, Katyayana, Vrihaspsti, Parasara, Vyasa, Sankha, Likhita, Daksa, Gautama, Satatapa and Vasistha (Yajnavalka i. 4-5). On this passage the Mitakshara makes the following comment :—"This is not an exhaustive enumeration but merely illustrative" and he mentions the names of Baudhayana, Narada and Devala as authors of Dharma Sastras. Mr. Mandlik says that the number of the Smritis is very great and that many have been lost and that some exist as fragments and that others are only known from quotation in other Smritis or Digest of more modern

(a) Monier Williams' Indian Wisdom p. 213.

writers (a). He points out that the Smritis quoted by Nilkanta are 97 in number. In the Nirnayasinidhu, Kamalakara refers to 131 Smritis. The general belief is that Manu is the first law-giver of India. There has been much controversy regarding the origin of the Manu Smriti. But the generally accepted view is that of Professor Max Muller according to which Manu Smriti is based on, or is in fact a re-cast of an ancient Dharma-Sutra (b).

With regard to the Puranas, Professor Wilson in his introduction to the Vishnu Purana says that "Puranas are not authority in law, they may be received in explanation or illustration but not in proof." But a writer of repute like Raghunandan has relied on the authority of the Aditya Purana in enjoining that certain practices should be eschewed in the Kali (Iron) age for instance, Niyoga etc (c). Vyasa recognizes the authority of these Puranas and says that in a conflict between Smritis and the Puranas, the former should prevail. Sulapani also regards the Puranas as sources of law (d).

(iii) Puranas,
as sources
of law.

(a) Mr. Mandlik's Introduction to Vyabahara Mayukha p. xiii.

(b) See Introduction, Sacred Books of East, Vol. XXV p. xviii. (c) See Raghunandan's Udbaha-tattwa.

(d) इतिहास पुराणानि तु क्वचित् अलौकिकमर्थमप्रमाणयन्ति अतो धर्मोऽपि प्रमाणम् ।

(iv) Custom,
one of the
sources.

Requisites of
a valid cus-
tom.

Custom out-
weighs writ-
ten text of law.

Custom is one of the sources of law and as has been observed before has played no small part in the development of Hindu law. Custom, say the Judicial Committee of the Privy Council is a rule which in a particular family or in a particular district has from long usage obtained the force of law. It must be ancient, certain, and reasonable and being in derogation of the ordinary law of the country must be construed strictly (*a*). There has been a difference of opinion amongst commentators and modern writers on Hindu law on the question whether customs which are in conflict with some texts of *Srutis* and *Smritis* can be enforced or given effect to. *Sabarswamy, the great commentator of *Jaimini* inclines to the view that usage cannot be disregarded although it contravenes some texts of the *Vedas* (*b*). Kumarila Bhatta(*c*), another com-

(*a*) *Hurprasad vs. Saco* L. R. 3, L. A. 259, 285.

Rama vs. Shiva 14 M. L. A. 570, 585.

(*b*) See *Mimansa Darsan*, Benares Edition (Chowkhamba series p. 45—48, Chapter I.

(*c*) यद्वा मत्वर्थेणापि एतदेवाधिकरणं व्याख्यातव्यं ।

इहाय्यावर्तनिवासि शिष्टाचाराणोद्भात्य पूर्ववत् प्रामाण्याप्रामाण्यसन्देहं
शिष्टाकीपःविरुद्धम् सिद्धान्तस्त्वावदपक्रम्यते तथाहि ।

शिष्टं यावच्छ्रुतिसंश्लोकेन यत्र विरुध्यते ।

तच्छिष्टाचरणं धर्मं प्रमाणत्वेन गम्यते ॥

यदि शिष्टस्य कीपः स्याद्विरुद्धेन प्रमाणता ।

तदकीपात् न आचार प्रमाणत्व विरुध्यते ॥

Tantravartika, p. 145 Benares Edition, 1883.

mentator of Jaimini who has written a gloss on Sabar's commentary, on the other hand maintains that if custom is against express text of Sruti and Smriti then its validity is negated.*

Kulluka Bhatta in commenting on the text of Manu regarding the duty of a King to respect established usages in framing laws (*a*) adds the gloss that the King must respect the customs peculiar to the families, to the guilds and to the classes and districts, provided such customs or usages are not repugnant to the revealed law contained in the Vedas. Mr. Mayne rejects this gloss of Kulluka as mere dictum and maintains that Manu contemplated no such restriction (*b*). Dr. Jogendra Nath Siromani however strongly maintains that there is no authority for the doctrine that custom can prevail, although contrary to revealed law (*c*). Colebrooke is of the latter opinion. He says as follows on the point :—"any usage which is inconsistent with a recorded recollection is not to be practised, so long as no express text of scripture is found to support it" (*d*). The matter

* * This is believed to be the result of original research. (*a*) Manu, VIII, 46.

(*b*) Mayne on Hindu Law. 7th Edition, p. 46.

(*c*) Dr. Jogendra Siromani's Hindu Law, p. 51.

(*d*) Colebrooke's Miscellaneous Essays Vol. I. p. 313.

Custom must
not be im-
moral or con-
trary to public
policy.

however seems to be now settled by the highest tribunal for India in the case of *Collector of Madura vs. Moottoo Ramlinga* (12 M. I. A. 397) that clear proof of usage will outweigh the written text of law (*a*). Another element necessary to render a custom valid is that it should not be immoral and contrary to public policy. So far back as 1879 Mr. Justice West refused to recognise the custom of the adoption of a daughter by a dancing girl on the ground that it was contrary to morality and to public policy (*b*). But subsequent decisions both in Madras and Bombay have drawn nice distinctions and such adoptions have been sanctioned on the ground that prostitution is not a necessary consequence of becoming a dancing girl. The ratio decidendi in the Bombay case were disapproved by the learned Judges of the Madras High Court in a later case (*c*) and

(*a*) See however, I. L. R., 22 Madras 398 where the Judicial Committee observe as follows :—The extent to which the Smritis admit of special customs has not been argued in these cases and their Lordships cannot easily form any opinion about it. But in a discussion about the sources of Hindu Law by Dr. Jolly published in 1883 (See page 33), that learned Sanskrit scholar states grounds for holding that customs are only recognised by the Smriti when they do not contravene Divine laws.

(*b*) *Mathura Vs. Esu* I. L. R., 4 Bombay 545

(*c*) *Vanku vs. Mahalinga* I. L. R. 11 Madras 393.

even the High Court of Bombay refused to adopt those reasons in their entirety in a subsequent case^(a). The Madras High Court has in a series of decisions adopted the rule laid down in the case in I. L. R., 11 Madras and the result is that such adoptions only would not be recognised which are made with an immoral object so as to bring the case within the provisions of the penal law of the country. We shall have to say more of this in another place.

The commentaries which represent the third phase in the evolution of Hindu Jurisprudence must now be regarded as of the greatest practical importance as sources of law, for the Judicial Committee have once for all laid down that commentaries which are respected in the district where the case arises for decision, are decisive of the question at issue.

(v) The Commentaries.

Of all the commentaries, that by Vijnaneswara known as the Mitakshara has the widest range of influence. Its authority is supreme in the United provinces and in Behar. In western India it is decisive except in the Island of Bombay and Guzerat where the Vyavahara Mayukha prevail. In southern India it is supplemented by the Smriti Chandrika, the Daya Bibhaga, the

Mitakshara.

Vyavahara Mayukha.

(a) Tara Naikin vs. Nana I. L. R. 14 Bombay 90.

Smṛiti Chan-
drika.

Dayabhaga.

Vivada Chin-
amani.

Saraswati Vilasa and other works. Its authority is denied in Bengal in so far that it yields to the Dayabhaga in points where they differ. The Mitakshara is a running commentary on the Institutes of Yajñavalkya and its age has been fixed to be the 11th century of the Christian Era (*a*). It is supposed to be earlier than the Dayabhaga although opinion on this point is not unanimous (*b*). In Mithila, the Mitakshara is supplemented by the Vivada Chintamani, which prevails over the Mitakshara in points where they differ. The Viramitrodaya by Mitramisra is regarded as an authority by the Benares School in points which are left doubtful by the Mitakshara (*c*). It may also be consulted in Bengal in cases where the Dayabhaga is silent (*d*).

The commentaries have given rise to five schools of Hindu Law. The term 'schools of Law' as applied to different legal opinions as prevalent in different parts of India seems to have been first used by Colebrooke. Those schools are the Bengal, the

(*a*) West and Buhler's Digest of Hindu Law, second edition p. 17.

(*b*) See Dr. Jolly's Tagore Lectures 1883 p. 26.

(*c*) Giridhari Lal Roy vs. The Bengal Government 12 M. I. A. 448, 466.

(*d*) Moniram Kolita vs. Keri Kolitani I. L. R. 5 Cal 776 (p. c.)

Benares, the Mithila, the Maharastra, the Dravida schools of law. But in the opinion of Mr. Mayne there are really two schools of law marked by a vital difference of opinion viz., one which follows the Mitakshara and the other which follows the Dayabhaga (*a*). And in fact the Judicial Committee of the Privy Council in one of its earlier decisions took the same view (*b*).

But now five schools of law are recognised as we have already indicated, and the commentaries that are respected as authorities in the respective schools are given below (*c*),

*The Hindu law contains within itself the

(*a*) Mr. Golap Chandra Sircar is also of the same opinion. (See Hindu Law. Ed. 1910 p. 5)

(*b*) Cavalry Vencata vs. Collector of Masulipatam 8. M. I. A. 500, 513.

(*c*) Bengal School :—Dayabhaga, Mitakshara,
Dayatattva, Dayakramasangraha,
Viramitrodaya.

Benares School :—Mitakshara, Viramitrodaya.

Mithila School :—Mitakshara, Vivadaratnakara,
Vivada Chintamani.

Mahrasthra school or Bombay :—Mitakshara, Vyavahara Mayukha, Viramitrodaya, the Nirayasinidhu of Kamalakara, the Sanskara Kaustuba.

Dravida or Madras School :—Mitakshara, Smriti Chandrika, Parasara Madhavya, Viramitrodaya.

* Views expressed here are believed to be original.

Rules of
Interpretation

Jaimini's
Mimansa.

rules of its own interpretation. The Mimansa of Jaimini which is known as the Purva Mimansa furnish such rules (*a*). Although it purports to interpret the Vedic law, its disquisitions bear a certain resemblance to juridical questions. The logic of the Mimansa is the logic of law, the rule of interpretation of civil and religious ordinances. But the Mimansa system of interpretation has not received the amount of attention it deserves. On the other hand we find so great an authority as Mr. Mayne averse to apply to any discussion on Hindu law the Mimansa principles of interpretation. Speaking with reference to one of such Mimansa rules, Mr. Mayne expressed himself as follows :—“The rule, if finally accepted as a governing principle of interpretation would be of such a far-reaching character that it would be advisable to examine whether such a novel and disturbing element should be added to the difficulties which already encompass

(a) The Vedanta school of Philosophy, the founder of which is Vyasa, is also denominated Mimansa and in order to distinguish it from Jaimini's philosophy, the Vedanta is called the Uttar or posterior Mimansa, and the other Purva or prior Mimansa.....The Mimansa of Jaimini deals with practical or ceremonial precepts whereas the Mimansa of Vyasa relates to the theoretical or theological precepts contained in the Upanishadas.

See Mr. Golap Ch. Sarkar on Adoption p. 74.

every discussion on Hindu law" (*a*). Although the commentators refer to the rules on interpretation of Jaimini in discussing doubtful questions of law, it is strange that these rules were not judicially considered before the adoption case from Allahabad (*b*). The fact seems to be that it was thought that the rules of Mimansa had nothing to do with the interpretation of law but were intended to elucidate Vedic ritual and they were consequently overlooked by Hindu as well as English text-writers and commentators. But that the Mimansa contains much that is valuable from a legal point of view will become apparent when we deal with Jaimini's views on the status of women in the next chapter. That there is no full English translation of the Mimansa aphorisms also accounts for the paucity of reference by judges and English text-writers on Hindu law (*c*). There can be no doubt that the Mimansa of Jaimini contains no new rules of construction but are authoritative rules for the interpretation of the texts of the sacred law of the Hindus.

(*a*) Mayne's Hindu Law, (Sixth Ed). Pages 34 and 35.

(*b*) Beni Prasad vs. Hardai Bibi (F. B.) I. L. R. 14 All 72.

(*c*) See the observation of Sir John Edge in Beni prasad vs Hardai Bibi I. L. R. 14 All 70.

Difficulties of
the subject :—

* It has been shown that Hindu law has been subject to the rule of evolution and has had growth and development. But though a growth, the whole process of evolution does not unfold itself, as it were, before our very eyes by slow and almost imperceptible gradation. In this respect Hindu law offers a striking contrast to Roman law. "In the history of legal conceptions," says Dr. Hunter, "the Roman law occupies a position of unique value. It forms a connecting link between the institution of our Aryan forefathers and the complex organisation of modern society. Its ancient records carry us back to the dawn of civil jurisdiction and as we trace its course for more than a thousand years there is exhibited a panorama of legal development such as can not be matched in the history of the laws of any other people" (a). From the time that Rome emerges into the light of history a continuous history of the Roman law can be obtained. But it is not so with Hindu law. Hindu chronology is extremely uncertain. As writers have speculated and differed widely, it is not always possible to obtain

Arising from
uncertainty of
Hindu chrono-
nology.

* The discussion in the remaining pages of this Chapter is believed to be original.

(a) Hunter's Introduction to Roman Law, p. 1.

direct evidence of the relative antiquity of the texts of Hindu law. "The ancient History of India," say Messrs West and Buhler, "is enveloped in so deep a darkness and the indications that the Smritis have frequently been remodelled are so numerous that it is impossible to deduce the time of their composition from internal or even from circumstantial evidence" (*a*). The historical order of the different authorities on which our conclusions must rest is uncertain. Although European writers of celebrity like Sir William Jones and Professor Max Muller, not to mention a host of other names, have with great research and sagacity, tried to find out the historic order of the texts of the different sages, they have not succeeded in placing the matter beyond the region of conjecture and speculation. And the conclusion can be safely hazarded that neither internal nor external evidence will ever suffice to make the chronology of Hindu law certain and precise. Indeed, great difficulties are felt in dealing with any question on Hindu law in a systematic way beginning from the earliest times till now by reason of the want of an authentic history regarding its growth and development.

(*a*) West & Buhler's Digest of Hindu Law, p. 16. (2nd Edition.)

We do not for instance know whether Jaimini preceded Baudhayana in point of time or came after him. The practical difficulty arising out of such uncertainty of chronology is manifest. Our speculations have no certain basis. To take an example, Jamini's views regarding the rights of women are, as we shall see hereafter, more liberal than those of Baudhayana. If we were certain that Jaimini preceded Baudhayana then we could get sure ground for a theory that women possessed higher rights in Jaimini's time which had been curtailed by later Brahminical sages.

As illustrated
by Jaimini's
and Baudha-
yana's views
regarding wo-
men's rights.

As has been said already, from the same remoter sources of Hindu law, commentators have come to different, and sometimes to almost opposite conclusions. The age of the commentaries can not be definitely fixed and it is impossible to say how and when different rights accrued to women in the different areas. The opinions among commentators regarding women's rights are sometimes diametrically opposite. For example sister is no heir under the Bengal school of Hindu law, although she is an absolute heir in Bombay. It is indeed difficult to trace how and when from the same remoter sources the two schools came to two most divergent conclusions.

The next difficulty arises from the mingling of law, religion, ritual, cosmogony all in the same code or Dharma Shastra. If a precept of law is placed side by side with a moral or religious precept, it often-times is a matter of difficulty to distinguish between them. Numerous instances may be cited from Manu where the distinction between law and religion is completely overlooked.

Arising from mingling of Law and religion and ritual.

There is no orderly classification as in the Roman law or any of the continental systems based on the Roman law. In the Institutes of Yajñavalkya, for instance, the Dharma Shastra is divided into three sections Achara (ritual), Vyavahara (Jurisprudence), and Prayaschitta (Expiation) and the law of marriage is contained not in the section which deals with Vyavahara (Jurisprudence) but in that which deals with Achara or ritual although it is clear that the law of marriage is one of the important topics that fall within the province of Jurisprudence.

Arising from want of an orderly classification.

Then again although such purely legal writers as the author of Viramitrodaya discusses marriages between persons of different castes, there can be no doubt that the author is talking of something which had long ceased to exist. Yet in discussing this part of the law of marriage, he descends to such

Arising from juxtaposition of obsolete and current usages.

minute details that it would seem as if the author was describing the actual practice of his time. An obsolete custom or usage is referred to in the apparent faith as if it was a current one.

Arising from
the maxim
that every
sacred text is
equally true.

Another difficulty arises from the maxim of Hindu law that every sacred text is equally true. The logical consequence of this maxim is a search for consistency. The judges are bound to elicit consistent doctrines from the Hindu law texts and the writers on Hindu law are bound to evolve a consistent theory out of them. The disinclination of judges as also of the writers on Hindu law to hold that the author of Mitakshara denied the proprietary incapacity of women in general and included inherited property within the category of stridhan is to be referred to this search for consistency. The decision of the Judicial Committee in the case of *Thakoor Deyhee vs. Rai Baluk Ram* (11 Moore's I.A.p. 173) illustrates this to a certain extent. One of the questions raised in that case was whether under the Hindu Law as administered in the Benares school, property inherited by a woman becomes her stridhan and a passage of the Mitakshara directly supporting the affirmative of this proposition was strongly relied on in the course of argument. But their Lordships

As illustrated
by the view
of Mitakshara
regarding stridhan.

declined to act upon this passage and one of the reasons assigned by them was that it was inconsistent with the general spirit of Hindu law as shown by the numerous texts declaring the perpetual dependence of women. In coming to this conclusion their Lordships ignored the fact that the Mitakshara and the Smritis which contained the texts about perpetual tutelage of women represent very different stages of development of Hindu law. It would have been right to hold that the author of Mitakshara was a stronger advocate of women's rights than the ancient sages and the passage relied on should have been accepted notwithstanding its apparent inconsistency with the tenor of Hindu law as laid down by the early sages. The truth is, as has been well said (a) that the law is only approaching and never reaching consistency. It will become entirely consistent only when it ceases to grow. These are the numerous difficulties that beset the investigator in this and other branches of Hindu law.

The subject of our thesis, besides being of considerable interest, is really one of great importance, for the position of women in any civilisation shows the stage of evolu-

Importance of
the subject.

(a). Holmes' Common Law p. 36.

tion at which the civilization has arrived. Law is one of the agencies by which the life of a nation is developed and the position of women in Hindu law furnishes a true test of Hindu civilisation and culture. Law it has been said is the result of social and economic forces and cannot be studied in isolation from those forces. The position of women in any system of law represents the thought and feeling of the community with regard to them at the time when the law was made. "The degree," says Sir Henry Maine, "in which personal immunity and proprietary capacity of women are recognized in a particular state or community is a test of the degree of the advance of its civilization ; and though, the assertion is some times made to give it value, it is very far indeed from being a mere gallant common place. For in as much as no class of similar importance and extent was, in the infancy of society, placed in a position of such absolute dependence as the other sex, the degree in which the dependence has voluntarily been modified and relaxed serves undoubtedly as a rough measure of tribal, social, national capacity for self-control.... The assertion, then, that there is relation between civilization and the proprietary capacities of women is only a form of the truth that

every one of those conquests, the sum of which we call civilization, is the result of curbing some one of the strongest because of the primary impulses of human nature" (*a*). In another place, the same writer says that of all the chapters of the law of persons the most important is that which is concerned with the status of females (*b*). The position which women occupy in Hindu law is not only an index of Hindu civilisation but is also a correct criterion of the culture of the Hindu race. When the woman stands by the side of her husband possessed of full rights, with a free and independent will, restrained only so far as not to amount to undue liberty, not merely the mother of her children but the mistress of the household, not a simple chattel but a companion and friend, only then can it be said that the people amongst whom the relation of the sexes is so developed, is a truly cultured race.

It remains now to conclude this introductory chapter by describing the plan or arrangement of our thesis. We will deal in the next chapter with the status of females generally. The third chapter will be devoted to the status of wife and the law of marriage.

Plan of the
thesis.

(*a*) Early History of Institutions, p. 339.

(*b*) Maine's Ancient Law, p. 157 (Edition by Sir Frederick Pollock).

The fourth chapter will deal with the status of widows. The fifth and sixth chapters of this thesis will be devoted to a discussion of the proprietary position of women—the former chapter dealing exclusively with *inheritance*, the latter with *Stridhana*. The seventh chapter will be devoted to a discussion of the status of courtesans and dancing girls, status being there used in the widest sense.



CHAPTER II.

Status of Women Generally.

* In this chapter will be presented a general view of the status of women in Hindu law and the two following chapters will be respectively devoted to the status of wife and the status of widows in particular. The same ground may therefore in a few instances have to be traversed twice over but attempt will be made to avoid needless repetition as much as possible.

A chapter in Jaimini's *Mimansa* aphorisms offers materials for a new theory regarding the status and proprietary position of women in early Hindu law. That these materials have not been hitherto accessible in an English form is due to the fact that investigators in the field of Hindu law have not been many ; for as Dr. Ghosh said with great force and propriety, not many years ago "legal antiquities ought to engage special attention, as India offers a rich and varied field for such enquiries. The harvest has long been ripening for the sickle, but as yet, to our reproach the reapers are few in number, and that wealth of materials which should be

Materials for
a new theory
regarding sta-
tus of women

* Portions of this chapter within asterisks are the result of original research.

Generally
accepted
theory.

our pride is now our disgrace" (*a*). A study of a few Adhikaranas in the first chapter of the sixth book of the said aphorisms will make us modify considerably, if not reverse altogether our generally accepted notions regarding the personal and proprietary capacity of women in the earliest times of which we have any record. Hitherto it has been the accepted creed with the majority of the writers on Hindu law that women were in very ancient times regarded merely as chattels (*b*), that they could be bought and sold and that they were treated like slaves, that they were incapable of holding property and that gradually both their status and proprietary position were elevated by the later Smriti-writers and the commentators. In fact according to the prevailing theory, the general principle followed with respect to females is, that no right can be claimed by them unless it is supported by express authority.

Jaimini's in-
fluence on
Hindu Law.

We have already indicated in the introductory chapter what influence Jaimini's Purva Mimansa exercised on Hindu law. The Purva Mimansa teaches the art of reasoning with the express view of aiding

a) Dr. Rash Behari Ghose's Law of Mortgage in India, 3rd Edition, Page 5.

b) Mayne on Hindu law, Page 86 (6th Ed)

the interpretation of the Vedas which, as we have seen are the primary source of Hindu law. Purely legal treatises like the Mitakshara and the Dayabhaga, the Dattak-Mimansa and the Dattak-Chandrika, the Viramitrodaya and the Vyvahara Mayukha by Nilkantha contain instances of the application of the Mimansa method of reasoning to the discussion and determination of juridical questions. From these and other numerous references in the writings of the commentators to the Mimansa principles of reasoning, it will appear that Hindu law owes a heavy debt to the Mimansa system of philosophy. We will presently discuss the aphorisms which are suggestive of the new theory. Madhavacharjya, in his commentary on Jaimini's Mimansa known as Jaimini's Nyayamala Vistara describes the third Adhikarana of the first chapter of the sixth book as "the aphorisms which negative the view of the personal incapacity of women" (a). The sixth book of the Sutras deals with the Adhikarana which relates to Adhikara Vidhis. The word Adhikara according to the Sanskrit grammarian Panini involves the idea of authority with obligation. Adhikara Vidhis would mean rules regarding personal capacities or incapacities. In the commentary of

Aphorisms
suggestive of
the new theory.

(a) द्वितीये स्त्रिया अनधिकार निराकरणे सूत्रानि ।

Jaimini's Mimansa Darsan by Sabar Swami, the great Vedic Scholar, the said third Adhikarana of the sixth book is headed as "the Adhikarna that deals with the equal rights of men and women in the performance of sacrifices etcetra." We shall see the significance of the word *etcetra* hereafter. Before we enter into a study of the said Adhikarana it is necessary to explain what is signified by the word Adhikarana. An "Adhikarana" is said to consist of five limbs (parts). According to Kumarila Bhatta who has written a gloss on Sabar's commentary of Jaimini's Mimansa, the matter to be considered or discussed, the doubt raised concerning it, the *prima facie* or wrong view with regard to it, the refutation of the wrong view and the conclusion constitute the five limbs of the Adhikarana (a). The verse of Kumarila cited below shows the method of discussion of a theme pursued by Jaimini in his Mimansa aphorisms. To explain the matter more clearly, the sage in dealing with any one topic will first state, in the form of an aphorism, the matter to be considered, and then the doubt which might be raised concer-

Adhikarana explained.

Jaimini's method of discussion.

(a) विषयो विषयश्चैव पूर्वपक्ष क्षणीत्तरम् ।

निर्णयश्चेति पञ्चाङ्गं शास्त्रेधिकरणं स्मृतं ॥

Kumarila Bhatta cited in *निश्चितश्च* by Raghunandana. See also Madhavacharjyas' Nyamala Vistara, page 3.

ning it ; next he will proceed to state the view which is opposed to his own (Purva paksa), then other aphorisms will follow in support of the opposite or wrong view. When the latter becomes plausible or *prima facie* reasonable the sage will proceed to refute the same, giving reasons to support the refutation and will lastly state his own conclusion, all in the aphoristic form. This is the general method pursued by Jaimini in his Sutras but there are exceptions to the rule (a).

This topic or Adhikarana regarding the equal rights of men and women to which reference has just been made turns on a text of the Vedas to the following effect (b) :—

“*Darsa Purna Masabhyam Swargakamo yajeta.*” This Vedic text is in the nature of an injunction or command and may be translated thus,—Perform the sacrifice of *Darsa* and *Purnamasa* for the purpose of attain-

(a) Mr. Colebrooke described this method in the following terms :—It will be observed as has been intimated in speaking of the members of an Adhikarana in the Mimamsa, that a case is proposed either specified in Jaimini's text or supplied by his scholiasts, and upon this a doubt or question is raised and a solution of it is suggested which is refuted and a right conclusion established in its stead. Colebrooke's *Miscellaneous Essays* Vol. I p. 316.

(b) दशपूर्णमासाभ्याम् स्वर्गकामी यजेत ।

ing Heaven (a). Now a question is raised whether men alone are competent to perform these sacrifices or women also. We proceed without further consideration to translate the whole Adhikarana with the commentary of Sabar Swami thereon, as it has never been translated before and therefore has not been accessible hitherto to any but Sanskrit scholars. After we have done so, it will be seen that there is much in it that throws light not only on the status of women in early Hindu law, but also on their proprietary position. We have adopted the commentary or Bhasya of Sabar Swami as it is the oldest and the only full commentary in existence on the Mimamsa Sūtras. This commentary of Sabar Swami has in its turn been commented on by Kumarila Bhatta in his Tantra Vartika, Sloka Vartika and Toop Tika. It may be as well to mention here that amongst the later commentaries on the Mimamsa Sūtras, Nyamala Vistara by Madhavacharjya, to which reference has already been made, and the Sastradipika by Partha Sarathi Misra have attracted the attention of Sanskrit scholars.

Commenta-
tors of Jaimi-
ni's Mimamsa.

(a) This may also be translated as :—

Those who are desirous of attaining heaven should perform the sacrifice of Darsa and Purnamasa.

Sixth Aphorism of Jaimini (Chapter VI, Pada I, Adhikarana III) :—

Translation
of the Apho-
risms.

As the particular gender is specified it refers to males, so says (the sage) Aitisayana.

Comment of Sabar Swami.

The Vedas say that one who is desirous of attaining Heaven should perform the sacrifices of Darsa and Purnamasa. A doubt is raised viz. whether by the above revealed text a man alone having the desire of attaining Heaven is declared competent to perform sacrifices or no distinction between man and woman in this behalf is indicated. (Let us see) what is reasonable. Aitisayana thinks that man alone is competent to perform (sacrifices) for the masculine affix to the word (Swargakamo) is significant ; Why ? Because gender is specified ; therefore the words Swargakamo yajeta (sacrifice for the purpose of attaining Heaven) refer to man only and not to woman (Purvapaksa).

लिङ्गविशेषनिर्द्देशात् पुंयुक्तमैतिशायनः ॥ ६ ॥

दर्शपूर्णमासाभ्यां स्वर्गकामी यजेतेत्येवमादि समाधायते । तत्र सन्देहः । किं स्वर्गकामं पुमांसमधिकृत्य यजेतेत्येष शब्द उच्चरितः । अथ वाऽनियमः, स्त्रियं पुमांसं च ? इति । किं प्राप्तम् । पुल्लिङ्गमधिकृतं मेने ऐतिशायनः । कुतः । लिङ्गविशेषनिर्द्देशात् । पुल्लिङ्गेन विशेषणं निर्द्देशो भवति, स्वर्गकामी यजेतेति । तस्मात् पुमानुक्तो यजेतेति, न स्त्री ॥ ६ ॥ पूर्व० ॥

Seventh aphorism of Jaimini.

(That competency of man only to perform sacrifices is intended in the Vedas) because it is said therein that (in the case of destruction of the child in embryo whose sex is unknown) sin is committed.

Comment of Sabar.

In the case where the (child in embryo) of a bramhin woman is destroyed before the sex of the child can be ascertained the person causing such destruction is called *Vrunaha* in the Vedas. *Vrunaha* is the

तदुक्तित्वाच्च दोषश्रुतिरविज्ञाते ॥ ७ ॥

अविज्ञाते गर्भे हते भ्रूणहत्यानुवादी भवति । तस्मादविज्ञातेन गर्भेण हतेन भ्रूणहा भवतीति । भ्रूणहा पापकृत्तमः । यथोभयौलोकयोरुप-
करोति, तस्य हता भ्रूणहा । यज्ञहता भ्रूणहा । स यज्ञसाधनवधकारी ।
तस्मादयज्ञं भ्रूणशब्देन अभिदधाति । स हि विभक्तिं वा सर्वं, भूतिं वा
आनयति । अतो भ्रूणहा यज्ञवधकारी । स पुंयुक्तत्वादनुवादोऽवकल्प्यते ।
अविज्ञाते गर्भे हन्यमाने कदाचित् पुमान् हन्येत । तत्र यज्ञाधिकृतस्य
हतत्वाद्यज्ञवधी भ्रूणहत्या स्यात् । इतरथा यद्युभयोरधिकारस्ततो विज्ञाते
चाविज्ञाते च यज्ञवधः स्यात् । तत्र । विज्ञातग्रहणमतत्वमिति कल्प्येत ।
तस्मादविज्ञाता पुंलिङ्गस्य वाचिका विभक्तिरिति ॥ तथा, आचर्यौ हत्वा
भ्रूणहा भवति । आत्रेयीमापन्नगर्भासाहुः । अत्र=कुक्षौ अस्या विद्यते
इत्यात्रेयी । तस्मादपि पुंसोऽधिकारी गम्यते । यथा, पशुमालभेतेति पुंशु-
रिवाक्यमिति । लिङ्गविशेषनिर्द्देशात् । एवमिहापि द्रष्टव्यमिति ॥ ७ ॥ युक्तिः ॥

एवं प्राप्ते ब्रूमः—

greatest sinner ; since he destroys one who produces benefit both in this world and in the future. Therefore Vrunaha is one who has destroyed the sacrifice itself by destroying one who might perform sacrifices. Hence by the word Vruna the Vedas mean sacrifice because sacrifice protects (all persons) or produces prosperity. Therefore Vrunaha is one who destroys a sacrifice. This indicates that a person having the capacity of performing sacrifices should be a male and not a female. By killing a child in embryo before the sex of the child can be distinguished sometimes a male child is killed. In that case as one who is competent to perform sacrifices is killed, that destroyer is called Vrunaha. But if both man and woman were competent to perform sacrifices then whether the sex of the child in embryo were known or unknown still a sacrifice will be thwarted or destroyed. It would in that case have been unnecessary to use the qualifying word *Abijnate* (before sex of the child can be distinguished) in the Vedic text. Therefore the masculine affix to the word Swargakamo is significant. So also there is another text :—"Whoever kills a pregnant woman, becomes a vrunaha. The word Atreyi means pregnant woman, being derived from *Atra* (in the womb of whom.

Vidyate lives a being) (a). Just as in the case of the text, kill an animal for sacrifice, a male animal is intended because of the specification of the masculine gender similarly in the passage above quoted (*Swargakamo yajeta*) significance should be given to the gender or masculine affix. (Argument in support of *Purbapaksa*).

Eighth Aphorism of Jaimini.

Badarayana says that any one (whether man or woman) belonging to the three regenerate classes is entitled to perform sacrifices as there is no class distinction in the word (*Swargakamo*) therefore woman also is included because the three regenerate classes consist of men and women alike.

(a) Although the word *Abijnate* does not occur here still in order to harmonise with the text of the Veda cited above, the word *Abijnate* will have to be read into the text. This is apparently suggested by the exponent of the *Purvapaksha*. (*Prima facie* or wrong view).

जातिं तु बादरायणोऽविशेषात् तस्मात् स्यपि

प्रतीयेत जात्यर्थस्याविशिष्टत्वात् ॥ ८ ॥

तुशब्दः पक्षं व्यावर्तयति । नैतदस्ति, पुंसोऽधिकार इति । जातिं तु बादरायणोऽधिकृतां मन्यते स्म । आह । किमयं स्वर्गकाम इति जातिशब्दः समधिगतः । नैत्याह । कथं तर्हि । यौगिकः, स्वर्गच्छायोगेन वर्तते । केन तर्हि शब्देन जातिरुक्ता या अधिकृतेति गम्यते । नव च वयं ब्रूमो, जातिवचन इह शब्दोऽधिकारक इति । किन्तर्हि । स्वर्गकामशब्देनोभावपि स्त्रीपुंसावधिक्रियते इति । अतो न विवक्षितं पुल्लिङ्गमिति ।

Comment of Sabar.

Here the use of the word (तु—Tu) is intended to show that this aphorism contradicts the view above stated (Purvapaksa.) It can not be that men alone have the capacity to perform sacrifices for Badarayana thinks that any one belonging to the three regenerate classes can perform sacrifices quite irrespective of sex. Here a doubt may be raised viz. whether the word Swargakamo can have ever any possible reference to classes at all. The Purva-paksa answers, "Never." Because the collective compound consisting of the two words Swarga and Kama points to one who possesses the desire of attaining Heaven. Therefore by what word, it is asked, is reference to class indicated? Upon this the Sidhantini (author of the aphorisms) answers: "True there is no word which has direct reference to class but by the word Swarga-

कृतः। अविशेषात्। न हि शक्तीत्येषा विभक्तिः स्वर्गकामं लिङ्गेन विशिष्टम्। कथम्। लक्षणत्वेन श्रवणात्। स्वर्गकामो यश्च, तमेष लक्षयति शब्दः। तेन लक्षणेनाधिकृती यजेतति शब्देन उच्यते। तत्र लक्षणमविशिष्टं स्त्रियां पुंसि च। तस्माच्छब्देनोभावाऽपि स्त्रीपुंसावधिकृताविति गम्यते। तत्र केनाधिकारः स्त्रिया निवर्त्यते। विभक्त्या न चेत्। तत्र। कस्मात्। पुंनचनत्वात्। स्त्रीनिवृत्तावशक्तिः। पुंसो विभक्त्या पुनर्वचनमनर्थकमिति चेद् न। आनर्थक्येऽपि स्त्रीनिवृत्तेरभावः। परिसङ्ख्यायां स्वार्थहानिः परार्थकल्पना प्राप्तबाधश्च। न चानर्थक्यम्। निर्देशार्थत्वात्। तस्मात् न्यपि प्रतीयते जात्यर्थस्याविशिष्टत्वात् ॥ ८ ॥ मि० ॥

kamo is signified that men and women are entitled alike (to perform sacrifices). Therefore no significance is given to the masculine gender. Why ? Because the masculine affix to the word Swargakama can not restrict the term to males alone ; for emphasis is laid on the qualification alone. This word Swargakamo refers to the person who has the qualification of possessing the desire of attaining Heaven. As soon as the word Yajeta (pray and sacrifice) is uttered, it raises the question as to who is to do the act (of sacrifice). It does not raise any doubt about the sex of the person doing it. Therefore by the word (Swargakamo) it is indicated that both men and women are entitled (to perform sacrifices). Then if it be said that by the masculine affix to the word (Swargakamo) it is intended that women are excluded from the right of performing sacrifices, the answer is that masculine affix may refer to males but it does not exclude the females. For in order to exclude females (from the right of sacrifice) three difficulties will have to be faced. In the first place we will have to contemplate that the collective word Swargakamo does not carry its own import (for the word, Swargakamo which means whoever has the desire of attain-

ing Heaven can refer to both sexes). In the second place we will have to assume some other meaning than that contemplated by the text (for we will have to read into the text *men* having desire of attaining Heaven can perform sacrifices the words *and not women*). In the third place we will have to go against recognized facts. In our view the masculine affix is not without its use for by the use of the affix we are not guilty of breaking the conventional rules of grammar *a*).

Therefore women are included (in the text Swargakamo yajeta) for they are not excluded from the three regenerate classes competent to perform sacrifices. (This is the Siddhanta or the conclusion of the sage Jaimini).

Ninth aphorism. मेव नयने

Because it is enjoined as it is heard.

(a According to the Sanskrit grammarians, a word can not be used without an affix (विभक्ति).

चोदितत्वाद् यथाश्रुति ॥ ८ ॥

अथ यदुक्तं, पशुमालभेतेति पशुश्रालभ्यते । पुलिङ्गवचनसामर्थ्यात् ।
एवमिहापि पुलिङ्गवचनसामर्थ्यात् पुमान्विक्तियने यागवचनेनेति । तत्परि-
हर्तव्यम् । अत्रोच्यते । नात्र जातिद्रव्यस्य लक्षणत्वेन श्रूयते । यदि हि
लक्षणत्वेन श्रूयते, ततः स्त्रिया अपि याग उक्तो न पशुवचनेन विवर्त्येत । इदं
तु पशुत्वं यागस्य विशेषणत्वेन श्रूयते । तत्र पशुत्वस्य यागस्य च सम्बन्धी,
न द्रव्ययागयोः । यथा पशुत्वं यागसम्बन्धमेवं पशुत्वमेकत्वं च । सीऽयम्

Comment of Sabar Swami.

You, the exponent of the opposite view (Purvapaksa) said that just as by the Vedic text "kill an animal for sacrifice" a male animal is intended by reason of the masculine affix to the word "animal" so here in the present case as the word Swargakama ends with a masculine inflection it follows that males alone having the desire of attaining Heaven are entitled to perform sacrifices. But, says the Siddhantwin (author) this view of the opponent is not tenable. Here (in Swargakama) the masculine character of the class does not qualify the individual or person within it. If it was so intended, then notwithstanding the masculine affix the right of women to perform the sacrifice could not be withheld. But in the text *Pashum Alaveta*, the class of animal expressed by the word *Pashum* only (is heard

अनेकविशेषणविशिष्टो यागः श्रूयते । स यथाश्रुति एव कर्त्तव्यः । उपादेयत्वेन चोदितत्वात् ॥ यच्च दीपश्रुतिरविज्ञाते गर्भे हते आवेद्यां च पुंयुक्तत्वेनेति तत् परिहर्त्तव्यम् । अवीच्यते । अविज्ञातेन गर्भेणेत्यनुवादं प्रशंसार्थः । आवेथी च न हन्तव्येति । इत्थं गर्भो न हन्तव्यः । यदऽयुक्तेनाप्येनस्त्री भवति । पुल्लिङ्गविभक्तिः श्रूयमाणा न शक्नोति स्त्रियं निवर्त्तयितुम् । किमङ्गपुत्ररविज्ञातगर्भवचनं लिङ्गम् । तथा गीतप्रशंसार्थमावेद्या अवधसङ्कीर्त्तनम् । न चापन्नसत्त्वा आवेथी । गोचं हि एतत् । न हि अतः शब्दादयं तद्धित उत्पन्नः । समर्थानां हि तद्धित उत्पद्यते । न च अत्र-शब्दस्य सामर्थ्यमस्ति ॥ ८ ॥ आ० नि० ॥

to) qualify the performance of sacrifice, that is to say in the text the relation between the class of animal and sacrifice is indicated, not between any thing (which does not belong to the class of animal) and the sacrifice. As the class of animal is connected with the sacrifice so the singular number and the masculine gender of the word *Pashum* also qualifies the sacrifice. Therefore we hear that the sacrifice is circumscribed by many limitations. Therefore the sacrifice should be performed as the text is heard (with many qualifications) because emphasis is laid on every qualification (a). (Objections answered).

(a) This literal translation of the comment of Sabar is somewhat difficult to understand and therefore the following explanatory note is needed :—

According to Patanjali, the great commentator of Panini, words are divided into four classes : those denoting (a) class or concept (b) qualification (c) actions (d) individuals (things). Therefore the word which denotes class can never refer to individuals unless it is restricted by qualification. Here the word “Pashu” belongs to the category of words which denote “class” only. Therefore unless it is qualified by gender and number, in the text *Pashum alaveta* all the animals will have to be destroyed which is impracticable. There is a good deal of difference between the words “Pashum” and “Swargakamo” for the word “Pashum” indicates a certain species or class *viz.* animal whereas the word “Swargakamo” is not limited to the male sex, but refers to any one of

Tenth Aphorism of Jaimini (a).

Men alone have right to perform sacrifices because they have capacity to possess wealth as is evidenced by the sale and purchase by them of things but women have not the capacity to own wealth as they themselves are treated as chattels (by men.)

whatever sex who possesses the desire to attain Heaven. Unless the meaning of "Pashum" is restricted by a gender or number all animals will have to be sacrificed according to the text which seems to be an impracticable thing. Therefore according to proper mode of reasoning the word "Pashum" must be restricted to "one animal of the male sex hence the significance of number and gender. But in the case of "Swargakamo" we find no necessity of ascribing any significance to the qualifying affix for it is not impossible to conceive that every one who desires Heaven is entitled to perform sacrifices. The original verse of Patanjali in which this division of words is stated is as follows :—

चतुष्टयी खलु शब्दानाम् प्रवृत्तिः।

जाति गुणः क्रिया द्रव्यचेति ॥

(a) This Aphorism of the sage Jaimini again sets forth other objections raised by his opponent with a view to refute the same.

द्रव्यत्वात्तु पुंसां स्याद् द्रव्यसंयुक्तं क्रयविक्रयाभ्याम्-

द्रव्यत्वं स्त्रीणां द्रव्यैः समानयोगित्वात् ॥ १० ॥

पुंसां तु स्यादधिकारः। द्रव्यवत्त्वात्। द्रव्यवन्तो हि पुंसांसी न स्त्रियः। द्रव्यसंयुक्तं चैतत् कर्म। ब्रीहिभिर्यजेत, यवैर्यजेतेत्येवमादि। कथम् अद्रव्यत्वं स्त्रीणाम्। क्रयविक्रयाभ्याम्। क्रयविक्रयसंयुक्ता हि स्त्रियः। पिता विक्रीयन्ते। भर्ता क्रियन्ते। विक्रीतत्वाच्च पितृपनानामनौश्रियः।

Comment of Sabar Swami.

Males alone are entitled (to perform sacrifices) for males alone and not females possess the requisite means (wealth) necessary for performing sacrifices. Sacrifices can not be performed without wealth..... Women cannot perform sacrifices as they do not possess the capacity of owning property or wealth. Why? Because women are like chattels for they are themselves liable to be bought and sold. They are sold by their fathers; they are bought by their husbands. As they can be sold they can not have any right to their father's estate. As they are purchased they can not have any right over the property of their purchasers (husbands). The Vedas say : let hundred chariots be given to the father or guardian of the bride, (and in the Arsha* form of marriage) let one ox and one cow be given. It is apparent that the gift of the hundred chariots is made with the object of inducing the bride's father to part with his daughter hence the gift can not

क्रीतत्वाच्च भर्तृधनानाम् । विक्रयो हि यूयते । शतमधिरथं दुहितमते
दद्यात्, आर्षे गीमिथुनमिति । न चैतद् दृष्टार्थे सति आनमनेऽदृष्टार्थं
भवितुमर्हति । एवं द्रव्ये समानयोगित्वं स्त्रीषाम् ॥ १० ॥ पूर्व० ॥

* There were eight forms of marriage as we shall see later.

be said to be made for a religious purpose (Purvapaksa) (a).

Eleventh Aphorism of Jaimini.

In the same way other evidence is found (to support the opponent's view).

Comment of Sabar Swami.

The text of the Smṛiti "If any woman being purchased by the husband has sexual intercourse with another" :...shows that women could be bought. (Illustration in support of the 10th aphorism).

Twelfth aphorism of Jaimini (b).

The act of women which leads to acquisition of wealth conduces to the benefit of her husband (and not to her own).

(a) By this process of reasoning the Purvapaksa (exponents of the opposite view) seek to make out that women are on a level with chattels.

(b) This aphorism is given in support of the Purvapaksa (opposite view) and meets a doubt raised by way of anticipation—a doubt which the followers of the author (Jaimini) may raise.

तथा चान्यार्थदर्शनम् ॥ ११ ॥

या पत्या क्रीता सत्यथान्यथैतौति क्रीततां दर्शयति ॥ ११ ॥ उदाहरणम् ॥

तादर्थ्यात् कर्मतादर्थ्यम् ॥ १२ ॥

आह यदनया भर्तृपसर्पणेन वा कर्त्तनेन वा धनमुपार्जितं, तेन यज्यते इति। उच्यते। तदप्यस्या न स्वम्। यदा हि साऽन्यस्य स्वभूता, तदा यत् तदीयं तदपि तस्यैव। अपिच, स्वामिनस्तथा कर्म कर्त्तव्यम्। न तत्

Comment of Sabar Swami.

If any one objects that a woman may perform sacrifices with wealth which she earns by cooking food for others, or by saving from the food (diet) given, her the answer is that that is not her wealth.

When she herself is another's property the acquisitions belong to that other. Again, whatever she does is intended for the purpose of serving her husband. Leaving the duties (a) towards her husband she can not do any thing for herself ; whatever is acquired by her by other means belongs to her husband. So we have it in the Smritis "A wife, a son and a slave these three are declared as having no wealth of their own. The wealth which they may earn is the wealth of the man to whom they belong."

Thirteenth aphorism.

The earnestness (of women) for performing sacrifices in order to obtain its fruit is the same as that of men.

परित्यज्य स्वकर्माहंति कर्तुम् । यत्तयाऽन्येन प्रकारिणोपाज्यन्ते, तत् पत्युरेव स्वं भवितुमर्हतीति । एवञ्च स्मरति—

भार्या दासश्च पुत्रश्च निर्दनाः सर्व एव ते ।

यत्ते समधिगच्छन्ति, यद्य ते तस्य तद्वन्नमिति ॥ १२ ॥ आ० नि० ॥

(a) The suggestion probably is that the whole of her time must be devoted towards serving her husband. She can not call any time her own.

फलोत्साहाविशेषात् ॥ १३ ॥

तु शब्दः पक्षं व्यावर्तयति । न चेत्तदस्ति । निर्दना स्तीति । द्रव्यवती हि सा । फलोत्साहाविशेषात् स्मृतिप्रामाण्याद् अथवा तथा भवितव्यं,

Comment of Sabar.

The word तु (tu) in Sanskrit indicates that the objection of the exponents of the Purvapaksa is finished and the answer of Uttarpaksa has commenced. It is not a fact that women have no capacity to possess wealth. They have the capacity of owning wealth. They have the desire and earnestness for obtaining the fruit (attaining the merit) of performing sacrifices (in common with men). According to the Smritis, although (it is conceded) that they (women) have the desire for the fruit of performing sacrifices still whatever they earn belong to those (men) to whom they (women) belong. But according to the Sruti whoever has the desire for obtaining the reward of performing sacrifices can perform them. If you want to make women subordinate to or dependent on others and incapable of possessing wealth according to the text of the Smritis, then there is a conflict between the Sruti and the Smriti. This is not reasonable or just (a).

फलार्थिन्यापि। श्रुतिविशेषात् फलार्थिन्या यष्टव्यम्। यदि स्मृतिमनुकङ्क्षमाना परवशा निवृत्ता च स्यात्, यजेतेत्युक्ते सति न यजेत। तत्र स्मृत्या श्रुतिर्बाध्येत। न चेत्तत्राथ्यम्। तस्मात् फलार्थिनौ सती स्मृतिमप्रमाणीकृत्य द्रव्यं परिगृह्णीयाद् यजेत चेति ॥ १३ ॥ उत्तरम् ॥

(a) There is a well known rule of interpretation in Hindu law that in a conflict between the Sruti (revelation) and the Smriti (recorded recollection) the former (Sruti) must prevail.

Therefore women having the desire for the fruits of the act of performing sacrifices must on the strength of the Sruti, and in entire disregard of the Smritis be held capable of possessing wealth and performing sacrifices (Uttarpaksa).

Fourteenth Aphorism.

They (women) are also possessed of wealth.

Comment of Sabar.

But she (woman) has the capacity of owning wealth or property. At the time of marriage when the bride is presented to the bridegroom the father of the bride is required to utter the following :—She (the bride) should not be prevented (by the bridegroom) from acquiring Dharma, performing religious acts, from acquiring wealth and from fulfilling her legal desires. Therefore although the Smritis speak of the incapacity of the wife to possess wealth that is very unjust, because that is opposed to the Sruti. The theory of their dependence can only be

अर्थेन च समवेतत्वात् ॥ १४ ॥

अर्थेन चास्याः समवेतत्वं भवति । एवं दानकाले संवादः क्रियते—
धर्मे च अर्थे च कामे च नाऽतिचरितव्येति । यत्तूच्यते । भार्याऽदयो
निर्देना इति । अर्थमाद्यमपि निर्धनत्वमन्याय्यमेव । युतिविरोधात् । तस्माद्
स्वातन्त्र्यमनेन प्रकारेणोच्यते, संव्यवहारप्रसिद्धार्थम् ॥ १४ ॥ युक्तिः ॥

supported to the extent necessary to restrict them in their dealings with society (a).

Fifteenth Aphorism.

The purchase (of girls) is a religious ceremony.

Comment of Sabar.

As to what was said of the purchase of the girl, it is not a purchase ; it (gift) is merely a religious ceremony made to fulfil the law. For in the case of purchase there is variation of price. The gift of hundred chariots by the father does not vary. It is constant in all cases. Hundred chariots are given in all cases whether the girl is beautiful or not beautiful (ugly) (a). The texts of

(a) Jaimini does not restrict the liberty of women. The restriction is Sabar's who lived and flourished after the period of the Smritis and was to some extent influenced by the teaching of the Smritis. Besides the restriction suggested would seem to be a restriction to which every man is also subject as member of society.

क्रयस्य धर्ममात्रत्वम् ॥ १५ ॥

यत्तु क्रयः श्रूयते । धर्ममात्रं तु तत् । नासौ क्रय इति । क्रयो हि उच्चनीचपण्यपणी भवति । नियतं त्विदं दानम् । शतमधिरथं शोभनामशोभनाच्च कन्यां प्रति । आर्त्तं च श्रुतिविरुद्धं विक्रयं नानुमन्यन्ते । तस्माद् अविक्रयोऽयमिति ॥ १५ ॥ आ० नि० ॥

(a) The suggestion is that is that if the transaction were a sale, in the case of handsome or beautiful girls the price may be less than in the case of girls that are not handsome. But as the gift is constant in all cases viz 100 chariots it is paid not as price but in pursuance of a custom.

the Smṛiti about the transaction being a sale are opposed to the Śrutis and should be ignored or disregarded. Therefore the conclusion is that girls are not sold.

Sixteenth Aphorism.

Certain Vedic text shows that women have the capacity of owning and possessing wealth.

Comment of Sabar.

(The Vedic text) is as follows :—

The wife is entitled to the wealth given at the time of marriage (Yautuka) and whatever is acquired by the husband is permitted to belong to her. Women are made to perform sacrifices on account of their wealth, Wealth alone is their strength. By virtue of wealth which they possess they are entitled to govern another's (their husband's) household. Thus ends the Adhikarana which deal with the equal rights of men and women to perform sacrifices.

(a) It is to be noticed here that Jaimini makes no distinction between wealth acquired by inheritance and wealth acquired in other ways.

स्वत्तामपि दर्शयति ॥ १६ ॥

पत्नी वै पारिणयस्य ईष्टे पत्यैव गतमनुमतं क्रियते । तथा भसदा पत्नीः संयाजयन्ति । भसदौय्या हि पत्नयः । भसदा वा एताः परगृह्णाणामेष्टव्यमवकुर्वन्ते इति ॥ १६ ॥ यक्तिः ॥ यागादिषु स्त्रीपुंसयोरुभयोरधिकाराधिकरणम् ॥ ३ ॥

The next topic or (Adhikarana) deals with the rights of husband and wife to perform sacrifices jointly. We now proceed to translate this Adhikarana also as we think that it contains much useful information regarding the Status of women in early Hindu Law. But before we do so it is necessary to state that in this Adhikarana which we are going presently to translate, Jaimini has departed from the usual method of discussion followed by him in his Mimansa Sutrās. We have seen already that usually Jaimini states the view opposed to his own (Purva-paksa) in the form of an aphorism then he states the reasons supporting the opposite view and lastly he stated his own conclusion (Sidhwanta) But in this topic about the rights of men and women to perform sacrifices jointly he reverses the usual mode and states his own conclusion first.

Seventeenth aphorism of Jaimini.

By virtue of (Vedic) texts, the husband and wife while both are capable of possessing wealth should perform sacrifices jointly.

स्वतीसु वचनादैककर्म्यं स्यात् ॥ १७ ॥

स्वन्तावभाषपि दम्पती इत्येवं तावत् स्थितम् । तत्र सन्देहः । किं वृथक् पत्नी यजेत, पृथग् यजमानः ? उत सम्भूय यजेयातामिति । किं प्राप्तम् । पृथक्त्वेन । कुतः । एकवचनस्य विवक्षितत्वात् । उपादेयत्वेन कर्ता यजेतेति श्रूयते । तच्चादैकवचनं विवक्ष्यते । यथा न द्वौ पुरुषौ सम्भूय

Comment of Sabar.

It has been established that both husband and wife have the capacity of owning or holding wealth (property). Now a doubt is raised whether they are to perform sacrifices jointly or separately. Let us see which of these alternatives is prima-facie reasonable. The former (i.e. separately) seems reasonable. Why? Because the singular number is significant and

यजेयातां, तथाऽत्रापि द्रष्टव्यम् ॥ एवं प्राप्ते ब्रूमः । स्वतन्त्रं वचनादेक-
कर्म स्यात् । वचनात्तयोः सह क्रिया । एवं हि स्मरन्ति, धर्मं चार्थं च
कामे च नातिचरितव्येति । तथा सहधर्मश्चरितव्यः सहापत्यमुत्पादितव्य-
मिति । उच्यते । स्मृतिवचनेन न श्रुतिवचनं युक्तं बाधितम् । नेति ब्रूमः
इह किञ्चित् कर्म स्त्रीपुंसकतर्कमेव । यथा दर्शपूर्णमासौ ज्योतिष्टोम इति ।
यत्र पत्रावेक्षितेन यजमानावेक्षितेन चाज्यं न होमं उच्यते, तत्तान्यतराभावे
वेगुण्यम् ।

ननु पुंसो यजमानस्य यजमानावेक्षितमाज्यं, स्त्रिया यजमानायाः पत्रा-
वेक्षितं भविष्यतीति । नेत्याह । न अयमौचित्यसंस्कारः । ईक्षितः
संस्कारो यदि, तदैवं स्यात् । आज्यसंस्कारश्चायम् । गणभूतो ईक्षितारौ ।
तत्तान्यतरापाद्ये नियतं वैगुण्यम् । सर्वज्ञापसंहारौ च प्रयोगवचनः ।
तत्रेतत् स्यात् । स्त्री यजमाना पुमांसं परिक्रथत्याज्यस्योक्षितारं, पुमांश्च
स्त्रियन्त्रवेक्षितौमिति । तच्च न । पत्नीति हि यजस्य स्वामिनौच्यते, न
क्रीता । पत्नीति सखन्विशब्दोऽयम् । यजमान इति च भवामी, न क्रीतः ।
तस्मान् स्त्रीपुंसयोरेकमेवज्ञातीयकं कर्मेति ॥ तत्र श्रुतिसामर्थ्याद् यः कश्चिद्
यथा कथाचित् सह सम्भूय यजेतेति प्राप्ते, इदमुच्यते—यस्त्वया कश्चिद् धर्मः
कथाचित् सह कर्त्तव्यः, सोऽनया सहति । तेन न श्रुतिविरोधः स्मृतेरिति
गम्यते । अथ यदुक्तं, केवलस्य पुंसोऽधिकारः, केवलायाश्च स्त्रियाः । यजे-
तत्येकवचने विवक्षितं, कथं षोडशभिर्हविभिः सह यागी भवतीति ।

emphasis is laid on the act of performing sacrifice. Just as two men can not jointly perform a sacrifice similarly a man and a woman can not jointly perform a sacrifice. This view being prima facie reasonable, a refutation becomes necessary. The refutation of this view is embodied in the 17th Aphorism. It is distinctly mentioned in the Vedas that they (husband and wife) must perform sacrifices together. According to the Smritis the wife is not to be prevented by her husband from performing religious acts, from acquiring wealth and from fulfilling her legal desires. She must perform religious acts jointly with her husband. Both must join in the duty of raising

एवमुच्यते, प्रतिकारकं क्रियामेदः। याजमानानिव पदायांन् परिक्रयादोन् कुर्वन्, यजते इत्युच्यते यजमानः। आध्वर्यवानिव कुर्वन् अध्वर्युर्यजतीत्येवमुच्यते। यथा सम्भरणमेव कुर्वती स्थातो पङ्क्तिं करोतीत्युच्यते। यस्य च कारकस्य य आक्रीयो व्यापारः, स एकवचने विवक्षिते एकेन कर्त्तव्यो भवतीति। एवं चेद् यावान् व्यापारा यजमानस्य स तावान्, न सम्भूय कर्त्तव्यः। एकेनेको याजमानोऽपरिणापरः। इदं वा शते एकेन षट्पञ्चाशत्, अपरिणापि षट्पञ्चाशदिति। इह तु पत्नीव्यापारोऽय एव। न तत्र पत्नी प्रवर्त्तमाना यजमानस्यैकत्वं विहन्ति। यथाऽध्वर्युराध्वर्यवेषु प्रवर्त्तमानोऽवश्यं च सह पत्न्या यष्टव्यम्। मन्त्रकं हौदं दम्पत्योर्धनम्। तत्र यागोऽवश्यं सह पत्न्या कर्त्तव्यः। इतरथाऽन्यतरानिच्छायां त्याग एव न संवर्त्तते। तथा हि द्वितीयया पत्न्या विना त्यागो नैवावकल्पते। यस्य द्वितीया पत्न्यास्ति, तत्र क्रत्वर्थान् एका करिष्यति। कर्त्तृसंस्कारार्थेषु नैव दोषः। सम्भवन्ति हि तानि सर्वदेति ॥ १७ ॥ सि० ॥

issues. But then it is said that the texts of Smṛiti can not override the texts of Śruti which indicate that the doer of the act of sacrifice is a single person as the word "Swargakamo" ends with the inflexion indicative of singular number. This can not be said for there are certain acts which must be done by both husband and wife, for instance the sacrifices of *Darsa Paurnamasi* and *Jyotistoma*. In these sacrifices (it is essential that) both the husband and wife must (view) the *Ajya* (clarified butter) which is to be poured into the sacrificial fire. If this condition of the clarified butter being seen by both husband and wife is not fulfilled, then the sacrifice must be regarded as improperly done. Then again it may be said that the text refers to different cases e.g. when the husband is the performer of the sacrifice the wife is required to see the clarified butter and *vice versa*, when the wife is the performer of sacrifice (yajamana) then the husband is to see the clarified butter. But you can not say so. It (condition of being seen) is not a qualification of person seeing. (It is of the essence of the sacrifice) that the *Ajya* which is to be used in the sacrifice must have been seen by both husband and wife conjointly. Therefore if only one of them sees the *Ajya*

the sacrifice is improperly done, Every one of the expressions used in Vedic texts is obligatory, Then it may be said that where a woman is the performer of sacrifice, she may ask a man to see the clarified butter by paying him a price for his labour and trouble, and similarly *vice versa*, where a man is the performer of sacrifices he may ask a woman to see the clarified butter by paying her something for her trouble. But even this can not be. *Patni*, the legally married wife is the principal female factor in this sacrifice and not a woman who has been bought. The word (*patni*) is a correlative word ; (it means a woman who has a right to perform sacrifices jointly with her husband). So also the Yajmana must be a person who has a right to perform a sacrifice. He can not be a person bought by the wife for the purpose of joining in the sacrifice. He must be the husband of the woman. The command of the Sruti is that the sacrifice is to be performed by a man in company with a woman. The Smriti does not contradict the Sruti but says that that woman must be no other person than the wife. Although the Sruti (Veda) does not use the word *Patni* i.e, wife but uses the word *Stri* (woman) generally, still (the word *Stri*) must be taken to mean the wife as the

Smriti explains. Therefore what was said before that a man or a woman has each separately a right to perform sacrifices, on account of the word *Yajeta* being indicative of the singular number must be abandoned as untenable. I should ask a question, to those who hold the opposite view. If in your opinion the word *Yajeta* indicates that the performer of the act of sacrifice must be a single person, how is it that the sacrifice is performed by sixteen *Rittiks* (priests). It is to be said that there would be as many different acts as there are persons to perform those acts. When we say that a *Yajamana* is performing a sacrifice we mean he is doing the act peculiar to the performer (*Yajmana*), which consists in the appointment of priests to perform the sacrifice. In the same manner when we say that *Adhyarju* (a priest who is appointed to perform the acts specifically indicated in the Yajur Veda) is performing a sacrifice, we mean he is doing his duty as such priest. So when we say that the vessel is cooking food we mean that it contains the food which is being cooked (a). Where the singular

(a) It is doing its own peculiar act of holding the food which is being cooked.

According to the sanskrit grammarians the same verbs bear different meaning when applied to different subjects or things.

number is specified there the doer of the act must be a single person. He must do alone the duties peculiar to himself. He cannot perform part of his duties and leave the remaining part to be done by another. For example one of the duties of the *Yajaman* is that he must make a gift of 112 cows to the priest as his fee or remuneration. It will not do for him to give away 100 cows leaving another to make a gift of the remaining twelve. Neither will it do for him to give away 56 leaving another to make a gift of the remaining fifty six. In the present case the duties of wife are different from those of the husband. Therefore if she perform her own special part in the sacrifice, that cannot affect the single character of the act of the husband *viz.* the performance of the sacrifice.

Therefore notwithstanding the joining by the wife in the act of sacrifice, the *Yajaman* or performer of sacrifice is a single person. In the same way the fact of the *Adhyarju* performing the duties of priest does not destroy the single character of the act of the *Yajaman*. Therefore the sacrifice must be done in company with the wife. Because the wealth belongs to both husband and wife jointly. The wife is entitled to wealth earned by the husband and *vice versa*. Hence sacrifice must be performed

by both jointly because if one of them is unwilling to perform it, the gift cannot be valid. Therefore gift of money even earned by the husband is invalid if the wife's consent is not obtained. In case of there being two wives, the gift cannot be valid unless the consent of the second wife is also obtained.

Therefore where some acts are required to be done by the wife as her peculiar duty, those acts must be divided between the two wives. Therefore if several wives join in the sacrifice, the single character of the act of the performer of sacrifice (husband) is not destroyed. (Conclusion of the author.)

Eighteenth aphorism.

There are certain Smriti texts indicative or suggestive of the opinion just expressed.

Comment of Sabar.

There are Smriti texts in support of the view just expressed viz. By a thread the wife should be united with the husband. In one sacrifice both husband and wife should be

लिङ्गदर्शनाच्च ॥ १८ ॥

लिङ्गं खल्वपि दृश्यते । योक्त्रेण पत्नीं सन्नहति मेखलाया यजमानं
मिथुनत्वार्थित । यदि स्त्रीपुंसविकल, योक्तृस्य मेखलायाश्च विभागो वाक्याद्
गम्यते । मिथुनसंस्तवश्च । तदेतत् स्त्रीपुंससाधनके कर्मण्युपपद्यते,
नान्यथा ॥ १८ ॥ युक्तिः ॥

united by a thread. The wife is to be tied with the *Yoktra* (thread of kusa grass used for tying animals), the husband or the *Yajamana* is to be tied with the *Mekhala* (thread tied round the waist of women) and both are to be united, Although the husband and wife are united together yet by the use of the two words *Yoktra* and *Mekhala*, it would seem that there is distinction between the two. But these two expressions are in praise of the act of uniting the couple. For that reason, the Vedic text about joining of husband and wife must refer to acts required to be performed by husband and wife together and not to other acts. (Reasons in support of the above Aphorism.)

Nineteenth aphorism.

The husband has full control over the wife as she is purchased or bought.

Comment of Sabar.

Having so far established his own conclusions, the author now states the opposite

क्रीतत्वात् भक्त्या स्वामित्वमुच्यते ॥ १८ ॥

स्थितादुत्तरमुच्यते । तुशब्दः पञ्च व्यावर्त्तयति । नेतदस्ति । यदुक्तं स्ववती स्त्रीति । क्रीता हि सा । दृष्टार्थत्वादधिरथशतदानस्य । अती यदस्याः स्वामित्वमुच्यते, तद् भक्त्या । यथा, पूर्णकीर्त्त्याकं बलीवर्हानामीष्टे इति । एवं पत्रापि पारिणयस्य ईष्टे इति ॥ १८ ॥ पूर्व ० ॥

view. The word *Tu* shows the change of *Paksa*. It is not right to say as has been said by the *Uttarpaksa* that woman has the capacity to own wealth. She can be purchased or bought. As we have seen in popular practice she is purchased for a price of one hundred chariots. Therefore her ownership of wealth is apparent and not real. Her ownership of wealth is on behalf of her husband. Just as our cowherd is the master of our oxen, in the same sense has the wife ownership over her husband's wealth. The wife's proprietary rights extend over wealth acquired during her marriage and not over other wealth. (*Purvapaksa*).

Twentieth Aphorism.

She is the real owner of wealth as she has the desire for obtaining the fruit of actions.

Comment of Sabar Swami.

That (she is not the real owner but merely apparent owner as stated by the *Purvapaksa*) is not tenable, because she possesses the desire for obtaining the fruits of actions. The *Smṛiti* should be disregarded, for it conflicts with the *Sruti*. The *Smṛiti* says

फलार्थित्वात् स्वामित्वेनाभिसम्बन्धः ॥ २० ॥

नेतदस्ति । क्रयौ मुख्यौ, गौणं स्वामित्वमिति । फलार्थिनी हि सा,
कृतनिर्दारिद्र्यतः । कृत्यनुरोधादस्मात् स्यात् । स्ववती श्रुत्यनुरोधात् ॥२०॥

that she has not the capacity to own wealth. But according to the *Sruti* she has such capacity.

Twenty-first Aphorism.

It (*Sruti*) shows that she is entitled to earn the fruits (rewards) of her acts.

Comment of Sabar.

Sabar quotes the following Vedic text: "Let the wife unite with the husband in (sharing) fruits of sacrifice. Let both the husband and wife join in taking the burden of performing the sacrifice. Let them knowingly abandon the enemies. Let them commence brilliant and imperishable life in Heaven." This shows the (ultimate) effect of a married life. Therefore it is settled that both are entitled to perform the sacrifice (*Uttarpaksa*). Thus ends the *Adhikarana* which deals with right of husband and wife jointly to perform the sacrifice.

The foregoing *Adhikaranas* of Jaimini, read in the light of the comments of Sabar Swami lead to the broad conclusion that men and women have equal rights in respect

Conclusion
from Jaimini's
Aphorisms.

फलवत्तां च दर्शयति ॥ २१ ॥

सं पत्नी पत्या सुकृतं गच्छतां यज्ञस्य धर्त्या युक्तावभूताम् सच्चानानां
विजह्नीताम् । अरातीर्दिवि ज्योतिरजरमारभेतामिति दम्पत्योः फलं
दर्शयति । तस्मादप्युभौ अधिकृताविति सिद्धम् ॥ २१ ॥ उत्तरम् ॥ यागे
दम्पत्योः सहाधिकाराधिकरणम् ॥ ४ ॥

of the performance of Vedic sacrifices ; or in other words both the sexes are equally competent to perform the sacrifices and that there is no difference in this behalf arising out of the difference in sex between them. It follows further from the said Adhikaranas that in respect of rights to perform one of the Vedic commands, women are on a level with men. But this injunction or command which is the pivot on which the Vedic law hinges, is taken as illustrative. The way in which this Adhikarana is described by Sabar Swami and Madhavacharya shows that the text of the Vedas *Svargakamo yajeta* is a typical command, so that all rights which men have under the Vedic law are in Jami-ni's view equally shared by women. The word *etcetra* which follow the word *Sacrifices* in Sabar's commentary lends corroboration to this view. Partha Sarathi Misra in his Sastra Dipika takes the same view. It follows from all this that the rights of men and women are equal in respect of all commands contained in the Vedas. In fact Madhavacharya in his Nyamala Vistara contends that according to the first of the two Adhikarans translated above a girl of the twice born classes has as much right to be initiated at the age of eight years as boys of the same age and is entitled equally with

Right of
women to
Upanayana
and to study
the Vedas.

Equal right
of men and
women in
sacrifices.

them to study the Vedas (a). The spiritual significance of the initiation is the right to study the Veda and specially to recite the most sacred of prayers, the Sabitri. According to the sage Jaimini the personal status of women is generally on a par with that of men and their equal rights in this behalf can only be curtailed by express prohibitions which may form exceptions to the general rule.

Legal im-
portance of
Jaimini's con-
clusion.

Jaimini was laying down rules for the interpretation of the Vedic law which deals mostly with religious precepts. What it may be asked, notwithstanding what has been said before, has the discussion about the equal rights of men and women in respect of the performance of Vedic sacrifices to do with the determination of their respective rights relating to juridical matters, which form part of the law contained in the Smritis. The answer is that the law in the Smritis has evolved out of the law contained in the Sruti (Vedas), for the theory is that the Smritis are merely recollection handed down by tradition and must have a corresponding Sruti text to support it. In other words, Hindu law is primarily based on the Vedas

(a) अस्यैवाधिकरणस्यानुसारेण ऋष्टवर्षं ब्राह्मणं पनीयत तमध्या-
पयेत इत्यत्रापि स्त्रियाऽप्यधिकारः ।

Nyamala Vistara, (Bombay Edition) p. 335.

and the Smritis are supposed to contain the purport of Vedic texts as recollected by the sages who were their authors. Besides as has been pointed out above, the logic of the Mimansa is the logic of the law. "He alone" says Manu, "and no one else knows the sacred law who explores the precepts of the law uttered by the sages by the use of reasoning not repugnant to the Vedic lore." The principles of interpretation professedly followed by Hindu commentators are closely connected with the philosophical system of the Mimansa. Besides, the commentators like Nilkanta, Jimutbahana, Mitramisra, Raghunanandan who have written purely legal treatises look upon the rules of Purva Mimansa as the legitimate and authoritative guides of interpretation. It will have been observed that Jaimini commingles the rules of status with the rules relating to property. This brings us to the strictly legal conclusions that flow from the said Adhikaranas. These conclusions are *firstly* that women are persons in the eye of the law and cannot be regarded as chattels; *secondly*, that there can be no purchase or sale of women and the chariots and cows given to the bride at the time of marriage being constant in number does not make the transaction a sale; *thirdly*, that women are capable of owning or holding

property and in this respect no distinction is drawn between acquired or inherited property ; *fourthly*, that the position of women cannot be likened to that of slaves according to the Vedas and if there was anything contrary to it in the Smritis, that must be disregarded ; *fifthly*, that wife has co-ownership in the husband's wealth and the husband has co-proprietary right in the wife's wealth and that neither the wife nor the husband can part with property belonging to either without the other's consent, and that the gift made by the husband without wife's consent is invalid. We will have to say more about the conclusion regarding the proprietary capacity of women in a subsequent chapter. We are now in a position to affirm that the lesson which Jaimini's aphorisms teach us, is that we must accept the theory of modern writers regarding the position of women in early Hindu law with considerable qualification. It is significant that these writers in treating of women's rights in early law did not look beyond the period of the metrical Smritis and the error in their theory is that they took these Smritis as the starting point of their generalizations. The fact that in the earliest times of which we have any record, the status of women was on a par with that of men, as would seem to

follow from Jaimini's conclusions, receives corroboration from other evidence. For instance we find some of the hymns of the Rigveda were originally given through women, through their mouths the sacred mantras were spoken which in these modern days their daughters may not study nor repeat. Viswavara, a lady of great learning composed the *Rik* in the 4th *Asthaka* 5th *Mandal* 28th *Sukta* of the Rigveda. Lopemudra, another lady composed another hymn of the Rigveda. Maitreyi, the wife of the sage Yajnavalka carried on philosophical discussions with her husband. Gargi the daughter of Vachakru took part in a discussion in the court of king Janaka, and proposed a question to the sage Yajnavalka which he answered(a). The text of Yama quoted below shows that in very early times maidens used to tie the sacred cord (sign of initiation) to study the Vedas and to recite the Sabitri the most sacred of prayers. Harita one of the

(a) Vedanta Darshan (Mimansa sutra by Veda Vyasa)
 Edited by Kristo Gopal Bhatta, Chap. 3. 4th Pada
 p. 277.

(b) पुराकल्पे कुमारीणां मौञ्जीवन्धनमिष्यते ।

अध्यापणं च वेदानां सार्वत्रिकं वदन् तथा ॥

Yama quoted in Parasara Madhavya.

Amongst the Parsis who are descended from the same Indo-Aryan stock as the Hindus, the custom of tying thread both by men and women prevails.

earliest of sages describes that all the four orders of life including that of studentship were open to women and that both the sexes had right to utter the mantras (Vedic texts).

In course of time the right of initiation (*Upanayana*) and the right to study the Vedas or sacred literature generally were denied to women. It is impossible to decidedly fix the time when the movement commenced which eventually led to this defect in their status. But from the first aphorism of Jaimini cited above it is apparent that a school had in Jaimini's time already sprung up of which the sage Aitisayana was the exponent, which was not favourably disposed towards women and which maintained the view that women were not entitled to perform Vedic sacrifices. A study of the two *Adhikaranas* cited above will not fail to impress even the superficial reader with the forcible and vigorous reasoning with which Jaimini refutes arguments of the opposite school and claims for woman equality with man in respect of personal and proprietary rights. It also appears from the eighth aphorism that the sage Badarayana supports the view taken by Jaimini.

When we come to the *Dharma Sastras* or the metrical *Smritis* we find that the status of women had considerably diminished and

they were thought incompetent to perform sacrifices (a) and to read the Vedas as they could not be initiated (*Upanayana*). Manu (b), for instance, says that initiation of women consisted in their marriage. "The nuptial ceremony is stated to be Vedic sacrament for women and to be equal to the initiation, serving the husband (equivalent to) residence in the house of the teacher and the household duties the same as the daily worship of the sacred fire."

Women incompetent to study the Vedas, in the period of the Smritis.

Medhatithi and Narayana, two of the commentators of Manu, add the gloss that by Vedic sacrament is meant the sacrament having for its object the study of Vedic texts. Kulluka in his commentary hints that by prescribing marriage in the place of *upanayana* (initiation), it is implied that women must not be initiated (c). If they could not be initiated, it followed that they could not study the Vedas. In another verse Manu makes the position clear. In chap IX, verse 18, the sage says: "For women no sacramental rite is performed with sacred texts; thus the law is settled; women who are destitute of strength and

No initiation for women.

(a) Manu IV 205, 206. (b) Manu II 67.

(c) See also the comment of Vijnaneswara on sloka 15 of Yajñavalkya Smṛiti in the chapter on Achāra where he says that initiation for women means marriage.

destitute of the knowledge of Vedic texts are impure as falsehood itself, that is a fixed rule." In Jagannath's opinion, this text indicates the exclusion of women from the study of the Vedas. From this cause (*viz.*, exclusion from the study of the Vedas) though physically existent, they are morally non-existent or false beings. (Colebrooke's Digest Vol. II p. 506). There is also a text of Yama which ordains that women are forbidden to utter Vedic mantras.

Reasons for
the degrada-
tion in wo-
man's status
suggested.

It is difficult to gather the reasons which led to the degradation in the status of women in the period when writers of the earlier Smritis flourished. But we venture to make the following suggestion. It is the early foreign invasion of India that may account for this inferiority in the position of the female sex to some extent. We find indications for the first time of a foreign invasion of Hindusthan in the metrical Smritis. For instance, Manu speaks of the *mlechchas* (barbarians) as distinguished from the Aryans. (Manu X. 45.). In the previous verse of the same chapter he speaks of the Yavanas, the Sakas, the Paradas (*a*).

(a) In Professor Goldstucker's opinion, the Yavana invasion might possibly refer to the Graeco-Indian invasion in the 3rd century B. C.

Goldstucker's Panini (1861) p. 234.

But there is no allusion to such foreign attacks in the *Kalpasutras*. In almost every nation of the world in the primitive stages of its development, the early ideas about the inferiority of the female sex prevailed; woman was not regarded as a person, she was not recognised as a citizen. "In fact she was not a unit but a zero in the sum of human civilisation" (a); and it is very probable that the conquering *mlechchas* entertained these notions. When the people of Hindusthan who had already attained to a high degree of civilisation came in contact with their first foreign rulers far less civilised than they, they might have adopted those rules concerning the position of women which belong peculiarly to an imperfect civilisation.

It may perhaps be objected that Jaimini was merely fighting for a theory and that when claiming for woman equality with man in the performance of Vedic sacrifices, he was breaking away from the conventional feeling of his time. But the objection loses all force when we turn to the evidence (to which reference has already been made) of the superior position of women furnished by the Vedas and the Sutras both of which

Possible objection to the new theory answered.

Jaimini.

(a) Mr. Cady Stanton's History of Women's Suffrage vol III p 290.

preceded the Smritis in point of time. It is impossible to fix the time when Jaimini lived with any degree of certainty. It is probable, however, that Jaimini preceded the writers of the earliest metrical Smriti *viz.* Manu's code (*a*), and it seems in his time, due to the influence of the foreign invaders, which might have resulted in the fusion of Hindu law with the custom of the less civilised or barbarian invaders, a school of lawyers had sprung up who were instrumental in lowering the position of women. It seems to us that in the aphorisms cited above Jaimini was only uttering in a comparatively modern time the firm and accepted notions of the Vedic age about the equal rights of men and women—notions which had continued down to his own time when signs of a change unfavourable to women were becoming manifest. This incapacity of women to study the Vedas and sacred texts or Shastras generally, which does not seem to have existed in the Vedic period, affected their status. It was made the basis on which the dependent condition of women was made

Right to study
the Vedas test
of legal
status.

(*a*) K. L. Sarkar's Tagore Lectures, (1905) p. 511. Max-muller thinks Jaimini preceded Bhartrihari whose age is fixed at 650 A. D.

See Max-muller's Six Systems of Indian Philosophy p. 118.

to rest. In the Narada Smriti (a) which is Narada. the first to limit Dharma to law in the strict sense, the following text occurs : "Through independence woman goes to ruin though she be born in a noble family ; therefore the Lord of creatures ordained dependence for them." In commenting on this text, Asahaya. Asahaya (b) the commentator of Narada Smriti observes that the reason for the dependence is, that women have no right to study the Shastras and consequently lack the knowledge to decide between right and wrong, between Dharma (justice) and Adharma (injustice) since such knowledge is dependent on the Shastras. This furnishes the test of legal status, and we accordingly find that in the early Hindu law when women could be instructed in the sacred lore, their position was not one of subordination and their rights were equal to those of men ; but with the withdrawal of that right their legal position was lowered. All the texts of the different sages about the so-called perpetual tutelage of women which we shall cite presently are based on the incompetency of women to study the Vedic lore. It is this incompe-

(a) Narada XIII. 30.

(b) तथाहि शास्त्राध्ययनानधिकारित्वात् शास्त्रमावीपत्रीवि धर्माधर्म्यं ज्ञानभावात् स्वात्मन्य वर्त्तमानत्वेन पुरुषपारतन्त्र्या भावात् तन्मोपदेशासंज्ञकः ।

Institutes of Narada by Dr. Jolly 1885.

tencey to study the Vedic text that also accounts for the inferior status of Sudras. Even in Jaimini's time the Sudra could not perform certain sacrifices like the *Agnadhaya*. Jaimini in the sixth book of his sutras concludes the discussion regarding the status of Sudras by saying that the Sudras were debarred from performing sacrificial act, as Vedic teaching was not open to them. We read in the Srimat Bhagbat Purana that women in common with the Sudras, were declared incompetent even to hear the Vedas so far had their position in this respect deteriorated at the time of the said Purana. This is the proper place to indicate another test or mark of status in Hindu law. In the Jurisprudence of England, modern private law places all persons irrespective of their birth or order on the same footing in respect of legal right or duty. It takes no account of incapacities unless the weakness is so marked as to fall into certain well-known exceptions such as infancy or idiotcy. It makes no distinction between men or women in enforcing rights and enjoining duties according as they belong to a superior or an inferior class in the social scale. But it is otherwise with Hindu law under which every individual has ascribed to him or her, at his

Caste another
test of status
in Hindu law.

or her birth the state or condition by which he or she becomes the possessor of a particular caste and as such, subject to the rights and obligations peculiar to the members of that caste. The caste to which a person belongs, influences his or her legal position. No one can read the texts of the sages without being impressed by the influence of caste on the material character of Hindu law. The origin of castes may be traced to the period of the Rigveda. The hymn (X. 90) of the Rigveda for the first and only time mentions the four castes ; for it is there said that *Purusha's* (creator's) mouth became the Brahman, his arms the Rajanya (warrior), his thighs Vaisya (agriculturist) and his feet the Sudra (serf) (*a*).

Origin of
caste.

But we find the four castes firmly established as the main divisions of Indian society in the Yajurveda (*b*). Manu in his code speaks of the four great castes and gives in detail the separate duties of a Brahman, a Khatriya Vaisya and a Sudra (*c*). The superiority of the Brahman is next indicated by the following verse. "A Brahman coming into exis-

(*a*) Prof. Macdonell's History of Sanskrit Literature p. 133 (Impression 1909).

(*b*) Prof. Macdonnell's History of Sanskrit Literature p. 184 (Impression 1909).

(*c*) Manu Ch. IV 87 (88-91).

tence, is born as the highest on earth, the lord of all created beings for the protection of the treasury of the law" (Manu I. 99). "In this work" the same sage tells us "the sacred law has been fully stated as well as the good and bad qualities of (human) actions and the immemorial customs of the four castes (Varna) (a). In the Institutes of Yajnavalka the Chapter on Religious and moral observances commences with the following verse—"The Munis (thoughtful) having worshipped Yajnavalkya, the lord of Josis said 'tell us completely the Dharmas (duties) of the classes, orders and the mixed'. The comment on this sloka by Vijnaneswar is as follows ; "By classes is meant (1) Brahman (2) Khsatriyas (3) Vaisyas (4) Sudras. Order signifies the four stages of life of a twice born Aryya viz. those of a Brahmacharin (or student) Grihasta (householder) Vanaprastha (hermit) and Sanyasi (retired sage). The mixed are those who are outside the pale of the four classes and the four orders who are called the *Itara* by the author."

We thus find that in the Institutes of Yajnavalka where the distinction between law and ritual is sharply drawn, there is recognition not only of the four principal

(a) Manu Chap. IV. 107.

classes but also of the mixed classes and of the orders ; and the question put to the sage indicates that those duties must be different and in fact they are so. In all the other Smritis the four great divisions of caste are always kept in view. It is manifest then that a person's legal position in Hindu law varies with the caste to which he or she belongs. A Sudra (*man*) could not lawfully marry a woman of a higher class than his own (*a*). A Brahmini widow may not adopt a Kshatriya or vice versa. In early Hindu law the diversity of castes represented one of the principles of classification of the diverse modes, of acquisition of property (*b*). Instances might be multiplied to show the influence which ancient class distinctions exercise in determining the law of status in Hindu Law. But there were certain characteristics, which were common to the first three classes. One of the *Sanskaras* or ceremonies which was compulsory for all the three classes was the right to be initiated (invested with the sacred thread). The spiritual significance

(a) Manu III § 13. IX § 157.

(b) Narada I—52—54.

Manu 1—88—91, X. 74—80.

Yajnavalka II—118—120.

Vishnu II—4—14.

Vasistha II—13—20.

of the initiation consisted in the right to study the Vedas in those who had gone through the ceremony. The Sudra had no such ceremony (*Sanskara*) and it followed as a necessary consequence that they had no right to study the Vedas. The competency to such study was made the basis of a great division of the Hindu people into two classes *viz* the twice-born on the one side and the Sudras on the other. And it may be observed here that there is one common feature which underlies all the Dharma Sastras *viz* tendency to reduce women of the three regenerate classes to the level of *Sudras* in respect of legal rights and duties. The Sudras have no initiation or regenerating ceremony ; so have not women. The initiation of both consists in their marriage. In fact the difference which existed amongst persons as subjects of personal rights and duties on account of difference in sex was founded on the incompetency of women to be instructed in the Vedas.

Tendency in
Dharma Sa-
stras to reduce
women to the
level of Sud-
ras.

The condition of women during the period of the Smritis was one of dependence. This dependence was, however, nothing more than mere moral subjection. It was not legal subjection in any sense, and as will be shown presently, it has not much indeed in common with the perpetual tutelage of

Dependence
of Women.

women in early Roman law, as many eminent writers on Hindu law, seem to think. Let us see then how the question of the dependence of women stands on the original authorities on Hindu law and then we will be able to examine how far the view of subsequent writers on Hindu law is borne out by them.

Original Sanskrit authorities regarding such dependence.

In prescribing the duties of women Manu says : 'By a girl, by a young woman or even by an aged one nothing (must) be done independently in her own house'. The use of the word "*Kartavya*" (*b*) in the original shows that this is merely a moral injunction and the word "*must*" in the translation by Professor Buhler in the sacred Books of East, Vol XXV. means "should."

In the next verse the sage says :—In childhood a female must be subject to her father, in youth to her husband when her husband is dead to her sons ; a woman must never be independent (*a*).

Then again in Chapter IX which deals with the eternal laws for a husband and his wife, who keep to the path of duty whether they be united or separate, Manu says :—Her father protects (her) in childhood, her husband protects (her) in youth and her sons protect her in old age ; a woman is

(a) Manu V. 148.

never fit for independence." The use of the (लट्) affix in the verb रक्षति (protect) shows that the precept is not an obligatory one (*vidhi*), but that it is merely an *arthavada* or a laudatory precept. If it was meant to be an obligatory precept then the विधिलिङ् affix might at least have been used. The protection here means the protection from vice. The notion of moral restraint is conveyed by the word रक्षा (*Raksha*) ; in other words, the suggestion is that women are not to be allowed to stray into the path of vice. An examination of a few of the verses of Chapter IX which follow the text about protection, shows that Manu disavows altogether the notion of physical coercion and declares those women to be well protected who protect themselves by guarding their own evil inclinations. Thus Manu says :—"Verily the man is cursed who confines the woman with a view to protect her" (a). After laying down the rule that women are not to seek independence the sage proceeds to explain the reasons for the rule. Those reasons are stated thus : "women must particularly be guarded against evil inclinations, however trifling they may appear, for if they are not guarded they will bring sorrow on two families." (Chap. IX.

(a) Manu, Chap. , V

verse 5.) Considering that to be the highest duty of all castes, even weak husbands must strive to guard their wife. (IX. verse 6). The father's and the husband's families go to eternal perdition, if women are not well protected. On her depend the progeny, character family and self. So one desirous of protecting *Dharma* and self need but take good care to protect his wife. (Chapter IX. verse 7). After stating that the husband after conception by his wife becomes an embryo and is born again of her and citing a text of the Veda in support of it, Manu proceeds to indicate the method by which women are to be protected. He declares the futility of coercion as an instrument of protection. "No man," says Manu, "can completely guard women by force." The sage suggests the following expedients for protecting her : "Let the (husband) employ his (wife) in the collection and expenditure of his wealth, the keeping of everything clean, in the fulfilment of religious duties, in the preparation of his food and in looking after household utensils." Then follow an enumeration of the evil ways of women and of the dangers that are likely to arise from the neglect of the rule of protection. Thus it is said :—"Unprotected women follow the path of dalliance, for such is their nature. Six are the causes

which pervert a woman. They are drink (spirituous liquor), evil company, absence from her husband, rambling, excess of sleep, and residence in another house."

The fact that women were not latterly initiated and were incompetent to study the Vedas rendered them liable to the weaknesses of the flesh. To protect women against the evils which flesh is heir to, was the main object of the legislator.

Kulluka writing at a time when much of women's rights had been curtailed says, that women are to be protected from the path of vice by such advice as will point out to them the respective consequences of an act of merit and demerit—that the one leads to heaven and the other leads to hell. The above analysis of the contents of Manu's code regarding the present topic shows clearly that constant dependence of women was intended in order to prevent them from straying away from the path of virtue. The so-called perpetual tutelage of women resolves itself into a control or supervision over the morals of women by those versed in the sacred scriptures (Vedas) and who are supposed by reason of such training to possess virtue and self-control.

Conclusion
from an
analysis of
Manu's texts
on the point.

In the view of Hindu sages chastity is the supreme virtue for a woman ; all other

virtues are secondary when compared with it and the dependence was ordained with the object that women may remain chaste and pure.

The next sage of importance and authority is Yajnavalka. "The father," said Yajnavalka, "should protect the maiden daughter, the husband when she is married, the sons in her old age, in their absence their clansmen. A woman has no independence at anytime (a). In commenting on this text the author of the Mitakshara says that until her marriage the father of the girl shall guard (protect) her against the doing of something prohibited (*akaryyakaranat*), and after marriage the husband and in his absence the sons (are to guard her), likewise in the absence of those previously mentioned, the clansmen ; and in the absence of the clansmen the king is to protect her ; therefore women are to have no independence at anytime. Then again Vijnaneswara while dealing with the inheritance of the widow observes that the text of Narada (b) which declares the dependence of women is is not incompatible with their acceptance of property even if their thralldom be admit-

Yajnavalka's
view on the
question.

Mitakshara.

(a) Institutes of Yajnavalka I. V. 85 cited in the Chapter on *Achāra*.

(b) Narada XIII. 31.

Sanskara
Kaustuva.

ted. The inference drawn in the *Samskara Kaustuva* of Anantadeva from the text of Yajnavalka and the comment of the Mitakshara thereon, shows that a woman during the several guardianships at different periods of her life is restrained from the doing of something prohibited, and not that there is any restraint on her in respect of the observance of what is commanded by the Shastras.

In the text of Yajnavalka although the verb रक्षेत् (Rakshet) ends with the affix (Ling) the text cannot be regarded as obligatory. The text is laudatory (*arthavada*) as we find the direction contained in it generally carried out not in pursuance of the text but quite independently of it. For, the protection of girls, wives and widows by their fathers, husbands and sons respectively, is seen in everyday life and we require no *vidhi* to enjoin us to do that which is seen daily done under natural impulses(a). Hence Manu does not use the termination लिङ् (ling) which indicates an obligatory precept. The text cannot be regarded as a *vidhi*. Thus a woman's dependence on the father, husband and son in the particular states alone are respectively indicated. In dealing with the question of adoption by a widow without

Nilkantha.

(a) अनुवाद्य अनुक्तात् न विधियमुदीरयेत् ।

प्रातस्य पुनः कथनं अनुवादः ॥

her husband's permission Nilkantha takes the same view of the text of Yajñavalka, which we are now considering. After quoting the text he says (a) : "Thus her dependence on the husband in a particular state is indicated. In his absence, or owing to his infirmity on account of old age or otherwise her dependence rests even on her sons. Katyāyana also, who says: 'whatever spiritual acts (or acts relating to the future state), a woman performs without the permission of of the father, the husband or the son, to obtain a benefit after death, it shall become fruitless' declares the permission of the husband applicable to particular states. *Aurdhadehikam* (means) relating to the next world—therefore permission of the husband indicated for a particular state by Yajñavalka is also laid down here (by Katyāyana following Yajñavalka) and is not a new rule laid down without prior authority."

Narada whose judicial theories as a rule, show an infinitely advanced stage of development as compared to Manu and whose works have been proved to be later than the Institutes of Yajñavalka, reproduces almost exactly the text of Manu about dependence (Chap. IX. verse 2). Then again

Narada.

(a) Mandlik's Edition of the Institutes, Vyavahara Mayukha. Page 57.

the same authority tells us : women, slaves, attendants are dependent (Narada III. 36). But Narada explains by other verses what this dependence means. Thus he says : All the subjects are dependent, the sovereign is independent, the pupil is said to be dependent, but the teacher enjoys independence, and again, "Three persons are independent in this world, a teacher, a King and in every class throughout the whole system of classes, he who is the head of the family" (Narada III. 34&35). It is obvious that this dependence cannot mean legal subjection for no one would suppose for a moment that the Hindu legislators intended that the juristic act of a pupil or subject is invalid if done without consent of his teacher or the King respectively. There are two other texts in Narada Smriti which have some bearing on the question under consideration and must be dealt with. Those texts are as follows (a) : "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 the 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

(a) Narada Chapter XIII. verses 28,29.

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." The same sage tells us that "women, sons, slaves and attendants are dependent" (*a*) To the first of those two verses the commentator Asahaya adds the following gloss (*b*):—Thus without her guardian's consent she may not give anything to any person : nor indulge herself in matters of shape, taste, smell and the like ; and if the means of subsistence be wanting he must provide her maintenance." Jagannatha in commenting on the text of Narada observes as follows (*c*) : "As for the declared subjection of women to the control of the nearest kinsman when deprived of her husband and son, it does not thence appear that the gift made by her is void ; for the implied object of the text is to show sin in not subjecting herself to the control of kinsmen on the husband's side. A gift or alienation by the wife is valid though blameable."

Asahaya.

Jagannatha.

The author of the Viramitrodaya comments on these two texts of Narada thus : "On this it is to be said, is it that even when a gift or like disposition of her hus-

Mitra-misra.

(*a*) Narada Chap. III. verse. 36.

(*b*) Dr. Jolly's Narada Smṛiti (Ed. 1886,) XIII. verse 28.

(*c*) Colebrooke's Digest Vol IV. P. 166.

band's property is made by the widow :— this is *per se* invalid. This however is not reasonable." In another place Mitramisra makes the following remark bearing on the matter under consideration. "This much," says the author, "is the distinction. In the same way as women in performing religious and charitable acts by means of their own wealth are to take the permission of their husbands by reason of the declaration of their dependence. But if the permission be not taken then the independent conduct gives rise to sin or imperfection in the act, but what is of the essence of such act is not on that account invalid". Mitramisra again notices the texts about dependence in connection with the adoption by a widow in the following words : "After he (the husband) is dead, the permission of those alone will be necessary upon whom the widow is dependent." It is to be noticed here that the text of Narada makes no distinction between *stridhan* of the description over which woman has an absolute control and other kinds of property in considering the question of the dependence of woman on her guardian in the disposition of her property. It would follow from a strict reading of the text of Narada that even over that kind of the *stridhan* which is known a *Sau-*

dayikya stridhan (gifts of affectionate kindred) the husband, and after his death the guardians of the widow have absolute control. Yet the law is well settled that over such property she has absolute power of disposition and the commentators are all agreed as to this. The text of Katyayana :— “The independence of women who have received a kind gift is admitted in respect of it (for it was given by them out of kindness for their maintenance) ; with respect to a kind gift, the independence at all times, of women is proclaimed in making sale or gift according to pleasure, even where it consists of immoveable property” would be contrary to the text of Narada which we are now considering. The author of Dayabhaga after premising that the widow is entitled to inherit her husband’s estate maintains that in the disposal of property by gift or otherwise, she is subject to the control of her husband’s family, after his decease and in default of sons ; and in support of this view he cites the two texts of Narada referred to above. Jimutavahana does not however proceed to say what will be the consequence if a gift or other alienation is made without the guardian’s consent. But in the alienation by one of several co-parceners of common property which cannot be

Dayabhaga.

Vrihaspati.

dealt with without the consent of the others the doctrine of *factum valet* was applied and the gift or alienation was not rendered void. So we may take it that Jimutavahana intended to apply the same reasoning to the present case and the consequence would be that in the case of gift or sale without permission from the guardian the gift or sale would not be void. This inference would be in consonance with the conclusion arrived at by the author of the Viramitrodaya and others. Vrihaspati, whose enlightened views on the subject of women's rights have been supposed to render it probable that his composition belongs to a more recent period than the Narada Smriti, points out the way by which women are to be protected in the following text (a). "Employing a woman in the receipt and expenditure of wealth, in the preparation of food, in the preservation of domestic utensils, in purification and in the care of the (sacred household fire) is declared to be the (best) way of guarding women." It is also said by the same sage "a woman must be restrained from slight transgressions even by her relations ; by night and by day she

(a) आर्यव्ययऽन्नसंस्कारे गृहीपङ्कजरक्षणे ।

शौचाग्नि कार्ये संयोज्या रक्षास्त्रीणामियं स्मृत ॥

Vivada Ratnakara. p. 146, Chapter on Stri Taranga.

must be watched by her mother-in-law and other wives belonging to the family" (a). Thus the question of dependence stands on the original Sanskrit authorities.

Let us see what are the the conclusions that flow from them. But in stating those conclusions, we should guard ourselves on one point. It should not escape us that the Dharmashastras and the commentaries represent different stages in the development of Hindu law. This being so, let us first consider what are the conclusions that may be derived from the texts of the sages quoted above. In our opinion, these texts about dependence aimed at preserving the morals of women as they had no capacity to distinguish between right and wrong since they were not instructed in the sacred scriptures. It further follows that they were moral precepts intended for the guidance of women as social beings. Even the text of Narada which at first sight would seem to be a legal injunction was not in reality so and Jagannatha is right in pointing out that a disobedience of the injunction would lead to a moral guilt or sin. Coming to the conclusion to be derived from the commentaries, we find that the author of the Mitakshara

Conclusions from the sanskrit texts.

Dependence is only moral, and not legal subjection.

Commentaries also take the same view-

Mitakshara.

(a) Sacred Books of the East. p. 367. Vrihaspati.
Ch. 24. verse 2.

would seem to regard the texts about dependence as relating not to property but merely to the personal or moral conduct of women. He does not regard them as legal prohibitions, which affect either their status or proprietary position. The author of the Viramitrodaya agrees so far with the Mitakshara in that he holds that the texts about dependence do not render gifts made by woman without the permission of her guardian invalid, but he dissents from it in holding that they affect the personal status of a widow to adopt without the consent of her husband's kinsmen. The author of the Dayabhaga cites the text of Narada about the dependence of women in the disposal of property, in support of his view that a widow cannot alienate property without the consent of her husband's kinsmen. He nowhere says that such an alienation would be invalid. On the other hand from his silence on this point an argument may be derived that he would apply the doctrine of *factum valet* to the alienation by the widow without the consent of her husband's kinsmen, a doctrine which was applied by him in a previous chapter to render valid dispositions made by one of several coparceners without the consent of the remaining ones. This was also the opinion of four of the Pundits who were

Viramitrodaya

Dayabhaga.

examined before the Supreme Court in the case of *Kasinath Basak vs. Hara Sundari Dasi* which was eventually taken in appeal to the Privy council, (a). The definition of *stridhan* given by *Jimutavahana* shows that there were certain kinds of property over which the woman had absolute control, notwithstanding the texts about dependence. According to *Nilkantha* the author of *Vyavahara Mayukha*, these texts about dependence affect the capacity of widow to adopt in so far that she cannot adopt without the permission of her husband's kinsmen. He regards these limitations as depending on evidently worldly reasons and not based on any superhuman sanction. The reasonable inference then is that the injunctions of the ancient sages can scarcely be interpreted to mean that if a widow gives away or sells her estate such gift or sale is invalid and even the later commentators have stopped short of such a declaration. They are all agreed that she can make the alienation for religious and allowable secular purposes.

Nilkantha.

When we pass from the commentators to the European writers on Hindu law we meet with diverse opinions regarding the meaning and effect of these texts

Views of European writers on the question of dependence.

(a) *Syama Charan Sarkar's Vyavastha Darpan* p. 97 (103.)

Sir Henry Sumner Maine takes woman's position in Hindu Law to be one of perpetual tutelage.

about the dependence of women. "We have several times laid down," wrote Sir Henry Sumner Maine in 1861, "that early law takes notice of families only; this is the same thing as saying that it only takes notice of persons exercising *Patria potestas*, and accordingly the only principle on which it enfranchises a son or a grandson on the death of his parent, is a consideration of the capacity inherent in such son or grandson to become himself the head of a new family and the root of a new set of parental powers. But a woman, of course, has no capacity of the kind and no title accordingly to the liberation which it confers. There is, therefore a peculiar contrivance of archaic jurisprudence for retaining her in the bondage of the family for life. This is the institution known to the oldest Roman law as the perpetual tutelage of women under which a female though relieved from her parent's authority by his decease, continues subject through life to her nearest male relations or to her father's nominees, as guardians. Perpetual guardianship is obviously neither more nor less than an artificial prolongation of the *Patria potestas*, when for other purposes it has been dissolved. In India the system survives in absolute completeness, and its operation is so strict that a Hindu

mother frequently becomes the ward of her own sons" (a).

Sir Henry Maine must have been thinking, when writing the passage above cited, of the texts about the dependence of women —texts which had been made accessible to English scholars by the publication of Colebooke's famous digest of Hindu law in 1796. He finds a parallel to the perpetual tutelage of Roman women in the dependent condition of Hindu women. But the parallel is just in only one point. The element of dependence or subjection is common to women both in Roman and Hindu law. The comparison, however, cannot be pushed any further. The law regarding the perpetual tutory of Roman women differs in its purpose and effect from the rules regarding the dependence of Hindu females. As we have already seen, the aim of the texts regarding dependence of Hindu women was to preserve their chastity and to protect them from vice : but the manifest reason of the perpetual tutory in early Roman law was to put it out of the power of women *sui juris* to dispose of any part of their family estate to the prejudice of their gens without its co-operation (b).

Maine's view criticised.

Analogy between Hindu and Roman law only partial.

(a) Maine's Ancient Law (Sir Frederick Pollock's Edition) pp. 157-58.

(b) Muirhead's History of Roman law p. 33.

Nor do we think did the dependent condition of the Hindu woman disqualify her from exercising independent control over her own property ; in others words, she was not prevented, by reason of her dependence from performing any juristic act (*c.g.* contract of sale or loan) without the concurrent auctoritas of the guardian. According to Roman Law on the other hand, right down even to the classical period, every woman, whether minor or adult, who was not in *patria potestas* or *manu mariti*, was on account of her sex subjected to the guardianship of a tutor and was thus incapable of binding herself by any transaction and from concluding any juristic act without the concurrent auctoritatis interpositio of her tutor" (a).

As to the remarks of Sir Henry Maine that the mother is sometimes the ward of her sons, all that need be said is that the control that is exercised by the son is a sort of moral control. On the other hand, mothers are appointed guardians of their infant sons. Under the Mithila school of Hindu law a mother is preferred to the father as a guardian of her son (b).

Prof. Wilson
differs from
Sir Henry
Maine.

(a) Sohm's Institutes of Roman Law p. 511.

(b) See *Jussoda Kooeri vs. Lallah Nettya Lall*
I.L.R. 5, Cal. 43.

Professor H. H. Wilson seems to take a sounder view. In Volume V. of his works at p. 29, he says :—"It is absurd to say that a woman was not intended to be a free agent, because the old Hindu legislators have indulged in general declarations of her unfitness for that character. Manu, it is true, says of woman 'their fathers protect them in childhood, their husbands protect them in youth, their sons protect them in age. A woman is never fit for independence'; but what does this prove in respect of their civil rights? Narada goes further and asserts that 'after a husband's decease the nearest kinsman should control a widow who has no sons, in expenditure and conduct.' But as we have observed, this is neither the law nor the practice of the present day. Besides it does not apply to the case of partition, as there the widow has no sons, and they surely abandon a right to control property which they themselves have given. To sanction any other mode of procedure would only tend to perpetuate the degraded condition of the female sex in India."

Mr. Cowell's
view.

Mr. Cowell takes an exactly opposite view. "Women", he says, "for example whose family relationship is according to the Shastras, one of abject dependence find that

state inconsistent with the character of free citizens ; and have gradually obtained freedom and rights of property far beyond those which ancient Hindu law would have sanctioned" (*a*). In the view of this learned author (*b*) "women could not be appointed guardian for under the old rules of Hindu law they were themselves in perpetual tutelage." He further maintains (*c*) on the authority of the texts about dependence, that women were in fact crushed by the weight of the joint family system and that the males alone had authority in those small communities and their union tended to rivet more closely the chains of female subjection. This is indeed a picture of domestic slavery. From what has been said before, it is manifest that Mr. Cowell's strong inference as to the want of freedom of Hindu women is unreasonable and does not at all follow from the original Sanskrit authorities. Professor Wilson has, as we have already seen, condemned such a view. We may further point out that there are texts of Manu and other sages regarding women which would be wholly incompatible with the notion of abject servility and dependence with which Mr. Cowell had asso-

Cowell's view
not reason-
able.

(*a*) Tagore Lectures, 1870, p 28.

(*b*) Ibid p. 152.

(*c*) Ibid p. 187.

ciated the position of women in Hindu law. "Where females are honoured," says Manu, "There the deities are pleased but where they are dishonoured there all religious rites become useless. Women must be honoured and adorned by their fathers, brothers, husbands and brothers-in-law who desire (their own) welfare." "Where the female relations live in grief, the family soon wholly perishes, but that family where they are not unhappy ever prospers. The houses on which female relations, not being duly honoured, pronounce a curse, perish completely as if destroyed by magic." "Strike not with a blossom," said another sage "a woman guilty of a hundred faults", a sentiment so delicate that the most chivalric poet of modern Europe never uttered anything more refined. In the long catalogue of things pure and impure, Manu says (a) however, "the mouth of a woman is constantly pure and he ranks it with running water and the sunbeam. It has also been said, "a way should be made for a woman." These texts read with the texts about dependence, in a proper light are sufficient to show that the condition of Hindu women was not inconsistent with the English notions of freedom. Their dependence was not ordained as check on their individual free-

Texts inculcating respect for women.

Danger of
basing conclu-
sions on iso-
lated texts.

dom as freeborn beings, but for other ends. The conclusion to which Mr. Cowell was led, illustrates the danger of basing inferences on isolated texts of Hindu law and of disregarding the end which Hindu legislators had in view in laying down the precepts contained in them.

Sir William
Macnaughten.

Sir William Macnaughten, whose *Principles and Precedents of Hindu law* were composed, as appears from the preface after collecting all the information that could be procured from all quarters and after a careful examination of all the original authorities, says (a) "that in point of fact females are kept in a continual state of pupillage and that the father in the unmarried state and the husband after marriage and the husband's relations after his death, exercise the duties of guardian over woman and her property. Mr. Mayne whose book on Hindu law and usage is a *vade macum* for all students of Hindu law cites the texts about dependence in the chapter on Inheritance (b) where he deals with the principles of succession in the case of females and seems to suggest that those texts not only prove a want of independence but also a want of proprietary capacity in women. Mr

Mayne.

Colebrooke.

(a) Macnaughten, Vol I. (104)

(b) Mayne on Hindu Law and usage (6th Ed. p. 683.

Colebrooke, the highest European authority on the subject (a), does not agree with Jagannatha in the interpretation which he put upon the text of Narada about the dependence of women in the disposal of property. Messrs West and Buhler say on this point as follows : "If we look back to the state of Brahmanical feeling as the expression of which the principal Smritis were composed we find the position of woman regarded as essentially dependent. Those who on account of their weakness had a claim to be protected and maintained by their male relatives in the family of their marriage or of birth were not likely, so long as the earlier ideas concerning land prevailed, to excite the commiseration out of which might spring the moral and eventually the legal recognition of their right to take the estate dedicated equally to the celebration of sacrifices to the dead as to the support of the living members of the family"

West and
Buhler.

When we pass from the European authorities to the judicial decisions we find this doctrine of dependence or perpetual tutelage as some writers have called it, turned to new uses. The Mitakshara as already seen, laid it down in clear terms that want of independence did not mean defect

Judicial interpretation of the dependence of women.

(a) Shyama Charan Sarkar's Vyavastha Darpana -93.

of ownership and did not disqualify women from proprietorship yet in the face of this clear assertion their Lordships of the Judicial Committee of the Privy Council made the texts the basis for laying down that the widow's estate under the Mitakshara was a qualified one. "It is not merely" say their Lordships, (a) "for the protection of the material interests of the husband's relations that the fetters on the widow's power is imposed. Numberless authorities from Manu downwards may be cited to show that according to the principles of Hindu law the proper estate of every woman is one of tutelage, that they always require protection and are not fit for independence. Sir Thomas Strange cites the authority of Manu to show that if a woman has no other controller or protector, the King should control or protect her." In doing so it is submitted with great respect their Lordships missed the real aim and object of the texts declaring the dependence of women. A plain reading of text of Yajnavalka and the comment of the Mitakshara can lead to but one conclusion, viz, that the estate inherited by the widow is as absolute as the estate of a male heir under the Mitakshara. The aid of the doctrine

Judgment of
privy council
in Collector
of Masulipa-
tam vs. Caval-
y Vencata criti-
cised.

Mitakshara
gives an abso-
lute estate to
widows in-
heriting their
husbands' pro-
perty.

(a) Collector of Masulipatam vs. Cavalry Vencata Narainpati 8. M. I. A. 529.

of dependence which relates to personal status should not have been invoked to curtail proprietary rights of women under the Mitakshara. But if their Lordships are in this matter acting contrary to the intention of the Hindu sages and the commentators they do so in good company since some of the highest European authorities like Mayne, Colebrooke, Messrs West and Buhler, as have been shown before hint at the same view as their Lordships do. But we shall have to say more of this in another place.

This theory of perpetual tutelage of women has not only moulded their proprietary position but has affected their personal status in Hindu law. In the presidency of Madras a widow was held not competent to adopt a son without the assent of her husband's kinsmen since (a) "the assent of kinsmen seems to be required by reason of the presumed incapacity of women for independence." In a case arising in the Presidency of Bombay, the doctrine of dependence was pressed into service for establishing the proposition that the widow of a deceased coparcener in a joint Hindu family can adopt with the sole assent of her father-in-law, if

Theory of perpetual tutelage has affected personal status.

View taken by the Madras High Court.

Bombay.

(a) Collector of Madura vs. Moottoo Ramlinga. 12. M. L. A. 435. *also* Sri Virada vs. Sri Brojo Kishore L. R. 3. I. A. 154.

Allahabad.

he is the head of the family and actual guardian of the widow, whatever may be her motives or the effect of adoption on the interest of his undivided kinsmen (a). In Allahabad in the case (b) in which the Full Bench determined that according to the Benares School of Hindu Law, a Hindu widow cannot make a valid adoption to the deceased husband without his express authority, Mr. Justice Mahmud after quoting the text of Manu about the dependence of women (Manu Chap. V. 148) *in extenso* made the following observations :—"I have quoted the text *in extenso* not only because it leaves no doubt that Hindu Jurisprudence recognises no equality between man and woman for temporal benefits but also because the text itself is in no small measure referred to in the authoritative passages which I have quoted and relied upon as an authority for the proposition that even for such spiritual benefits as may arise out of adoption the position of woman is far below that of man and is in no case independent of the consent of males." The learned Judge proposes to himself the question—what then are the behests of the Hindu law as to the relative position of man and woman in regard to the

(a) Vithoba V. Bapu I. L. R. 15 Bom 110 (131).

(b) Tulsi Ram V Beharilal I. L. R. 12 All 328.

exercise of legal rights, be they of a temporal or spiritual character?—and so far as her position in this world is concerned, finds a conclusive answer in the text of Manu (V. 148).

Let us now pass to the rights of women in regard to adoption. "Adoption," it has been said, "is not a rule of property under the Hindu law but a rule of personal status." (*per* Mahmud J, I. I. L. R. 12 All. 362). The *Dattaka* and the *Kṛitima* are the only forms of adoption which are recognised by our Courts. The former of these is in vogue in all parts of India but the latter (*Kṛitima*) is confined to Mithila and many districts in northern India and some parts of the Deccan.

Capacity of women in the matter of adoption.

The capacity of women in matters of adoption in the *Dattaka* form has to be considered with reference to three heads, viz. the capacity to take in adoption, the capacity to be adopted and the capacity to give in adoption. We will consider each of the three heads in the order in which we have stated them. In the Vedic period we find the existence of the practice of adoption. For instance, we read in the *Rigveda* that *Vadhrimati* the daughter of a certain *Rajarshi* was the wife of an impotent man. She prayed to the *Āswins* for a son which was granted and she was given a son of the name of

Adoption by women in the Vedic period.

Hiranyahasta. The hymn of the Rigveda is as follows (a) :—

The intelligent (Vadhrimati) invoked you Nasâtyas who are the accomplisners of desires and the protectors of many, with a sacred hymn ; her prayer was heard like the instruction of a teacher and you Aswins gave to the wife of an impotent husband Hiranyahasta her son" (Rigveda 1-116-13). In another place of the same Veda we find the sage Vasukarna addressing the Aswins said "You gave to Vadhrimati a swarthy son named Hiranyahasta"(b). In the Aitareya Brahmana the legend of Sunasepha also shows that the practice of adoption prevailed in the Vedic period. The legend of Sunasepha related to adoption by a man but whether the instance of adoption cited from the Rigveda may lead to the inference that the adoption by a woman was also in vogue in the Vedic period is more than can be definitely ascertained. If the Vedic law is to be interpreted in the light of Jaimini's rules, then woman's capacity in this behalf would not seem to differ from that of man. When we come to the Smritis we find that all the sages, except Vasistha and Baudhayana, maintain a

(a) Rigveda 1-116-13. Pages 264-5 of M. N. Datta's Edition.

(b) Rigveda X, 65—12.

rigid silence regarding the power of a woman to adopt a son. In enjoining or rather recommending adoption Atri says "By one sonless alone should the substitute of a son be made (a). To Manu has been attributed a text of similar import by the author of Dattaka Mimansa (b). The word अपुत्रेन (By one sonless) in the text of Manu and Atri ends with a masculine inflexion and taken literally the two texts would seem to imply that males alone are capable of adopting. But if we apply the proper method of interpretation which Jaimini applied to the Vedic law regarding the performance of sacrifices there is nothing in the text debarring its application to females. As we have seen before, unless there is anything expressed to the contrary the text should apply to females as well. On this text of Atri then sonless man and woman are both equally competent to adopt. But then so far as females are concerned their capacity to adopt are hemmed in by limitations suggested or ordained by other sages. Vasistha, for example, says (c)

Result of the application of Jaimini's method of interpretation to this text.

(a) अपुत्रेनैव कर्त्तव्यं पुत्रप्रतिनिधिं सदा । Dattaka Mimansa I—3.

(b) "A son of any description must be anxiously adopted by one who is sonless." Dattaka Mimansa I. 9.

(c) Sacred Books of the East. Vol. XIV. Ch. 15. verse 5.

"let a woman neither give nor receive a son except with her husband's permission". Bau-dhayana (*a*) likewise says :—Let a woman neither give nor receive a son except with the permission of her husband." There has been considerable diversity of opinion regarding the interpretation of the above text of Vasistha ;and this difference has led to different views in respect of a woman's power to adopt amongst the commentators and in the different schools of Hindu law. Of all the commentators Vachaspati Misra, whose authority is followed in the Mithila school is strongly adverse to woman's right to adopt. He maintains (*b*) that a woman is incapable of adopting a son even with her husband's permission and as a reason for this he offers the incapacity of woman to take part in the religious ceremony of adoption. He explains away the text of Vasistha by saying that it was intended for enjoining her husband to associate her in the act of adoption. We have seen already that originally in the Vedic age, women were competent to recite Vedic mantras but they were deprived of this right in the age of the Smriti writers. Vachaspati Misra sees in this incapacity to recite Vedic texts the basis of woman's incompe-

(*a*) Ibid. Parisistha Prasna VII. Adhaya 5. verse 6.

(*b*) Vivada Chintamani pp. 74-75.

tency to adopt, for the recitation of mantras and the performance of Homa form essential parts of the ceremony of adoption.

According to Nanda Pandita, women are generally incompetent to adopt. But he is inclined to the view that Vasistha's text contains an exception to the general rule and authorises a wife to adopt with the assent of her husband. A widow, according to him is incompetent to adopt, as in her case, the assent of the husband is beyond the range of possibility.

Nanda Pandita's view.

The Dattaka Chandrika (a) attributes no significance to the masculine gender in the text of Atri cited above and quotes the text of Vasistha authorising woman to adopt with the assent of her husband. The author seems to think that the wife cannot adopt a son to herself so that if there are sons begotten by the husband on one wife, the co-wife cannot adopt. But from what the author of the Dattaka Chandrika says viz. that a woman is excluded from Heaven as much as a man is, (sec 1, verse 25), if destitute of male issue, it would seem to follow that her right to adopt on failure of that issue should be co-extensive with his.

Dattaka Chandrika.

(a) Dattaka Chandrika 1, 7. (Sutherland's Translation Page 130.) Ibid 1. 23. p. 136.

Dattaka
Nirnaya and
Dattaka Tilaka.

The Dattaka Nirnaya says (a) :—"Giving or taking a son in adoption is illegal in a woman unless her husband gives his consent to it". The Dattaka Tilaka (b) quotes the text of Vasistha cited before and the following text of Harita :—"In regard to a wife, in regard to wealth, and especially in regard to sacred law, a woman does not deserve independence neither in taking nor abandoning" as also a text of Narada by which the sage declares woman's business transactions to be null and void, and comes to the conclusion that a woman is not allowed to receive a son in adoption independently of the husband.

Jagannatha.

Jagannatha says (c) "that the adoption of a son is the act of a man and in no code is it seen that it is the act of a woman" and he maintains the necessity of the husband's assent for adoption by a woman. While dealing with the perpetual tutelage of women we have already stated the views of the author of Viramitrodaya and of Nilkantha on the question. It will be sufficient to say here that the widow's power to receive a son in adoption subject to some conditions is now admitted by all the schools except that of Mithila. What those conditions are and

(a) Dr. Jolly's Tagore lectures for 1883 p. 303.

(b) Ibid. p. 304.

(c) Cole brooke's Digest vol III. p. 322.

how they vary in the different Schools will be discussed in a subsequent chapter which deals with the status of widows in particular.

The right of adoption is not available to a maiden. The commentators make no reference to such a right. But if the foundation of the right of adoption is the spiritual benefit of the adopter, it is difficult to see why that right should be available to a bachelor and not to an unmarried woman. If women are competent to adopt in their own right "spinsters might like bachelors, adopt sons with the consent of the father or his relations according to the guardianship theory" (a). But the commentators, as we have seen above, all maintain that adoption by a woman is for the benefit of the husband and it would therefore seem to follow a maid is incompetent to adopt. Jagannatha, referring to an ancient practice says (b) :—It should not be argued, that the offspring (c) of an unmarried girl and the rest become adoptive sons through the act of the woman. Although she produced the child through lust, its filiation is valid by the choice of the father or by the authority of law and not by

Maiden's
right to adopt

(a) See Tagore Lectures on Adoption 1888 p. 226.

(b) Colebrooke's digest vol III. p. 322.

(c) According to ancient law, a damsel could have a *Kanina* son who belonged to the husband after marriage.

the choice of the woman." This question is however, devoid of all practical importance as Hindu maidens are now married at a very early age. But notwithstanding its practical inutility, its importance should not be minimised considering that it is suggestive of the line along which the modern theory of capacity of women to adopt has developed. According to the modern view a woman is incompetent to adopt to herself, but that she adopts to her husband under a delegated authority. The authority cannot be delegated to any one except to herself alone. In fact this principle has been carried so far that the Judicial Committee in a very recent case declared an adoption by a widow invalid, where the husband directed her to adopt jointly with two executors (a). स्यामेव जयते

Wives have the capacity to adopt subject to certain conditions which shall be stated in the chapter which deals with the status of wife.

Analogy
with Roman
Law.

Under the Roman law, women were incapable of adopting. "From the time of Diocletian" says Mr. Sohm, "women whose children had died were allowed to adopt by means of a *rescriptum principis* ; but the only effect of this so-called adoption was to

(a) See *Amrita vs. Sarnomoyee* L. R. 27. I. A. p. 120.

create mutual rights of intestate succession as between the adoptive mother on the one hand and the adopted child and his descendants on the other hand." The reason for this incapacity of women to adopt in Roman law is stated by Justinian in the following passage of his Institutes(*a*) :—"Again women cannot adopt for even their natural children are not subject to their power, but by the imperial clemency they are enabled to adopt, to comfort them for the loss of children who have been taken from them."

The law of England does not acknowledge relationship arising from adoption (*b*). No question of adoption by women can consequently arise in English law.

English Law does not recognize adoption.

According to Nanda Pandita daughters could be adopted by persons destitute of female children. The whole of Section VII., of the Dattaka Mimansa is devoted to show that for the legitimate daughter, there may be substitutes as for the legitimate son. Nanda Pandita cites the text of Manu:—"Not having read the Vedas, not having produced issue : and not having performed the various sacrifices, a regenerate man desiring absorp-

Adoption of Daughters — Nanda Pandita's view.

(*a*) Moyle's translation of the Institutes of Justinian p. 17.

(*b*) Dicey's conflict of laws p. 475.

Story's conflict of Laws p. 142 note (a)

tion falls into a region of horror," and says that the word *Praja* (issue) in the above text includes both son and daughter. He cites from Yaska, the author of the Vedic glossary the following passage :—"Manu, descendant from self-existent hath declared at the commencement of the world, without distinction, that wealth is that of children (*putra*) male and female (*mithuna*)." The adoption by Lomepada of Santa, the daughter of Dasaratha is cited from the Ramayana in support of the practice of adoption of daughter. The adoption of daughter in the Kritrima form is also illustrated by the example of Kunti, the mother of Judhishthira and the four other Pandavas. Adoption is of two kinds, the Dattaka and the Kritrima. The Kritrima form is obsolete except in Mithila. In the Kritima form the girl must be an orphan and there is no ceremony of giving and taking as in the Dattaka form. But adoption of daughter is not now considered legal. Nilkantha says (a) :—"that a male only can become adopted, not female ; because from the pronoun सः (he) occurring in the text (b) ('he is to be known to be a son given') which sentence is expressive of a con-

Nilkantha's
view.

(a) Mandlik's Vyavahara Mayukha p. 51.

(b) This is a fragment from a verse in Manu (ch. ix. v. 168).

nexion between an object and its attribute, it is understood to imply a male person equal in class who is the subject of a gift made by the father and mother accompanied with affection and pouring of water and of which distress is the motive ; as from the pronoun him in the holy text (a) :—‘Let a Brahman of eight years be initiated and let him be instructed’ ; there arises the knowledge of male of eight years of the Brahman class, initiated at the thread ceremony and the like. From the above results, the refutation of what some persons have held, viz, that since in the act of gift, signified by the term ‘*dat-trima*’ (or given) there is nothing distinctive (of either male or female) and as by the aphorism *Ktrermam Nityam* (b) (i.e. formations ending in the affix ‘*ktri*’ always have *maṣ* added), whether the word be masculine or feminine, the daughter given to the husband or another is signified by the term ‘*dat-trima*’.”

*But Nilkantha's view is open to the following criticism—According to Jaimini's method of interpretation, the text of Asvalayana about the initiation of Brahman male of eight years cited by Nilkantha would seem to apply equally to females. In fact

Nilkantha's
view about
adoption of
daughters
criticised.

(a) Asvalayana Sutra (Adi. Kand xix. su. 1).

(b) Panini Ch. iv. quart. iv. sutra 20.

* The portions in asterisk are based on original research.

Adoption of
daughters not
allowed by
modern Hindu
Law.

Madhavacharyya, as we have noticed before thinks this to be legitimate conclusion as following from the Adhikarana of Jaimini regarding the equal rights of men and women in performing sacrifices. Jaimini's rules of interpretation would, therefore seem to lend an additional support to the arguments of Nanda Pandita in favour of the adoption of daughters. But Nilkantha's view has been accepted by the courts and it is now firmly established that women cannot be adopted. In the case of *Ganga Bai vs. Anant (a)* in which the validity of the adoption of a daughter by a Brahmin was questioned, Mr. Justice Nanabhai Haridas is reported to have said :—"The adoption of a daughter appears opposed to the very purpose and history of adoption. 'Males only need sons to relieve them from the debt due to ancestors' (*b*). The adoption of a daughter is not warranted by any Smriti, it is supported only by some Pauranic instances."

Adoption in
Roman Law.

Under the Roman law there were two kinds of adoption. The person adopted might either be a *paterfamilias* in which case the adoption was called "*arrogatio*" or a *filius familias* in which case it was called

(a) I. L. R. 13 Bom. p. 691.

(b) (Colebrook's Digest, Book V. p. 263, commentaries.)

'adoption' in the narrower sense of the term. A change of family relation such as '*arrogatio*' was a matter of public concern and the ceremony took place in the popular assembly. As women could not appear in the popular assembly, there could be no '*arrogatio*' of a woman. But adoption in the narrower sense of the term could be effected by means of a private juristic act. A daughter could consequently be adopted in this form, there being no such obstacles as existed in the case of '*arrogatio*' (Sohn's Institutes of Roman law, translation by Ledlie pp. 499 500 and 501).*

Adoption
of daughters
under the
Roman Law
compared.

The capacity of a woman to give a son in adoption is larger and more unrestricted than her capacity to take a son in adoption. It is true that the text of Vasistha, "But a woman should neither give nor accept a son without the permission of her husband"—would seem to indicate that the power to take and give is circumscribed by the same limitations of being subject to the husband's assent. But the giving of a son in adoption is regarded as an act which results in the benefit of the child and the rule of Vasistha is not construed strictly as the question of the child's advancement may be safely left to the discretion of the mother. But the text of Manu : "That (boy) equal by caste

Capacity of
a woman to
give in adop-
tion.

Authority of
the widow to
give differs in
different
schools.

whom his father or his mother affectionately gives with water in time of distress as son must be considered as an adopted son" would seem to imply that the mother has a right to give independently of the husband. But the authority of the widow to give in adoption is not identical in the different schools of Hindu law. In Bengal the rule is now established that the wife is competent to give her son in adoption when the husband is alive, with the assent of her husband, but that assent is to be presumed in the absence of express prohibition (*a*) and that even in the absence of any authority from her deceased husband it is competent to the widow to give her son in adoption (*b*). In the case of *Sri Balusu v. Sri Balusu* (*c*) the Judicial Committee of the Privy Council laid down the law with regard to the Southern School thus :—"Unless there is some express prohibition by the husband, the wife's power to give or take in adoption an only son at least with the concurrence of Sapindas in cases where that is required is co-extensive with that of the husband." In the Maharashtra School, the husband's consent to an adoption by the widow, is, in the absence of

(*a*) *Jogesh vs. Nritya* I. L. R. 30 Cal. 965.

(*b*) *Ibid.*

(*c*) I. L. R. 22 Madras, p. 398 ; 26 I. A. p. 113.

prohibition always to be implied. (a) But in Bombay the Judges are not agreed as to the nature of the basis of the right of the mother to give a child in adoption. Mr. Justice Ranade held (b) that the right to give a boy in adoption is a right of disposition, a portion of the *Patria Potestas* which comes to the widow by reason of the connection with her husband's estate. On the other hand in a recent case (c) Chief Justice Scott held that according to the texts, the right of a female parent to give her son in adoption results from the maternal relation and is not derived by delegation from her husband. We shall have to return to this subject in a subsequent chapter.

Basis of the mothers right to give in adoption.

Next let us pass to the rights of women to serve the office of a guardian. Minority under the Hindu law ends with the sixteenth year (d). Narada says :—‘A youth who has not reached the age of sixteen is called ‘Poganda’ (v. 35) ; to this verse Asahaya adds the gloss :—‘He is called ‘Poganda’ (a young man) because he is not capable of

Rights of women to serve as guardian.

(a) Lakshmi Bai vs. Saras bati Bai I. L. R. 23 Bom. 789 (795)

(b) Panchappa, vs. Sangan Baswa I. L. R. 24 Bom 89 (94).

(c) Putla Bai v.s. Mahadu I. L. R. 33 Bom. 107.

(d) Narada, Dr. Jolly's Sanskrit Edition. p. 58.

transacting legal business." This rule of Narada is the basis on which the modern Hindu law regarding the duration of minority rests. But there is a conflict of opinion amongst commentators as to whether minority ceases at the beginning or at the end of the sixteenth year. The different schools of Hindu law do not agree as to whether the age of majority is attained at the commencement or at the end of the sixteenth year. In Bengal (*a*) the former while in the other schools, the latter view prevails. The Indian Majority Act (Act IX of 1875) has now fixed the age of majority for all persons at eighteen except such persons as are referred to in section 3 of the said Act for whom the age of majority is fixed at twenty-one. But the Act does not propose to affect the Hindu Law regarding majority so far as it relates to marriage, divorce and adoption. (*b*)

King as *parens
patria*.

That the king should protect all who have no other protector, that he is the guardian above all guardians is the idea that is prominent in Hindu Law. Thus Manu says (*c*) :—"The king shall protect the inherited (and other) property of a minor

(*a*) *Mothoormohan vs. Surendra I. L. R. 1 cal. 108 (F. B.)*

(*b*) *Act IX 1875. sec. 2 clause (a)*

(*c*) *See Manu VIII 27-29.*

until he has returned from his preceptor's house or until he has attained majority. In like manner care must be taken of barren women, of those who have no sons, of those whose family is extinct, of wives (a) and widows faithful to their lords and of women afflicted with diseases. A righteous king must punish like thieves those who appropriate the property of such females during their lifetime." Other sages (b) might also be quoted to show that the sovereign is the *Parens Patriae* under the Hindu law. But the king's protection could only be invoked when the relatives are either dead or are unable to provide for the females or try to oppress them. According to the theory of perpetual tutelage of women, it would seem to follow that women who themselves require protectors, could never be appointed guardians of their infant children. So it was, indeed in early Roman law (c) where women were really under perpetual tutelage. But we have endeavoured to show before that women under Hindu law were not subject to anything that ought to be called a perpetual tutelage. And we find, there-

In early Roman law women could not be appointed guardians.

(a) Wives whose husband are absent.

(b) Gautama X. 48. Vasistha XVI 8. Vishnu III 65.

(c) Sohm's Institutes of Roman law p. 515. Muir heads Roman law p. 391.

No positive rules regarding guardianship of women in the texts.

fore, texts which give the mother the right of guardianship next to the father. Hindu law does contain positive rules regarding the rights of guardianship of female relations in respect of marriage. We shall deal with this class of rights in the chapter on marriage. But it does not apparently contain any positive rules with respect to the rights of guardianship in other cases. The following text of Manu(*a*) :—"The production of children, the nurture of them when produced, and the daily superintendence of domestic affairs are peculiar to the wife" may be cited as authority for the view that a mother is the proper person to act as the guardian of her infant son. The text would seem to imply that the right to what Blackstone (*b*) calls 'guardianship for nurture' belongs to the mother in the first instance. In Bombay upon the authority of this text of Manu, the Poona Pandits, in answer to a question put to them, said that the widow during her son's minority would be the guardian of her son both with regard to his person and property, (*c*) Under

(*a*) उत्पादनमपत्यस्य जातस्य परिपालनम् ।

प्रत्यहं लोकायावायाः प्रत्यक्षं स्त्रीनिर्वन्धनम् ॥ Manu IX, 27.

(*b*) Blackstone's Commentaries of the Law of England Vol II p. 315.

(*c*) See West and Buhler's Digest 2nd edition p. 88.

the Mithila school of Hindu law the mother is preferred as guardian even to the father' (*a*). In a recent case a Hindu mother was appointed as guardian to her infant daughter in preference to the infant's paternal grandfather, (*b*). This right is not taken away by the fact that the mother has been out-casted' (*c*) or that she has remarried. There is nothing in Hindu law to make it obligatory on the court to remove the mother from the office of guardian of her infant children merely because she has remarried (*d*). The mother and guardian of a Hindu minor may deal with the estate within the limits allowed by Hindu law (*e*). The power of a female guardian of an infant heir to charge an estate not her own is under the Hindu law, a limited and qualified power. It can only be exercised rightly in case of need or for the benefit of the estate. The rule as to the limitations on the power of a guardian to deal with the estate of her ward is laid down by the Judicial Committee in the case

Mother preferred to father as guardian in Mithila School.

(*a*) Jussoda koer vs. Lallah Nettyah Lall. I. L. R. 5 cal 43.

(*b*) Kaulesra vs. Jorai I.L.R. 28 All. p. 233.

(*c*) Kanhaia v.s. Vidya I.L.R. 1 All. 549 also I. L. R. 28 All. p. 233 cited a above.

(*d*) Gunga vs. Jhalo 13 C. L. J. 558.

(*e*) Roshan vs. Harsankar I. L. R. 3 All. 535.

of Hunooman Pershad vs. Mt. Babooee (6. M. I. A. p. 393-423).

Testamentary
capacity of
women under
Hindu law.

Let us now pass on to consider the personal right of a Hindu woman to make a will ; we cannot however expect to find anything on this head in the writings of the Hindu sages and commentators for it is recognised that testamentary instruments, in the sense affixed by English lawyers to that expression, were unknown in ancient Hindu Jurisprudence (a). And the reason is not far to seek. There is no possible occasion for it in the primitive state of Hindu society when family property was vested in the family corporation. The evolution of the law of wills has been contemporaneous with the growth of the conception of individual ownership. It is not within the scope of this thesis to consider whether the origin of wills is to be ascribed to the influence of English lawyers in the supreme courts or to the Brahmanical influence which displayed itself in the sanctity attributed to religious gifts. Whatever their origin we must look for the law of the testamentary capacity of Hindu women not

(a) Nagalutchmee vs. Gopoo Nadaray Chetty 6. M. I. A. p. 309 (344)

Bhoobunmoyee vs. Ramkishore 10 m. I. A. 308.

Beerpertab Saha vs. Rajendra Pertap Saha 12. m. I. A. 1.

in the writings of Hindu sages but in the judicial decisions. (a) These judicial decisions establish that a married woman or a widow possesses the capacity of making a testamentary disposition of that kind of stridhan or other property which is absolutely at her own disposal. For instance, it has been held in Madras (b) that where a Hindu lady had received presents of moveable property from her husband, from time to time, during their married life, and, after his death, partly

Capacity of women to make wills in respect of Stridhan established by Judicial Decisions.

Madras.

(a) "There is no mention of wills in our Shastras and therefore they ought not to be made," was the reply given by the Shastris of Bombay in an early case (see Strange's Hindu Law 4 Digest). 'But there are some texts of the Hindu sages,' says Mr. Mayne "which contain the actual germ of a will and which were capable of being developed into a complete testamentary system," and he cites three texts from Katyayana and Harita. But Mr. Mayne is careful to point out that the only writer who has remarked the bearing of the texts of Katyayana and Harita upon the question of testamentary capacity in Hindu Law is Mr. Gibeline who considers that a Hindu will was a native and not a European invention. (Mayne's Hindu Law 6th ed. p. 523). But there can be no reasonable doubt that we owe the first recognition of the institution by English lawyers to the supposed analogy between a gift and bequest. (Dr. R. B. Ghose's Mortgage 2nd Ed. p. 2).

(b) Venkata Ram vs. Venkata Suryya Ram. I.L.R. 1 Mad. 281 affirmed by Privy Council in I. L. R. 2 Mad. 333.

out of such property and partly from funds raised by the mortgage of jewels admitted to be her stridhanam, purchased immoveable property, it was held she could dispose of such property by will. It was contended by Counsel in the Madras case cited above that it would be repugnant to Hindu law to allow a widow to acquire a large property and to dispose of it by will and the texts about dependence were cited to curtail the testamentary powers of women. But the learned Judges of the Madras High Court refused to accede to the contention. In appeal from the Madras case, the Judicial Committee of the Privy Council are reported to have said :—"The testamentary power of a Hindu female over such stridhanam is admitted by Mr. Mayne to be commensurate with her power of disposition in her life-time, both being absolute" (a). It would appear from these observations that their Lordships found an analogy between a gift and a bequest and in this view of the matter, the testamentary power of a Hindu woman to make a will must be regarded as co-extensive with her power to make a gift.

Bombay.

Similarly in Western India, a widow takes absolutely the moveables bequeathed

(a) See also the observations of the Privy Council in *Luchman vs. Kali Charan* 19 W. R. 292.

to her by her husband and she may dispose of the same by will (*a*). But she has no power of disposition by will of moveables inherited by her from her husband (*b*). A widow governed by the Mayukha in Guzerat has power to bequeath moveable property which she took under the will of her husband and over which she was given a free power of disposition (*c*).

In a recent Bombay case it was held that a widow after her husband's death has an absolute power of disposition by will of so much of her *soudayika stridhana* derived from her husband as consists of moveable property (*d*). But a daughter and a sister are absolute heirs in Bombay, and as such, they have full testamentary capacity in respect of property obtained by inheritance.

Woman's power over *Soudayika stridhana* confined to moveables in Bombay.

In Bengal it would seem that a woman can make a testamentary disposition of her stridhan, for, according to the Dayabhaga, stridhana means such property over which a woman has absolute power of disposition. "That alone is her peculiar property

Woman's power of testamentary disposition over her stridhana in Bengal.

(*a*) Damodar Das vs. Purman Das I. L. R. 7 Bom. 155.

(*b*) Gadadhar vs. Chandra Bagbai I. L. R. 17 Bom. 610.

(*c*) Motilal vs. Rotilal I. L. R. 21 Bom. 170 (174).

(*d*) Hoor Bai vs. Sooleman, 3. Bom. L. R. 790.

(stridhana) which she has power to give, sell or use, independent of her husband's control" (a).

The law of testamentary capacity of women became the subject of discussion in a very early Bengal case (b), and the learned judges made the following observations :—"It is scarcely necessary for us to go into the question whether a woman can or cannot execute a will, though it does arise in this case. We think that a woman cannot execute a will regarding any property she inherits in the usual course from her husband or father, for in this, she has but a life-interest, but it is otherwise with *streedhan* which she is at liberty to dispose of either by gift or by will, or sale except in the case of immoveable property given to her by her husband." In a later Bengal case (c) it was held that there is no rule of law which forbids a Hindu widow from making a will with regard to property which belongs exclusively to herself.

Law in the
Mithila
School.

In the Mithila school, a childless Hindu widow has the power of disposing by will moveable property inherited by her from

(a) Dayabhaga, Ch. IV Sec. 1. 18.

(b) Teencowree Chatterjee vs. Dino Nath Banerjee (1865) 3. W. R. 49 (C. R).

(c) (1878) Behary vs. Jogo Mohan I. L. R. 4 Cal. 1.

her husband (*a*). Her absolute power to deal with such property was decided in the very early case of *Sreenarain vs. Bhyajha*. In the second case noted below texts were cited from the *Vivada Chintamani* and *Ratnakara* in support of the absolute power of a widow over moveables under the Mithila School of Hindu law.

According to the Benares School of Hindu law, a woman has a right to make a will of property to which she is absolutely entitled. For instance, where a woman has acquired by adverse possession a right to certain immoveable property she can dispose of the same by will (*b*). In a recent Allahabad case the question whether a Hindu widow was competent to make a testamentary disposition of property which she obtained under a deed of gift or testamentary instrument of her late husband was raised, and the High Court of Allahabad held that she had no such power. That instrument *inter alia* contained the following clause :—"After my

Benares
School.

(*a*) *Sreenarain vs. Bhyajha*, 2. Sel. Rep. 23.

Birajan vs. Luchmi I. L. R. 10 Cal. 392.

Doorga vs. Puran 5. W. R. 141.

(*b*) *Ramsankar vs. Ganesh* I. L. R. 29 All. 451.

Pasam vs. Tek, I. L. R. 29 All. 217 ; *Kanhai vs. Musst.*

Amri, I. L. R., 32 All. 189.

Brij Inder vs. Janki, L. R., 5 I. A., 1.

death they (the two widows) shall under the document get their names recorded in respect of the respective properties given to them and remain in possession as owners with full proprietary powers (*Malik wukhud Iktiar*).” But this decision was reversed by their Lordships of the Judicial Committee. Their Lordships held that the use of the word ‘*Malik*’ showed that the wives had full proprietary rights, and that there was nothing in the context to cut down the full proprietary right that the word imports, and they declared she had full power to make the will (a).

English Law
compared.

In England a married woman has no testamentary power unless she was possessed of separate property. In the case of *Tharp vs. Macdonald* in the goods of *Tharp* (b), Sir G. Jessel pointed out that it was the possession of separate property which removed the legal incapacity under which she would have been so far as the making of a will was concerned.

Early Roman
Law.

Under the early Roman Law as long as the *tutela mulierum* was in force, women who were *sui juris* could only make a will with the *auctoritas* of their guardian, but the

(a) *Surjamani vs. Rabinath* (P. C.) 1 L. R. 30 All. 84, reversing 1 L. R. 25 All. 351.

See also 29 All. 217.

(b) L. R. 3. P. D. 76.

abolition of the *tutela mulierum* removed this restriction (a).

Next we proceed to deal with the personal right of a woman to enter into a contract under the Hindu law. From what has been shown before, *viz.*, that the position of women was one of equality with men in Vedic times, it would seem to follow that in the Vedic period, women were as free to enter into contract as men. And it does not seem that in the period of the Smritis, their capacity to enter into a contract was taken away. From the catalogue of persons mentioned in the codes of Manu, Yajnavalka, Katyayana and Gautama as incompetent to contract, women are omitted (b). The capacity of a woman to contract is not affected or taken away by her marriage. In the case of a married woman, it is not necessary that she should take the consent of her husband to such transaction. In this respect she is unlike the married woman under the Roman law, who required the *auctoritas interpositio* of her husband or guardian before she could enter into a contract which would bind her. In the Insti-

Right of woman to enter into contract under Hindu Law.

Women quite free to enter into contract in Vedic period.

Women's capacity to do so not taken away by the Smriti-writers.

Capacity of women to contract not affected by marriage.

Distinction with Roman Law.

(a) Sohm's Institutes of Roman Law by Ledlie p. 567.

(b) Colebrooke's Digest Bk. II. Ch. IV. Texts 57, 58, 61 and 66.

Narada. tutes of Narada, Yajnavalka and Katyayana we find it expressly laid down that a woman shall pay the debts contracted by herself. For instance Narada ordains :—“A debt contracted by the wife shall never bind the husband unless it has been contracted at a time when her husband was in distress” (Narada 1. 18). Then follows an exemption of the wives of washermen, huntsmen, cowherds and distillers of spirituous liquors, on the ground that the income of these men depends on their wives and the household expenses have also to be defrayed by the wives. (Narada 1. 19). Narada again says, as appears from a verse attributed to him in Colebrooke's Digest (a), that “a childless widow must pay the debt of her sister enjoining payment or whoever receives the assets left by that sister must pay her debts,” a direction which necessarily presupposes in the sister the legal capacity to borrow money on her account. Then again the sage Vishnu tells us that the husband or son shall not be compelled to pay the debt of his wife or mother, thus showing the capacity of the wife and the mother to contract for themselves. Yajnavalka says :—

Vishnu. “A debt acknowledged by her husband, or contracted by her jointly with her husband

Yajnavalka.

(a) Colebrooke's Digest Vol. 1. Vers 213.

or son, or contracted by the woman herself, must be paid by a wife or mother ; no other debts shall a woman be compelled to pay" (a). In commenting on this text of Yajnavalka, Jagannath gives an illustration of the nature of the debt contracted by the woman herself. "For instance," says Jagannatha, "her husband and son being incompetent to the management of affairs, and the woman herself being very active, she contracts a debt jointly with them ; such debt is meant ; or the husband and son being incompetent or being unable to act by reason of other occupations, she uses their names or contracts debts in her own name from the money-lender ; in either of these cases the debt is contracted by the woman herself."

Jagannath's
comment on
Yajnavalka.

Katyayana follows in the same strain as Yajnavalka. "A debt contracted jointly with her husband or son or singly by the woman herself shall be paid by a wife or mother." All these texts lay down unmistakeably that women who have attained the sixteenth year (beginning or end of the sixteenth year according to different schools) were under the Hindu law competent to contract. The Indian Contract Act (section 11) enacts that every person is competent to contract who is of the age of majority,

Katyayana.

Sec. 11, Indian
Contract Act.

(a) Colebrook's Digest v. 210.

Indian Majority Act.

according to the law to which he is subject, and is of sound mind, and is not disqualified by any law to which he is subject ; and the Hindu law relating to the capacity of a woman to contract is surely controlled by this provision of the Indian Contract Act. The age of majority under the Indian Contract Act is regulated by the Indian Majority Act (IX of 1875). Section 3 of the latter Act declares that every person domiciled in British India shall be deemed to have attained his majority when he shall have completed the age of eighteen years and not before. In the case, however, of a minor of whose person or property, or both, a guardian has been appointed by a Court, or of whose property charge has been taken by the Court of Wards before the minor has attained the age of eighteen years, the Act provides that the age of majority shall be deemed to have been attained on the minor completing his age of twenty-one years. Section 2 of the Act declares that nothing in the Act contained shall affect the capacity of any person to act in matters of marriage, dower, divorce and adoption. It follows, therefore, that a Hindu woman, who has attained the age of majority within the meaning of the provisions of the Indian Majority Act, is competent to contract. So

that where a Hindu woman above the age of sixteen but under the age of eighteen years and whose husband had his domicile in British India, executed a bond at Kolhapur outside British India, it was held that she was not liable on the bond according to the law in British India, namely, the Indian Contract Act (a). In Kolhapur the Hindu law is unaffected by the Indian Contract Act, and she would have been liable on the bond if her capacity to enter into the contract was determined by the *lex loci contractus* (i.e., the law of Kolhapur). But on the authority of *Sottomayor vs. De Barros* (b) their Lordships of the Bombay High Court held it to be established that such capacity must be determined by the law of her domicile, which was in British India.

Sottomayor
vs. De Barros.

Sir Thomas Strange said with reference to the capacity of a wife to enter into a contract that it may be taken to be commensurate with reference to her rights of property as consisting in her stridhana, land excepted (c).

Sir Thomas
Strange's view

(a) See (1895) *Kashiba vs. Shripat* I. L. R. 19. Bom. 697.

(b) L. R. 3. P. D. p. 5 : See however as to the law governing capacity to contract, Dicey's *Conflict of Laws* p. 543, Footnote (2). Story's *Conflict of Laws* 64, 81, 82. Foote's *Private International Law* 3rd. Edition p. 364.

(c) Strange's *Elements of Hindu Law* vol. 1. p. 275.

Sir William
Macnaughten's
view.

His view
criticized.

Sir William Macnaughten, while recognising the capacity of women to contract, says, it is a general rule that coverture incapacitates a woman from all contracts (*a*). We are unable to find any authority for this generalisation of Sir. William Macnaughten. On the other hand, the preceding observations are sufficient to show that coverture does not take away the capacity of women to contract. In the second volume of his *Principles*, the learned author gives the opinion of the Pundits in two cases from which it would appear that women were competent to enter into a contract which may not only bind her but also her husband, where money is borrowed for the benefit of the family (pp. 281-282). Macnaughten cites the following verse from Manu: "A contract made by a person intoxicated or insane, or grievously disordered, or wholly dependent, by an infant or decrepit old man, in the name of another without authority, is null." (Manu VIII, 163). The word "wholly dependent" in Manu's texts has apparently led Macnaughten into thinking that wives who are dependent on their husbands are incapable of entering into a contract. But Manu could not have meant to include

(*a*) *Principles and Precedents of Hindu Law*
vol. I. p. 122

'women' in the persons "wholly dependent." None of the commentators of Manu consider this text as indicating that women are excluded from entering into a contract. On the other hand, Medhatithi, Govindaraj, Kulluka, Narain and Raghunandan paraphrase अर्धधिनपि (one wholly dependent) in Verses 66, and 166 Chap VIII to mean a slave by birth. Yajnavalka omits the word "wholly dependent" from the parallel text regarding contracts. 'A transaction entered into by a person intoxicated, affected with disease, in difficulties, or by an infant, or one threatened or the like, does not hold good ; also that which is improper' (ch. II, verse 32). Vijñaneswar explains the last class of improper or void contracts to be contracts between teacher and pupil, husband and wife, master and servant. But Vijñaneswar says that this text of Yajnavalka directs that such contracts should not be entered into, but there is no legal prohibition against such contracts. In other words, it is merely directory and not mandatory.

Commentators on the text of Manu regarding persons excluded from entering into contracts.

In the case of *Nathubhai vs. Javher (a)*, the capacity of Hindu women to enter into a contract was recognised. Mr. Justice Nanabhai Haridas is reported to have said

Judicial
Decisions.

in that case that a Hindu female is not, on account of her sex, absolutely disqualified from entering into a contract. Mr. Justice West took the same view in a later case (*a*).

Extent of
woman's li-
ability on con-
tract.

A woman is liable on the contract to the extent of her *stridhanam* or separate property. A Hindu married woman has, in common with the married women in England, the power to deal with her separate property (*stridhanam*), and accordingly, she has the other power incident to property in general, namely, the power of contracting debts to be paid out of it. In a Bombay case (*b*) where the wife had joined the husband in a mortgage deed, by which she and her husband jointly and separately entered into a contract to repay the plaintiff the money which he had advanced, it was held that she was liable to the extent of her *stridhan* to the plaintiff. Sir Charles Sargent, the Chief Justice of Bombay, observed as follows: "In India the *stridhanam* of a woman is, as regards her power over it, analogous to the separate property of a married woman in England, and there is no reason why it should not be similarly dealt with so as to

(*a*) *Narbada Bai vs. Mahadeo*, I. L. R. 5 Bom. 99 (107).

(*b*) *Gobindji Khunji vs. Laksmidas*, I. L. R. 4 Bom. 318.

give effect to her contracts." Similarly in a later case (*a*) where a married Hindu woman contracted jointly with her husband, she was held liable to the extent of her *stridhan* only. This case came on a reference from the Small Cause Court Judge, whose letter of reference sets forth clearly the reason for holding the opposite view, but the learned Judges of the Bombay High Court held that the cases of Nathubai and Gobindji just cited are sufficient authorities for holding that a married woman who contracts jointly with her husband is liable to the extent of her *stridhan* only.

So it was held in a case (*b*) where a decree which was passed against a married woman in a suit on a bond, in which she had joined with her husband as surety and which simply directed her to pay the debt, that it could be enforced only to the extent of her *stridhan* property, and it was further held that the direction to her to pay must be assumed to have reference to that fund only. In this case, the wife pleaded coverture after her arrest and claimed to be released on that ground. Sir Charles

(*a*) (1882) *Narottam vs. Nanka*. I. L. R. 6 Bom. 473.

(*b*) (1887) *In Re-Petition of Radhi* I. L. R. 12. Bom. 228.

Sargent C. J. held that mere omission to take the objection at the time of arrest could not be regarded as a waiver of her right of exemption from arrest, and having regard to the nature of the right claimed, it was one which the court could not properly decline to consider on review, however late the application might have been.

A husband, however, is not liable for debts contracted by his wife unless she had express authority from him to do so, or unless they were contracted under circumstances of such pressing necessity that his authority might be implied (a).

Position of
Mahomedan
women com-
pared.

A married Mahomedan woman is not by reason of her marriage disqualified from entering into a contract.

Women as
surety.

Suretyship is a kind of contract, and there is nothing in Hindu law to prohibit women from entering into this particular form of contract. It is however otherwise in early Roman law ; one of the salient features of the Roman law of suretyship is the practical incapacity of women to bind themselves by contracts of this kind. "A woman who was sued in respect of an *intercessio* of any kind, whether suretyship or any other, could plead the *exceptio senatus consulti Vellejani*" (b).

Roman and
Hindu Law
compared.

(a) (1880) Pusi v. Mahadeo Prasad I.L.R. 3 All. p. 122.

(b) Sohm's Institutes of Roman Law (Ledlie) pp. 292 and 405.

Next with regard to surety in suits, there is no provision in Hindu law restricting the general right of woman in this behalf. For instance, Yajnavalka says (see chap II verse 10) that "a substantial surety from each party should be taken for satisfaction of judgment." Then we find Katyayana enumerates different kinds of sureties from which women are not excluded. But Yajnavalka says in Ch. II, v. 52 that wife cannot stand as security for husband, neither can the husband stand as surety for the wife (a).

In ordinary cases it is the duty of the person making a contract with another and desiring to avoid its effect to prove that he is not liable under the contract, either because he did not understand the contents of the deed, or that he executed it under undue influence or coercion. But in the case of contracts entered into by those Hindu women who are according to the prevailing usage in many parts of India mostly *Pardanasin*, the ordinary burden of proof is reversed, and it is the duty of a person making a contract with a *Pardanashin* woman to show that the deed was explained to her and was understood by her. A Hindu woman who sits behind the *Parda* according to the prevailing custom is placed in the same category

Burden of proof in suits based on contracts entered into by women.

(a) Vyavahara Mayukha by Mandlik, p. 114.

as a "weak, ignorant and infirm" person whom the Court of Chancery in England is accustomed to protect (a).

Origin of
Parda.

A few words about the origin of *Parda* or this seclusion of Hindu women will not be out of place here. We do not find any thing of this seclusion in the Vedic period. It is only when we descend to classical Sanskrit literature, say the works of Kalidasa, that we find the practice of "seclusion of women" prevalent among the royal families. With regard to this system of *Parda*, sometimes it has been stated that it arose as a protection against the violence of a ruling race. But this statement must be accepted with considerable reserve. There can be no doubt that the custom in its present rigour dates from the period of the Moslem rule. Where that rule was firm and long established, there the *Parda* has sunk deep into Hindu habit ; and this accounts for the fact that we find no trace of the system in Bombay and Madras where Mahomedan rule was transitory. The origin of this institution of *Parda* is to be attributed to the idea of social prestige which introduced seclusion amongst royal families. In

(a) The *pardanashin* woman and her protection by British Courts of Justice,—Journal of Comparative Legislation, Dec. 1901, pp. 252, 259 and 258.

the works of Kalidas, we have the well-known instance of a king who, apparently contrary to the conventional rules of the time, used to hold his assembly in company with his wife ; and it is said that his minister pointed out to him the undesirability of such a course, for wives of kings are not to be seen even by the sun (असूर्यमपश्यत्पा , not to speak of other human beings. The *Parda* having once been introduced into the royal families spread into the lower strata of society.

Let us now return to the law as to the burden of proof. Before the passing of the Indian Contract Act, a series of judicial decisions established the rule that every one dealing with *Pardanashin* women is bound to prove affirmatively that she understood the nature of the transaction and that the terms were fair (*a*). This rule applies equally to *Pardanashin* Hindu and Mahomedan women, and in fact the earliest Privy Council decision on the subject was in the case of a Mahomedan *Pardanashin* lady (*b*). The next case on the subject which was decided by the Judicial Committee in 1870 (*c*) was the

Judicial decisions regarding Burden of proof in contracts with *Pardanashin* women.

(*a*) (1867) *Moonshee Buzloor Ruheem vs. Shumsoonnisa Begum*, 11 M. I. A. 551.

(*b*) See above.

(*c*) *Girish Chunder vs. Bhuggobutty* 13 M. I. A. 419 (431).

case of a disposition made by a Hindu lady, a short time before her death. Their Lordships observed as follows :—"But this Committee and the Courts in India have always been careful to see that deeds taken from *Pardah* women have been fairly taken, that the party executing them has been a free agent, and duly informed of what she was about." In 1881 a deed executed by a *Pardanashin* Hindu lady was before the Judicial Committee again, and their Lordships said that "in order to charge a *Pardanashin* woman upon an instrument or power purporting to have been executed by her, it is requisite that the person relying on such a document should give satisfactory evidence that it has been explained to and understood by her" (a).

In a recent case (b) the same highest tribunal for India laid it down that it is not sufficient to show that a document executed by a *Pardanashin* lady was read out to her. It must be further shown that it was explained to her, and that she understood the conditions and legal effect of the instrument.

(a) *Sudisht Lall vs. Mt. Sheobarat Koer* (1881) I. L. R., 7 Cal. 245. Also 8 All. 267.

(b) (1902) *Shambati Koer vs. Jogo Bibi* I. L. R., 29 Cal. 749; also (1901) 3 Bom. L. R. 658 (663); (1906) I. L. R. 31 Bom. 165.

The ordinary presumption that a person understands the documents to which he has affixed his signature or seal is reversed in the case of *Pardanashin* women. Quite recently, in another case (a) the Judicial Committee have gone to the length of holding that even where an illiterate *Pardanashin* lady admitted execution of a deed for a certain purpose, but said it was not read out to her by any one of those present, and she asked them to have it read out to her, and was told that it would be read afterwards, and that the registrar did not read it out but merely told her it was a deed of gift to Thakurji, it was held that it was incumbent on those who rely on the deed to prove affirmatively that the statements in the deed concerning adoption were brought to the notice of the *Pardanashin* lady before they could in any way rely on them as admissions against her.

But it is submitted that the rule laid down by the Judicial Committee should not be applied to cases of *Pardanashin* ladies where the evidence discloses that the lady is a literate one and possesses either efficient business capacity or a high order of intelligence sufficient to understand the nature of

Limits of the
rule of the
Judicial
Committee.

(a) *Kishori Lal vs. Chuni Lal*, 9 C. L. J., 172.
(P. C.) I. L. R., 31 All., 116.

the transaction or contract on which she is sought to be made liable. For, to apply the rule to such a case would be to adopt a sweeping generalisation that every *Pardanashin* lady who enters into a contract is presumably the victim of undue influence or fraud—a generalisation based on an assumption contrary to actual facts. Nor should this rule be extended to cases where the *Pardanashin* lady had the benefit of legal advice at the time of the execution of the document (a). It is satisfactory to find that the courts have latterly been less inclined to interfere with deeds which have been *prima facie* properly executed by a *Pardanashin* lady, where she is shown to be literate and to be possessed of business habits and considerable intellectual capacity (b).

Women not
generally
qualified as
witnesses.

In early Hindu law, amongst the circumstances which disqualified a person for being a witness, generally sex was one. But the dis-

(a) Umesh Chandra Khasnavis *vs* Gopal Lal Mustafi, I. L. R. 31 Cal. 233.

(b) This view has been adopted in a very recent case by Mr. Justice Mookerjee in Alik Jan Bibi *vs* Ram Biran, 12. C. L. J. p 357 See also Bindu Basini *vs* Giridhari 12 C. L. J 122. Mahomed Baksh *vs* Hosseini Bibi, I. L. R. 15 Cal. 684 ; Badi Bibi *vs* Sami Pillai, I. L. R. 18 Mad. 257 (262).

Khalija *vs* Ismail, I. L. R. 12 Mad 380 (384.)
Hodges *vs* Delhi and London Bank, I. L. R. 23 All. 137.

ability of women in this behalf did not exist in particular cases, as exceptions were introduced to the rule. Women, says Manu, should give evidence for women (VIII, 67). According to Medhatithi, Govindaraj and Kulluka, three of the commentators of Manu, this verse or text means that women should give evidence only in cases between women, or in matters that relate to the female sex. The sage Vasistha takes the same view (Vasistha, xvi. 30). But this restriction does not apply to the case where a woman has personal knowledge of an act committed in the interior apartments of a house, or in a forest, or of crime causing loss of life. In such cases, women are competent witnesses (Manu, VIII, 69). From the next verse of Manu it would seem that women generally are not qualified witnesses : for the sage tells us that, on failure of qualified witnesses, evidence may be given in the cases mentioned in verse 69 by a woman etc. (Manu, VIII. 70). Yajnavalka ordains that women are inadmissible witnesses generally (*a*). Vasistha also regards women as incompetent witnesses (*b*). Under the rules of early Hindu law, in adultery, theft, assault and a *Sahasa* (violence),

Manu.

Vasistha.

Yajnavalka

(*a*) Yajnavalka, II. 69.

(*b*) Vasistha, XVI. 29.

any person may be a witness, and it follows women were competent witnesses in these cases (a).

Section 118,
Indian Evi-
dence Act.

The competency or otherwise of a person to be a witness is now determined by the rules laid down in the Indian Evidence Act (Act I of 1872). Section 118 of the said Act lays down the rule, "that all persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions by tender years, extreme old age, disease whether of body or mind or any other cause of the same kind." No distinction is drawn between man and woman on the question of their competency to testify. The rules of the ancient Hindu law about the general incompetency of women to testify are, therefore, now of mere academic interest, having been superseded by the rules of evidence framed by the legislature.

Right of wo-
men to main-
tenance.

We will now proceed to deal with the right of women to maintenance. The right to maintenance is a purely personal right and exists solely for the benefit of the person to be maintained. The right to maintenance is in some cases enforceable as an absolutely personal obligation, and in others, it is

(a) Yajnavalka, II 72. Manu, VIII, 72.

dependent upon the possession of property. The text of Manu—"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) illustrates the former kind of right. This right has been variously described as a *legal* right analogous to the right of *property*, as an intangible right—a right which does not accompany the visible and bodily possession of property. This right ceases with the death of the female member of the family entitled to it. There is no full and systematic treatment of the law relating to the maintenance of females in the original authorities on Hindu law. The law has to be gathered from different texts occurring in different chapters of the commentaries and the codes—some directly and others indirectly inculcating the necessity of maintaining the female members of a family. Opinions differ both amongst the text-writers and commentators as to whether the right to maintenance is an absolutely personal obligation, being founded on relationship or is dependent on the possession of ancestral property. Kamalakara maintains that the right to maintenance is independent of

No systematic treatment of maintenance of females in original texts.

(a) Manu cited in Colebrooke's Digest Book V. Chap. VI. Sec. 2 Art. I.

Maintenance
of mother,
wife and in-
fant daughter,
not dependent
on possession
of property.

the possession of assets by the person from whom maintenance is claimed. He says, that it is incumbent on the sons and grandsons to maintain indigent widows and daughters-in-law, though no wealth of the family be in existence. All the commentators, however, are agreed that the maintenance of the mother, chaste wife and the infant daughter is an absolutely personal obligation, and is not dependent on the possession of any property, and they quote the following text of Manu, already cited in the beginning of this chapter—"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." This text of Manu does not find its place in the Institutes, but is attributed to Manu in Colebrooke's Digest. There is another text of Manu which is to the same effect. "Neither the mother, nor the father, neither the wife nor the son—can with propriety be abandoned—one abandoning them when they are not fallen *i.e.* not degraded by committing a sin, should be fined by the king six hundred coins" (Manu, Ch. VIII, verse 389.) Upon this Kulluka adds the gloss that "abandoning" means "not maintaining or not obeying them as the case may be." It has been said that the injunc-

tion is mandatory, for the penalty for not obeying the same is a fine by the king. It follows therefore that the maintenance of wife and mother is obligatory on the husband and son respectively.

The texts quoted below, would illustrate the view of the ancient sages regarding the rights of the female members of a family to maintenance. "These (women of the family) should be respected by their fathers and brothers; by husbands and husband's younger brothers and should be adorned with ornaments—if they desire to obtain abundant blessing. Where the women are honoured, there the Gods are pleased, but where they are not honoured, no sacred rite yields rewards. Where the female relations live in grief, the family soon wholly perishes, but that family where they are not unhappy ever prospers. That the houses, on which female relations not being duly honoured pronounce a curse, perish completely as if destroyed by magic. Therefore should these females be always respected and cherished with ornaments and clothing and food, by those men who are desirous of obtaining prosperity—on all occasions, on festival days and on days of auspicious rights." (Manu, Chap. III, verse 55—59.) The author of the Dayabhaga,

Texts of ancient sages regarding woman's rights to maintenance.

Manu.

Dayabhaga.

which is a purely legal treatise, comes to the conclusion that the maintenance of the family is an indispensable obligation and quotes the following text of Manu in support of this conclusion :—"The support of persons who should be maintained is the approved means of attaining Heaven but hell is the man's portion if they suffer" (*a*). Narada says :—"Even they who are born or are yet unborn and they who exist in the womb require funds for subsistence—deprivation of means of subsistence is reprehended" (*b*). Brihaspati says :—"A man may give what remains after the food and clothing of his family ; the giver of more who leaves his family naked and unfed, may taste honey at first but shall afterwards find it poison" (*c*).

We have thus indicated the views of ancient sages regarding the obligation of a man to maintain the female members of his family generally. The spirit of Hindu law as can be gathered from the sayings just cited shows, that at least there is a moral, if not, a legal obligation to maintain the dependent members of the family. Amongst the female members who are entitled to

(*a*) See Chap. II s. 23.

(*b*) Compare also Vyasa cited in the Mitakshara Chap. I. Sec. I 27.

(*c*) Brihaspati Ch. XV. verse, 3.

maintenance are the wife, the widow, the widowed daughter-in-law, the brother's widow, the grandmother, the mother, the daughter and the sister. The right of maintenance of the wife will be discussed in the next chapter which deals with the status of the wife, and the right of maintenance of the widow, the widowed daughter-in-law, the brother's widow will be discussed in Chap. IV which deals with the status of widows.

Here we will first proceed to discuss the right of maintenance of the mother. The text of Manu cited above is ample authority for the proposition that the mother must be maintained, whether there is ancestral property or not. The Mitakshara lays down, that where there may be no property but self-acquired property, the only persons whose maintenance out of such property is imperative, are aged parents, wife and minor children. But a question has often been raised whether a step-son is bound to support his step-mother, except when there happens to be family property in the hands of the former. In Bombay the step-mother's right to maintenance has been negatived. The learned Judges of the Bombay High Court say that the expression "mother and parents" in Manu's text should be read in their natural sense, whenever they occur in

Right to
maintenance
of Mother.

Step-mother
not entitled to
maintenance.

the Hindu law texts, so that under that law, there can be no legal obligation on the part of the step-son to support his step-mother, independently of family property (*a*). In Bengal the same view appears to have been taken in the case of *Kedarnath Coondoo v. Hemangini Dasse* (*b*), and it has been held that a step-mother is not entitled to get any share in a partition between her step-sons. But in a recent case which arose under the Mitakshara School, two learned Judges of the Calcutta High Court remarked incidentally that the step-mother may be entitled to maintenance from assets in the hands of the reversionary heirs of her deceased son's estate (*c*). But the correctness of this view seems to be open to question.

Unchastity
no bar to mother's maintenance.

There are texts of Hindu law to show mere unchastity does not operate as a bar to a mother's obtaining maintenance (*d*). It has been held in Bombay that a son is under a legal obligation to maintain his mother, even

(*a*) *Bai Daya v. Natha Govindlal*, I.L.R. 9 Bom. 279. See also on this point, *Papamma vs. V. Appa Rau*, I. L. R. 16 Mad 384 (395).

(*b*) I. L. R. 13 Cal. 336 affirmed by the Judicial Committee in I. L. R. 16 Cal 758.

(*c*) *Tahaldai Kumri vs. Gaya Prasad Shahu* I. L. R. 37 Cal 214, 220.

(*d*) *Apastamba* I, X, 2, 8, 9. *Gautama* XXI, 15.

though she be unchaste (*a*). As we shall see later, it would be different with a widow, in which case chastity is one of the requisite conditions necessary to sustain a claim for maintenance, and a widow loses her right to maintenance as soon as she is proved to be unchaste. The mother has a right to be maintained by her sons even when she has been out-casted (*b*).

Next we proceed to deal with the right of daughters to maintenance. This question would only arise where there are other nearer heirs barring her claim to inherit, for it will be seen hereafter that daughter is mentioned as one of the heirs in Yajñavalkya's well-known text laying down the order of inheritance. There is a legal obligation on the father to maintain his daughter until she is given in marriage, and the texts further impose on the father the obligation of defraying the expenses of her marriage. It is said—"As regards the daughter of a deceased co-parcener, it is thought that she should be maintained out of her father's share ; let them support her until marriage ; afterwards her husband is to support her" (*c*).

Daughters' right to maintenance.

Father's obligation to maintain daughter till marriage.

(*a*) Valu v Ganga, I. L. R. 7 Bom. 84.

(*b*) Baudhayana II., 2, 3, 4, 2.

(*c*) Mayukha, Chap. IV sec. 9 para 22, page 89, Mr. Mandlik's Edition.

Judicial decisions also establish the same propositions (*a*). The obligation to maintain the daughter does not end with the change of religion by the father, so that where the father became a Mahomedan convert, the daughter's claim to separate maintenance was allowed and such maintenance was made a charge on the father's property (*b*). In Bengal it has been held that a sonless widowed daughter cannot get separate maintenance from her father's estate until she can establish that she can not be maintained by her husband's family, to whom, under the law she must in the first instance look for her maintenance (*c*). In the case of *Bai Mangal versus Bai Rukhimni*, Mr. Justice Ranade pointed out that the support of unmarried daughter stands on a different footing from the support of married or widowed daughters, and that married daughters must seek for maintenance from their husbands' family. If this provision fails, and the widowed daughter returns to live with her father or brother, there is a moral and not a legal

Married daughters must in the first instance be maintained by husbands' family.

View in Bombay.

(*a*) *Ramabai v. Trimbak* 9 Bom. H. C. Rep. 283.

Mansha v. Jiwan I. L. R. 6 All. 617.

Jamna V. Machul, I. L. R. 2 All 315.

(*b*) *Mansha v. Jiwan* I. L. R. 6 All 617.

(*c*) *Mokhada v. Nando Lal* I. L. R. 28 Cal. 278.

obligation to maintain her (*a*). Sir Francis Maclean C. J. was however of opinion in the case of *Mokhada Dasse* above cited that a sonless widowed daughter in indigent circumstances and unable to get subsistence from her deceased husband's family, can claim maintenance out of the property of her father, and the learned Chief Justice justified this conclusion by reference to the dictum of Sir Barnes Peacock in *Kashinath vs. Khettermuni* (*b*). The right of daughters to claim maintenance ceases upon their marriage, so a decree for maintenance of daughters should contain a declaration that it should cease on marriage (*c*). There can be no doubt that the expenses of a daughter's marriage (*d*) are to be borne by the family property just in the same way as the cost of maintenance. The common practice of providing in partition decrees for the marriage expenses of daughters can hardly be accounted for, except on the hypothesis that such expenses are chargeable on family property.

Right of Daughters to maintenance ceases upon marriage.

Next we proceed to deal with the sister's right to maintenance. The texts of the

Texts about right of Sisters to maintenance.

(*a*) I. L. R. 23 Bombay 291.

(*b*) 10 W. R. F. B. 89.

(*c*) *Tulsha vs. Gopal Rai* I. L. R. 6 All 632.

(*d*) *Vaikuntam vs. Kallapiran* I. L. R. 23 Mad 512.

ancient sages on which this right is based, are as follows : “Uninitiated sisters,” says

Vajnavalka. Vajnavalka, “should have their ceremonies performed by those brothers who have

Manu. already been initiated giving them a quarter of their own share” (a). Manu also says :

“To the maiden sisters let their brothers give out portions out of their own allotments respectively ; to each, the fourth part of the

Vyasa. approximate share, and they who refuse it should be degraded.” Vyasa says : “And

for the unmarried sisters, their initiation shall be completed by their elder brother as the law requires.” According to Manu the initiation of females, as we have seen already, consists in their marriage.

Vachaspati Misra. Vachaspati Misra in his Vivada Chintamani maintains that the word “quarter” in Vajnavalka’s text cited above is not used in its ordinary sense but is only intended to enjoin the allowance of as much as will

Sulapani Smriti Chandrika Dayabhaga. Sulapani and the author of Smriti Chandrika and the Dayabhaga (b) agree with Vachaspati Misra in this view. In the Viramitrodoya (c)

(a) Vajnavalka II, 124.

भगिन्वय निजादंशादावां शन्तु तुरीयकाम ।

(b) Dayabhaga Chap. III. Sec. II 38, 39.

(c) Golap Chandra Sarkar’s translation of Viramitrodoya, Pages 81-86.

there is a long discussion as to what is meant by "quarter share", but the author agrees with Vachaspati in holding that so much will be given as may be necessary to give the daughter in marriage. The Mitakshara, however, regards the text as showing that sisters could get a share.

Mitakshara.

The grand-mother is also legally entitled to be maintained by her grandson.

Grand-mother's right to maintenance.

We will deal with the principle on which the amount of maintenance is to be ascertained by the courts in the chapter on the status of widows. We will also deal there with the assignability or otherwise of the right to maintenance, as also how far maintenance is a charge on family property. The Code of Criminal Procedure imposes certain statutory obligations on the Hindu father or husband to maintain his wife and children, legitimate or illegitimate (a).

Obligation to maintain under the Criminal Procedure Code.

Chastity is the supreme virtue for a woman in the eye of the Hindu legislators, and we have already seen that all the texts about the perpetual tutelage of women were directed to preserve the chastity of females. Hindu legislators laid down very stringent rules for the protection of the good name of maidens. A woman has a right as against

Defamation of women.

(a) See S. 488 of the Code of Criminal Procedure, Act V. of 1898.

the world to her good name. She has a right that the respect, which other men or women feel for her, in so far as that respect is well-founded, should not be lessened. The Hindu legislators accordingly provided for punishment where a maiden was defamed. Manu says, "But that man who out of malice says of a maiden 'she is not a maiden' shall be fined one hundred (*Panas*) if he can not prove her blemish" (*a*). So we see that under the Hindu law as in modern European jurisprudence, the personal right of a woman not to be defamed is subject to the limitation that the right is not infringed by a truthful imputation. Yajnavalka also lays down the same limitation, for he says that "(He) who *falsely* blames a maiden is to be fined a hundred *Panas*" (*b*). But in the chapter on adultery, Yajnavalka seems to have laid down that the truthful character of a slander against a maiden was no defence and was punishable (*c*).

In ancient Hindu times the same tribunal would dispense both civil and criminal justice. The king or in his absence the assessors

(*a*) Manu VIII. 225. See also Narada XII. Verse 34, Dr. Jolly's English Edition of Institutes of Narada.

(*b*) Yajnavalka's Institutes I, 66.

(*c*) अतं स्त्री दूषणे दद्याद्देतुं मिथ्याभिज्ञं सने

Yajnavalka's Institutes ch. II. v. 289.

appointed by him (*a*) would hear and determine all causes, whether it be an action for recovery of debt which is now entertained in a civil court, or a complaint which is now entertainable in a criminal court. The fines imposed by the king in cases of defamation of a maiden would seem to show that the violation of the right constituted a crime. It is to be noticed, however, that the ancient Hindu lawyers drew a distinction between a tort and a crime (*b*). If, as is alleged by some books of authority, the difference between a tort and a crime is a mere matter of procedure, the former being redressed by the civil while the latter is punished by the criminal courts, then no such distinction would exist in a system where the same court dispensed both civil and criminal justice. But, as is pointed out by Blackstone, the distinction between tort and crime lies deeper, and torts are an infringement of civil rights of individuals considered as individuals, whereas crimes are a breach of public rights and duties which affect the community. There is nothing in the Hindu law texts to show that the fine paid to the king could be made over to the maiden who was slandered by way of compensation. It is clear that defamation

Distinction
between tort
and crime.

(*a*) Manu VIII, I : 10-9)

(*b*) Manu VIII 287, 288.

Defamation considered as an offence against State in Hindu law.

was regarded as an offence against the State for which the accused person was liable to be fined by the king at the instance of the aggrieved party, and not as a tort.

Assault regarded both as a tort and a crime.

The law however that is now applied where a Hindu woman is defamed is not Hindu law, but the English law of torts and the Indian Penal Code (S. 499-500), and the law is the same as in the case of males. In the matter of redress for violation of a right which constitutes a tort, Hindu law is not applicable, so we need not pursue the law of defamation of women as contained in the Shastras. The personal right of any person not to be assaulted and to have personal safety from violence was provided for by Hindu lawyers. A case of assault was regarded not simply as a violation of a private personal right or as a tort, but also as an offence against the State. In the case of assault, not only was the injured person compensated for the harm done, but a fine had to be paid in addition. For Manu says (a) "If a limb is injured, a wound is caused or blood flows, (the assailant) shall be made to pay to the sufferer the expenses of the cure, or the whole (both the usual amercement and the expenses of the cure as a) fine to the King." Katyayana

Texts showing above.

also says, (a) "Just as fine is to be imposed in cases of injury to the organs of the body, so shall something be paid by the offender to the injured for appeasing him and for his cure as may be fixed by competent men." To this Nilkantha adds the following gloss :—"The word *Tustikaram* (agreeable) means something giving satisfaction to the sufferer, *Samsthanam* is the price of medicines and the like, *Panditai* means by skilled men. The meaning is 'what may be fixed by the skilled men'."

The great respect which Hindu legislators entertained for women made them visit the offence of assault with severer punishment where the offence was directed against the wife of another. Yajñavalkya says, "A fine of ten *panas* is recorded as the punishment for throwing ashes, and dust on a person. But if the offence be committed against the wife of another, the fine shall be doubled." The highest punishment was ordained by the Hindu law on those who were guilty of an indecent assault on another man's wife—his offence being described as *Sahasa* (heinous offence) of the highest degree.

Offences
against wife of
another person
severely
punished in
Hindu Law.

We have travelled generally over the whole field of personal rights of woman in

Retrospect.

(a) Vyavahara Mayukha Chap. XVI, S 11, 6 page 140, Mandlik's Edition.

Hindu law, except rights arising from marriage, which will be discussed in the next chapter separately. Our endeavour has been to show that in the period when Indian history begins, women were on a level with men in respect of their rights and duties ; that they had not then the degraded condition which is attributed to them by many modern writers on Hindu law, but that originally their condition was one of equality with men, and that latterly, during the period of the Smritis, their position deteriorated, the right to study the Vedas was taken away from them and gradually their legal status diminished and they were held as fit only for a dependent life. But again as a sort of re-action, writers have sprung up who would restore them to their pristine position (*a*). Of the writers of Hindu law who maintain a different theory not consistent with our own, all that need be said, is that it seems that those very learned writers did not look beyond the period of the Smritis as the starting point of their generalisations, and that is how their theory differs from the one which we have ventured to put forward in the preceding pages. The Mimansa system of Jaimini has by its

(*a*) Vignaneswara, the author of Mitakshara, is a strong advocate of women's rights.

exegetic method of interpretation, thrown considerable light on the position of women in Vedic times, and we have seen that there are texts in the Smritis, including the Smriti of Manu, which are opposed to the Vedic ideal. But the fountain source of law in regard to matters beyond the reach of ordinary human reason is the Vedas, for as Jaimini puts it, “चोदना लक्षणोऽर्थः धर्मः” and the Smritis are merely the recollections of what was revealed by the *Deity*. The position of women in the Vedic period furnishes a very correct criterion of their status in early Hindu law.

In the previous pages of this chapter we have indicated the agencies which have been potent in bringing about the downfall in the secular position of women. But there is yet another of such agencies which, though not often noticed has been none the less potent in this behalf. It is no mere speculation to say, that the economy of early Hindu society contained within itself germs, which, unseen and unperceived, undermined the position of women. From the earliest times, the Hindu mind has regarded the sacrament of the union of man and woman as the beginning of the life, the aim of which is attainment of the beatific state wherein the soul of man finds itself in tune with the

Agencies by which woman's position was lowered.

Infinite (a). A too watchful and all-absorbing pursuit of this high ideal, has resulted in a simultaneous neglect of the rights and privileges with which women were clothed on entrance into the married state. Woman who was cheerfully recognized by man as his helpmate in the arduous path of religion and piety, gladly and without remorse abdicated her rights, which in an ideal household meant nothing to her, in favour of man who was better fitted by nature for the robust struggle of life. It was not a case of ruthless wresting away of their valued rights from the unwilling hands of the weak by the strong and the avaricious. It was a graceful surrender by one who felt her very existence bound up in another.*

सत्यमेव जयते

(a) Compare Yajnavalkya Ch 1, verse 87.

* From Page 189 to the end of this chapter is believed to be result of original research.

CHAPTER III.

Status of wife and the Law of Marriage.

The status of wifehood is created by marriage. Raghunandan, the most acute and learned authority on the Smṛiti law has defined marriage as follows :—“The acceptance on the part of a man of the gift of a girl attended with certain ceremonies, resulting in the status of wifehood on the part of the girl” (a).

Status of wifehood created by Marriage.

Raghunandan's definition of Marriage.

From the dawn of Indian history, marriage was with the Hindus, as with the Greeks and the early Romans, a religious duty. It was regarded as a sacrament. The object of marriage was to provide an heir, who will extinguish the debts of the father to the ancestors. Every Hindu of the three regenerate classes becomes from the moment of his birth bound to discharge three debts, one of which was the debt to the ancestor which becomes extinguished on the birth of a son (b). One of the verses

Marriage, a sacrament with the Hindus.

(a) Raghunandan, opening lines of Udbahatatta.

(b) जायमानो ह वै ब्राह्मणम्-विभि ऋणैर्ऋणवान् जायते ।

ब्रह्मचर्येण ऋषिभ्यो, यज्ञेन देवभ्यः, प्रजया पितृभ्यः ॥

श्रुतिः ।

of Aitareya Brahmana dealing with the importance of having a son is as follows :—

“In him a father pays a debt
And reaches immortality” (a).

Marriage,
an established
institution in
the Vedic
period.

Marriage was an established institution at the very commencement of the Vedic period : we find clear and distinct traces of this institution in the Rigveda, which is the earliest Veda. The bride is addressed at the time of departure from the parents' home on the first day of marriage thus :—

“Go to the house, that thou mayst be the lady of the house. A mistress of the house thou shall direct the sacrificial rites” (b). Then again, the bride is addressed thus : “Giving birth to manly children and devoted to the Gods, be thou conducive to our happiness and well being” (c).

Marriage, with
adult and
mature brides
referred to in
the Vedas.

These hymns addressed to the bride signify, that the bride was in the Vedic period an adult and mature woman, fit to bring forth a progeny worthy of the brave Aryan. The next hymn of the Rigveda leads to the same conclusion :—

(a) McDonnell's History of Sanskrit Literature, P. 208.

(b) Rigveda. X 25, 26.

गृहान् गच्छ गृहपती यथाऽसौ ।

वशिनी त्वं विदधमावदासि ॥

(c) वीर मुदैवकामास्थीनाशं नी भव

Rigveda X. 85-44.

"As a virtuous (maiden) growing old in the same dwelling house with her parents claims from them her support, so come I to thee for support" (a). The possibility of daughters living as lifelong maidens shows, not only that infant marriages were not imperative, but that marriage of girls itself was not compulsory. Mr. Justice Mookerjee has also, in a very recent decision (b) pointed out, that in Vedic times marriages of girls took place after the attainment of puberty and the bride immediately left the abode of her parents on the completion of the marriage ceremony. The Mantra portion of the Vedas, which deals with marriage ritual throws no inconsiderable light on the question, whether in the Vedic age, marriage after puberty was the rule or not. The Brahmana portion of the Vedas does not contain the marriage ritual, and we shall have to look to the Mantra portion for the Vedic law of marriage, interpreting the same according to the rule of the Mimamsa. In the Mantra portion of the Rigveda, we find the bridegroom addressing the bride on entering his house thus :—

Marriage of women, not compulsory in the Vedic ages.

Mr. Justice Mookerjee's view about age of girls at the time of marriage in the Vedic times.

Mantra portion of the Vedas deals with marriage rituals.

(a) Rigveda 6 Ch. Anu II, Sukta VI, Verse 7 (M. N. Dutt's Edition).

(b) Churamon vs. Gope, I. L. R., 37 Cal. 1.

"May thy joy increase here through progeny.

Be thou ever awake here in this house for thy duty
as house-holder.

With this thy husband do thou unite thy body

And as thou advancest in age thou shall teach
the sacrificial law" (a).

Verses in the
Mantras shew
girls mature
in mind and
body, were
brides.

Similar rule
in the Sutra
Period.

Jaimini's
Grihya Sutras.

Marriage of
infant girls
strictly en-
joined in the
Smritis.

It is natural to expect that these words could only be addressed to a bride who is able to enter into the responsibility of married life, and this could only be expected of a girl quite mature in mind and body. Coming to the period of the *Sutras*, we find unmistakeable evidence that marriage after puberty was the rule. In Jaimini's *Grihya Sutras*, we find the bridegroom addressing the bride at the time of *Saptapadi* (walking of seven steps) as follows:—"Come now, let us beget, let us place the seed together that we may attain a male child" (b). Now according to this at the time of the ceremony of pacing of seven steps, which is one of the essential parts of marriage, the bridegroom and bride are of an age when they are fit to become parents of children. As we shall see later, this rule was done away with in the period of the *Smritis*, and marriages of infant girls were enjoined in the most unconditional terms. In the

(a) Rigveda X. 85, 27.

(b) Grihyasutras (Jaimini 21, 8).

Vedic period, however, the condition of society was not of a very primitive description. Indeed we were then very far off from the primitive man. The researches of oriental scholars show, that the social condition of the Hindus, as reflected by the hymns of the Rigveda, is not that of a pastoral or nomadic people, but on the other hand the hymns betray an advanced stage of civilisation. (a) In order therefore, to trace the origin of the institution of marriage amongst the Aryan Hindus, we must look far enough back in the stream of time. But unfortunately we have no evidence of the manners and customs of the Aryans in such remote antiquity. It is to be noticed, however, that the legend of Svetaketu, recorded in the Mahabharata, has been regarded by some writers as evidence of the social order of the Aryans in such remote past. The legend is in the form of a dialogue : The King of Hastinapur and his wife Kunti being afflicted by a curse, had lost the power of procreation. He was accordingly advising his wife Kunti to raise issue by another man (*Niyoga*), and in doing so he said there was nothing wrong, in that *Niyoga* was surely better than the looseness of sexual

Condition of Society in the Vedic period, not primitive.

Hymns of Rigveda betray advanced state of civilization.

No evidence of the social state of Aryans in pre-Vedic times.

Legend of Svetaketu.

(a) Goldstucker's Literary Remains p. 271. Muir's Sanskrit Texts, End of Vol. V.

relation which originally prevailed. Women, said the king, were originally unconfined, and roved about like animals at pleasure, and consorted together with men like cattle, until Svetaketu introduced the rules of marriage, and laid down that wives must thenceforth remain faithful to their husbands and *vice versa* (a). We are unable however to agree with these writers that the legend of Svetaketu represents a very early stage of Aryan civilization. We are inclined to think that these writers have come to this conclusion, arguing from analogy as it were, from the condition of other primitive societies, to which a passing reference will be made presently. It seems to us, however, that the legend of Svetaketu disclosed the ancient condition of the society of the non-Aryans. The progress of research has shown that after the Aryan invasion of India, the original non-Aryan inhabitants of the country had not everywhere adopted the customs and manners of their Aryan conquerors (b). It seemed that for sometime the two civilisations, Aryan and non-Aryan had existed side by side, and that the adoption of the Aryan customs was gradual.

Legend of Svetaketu does not represent early stage of Aryan civilization.

Legend of Svetaketu may refer to the social condition of early non-Aryans.

Gradual adoption of Aryan customs by non-Aryans.

(a) Mahabharata, Adiparva, Ch. II.

(b) See pp. 8, 9, 40, Macdonell's History of Sanskrit Literature.

The condition of promiscuity might have prevailed amongst the non-Aryan aborigines, and when they were adopting the institution of marriage from their Aryan conquerors, this legend might have been introduced, and in order to give it an air of authority, it was connected with the name of Svetaketu, son of Uddalaka. Uddalaka and Svetaketu are two very famous personages in the Chhandogya Upanishad, and if this legend had any connection with Aryan civilisation, one would have found a mention of it in the said Upanishad. That such a state of promiscuity, as is disclosed in the legend of Svetaketu, preceded the institution of marriage, in other primitive societies is now established by the researches of most of the sociologists who have written on early history. Bachofen, McLennan, Morgan, Lubbock, Bastian, Spencer and other writers have shown that man originally lived in a state of promiscuity. It is true that the great scientist Darwin does not agree in their conclusions, but on the other hand, considers that promiscuous intercourse belonged to a later stage of civilisation, when man has retrograded in his instincts and advanced in his intellectual powers (*a*). A very recent writer, Mr. Andrew Lang, has agreed in the

No mention of the legend of Svetaketu in the Chhandogya Upanishad.

State of promiscuity prevalent in primitive societies—views of Bachofen, McLennan, Morgan, Lubbock and others.

Contrary view of Darwin.

(a) Darwin's *Descent of Man*, Vol. II, p. 362.

Andrew Lang
agrees with
Darwin.

Westernmarck
considers
marriage exis-
ted at the
commence-
ment of the
human race.

Nothing in
the Vedas sug-
gests state of
promiscuity.

main with the conclusion of Darwin, and he accordingly rejects the theory of a promiscuous horde as having been the earliest state of human life (a). There is, however, no complete unanimity between all writers on the subject. But in opposition to the views of Bachofen, McLennan and other sociologists, Westernmarck considers that marriage had existed in all probability from the commencement of the human race. "The only result," says he in his book on the History of Human marriage "to which a crucial investigation of facts can lead us is, that in all probability, there has been no stage of human development when marriage has not existed and that the father, as a rule, has been the protector of the family. Human marriage appears then to be an inheritance from some apelike progenitor."

In the Vedas, there is nothing that can even faintly suggest that any such condition of society, as is disclosed in the legend of Svetaketu existed amongst the Aryans. The conclusion we arrive at, then is, that marriage was an established institution in the Vedic period amongst the Aryan Hindus, and the origin of marriage must be sought for in the period anterior to the compilation of the Vedas (of which period, so far as the

(a) *Secret of Totem.*

Aryan conquerors of Hindusthan are concerned, we have no authentic account) and further that the legend of Svetaketu may represent a condition of society of the non-Aryans. But it would be 'safe to put it down as a fiction, and to hold that with the fiction, the names of two real personages of the Upanishad were associated to make it appear, that the tradition represented some reality in the past.*

Legend of Svetaketu may represent condition of non-Aryans.

Or may be fiction.

In the hymns of the Rigveda, addressed to the two Aswins, there are indications of the existence of polyandry. The Aswins are, in many parts of the Rigveda, connected with Suryya, the youthful daughter of the Sun, who is represented as having for the sake of acquiring friends, chosen them for her two husbands. "Neither distress nor calamity, nor fear from any quarter assails the man whom, Ye Aswins, along with your wife cause to lead the van in his car." Again, "the daughter of the Sun stood upon your chariot attaining first the goal as if with a racehorse. All the gods regarded this with approbation in their hearts exclaiming, 'Ye, O, Nasatyas, associate yourselves with your good fortune'" (a). These hymns of the Rigveda furnish the earliest indication of

Indications of polyandry in the hymns to the *Aswins*.

*From page 200 to here is based on original research.

(a) See Dr. Muir's Sanskrit Texts 236.

Other hymns showing Aswins to be friends of the bridegroom.

polyandry. But they are wholly indecisive of the question, for there are other hymns where allusion is made to Suryya in connection with the Aswins, where, however they no longer appear as her husbands, but as the two friends of the bridegroom. The hymn is as follows :—"Soma was the wooer, the Aswins were the two friends of the bridegroom, when Sabitri gave to her husband, Suryya consenting in her mind." Mr. MacDonell, the Boden Professor of Sanskrit commenting on this passage says :—"The Aswins, elsewhere her spouses, here appear in their inferior capacity of groomsmen, who, on behalf of Soma, sue for the hand of Suryya from her father, the Sun-God. Savitri consents and sends his daughter, a willing bride to her husband's house" (a). Mr. Mandlik regards these stray passages, either as remains of old traditions or that they are used in a figurative sense, and does not regard them as evidence of the existence of polyandry (b). Mr. Mayne is of opinion that in the earliest times of which we have any evidence, polyandry had become rare and had fallen into complete discredit even where it existed (c). So we find in the

Mr. Mandlik does not regard these passages as evidence of polyandry.

Mayne holds polyandry had become rare in the earliest times.

(a) Prof. MacDonell's History of Sanskrit Literature p. 123. (b) Institutes of Yajnavalkya p. 397.

(c) Mr. Mayne's Hindu Law.

Aitareya Brahmana, one of the two Brahmanas attached to the Rigveda, a distinct prohibition against a wife having more than one husband at one time. (a) The only other evidence of the existence of polyandry is to be found in the Mahabharata in the well-known instance of Draupadi, who became the wife of five *Pandavas*. The father of Draupadi was shocked at the proposal of the five Pandavas to marry his daughter, as it was contrary to usage and the Vedas. One of the princes justified such a proposal by pointing to two traditional instances of polyandrous marriage recorded in the *Puranas*. One of those instances is that of *Jatila* of the family of Gautama who dwelt with seven saints and the other is that of *Varski*, the daughter of a sage, who was married to ten brothers. But these instances so few and far between, furnish very scanty evidence of the existence of polyandry. On the contrary, the conversation that took place between the father of Draupadi and the Princes shows, that the practice of polyandry was reprobated and was opposed to public opinion.

Prohibition in the Aitareya Brahmana.

Story of Draupadi.

*Some new light has been thrown on this question by Kumarila, the commentator of

Comment of Kumarila on the story of Draupadi.

(a) नैकस्यैवहवः सहपत्यः Aitareya Brahmana III. 2. 23.

Jaimini in his Tantra Vartika (a). Kumarila there enunciates the view that a custom opposed to either Sruti or Smriti is not valid. He is, however, confronted by his opponents with the example of Draupadi's marriage with five husbands at the same time, against the spirit of the sacred ordinances, as justifying polyandry. He meets this objection of his opponents, by pointing out that Draupadi was like a Superhuman Being, the Goddess of wealth, and her example is not to be followed by human beings, and that Draupadi's example cannot be cited in support of the view of the existence of the custom of polyandry. We quote a very beautiful passage from this discussion of Kumarila in the foot note (b). The said passage may be translated thus :—
 “That beautiful woman of noble mind was daily an unmarried damsel when she left one husband and went to another. She was like a maiden approached by a husband. She is the goddess of wealth and there is no fault in the goddess of wealth being enjoyed by several.”

Thus we find Kumarila has shown that the single instance of Draupadi's marriage

(a) या चीक्षा पाण्डुपुत्राणां एकपत्नीविरुद्धता

सापि द्वैपायने नैव व्युत्पाद्य प्रतिपादिता ।

Tantra Vartika p. 135. Benares Edition.

(b) सच्चानुभावा किल सा सुमध्यमा

वभूव कन्येव गति गतेऽ ह्यसीति ।

Kumarila explains that Draupadi was a Super-human Being and her example is not to be followed.

with five husbands cannot support the theory, that polyandry was in vogue in Ancient India at any time. We have already seen that in the Aitareya Brahmana, which belongs to a period subsequent to the Vedic age, polyandry was distinctly prohibited. In the Smritis, like the Code of Manu, no trace of polyandry can be found.*

No trace of Polyandry in the Smritis.

Polygamy prevailed in the Vedic period, but it was looked on with disfavour. In the Aitareya Brahmana there is an admission that a man can have more than one wife in the same text which prohibited polyandry(a).

Polygamy prevailed in the Vedic period.

That girls or women could choose their husbands in the Vedic age, appears from the following hymn of the Rigveda. "How many a woman is satisfied with the great wealth of him who seeks her. Happy is the female who is handsome. She herself loves or chooses her friend among the people" (b).

Girls could choose husbands in the Vedic Age.

The Vedic marriage was a very simple religious ceremony. Grasping of the hand was one of the rites connected with the ceremony (c). Other rites connected with

Marriage ceremony in the Vedas.

* This is the result of original research.

(a) तस्मादिकस्य बहवो जाया भवन्ति
नैकस्ये बहवः सहपतयः ॥

Aitareya Brahmana III, 2, 23.

(b) Rig Veda, vii. As. 10 man. 27 Sutra. M. N. Dutt's Edition.

(c) Rigveda x. 85, 36

Marriage
ritual more
complex in the
Sutra period.

the marriage were that *Agni* (fire) was requested to give long life and success to the married pair (*a*), that the Gods, Indra and Prajapati were invoked to bestow unswerving affection, progeny and good character on the bride (*b*), and that joint prayer was offered to the Viswadevas for mutual enlightenment of their hearts. As we shall see hereafter, the complete marriage ritual is now far more complex. When we come to the period of the *Sutras*, we find some additions to the simple marriage ritual of the Vedic age. The leading of the wife by the husband three times round the nuptial fire, the pointing to the pole-star *Arundhati* by the couple, and the mutual exhortation to be constant to each other, and the taking of the seven steps by the bride were all later additions of the Sutra period. In fact these *Sutras* are the basis of the present ceremonies of marriage. These ceremonies have been preserved much as they are described in the *Sutras*, and are still widely prevalent in the India of to-day. Marriage being a religious ceremony was indissoluble even in the Vedic period.

The horror of incest is universal amongst

(*a*) Rig Veda x. 85. 38, 39

(*b*) Rig Veda x. 85. 43, 45

„ „ x. 185. 47

mankind ; and the story of Yama marks the abhorrence with which an incestuous connection was looked on already in the Vedic period. Yama and Yami were twins (brother and sister) and the conversation between them shows, how Yama was refusing the request of Yami to marry her, adding that such connection was abhorred by the world. There are, however, passages in the Vedas, which go to show that prohibition of marriages between near blood relations, so rigidly enforced in later times, was not firmly established in the Vedic age. For instance, marriage with maternal uncle's daughter or paternal aunt's daughter was allowed. A passage from the *Nirukta* supports this : "Indra, come by easy paths to this sacrifice, accept my offering, the seasoned *Vapa* (meat) which is thy due as one's maternal uncle's or paternal aunt's daughter is his" (a). In the *Sathapatha Brahmana* (b), we find the following :—"In the third or fourth generation we unite."

Abhorrence of incest in the Vedic times—Story of Yama and Yami.

Marriages between certain blood-relations seems to have been allowed in Vedic times.

Having given a general idea of the law of marriage as it existed in the Vedic age, we proceed to deal with the modern law of marriage as laid down in the Smritis. The former will be of interest to the student of

Law of Marriage in the Smritis.

(a) 14 A 31.

(b) 1-8-3-2.

archaic jurisprudence, just as the latter will be of service to the practical lawyer. For the modern law of marriage, we must look to the Smritis and the commentaries and the interpretation put on them by judicial decisions.

Eight forms of Marriage in the Smritis.

It is in the Smritis that we meet with diverse forms of marriage. Manu (*a*) describes eight forms of marriage, and Apastamba (*b*), Gautama (*c*), Vasistha (*d*), Bauddhayaṇa (*e*), Viṣṇu (*f*), and Yajñavalkya (*g*), all agree with him. They are named as, (1) *Brahma*, (2) *Daiva*, (3) *Arsha*, (4) *Prajapatya*, (5) *Asura*, (6) *Gandharva*, (7) *Rakshasa*, (8) *Paisacha*.

Brahma and *Asura* forms of marriage prevalent at the present day.

Of these eight forms, the *Brahma* and the *Asura* are prevalent in the India of to-day. Although the Smritis sanctioned the traditional eight forms of marriage, the first four of these were considered as the approved forms in the case of a Brahman, and the last four were regarded with disfavour. Manu says that the *Rakshasa* form was considered lawful

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- (a) Manu, III. 21-34.
 - (b) Ap. II. 11, 17, 17-21.
 - (c) Gau. IV. 6-15.
 - (d) Vas. I. 17-35.
 - (e) Bauddh. I. 20, 1-21, 23.
 - (f) Vis. XXIV. 18-28.
 - (g) Yajn. I. 58-61.

in the case of a *Kshatriya*, and the *Asura* form in that of a *Vaisya* and of a *Sudra*. This, however, does not mean that the *Rakshasa* form is obligatory on the *Kshatriya*, and the *Asura* on the *Vaisya* and the *Sudra*, but that these forms are allowable. It is now settled that the *Bramha* form is allowable for all classes. In fact the prima facie presumption is, that every marriage under the Hindu law is according to the *Bramha* form. But this can of course be rebutted by evidence (a). There is conflict of opinion amongst the different sages on the permissibility of the different forms of marriage. The commentators try to reconcile these various conflicting texts by the method of interpretation which makes them twist and to-ture the text of one sage in order that it may agree with another. These different forms of marriage, says Mr. Justice West, are probably to be traced historically to the customs of different tribes which afterwards coalesced to form a single community (b).

Brahma form of marriage allowable for all classes.

Origin of different forms of Marriage.

The *Bramha* form of marriage is a gift of the girl, decked with garments and ornaments to a man learned in Vedas and of good conduct, whom the father himself

Brahma form of Marriage.

(a) *Chunilall vs. Surajram*, I.L.R. 33 Bom. 433 (437).

(b) *Vijjarangam vs. Lakshuman* 8 Bom. H. C. R. 244 (254.)

invites. The Sudras, though incompetent to study the Vedas are now permitted to marry in this form, although on a strict reading of the text this form would seem to be forbidden to Sudras (*a*).

Daiva form of Marriage.

In the *Daiva* form of marriage, the maiden was given in marriage to a priest officiating at a sacrifice during the course of the performance of the sacrifice (*b*). This form is obviously peculiar to Brahmans, as none but a Brahman could officiate at a sacrifice.

Arsha form of Marriage.

When the father gives away his daughter according to the rule, after receiving from the bridegroom for the (fulfilment of) the sacred law, *a cow and a bull* or two pairs, the marriage is said to be in the *Arsha* form (*c*).

Arsha Marriage, not a sale.

* In this form, the cattle (cow and bull) were given in fulfilment of the sacred law and did not constitute the price. There is an aphorism of Jaimini, which has been quoted in the beginning of the last chapter, which brings out with remarkable clearness the fact, that this form of marriage could not be regarded as sale, for the cows or oxen given to the bride were constant in number, and in a sale or purchase, the price of the girl would vary, according to her beauty or pretti-

(*a*) *Manu* III 27.

(*b*) *Manu* III 28.

(*c*) *Manu* III 29.

ness. We find it stated, however, in a text—book of great authority, that the cattle here constitute the price for the bride, and further that the *Arsha* form of marriage was in reality the same form as the *Asura*, to be described presently and was less objectionable, only because the sale of the bride was apparently less noticeable (a).

With great respect to this very learned writer, we are unable to agree in this view, and it is clear from Manu's text, read in the light thrown by the aphorisms of Jaimini, that the cattle were given in fulfilment of the sacred law, and this form was not in reality the same form as *Asura*, but differed vastly from it in its incidents, for in the *Asura* form of marriage, wealth was given not in accordance with the injunction of the sacred law, but as the price for the bride.*

In the *Prajapatya* form of marriage, we find the daughter given away by the father, after he has shown honour to the bridegroom (b) and has addressed the couple with the text, "May both of you perform together your duties."

Prajapatya
form of Mar-
riage.

When the bridegroom receives a maiden, after having given as much wealth as

Asura form of
Marriage.

(a) Tagore Lectures, 1878, Hindu Law of Marriage and Stridhana, Page 77. (Ed. 1896.)

* Portion within asterisks is believed to be original.

(b) Manu III. 30.

he can afford, to the kinsmen and to the bride herself, according to his own will, *i.e.*, not in accordance with the injunction of the sacred law, that is called the *Asura* form of marriage. This is really a purchase of the bride by the bridegroom. In the *Asura* form of marriage, the test is the payment of money (*a*). This form of marriage prevails amongst the Sudras in Southern India as also in Western India.

Payment of money the test of *Asura* form of marriage.

Gandharba form of marriage.

The *Gandharva* form of marriage is described by Manu thus :—"The voluntary union of a maiden and her lover, one must know to be the *Gandharba Riti* which springs from desire and has sexual intercourse for its purpose" (*b*). This form of marriage was permitted to the Kshatriyas alone (*c*). Mere cohabitation, however, without any intent and natural agreement to enter into a binding contract of marriage is not sufficient (*d*). This form of marriage is recognised in the family of the Rajas of Tipperah (*e*). It also prevails

Gandharba form allowed to Kshatriyas alone.

(*a*) *Vijjarangam vs. Lakshuman*, 8 Bom. H. C. R. 244 (256.)

Venkatacharyulu vs. Ranga Charyulu I. L. R. 14 Mad 316 (319.)

(*b*) Manu III. 32.

(*c*) Manu III. 26.

(*d*) *Chuckrodhaj vs. Beerchunder* 1. W.R. Civ. R. 194.

(*e*) *Ibid.*

amongst the Rajas of Jalpaiguri, who although belonging to a branch of the Koch tribe known as Rajbansis, affect to be equal to Kshatriyas or Chettris (a).

Govinda and Narayana, two of the commentators of Manu, enter on a discussion of the question, as to whether religious ceremonies and prescribed offerings are necessary in this form of marriage. Relying on a passage of Devala, these commentators hold that the *homas* must be performed. But they also hold, relying on the text of Manu in Chapter VIII, verse 226, that the Vedic nuptial texts need not be recited. Medhatithi, however, seems to think that opinion on this point is divided. But there is an unanimity of judicial decisions in this, that religious ceremonies are as necessary in this, as in the *Bramha* form (common form) of marriage (b).

Gobinda and Narayana hold that Vedic nuptial text need not be recited at *Gandharba* marriage.

Judicial Decisions hold otherwise.

The seventh form of marriage was the *Rakshasa* and is described by Manu thus :—
“The forcible abduction of a maiden from her home, while she cries out and weeps,

The *Rakshasa* form of Marriage.

(a) Fanindra Deb Raikat's case, I. L. R. 11 Cal 463 (480) P. C.

(b) Chukrodhaj *vs.* Beerchandra (1864) 1 W. R. Civ. R. 194 ; Harikrisna *vs.* Radhika (1865) 2 Mad. H. C. R. 369 ; Bhaoni *vs.* Maharaj (1881) I. L. R. 3 All 738 ; Brindabana *vs.* Radhamani (1886) I. L. R. 12 Mad. 72.

S. 366 of the Indian Penal Code prohibits such marriages.

after her kinsmen have been slain or wounded and their houses broken open, is called the *Rakshasa*" rite (*a*). For Kshatriyas, this form of marriage was permitted by sacred tradition (*b*). But the provisions of sec 366 of the Indian Penal Code would punish the attempt of any man to marry a girl in this form. It was condemned by Manu and had long since become obsolete. In a Bombay case it was pointed out that the *Rakshasa* form of marriage was not obligatory on the Kshatriyas but was only allowable (*c*).

The *Paisacha* form of Marriage.

The *Paisacha* or (the diabolical) form of marriage is described thus by Manu :—"when a man by stealth seduces a girl who is sleeping, intoxicated or disordered in intellect, that is the eighth, the basest and most sinful rite of the Pisachas" (*a*).

The sage Yajnavalkya also notices these eight forms of marriage in Chap. I (*e*) But unlike Manu and other sages he does not say which forms are allowable for which classes, and which are the approved forms

(*a*) Manu III 33.

(*b*) Manu III 26.

(*c*) Jaikison Das vs. Harakison Das I. L. R. 2. Bom. 9 (14.)

(*d*) Manu, III 34.

(*e*) Institutes of Yajnavalkya, Achara Adhaya Verses 58-61.

of marriage and which the contrary. But if any inference can be drawn, as to the comparative excellence or otherwise of the different forms of marriage, from the order in which these forms are mentioned in the Institutes, then *Paisacha* being placed last, must be regarded as the worst.

Paisacha, the basest form of marriage.

Besides these eight forms of marriage mentioned in the *Shastras*, custom has grafted on particular sections of the Hindu community, certain special forms of marriage, and the Courts have recognised such custom, where it has been immemorial and neither repugnant to the spirit of Hindu law nor repugnant to the general ideas of morality now current amongst Hindus (*a*).

Customary forms of marriage.

It would, however, expand the size of this thesis beyond its contemplated limits, if we were to deal in detail, with the numerous customary forms of marriage, that prevail in India.

We proceed next to deal with the Hindu law, relating to the capacity of parties to marry. Under Hindu law a man is said to marry, whereas a woman is said to be given or taken in marriage. The man is the active agent, whereas the woman is regarded the passive agent in the transaction. For instance, when Manu says that "a twice

Capacity of persons to marry.

Under Hindu law, man is the active agent, and woman, the passive agent in the transaction of marriage.

(*a*) *Gatharam vs. Moohita* 13 W. R. 179.

born man shall marry a wife of equal caste", he indicates that the doer of the act (कर्त्ता) is the man, the act (क्रिया) is the marriage, and the object of the act (कर्म) is the wife. But the transaction or act is described as "marriage," whether viewed from the standpoint of the bride or the bridegroom. As Raghunandan points out, we speak of the "marriage" of a son, just as we speak of the "marriage" of a maiden daughter and he cites a text of Vishnu to support it (a). The girl being the passive party in marriage, the question arises, what are the disqualifications which render a girl unfit to be taken in marriage. In the code of Manu, we come across injunctions to the effect, that a man should carefully avoid taking a wife from families, in which no male children are born, or in which the Vedas are not studied, or from those which are subject to Pthisis, or other constitutional diseases (b). It is also enjoined there, that he should not marry a maiden, who is sickly, nor one who is garrulous, nor one who is named after a constellation, a tree, or a river, or a mountain &c. (c). Nor, it is enjoined, should a man

Disqualifications which render a girl unfit to be taken in marriage.

(a) कन्यापुत्रविवाहे तु पितृणाम् यादृमाचरेत् ।

See Raghunandan's, Udbahatattwa.

(b) Manu III. 7.

(c) Manu III. 8, 9.

marry a maiden who has no brother, or one whose father is not known (a). But it is obvious, that these and other precepts of a like nature, were never intended to be mandatory or to have any legal effect. They were mere rules of caution and advice, and it was optional with the bridegroom or his guardian to follow them or not, in choosing a girl for marriage either for himself or his ward, as the case may be. Kulluka Bhatta, in commenting on these texts, says that the disobedience of these injunctions cannot invalidate the marriage and Raghunandan who is an authority on the Smṛiti law regarding marriage takes the same view (b).

Manu's rules laying down such disqualifications are not mandatory.

Kulluka Bhatta and Raghunandan agree in this view.

A girl or woman, whose husband is alive, is absolutely unfit to be taken in marriage again. We have noticed already, that polyandry has been condemned, even in the period of the Vedas, and instance of Draupadi is taken as an exceptional instance, to be justified only in the case of a God-like or a Superhuman Being like her. Marriage with a man, is an absolute disqualification for woman to marry again during his life-time.

Wife of another person, not fit to be taken in marriage.

Widows are according to some sages absolutely disqualified from being taken in

Marriage of widows prohibited by some, and allowed by other sages.

(a) Manu III. 10.

(b) Udbabatattwa.

marriage (a) but there are other sages who take a contrary view and permit widow-marriage (b). And the view of the latter sages have been accepted by the Indian Legislature (c) and Hindu widows are not now disqualified from being taken in marriage. More of this, however, in another place.

Indian Legislature has allowed remarriage of widows.

Incapacity of girls to be taken in marriage on the ground of Kinship.

We now proceed to deal with the rules of Hindu Law regarding the incapacity of girls to be taken in marriage, on the ground of kinship between the parties. In the writings of Hindu sages, there is a table of alliances forbidden to man, from which a corresponding table of alliances forbidden to woman may be inferred. "A damsel," says Manu, "who is neither the *Sapinda* of the father nor of the mother and who is not the *Sagotra* of the father or the mother is recommended to the twice-born man for wed-lock and conjugal union" (d)

Manu's text laying down the qualifications of a girl fit to be married.

Sapinda and Sagotra.

The words *Sapinda* and *Sagotra* are the two important words in this text, and there has been some diversity of opinion as to precise significance of these words. The word *Sapinda*, when applied to the mother

(a) Manu V. 161.

(b) Parasara Chap. IV. and Narada XII. 97.

(c) Act XV. of 1856.

(d) Manu, III, 5.

has a slightly different meaning from what it has, when applied to father.

This text of Manu is the basis of the rule of prohibited degrees in marriage in Hindu Law, and commentators have displayed much learning, in ascertaining the precise import and extent of this rule. It is not intended, however, to explore the exuberant learning, that has gathered round the table of prohibited alliances. We shall only give the conclusions, to which the sages and commentators have arrived, on the rule of prohibited degrees, as well as what has been established by the judicial decisions in regard to some of these rules. It may be generally stated, that in Bengal the exposition of Raghunandan on the subject has been accepted, while in the other schools, the rule accepted has been that of Kamalakara, in the *Nirnaya Sindhu*. But before we lay before the reader the exposition of Raghunandan, it is necessary to give the comment of Kulluka on this verse of Manu :—
“Asapinda is she, who is not the *Sapinda* of the mother (of the bridegroom). *Sapindaship extends to the seventh person*. Therefore by this is meant, she who does not belong to the family of the maternal grandfather (of the bridegroom). The word “*cha*” indicates, that the girl in order to be eligible for marriage,

The text of Manu is the basis of rule of Prohibited degrees in marriage in Hindu Law.

Raghunandan's view accepted in Bengal.

Kamalakara's view accepted in other schools.

Significance of the word *cha* in this text.

should not also be of the same *gotra* as the mother (*i.e.* the maternal grandfather) of the bridegroom. The bride who belongs to the family of the mother (of the bridegroom) and whose ancestors and family name can be traced, is unfit to be taken in marriage. But those, who do not fall in the category just mentioned, can be taken in marriage. So says Vyasa : 'In marriage one should not desire to have a girl who belongs to the same *gotra* as his mother. But if the family name is not known, then she can be taken in marriage, although belonging to the same family as the maternal grand father (of the bridegroom).' Therefore, Medhatithi has also quoted the text of Vasistha, regarding prohibition of marrying a girl who belongs to the same *gotra* as the mother."

Vyasa.

Medhatithi.

The words असगोत्रा च या पितुः shows, that the girl to be eligible for marriage, must not be of the same *gotra* as the father of the bridegroom. The word (*cha*) shows that she is not to be the *sapinda* of the father of the bridegroom and should not be the descendant of the father's sister. A woman or girl, who does not possess these disqualifications as aforesaid, is fit to be taken in marriage by the twice born classes. This text of Manu, read with the comment of Kulluka

makes it clear, that for the purpose of marriage, *sapinda* relationship ceases with the seventh person. So that, a girl who is within the seventh degree, both on the father's and mother's side, is not fit to be taken in marriage. Other sages however, as we will see presently, forbid alliance with a larger number on the father's side than on the mother's side.

According to Raghunandan the significance of the word "पितुः" in Manu's text is, that the bridegroom is to avoid marrying the seven *sapindas* from the father, and not from the bridegroom himself. So that he is to avoid eight *sapindas* reckoning from himself, and seven from the father. Sulapani, on the other hand, maintains that the word पितुः is to be read with *sagotra* to indicate, that the bridegroom is to avoid marrying the bride of the *gotra* to which the procreator belongs, in cases where the son is born on the wife of another (*khetraja*). The meaning of the word of *sapinda* has been a fruitful source of controversy. *Sapinda* is used in different senses, when used in connection with inheritance and marriage respectively. The word मातुः refers to the maternal grand-father of the bridegroom, for it cannot refer to the mother, as the mother's *gotra* is merged in that of her husband,

According to this text and kulluka's comment thereon, *Sapinda* relationship for the purposes of marriage, ceases with the seventh person.

Raghunandan's view :—

Bridegroom is to avoid eight *sapindas* reckoning from himself.

Sulapain's view.

The word मातुः refers to the maternal grand-father.

According to Raghunandan, *sapinda* relation for the purposes of marriage ceases with the 7th and 5th degrees from the father and mother respectively.

Raghunandan's comment on Paithinasi's text.

Sulapani's comment of Paithinasi's text.

Ratnakara's view on the question.

i.e. father by marriage (a). Raghunandan points out, that for the purposes of marriage only, the *sapinda* relationship ceases on the father's side with the seventh degree (from the father), and on the mother's side with the fifth degree from the maternal grandfather, and cites a text of Narada in support of this position (b). Raghunandan next comments on Paithinasi's view on the question. Paithinasi says, that a girl who belongs to the same *gotra* and *pravara* as the bridegroom, and who is a *sapinda i.e.* either within five degrees from maternal grandfather and seven degrees from the father, or within three degrees from the maternal grandfather and five degrees from the father, is not fit to be taken in marriage. Sulapani says, that the last clause of Paithinasi's text applies to all other kinds of marriage except *Bramha*, *Daiva* and *Arsha*. Ratnakara thinks that the alternative clause applies to marriages between different castes, and not within the same caste. Raghunandan's view is, that Paithinasi in the last clause indicates,

(a) प्रक्षानां भर्तृसापिण्डग्रम् प्राह देव पितामहः । Institutes of Raghunandan P. 571 (Udbahatatta).

(b) पञ्चमात् सप्तमादूर्ध्वं मातुलः पित्रतः क्रमात् ।

सपिण्डता निवर्त्तत सर्व्ववर्णे स्वयं विधिः ॥

Narada cited in Institutes of Raghunandan p. 571 (Ed. 1880).

that there is greater sin, in marrying those removed three degrees only on the mother's side and five degrees on the the father's side, than in the other alternative. Otherwise it is hard to reconcile Paithinasi's own injunction not to marry maternal uncle's daughter, mother's sister's daughter, father's sister's daughter, with the second alternative of this text. Therefore, Raghunandan supposes that the last clause in Paithinasi's text is not intended, to neutralize or in any way affect the effect of the previous clause, that marriage of a man with a girl, within five degrees from the maternal grandfather's, and seven degrees from the father's is prohibited, for this latter view agrees with the views of the other sages.

It is one of the maxims of interpretation in Hindu law, that it is better to put that meaning on a text of one sage in regard to any subject, which makes it agree with the text of other sages on the same subject (a). The endeavour is to secure unanimity, and not diversity of opinions.

Not only does the prohibition extend to those girls, who are the *sapindas* of the father and mother, but also those who are the *sapindas* of the *bandhus* of the father and the mother. For this, a text of Narada is cited by

Maxim of Hindu Law regarding interpretation of texts.

Prohibition to marry extends to *sapindas* of of *bandhus* of father and mother.

(a) सम्भवत्येकवाक्ये वाक्यभेदी न युज्यते ।

Narada's
text on the
subject.

Who are
bandhus of
father and
mother.

Raghunandan (a) which may be translated thus—"Girls descended from the father's or mother's *bandhus*, are not to be taken in marriage, as far as the seventh and fifth degrees respectively, as well as girls of the same *gotra* or equal *pravaras*." Raghunandan cites a text, defining who are included in the term *bandhus* of father and mother respectively. The *bandhus* of bridegroom's father, are his (father's) father's sister's son, his mother's sister's son and his maternal uncle's son. The *bandhus* of the mother are her (mother's) father's sister's son, her mother's sister's son and her maternal aunt's son (b). According to the text of Narada cited above, a girl is not fit to be married by a man, when she is within seventh degree from his father's *bandhus*, and their six ancestors, or within fifth degree from his mother's *bandhus* and their four ancestors.

Raghunandan, after explaining and illustrating what was signified by *sapinda*, pro-

(a) आसप्तमात् पञ्चमाच्च वन्धुभ्यः पितृमातृतः ।

अविवाह्या संगीचा च समानप्रवरा तथा ॥

Narada cited at p. 572 of the Udbahatattwa of Raghunandan.

(b) पितुः पितुः स्वसुः पुत्राः पितृभ्रातृः स्वसुः सुताः ।

पितृभ्रातृपुत्राश्च विज्ञेया पितृवन्धवा ॥

मातृभ्रातृ स्वसुः पुत्राः मातुः पितुः स्वसुः सुताः ।

मातृभ्रातृल पुत्राश्च विज्ञेया मातृवन्धवाः ॥

Raghunandan's Udbahatattwa, p. 574.

ceeds to explain the meaning of the word *sagotra*. The word *sagotra* means of the same *gotra*. A man is prohibited to marry a girl of the same *gotra* as himself. The Brahmans are said to be descended from a number of sages. The name of the first principal sage, through whom a Brahman claims his descent, furnishes the *gotra* of the Brahman. Brahmans are descended, for instance, from sages Kasyapa, Sandilya, Bhardwaja and so forth. They are accordingly of the *gotra* of Kasyapa, Sandilya respectively. A Brahman who belongs to the *Kasyapa gotra* cannot marry a girl who belongs to a family of *Kasyapa gotra*. But Kshatriyas and Vaisyas, not being descended from sages, could not strictly speaking, have any *gotra* of their own. They, however, adopted the *gotra* of the Brahman priest, who officiated at the sacrifices of the twice born classes. Raghunandan says, that the girl must not only be, not of the same *gotra*, but must not be of the same *pravara*. Now in sacrifices in ancient times, those who officiated as *Hota*, were known as *pravaras*. It might be, that sages of different *gotras* would have the same *pravaras*, having acted as *pravaras* in sacrifices. For instance, a Brahman of the *Batsya Gotra*, and one of the *Sabarnya Gotra*, had the same *pravaras*.

Gotra and
Prabara ex-
plained

Therefore a *Batsya* cannot marry a *Sabarnya*. As neither the *Khastriyas*, nor the *Vaisya* could officiate at sacrifices, their *pravaras* were the *pravaras* of their priests.

Rules relaxing the rigidity of prohibition of marriage within the 7th and 5th degrees from the father and mother respectively.

From the above rules about the incapacity of a girl, who is a *sapinda* on the father's and mother's side (as far as the seventh and fifth degrees respectively), to be taken in marriage, it would appear, that the number of girls eligible for marriage, becomes extremely limited, and marriage becomes difficult. In order to avoid this, other rules have been introduced by commentators, relaxing the severity of the rules above cited. The first exception introduced is, that where the girl whose hand is sought, is removed by three *gotras* from the bridegroom, she is eligible for marriage, though she may be a cognate relation, within the seventh or fifth degree, in accordance with the texts of Manu and Narada.

Girls removed by three gotras may be married.

Text in support of the position.

In support of this position, Raghunandan relies on two texts, one of which occurs in the *Matsya Purana* (a), and the other is a text of *Brihat Manu* (b). This exception becomes intelligible, when we

(a) सन्निकर्षेपि कर्त्तव्यं विगीतात् परती यदि ।

(b) असम्बन्धा भवेत् यात् पिण्डनैवोदकेन वा
सा विवाह्या द्विजातीनां विगीतान्तरिता च या ।

Raghunandan's Udbahatattwa p. 574.

remember, that a woman's *gotra* is changed by her marriage. A girl of *Bhardwaja gotra*, for instance, after being married to a boy of *Biswamitra gotra*, adopts the *gotra* of her husband, and her *gotra* thence forward is *Viswamitra* and not *Bhardwaja*.

Raghunandana does not refer to Yajnavalkya's text, which we now proceed to consider. "Let a man," says Yajnavalkya "who has finished his studentship of the Vedas or sacred literature, espouse an auspicious woman who is not defiled by connection with another man, is agreeable, *non-sapinda*, younger in age, and shorter in stature, and free from disease, is born of a different *gotra* and *pravara*, and is beyond the fifth and the seventh degrees from the mother and the father (respectively.)" The author of the Mitakshara, in commenting on this text says, *inter alia* as follows (b) :—"She whose *pinda* i.e. body, is the same i.e., one, is *sapinda*. One who is not *sapinda* is *non-sapinda*; *sapinda* relationship arises from connection with parts of one body" and again the same author says, while explaining the

Yajnavalkya's text on prohibited degrees.

Comment of Mitakshara on the above.

(a) Yajnavalkya's Institutes, Ch. IV. 52-53. The last line of these two verses are :—

"पञ्चमात् सप्तमात् ऊर्ध्वं माहृतः पितृसुता" ।

(b) Mitakshara, Achara Adhyaya, Page 14. (Venkateswar press Edition.)

term *non-sapinda*, "the *sapinda* relationship is stated to be, directly or mediately, through connection with one body ; but that relationship of all persons may, in one way or other, be traced with all other persons in this world of eternal transmigrations of the Soul with its minute body, and so it would include persons that are not intended to be included ; hence it is ordained '*and is beyond the fifth and seventh from the mother and from the father respectively.*' The purport is, that *sapinda* relationship ceases beyond the fifth from the mother *i.e.* in the mother's line, and beyond the seventh from the father *i.e.*, in the father's line. "Hence although the word *sapinda* by its etymological import applies to all relations, yet it is restricted in its signification. * * * * *

Accordingly, it is to be understood, that the fifth from the mother is she, who is (the fifth) in the line of descent from (any ancestor of the mother up to) the fifth ancestor, and (counting her and such ancestor, each as one degree)—in the computation—beginning with the mother (and counting her as one degree),—of the mother's father, paternal grand-father, and the like ; similarly, the seventh from the father is she who is (the seventh) in the line of descent from (any ancestor up to) the seventh ancestor (and

counting her and such ancestor, each as one degree),—in the computation—beginning with the father and counting him as one degree),—of the father's father, and the like :

* * * As for what is said by Vasistha (a) namely : 'May marry the fifth and seventh from the mother and father respectively,'—and by Paithinasi namely "beyond the third from the mother and fifth from the father," these should be taken to intend the prohibition of the nearer degrees ; indicated therein and not to allow of the espousal of the nearer degrees expressed therein, thus is the conflict between all *Smritis* avoided" (b).

From the views of the different sages given above, it is clear there is great diversity of opinion on the question of the rule of prohibited degrees in marriage. Manu, Yajnavalkya, Vasistha, Paithinasi do not agree, as to how far the *sapinda* relationship of females, for the purpose of marriage, extends. Manu forbids alliance with the largest number, while Paithinasi with the smallest.

There is one peculiarity in the method of reckoning prohibited degrees, in the Mitakshara. All the other commentators are

Diversity of opinion among sages on the question of prohibited degrees.

Method of counting prohibited degrees in Mitakshara.

(a) Vasistha quoted in the Mitakshara, Achara Adhyaya.

पञ्चमौ सप्तमोऽथ मातुः पितृतन्त्रः ।

(b) Translation by Babu Golap Chandra Sarkar of Mitakshara : See Sarkar's Hindu Law, 4th Edition. P, 54.

agreed, that the degrees have to be counted, by leaving the propositus out, on the father's side, and by leaving the mother out, on the mother's side. In computing degrees on the father's side the Mitakshara observes the same rule, but on the mother's side, it counts the mother as one degree. Raghunandana, as has been noticed already, says that as the mother's *Gotra* is merged in the father's by marriage, and therefore in the bridegroom's, the degrees have to be counted from the maternal grandfather and that the word **मातुः** means "maternal grandfather." The method of calculating prohibited degrees is that of the canonist, and not of the civilian. This fact, however, is sometimes overlooked, and Judges have sometimes fallen into the error of reckoning prohibited degrees in marriage, according to the method of the civilians (a).

The rule of the canonist followed in counting prohibited degrees.

Counting upwards, only male ancestors are reckoned ; counting downwards, both male and female descendants are taken into account.

Reason for the rule of prohibited degrees.

Another fact to be noticed in this connection is, that while in counting in the ascending line, male ancestors alone, of the father and mother, have to be considered, in counting downwards, both male and female descendants have to be taken into account.

It may not be out of place to refer to the reason of the rule of prohibited degrees in

(a) (1883) Venkata vs. Subhadra, I. L. R. 7 Mad. 548.

Hindu law. Montesquieu gives the following reason for the rule prohibiting marriage between cousins-german, in the early ages (*a*). "In the early ages", says the author of the Spirit of Laws, "that is, in the times of innocence ; in the ages when luxury was unknown, it was customary for children upon their marriage not to remove from their parents, but settle in the same house ; as a small habitation was at that time sufficient for a large family ; the children of two brothers, or cousins-german were considered both by themselves and others, as brothers. The estrangement then between the brothers and sisters, as to marriage, subsisted also between the cousins-german. These principles are so strong and so natural, that they have had their influence, almost over all the earth, independently of any communication." These remarks are of universal application, and furnish the clue, to the true reason of the rule in Hindu law. Jointness was the normal condition of a Hindu family, even from the most ancient times, and the descendants of the same father, grandfather etc. would live for generations together. The son of one brother, would look upon the daughter of another as a sister. The grandson of one brother would look upon the grand-

Montesquieu ascribes the rules of prohibited degrees to the practice of cousins living under the same roof, where they were regarded as brothers and sisters.

The same reasons apply to the rule of prohibited degrees in Hindu Law,

(*a*) Montesquieu's Spirit of Laws p. 70.

daughter of another, as sister, and so on. The preservation of the sanctity of the home necessitated the prohibition of marriage between them.

The violation of the rule of prohibited degrees, affects the legality of the union.

Legal effect
of marriage
within the
prohibited de-
grees.

Kulluka, in commenting on verse 11, Chapter III of Manu's Code observes thus :—

“In this topic, in connection with marriage with *sagotras*, desertion has been ordained ‘He who inadvertently marries a girl sprung from the same original stock (*sagotra*) and so forth, must support her, as a mother’ (a); and penance has been ordained by the text ‘If a man marries etc.’ (b); consequently, together with her, girls related as mother’s *sapindas*, do not become wives.”

Mr. Mandlik says, that a woman married within the prohibited degrees, though she cannot be the wife of the bride-groom, for any conjugal and religious purpose, cannot be married by another, and must be maintained by the bride-groom whom she has married (c). Raghunandana apparently takes the same view of the effect of marriage within prohibited degrees and quotes a text

(a) Kulluka here quotes from Baudhayana, II. 1, i, 37.

(b) Kulluka here quotes from Vasistha.

(c) Mandlik's Edition of Institutes of Vyabahara Mayukha 508.

of Sumantu "that a person should, after deserting father's sister's daughter, maternal uncle's daughter, a girl of the same gotra as the father and mother and also a girl with the same pravara as himself, whom he may have married, perform penance and maintain the girl." Raghunandana in this connection cited another text from Apastamba to similar effect (*a*).

Certain marriages, in which the relationship is close, do not seem to have been forbidden. For instance, marriage with wife's sister, step-mother's sister, wife's sister's daughter, paternal uncle's wife's sister and paternal uncle's wife's sister's daughter is not forbidden. In fact, in the Southern Presidency, marriages between a man and his wife's sister's daughter, are common amongst various sections of the Brahman community and are regarded as perfectly valid (*b*). Both under the Roman law (*c*) and, until recently, under the English law (*d*) marriage with a deceased wife's sister was declared invalid.

(*a*) See Raghunandan's Udbahatattwa, p. 572.

(*b*) See (1897) Raghavendra vs. Jayaram, I. L. R. 20 Madras, p. 283.

But the Nirnaya Sindhu cites passages from Bau-dhayana which regard these marriages as invalid on the ground of incongruous relationship.

(*c*) Marriage with a deceased wife's sister was forbidden by Constantine's sons in the East and by Valentinian, Theodosius, and Arcadius in the West. (*d*) Deceased Wife's Sister Marriage Act, 1907.

There are other rules, which are in the nature of moral injunctions e.g., a man is enjoined not to marry a girl who bears the same name as his mother (*a*) or a girl who is older in age than himself (*b*).

Intermarriage
between differ-
ent castes.

We proceed, in the next place, to deal with the eligibility of a girl, belonging to a different caste, to be taken in marriage by a man of inferior or superior caste. We have in the introductory chapter, referred to the four divisions of the castes, and to the principal division by the *Smritis*, of men into two classes, the Sudras on the one hand, and the twice-born or regenerate classes on the other. Raghunandana cites a text, from the Aditya Purana, to show that marriage between different castes is prohibited in the *Kalijuga* or present age. Manu's Code contains verses, from which it would seem that inter-marriage between different castes was allowable in his time, although such marriage was condemned by the sage himself (*c*). The Hindu sages and the principal commentators have spent no inconsiderable learning over this topic. While intermarriage between a woman of the inferior class and a man of the superior class would be allowed, marriage

Manu.

(*a*) Udvahatattwa.

(*b*) Yajnavalkya, I. 52.

(*c*) Manu, III, 12, 13.

between a woman of the superior class and a man of the inferior class was not permitted, and there are passages in the *Smritis*, providing for punishment by the King, if a man of the inferior class married a woman of the superior class. These passages suggest that the intermarriages of the latter kind were prohibited.

The Mitakshara and the Dayabhaga, which have influenced the developement of Hindu law, recognise intermarriage between a woman of the inferior and a man of the superior tribe, as also the legitimacy of the issue of such intermarriage. Chap. IX of the Dayabhaga commences as follows :—1. "Partition among sons of the same father by different women, some equal to himself by class, others married in the direct order of the tribes, is described. 2. Marriage is allowed with women, in order of the tribes as well as, with those of equal class" :..... The whole chapter deals with the rights of sons by marriage on partition. The Mitakshara in the Achara Adhyaya, comments on the texts of Yajnavalkya, and says, that a Brahman may have three wives in the order of the tribes, the Kshatriya may have two wives and the Vaisya one, but the Sudra can have only one of his own class ; and in sec. VIII. chap. I, (the chapter on inheri-

Mitakshara
and Dayabhaga
on the
point.

tance), the author of Mitakshara deals with the shares, which a son born of a wife of different caste to the father, obtains by inheritance. Although, from the somewhat detailed investigations into the shares of the sons by marriage with a woman of a lower caste, it would seem, that intermarriage was in vogue at the time, when these two commentaries were written, one cannot, however, be certain with regard to it, seeing that they deal with obsolete and current usages, side by side ; and our view is, that intermarriage had become obsolete, when Vijnaneswara or Jimutabahana flourished. We are confirmed in this view by the fact, that both Raghunandana and Kamalakara say that intermarriage is prohibited in the present age, and it is more likely than not, that intermarriages had become obsolete, at the time of the Mitakshara and the Dayabhaga.

Judicial
decisions on
the point.

In the absence of local usage, these intermarriages are not regarded as valid, and it has been held in the case of *Melaram vs. Thannooram* (9. W. R. 552.), that intermarriage between a Dome Brahmin and a girl of the Haree caste, is not valid. But in the present stage of Hindu Society, in which there are signs of reform in this direction, a

question may frequently arise, whether marriages between different sub-divisions of the same caste, may not be regarded as valid.

In the case of *Inderun vs. Ramaswamy (a)*, which was carried in appeal to the Judicial Committee from Madras, the Privy Council laid down, that intermarriage between different subdivisions of the Sudra caste was valid. In an early Bengal case (*b*), certain observations were made by Justice Romesh Chandra Mitter, against the validity of marriages, between different subdivisions of the Sudra caste. But these observations were regarded as *obiter dictum* in the recent case of *Upoma vs. Bholaram (c)*, when the Calcutta High Court came to an opposite conclusion, and declared intermarriages between different subdivisions of the Sudra caste valid. In the Punjab, intermarriages amongst Sudras, and Jats, the leading Sudra sub-caste in the Punjab, are not forbidden by Hindu law (*d*). In Bombay, marriages between members of different sects of Lingayets, are not illegal (*e*). And quite recently, it has been held there, that the marriage between a man of one caste and

(a) 13. M. I. A. 141.

(b) (1878) Narain Dhara's case I. L. R. 1. Cal. p. 1.

(c) I. L. R. 15 Cal. 708. (d) 64 P. L. R. (1908).

(e) I. L. R. (1896) 22 Bom. 277.

woman of another caste is valid, where the two castes are subdivisions of the Sudra tribe (*a*). In Tipperah, marriage between a Vaidya and Kayasth woman, (both being Sudras, but of different subdivisions) was held valid according to local custom prevailing there (*b*).

New light
thrown by
Hemadri.

*There is nothing in the Smritis or commentaries to prohibit such marriages. On the other hand, we find in the *Hemadri* a commentary which is of authority in the Bombay Presidency, a distinct statement to the effect, that the rule, that the gift of a daughter should not be made except to a man of the same subdivision of a caste (among the three regenerate classes) does not hold good (*c*).*

A question of no small importance arose in a recent case in the courts in England regarding the effect of the marriage of a twice born Hindu with an Englishwoman in England. The facts of the case are these : Mr. Venu Gopal Chetti is a member of the Indian Civil Service and is a District Judge in Madras. He married, while he was studying

a) Mahanta vs. Gangara 11. Bom. L. R. 822.

b) 1903—7 C. W. N. 619.

c) अतो न कन्यादाने नचापि हविर्दाने स्वशाखीयद्विजनियम इति सिद्धः ।

Hemadri Parisesh khanda, Vol. III. Part I. A. p. 381.

* The portion within asterisks is based on original research.

for the Indian Civil Service, an English woman in England, and had a child born of her. He did not bring her to India and practically deserted her. The wife petitioned for a judicial separation alleging desertion. The defence of Mr. Chetti was that, as Hindus belonging to the twice-born classes cannot lawfully marry out of their own caste, his marriage with the petitioner was invalid, and the question of his capacity to marry must be determined by his personal law which was Hindu law, and wher-

Marriage of a Hindu with a Christian woman not invalid.



to Hindu marriage rituals, for both parties must have the capacity of partaking in the religious ceremonies of marriage. A person after such marriage ceases to be a Hindu, and he cannot be permitted to say that the marriage is invalid because, prior to the marriage, he was a Hindu. If the marriage was valid, according to the law of the country where it was celebrated, no rule of Hindu law can make it void. In point



be married before twelve, which is considered generally to be the age when a girl attains puberty. But the reforming tendencies of Hindu youths of the present day, and the difficulty of getting a suitable bridegroom have imperceptibly raised, in practice, the marriageable age of girls in Hindu families, and we often find girls married after they attain puberty. The direction to marry a girl, while she is still an infant, seems to be in the nature of a moral injunction, and the disobedience of this precept does not render the marriage either void or voidable.

It has often been said that early marriage is an institution which is peculiar to India. But this is indeed far from the truth. Such marriages were known in England even in Tudor times. Professors Pollock and Maitland point out that the Canonists fixed the age of consent at seven years and that any marriage after that age, without the consent of parent or guardian or even in opposition to it, was held legal and that it was voidable so long as either of the parties to it was below the age at which it could be consummated. They further say, "so far as we can see this doctrine was accepted by our temporal Courts" (a).

Infant marriage not peculiar to India.

(a) Maitland's History of English law, II, p. 388.

Manu on the point.

Manu says :—"To a distinguished, handsome suitor of the same class, should a father give his daughter, in accordance with the prescribed rule, though she may have not attained the proper age" (a). In commenting on this text, Kulluka, Narayana, and Raghunandana say that 'proper age' means the age of eight years. Medhatithi, however, interprets 'proper age' to mean 'before she is bodily fit for marriage'. Other sages insist on marriage before puberty (b).

We have seen that in the Vedic age, marriage of girls was not compulsory. But this can not be said of the period of the Smritis, when it was obligatory on the guardians, to celebrate marriages of the girls under their care.

The following text of Manu, "But the maiden, though marriageable, should rather stop at her father's house until death, than that she should ever be given to a man, destitute of good qualities" (c), might be interpreted to mean that marriages of girls were

(a) Manu IX, 88.

(b) Gautama, XVIII 20-23, Vasistha, XVII, 69-71. Baudhayana IV, 1, 11-14, Brihaspati, XXIV, 4. Yajnavalkya, 1, 64. Kulluka in his comments on verse 4, chapter IX, Manu fixes the proper age to be before puberty.

(c) Manu IX, 89.

not regarded as compulsory, even in Manu's time. But Raghunandana points out that the true meaning of this verse is that a bad match is prohibited, and that it does not contain a rule, sanctioning the life-long maidenhood of girls, as in the Vedic age. In the next verse, Manu says, that a girl may wait for three years, after puberty and if the father or guardian does not during that period, find out a bridegroom for her, she must select one for herself (a). In practice however, the selection of bridegroom is generally made by the guardian of the girl, and the opportunity for the exercise of this right by her is extremely rare.

This is the proper place to consider the question of guardianship for the purposes of marriage. Infant marriages having been enjoined by the Smritis, the law regarding the guardianship in marriage is of great practical importance. But the sages are not all agreed as to the preferential right of certain relations, to act as guardians of a girl in marriage. Raghunandana, whose authority is followed in Bengal, deduces the following rule from the texts of sages in connection with the order of guardianship :—

“The father, paternal grandfather, the brother, sakulya, the maternal grandfather,

Guardians for
the purposes
of marriage.

(a) Manu, IX, 90.

the maternal uncle, and the mother, if of sound mind, are entitled in succession to give a girl in marriage." This order is the same as that of the sage Vishnu (a), except that the maternal uncle is interposed between the maternal grandfather and the mother. Yajnavalkya says, "The father, the paternal grandfather, brother, *sakulya*, and mother are the persons, who have a right to give away a damsel, provided they are of sound mind." The order given by Yajnavalkya is adopted by the Mitakshara and is followed, in determining the right to guardianship, in all the Schools, except that of Bengal.

Absence of guardian's consent does not invalidate marriage.

These texts, relating to the eligibility of persons who can claim the right of giving a girl in marriage, are however directory and not mandatory (b). The father has the most preferential right to dispose of his girl in marriage, both according to Raghunandan and the author of Mitakshara, but in certain exceptional circumstances, other relations are preferred to the father. So where a father had, for about eight years, voluntarily given up residence with his wife and daughters, and had neglected to marry the daughter

(a) पिता पितामही भ्राता सकुल्यो मातामही माताचेति ।

कन्याप्रदः पूर्वोभावे प्रकृतिस्थ परः परः ॥ Vishnu.

(b) (1897) Mulchand vs. Bhudhia, I. L. R., 22 Bom., 812.

of eleven years age, although requested by the mother to do so, it was held that marriage with the consent of the mother was valid (a). In this case, the learned Judges observed, that the consent of parents or guardian was not a condition precedent to the validity of the marriage. Absence of father's consent would not invalidate a marriage, where the marriage was performed with due ceremonies, in the absence of force or fraud. The Judges of Bombay High Court reaffirmed this view in the case in I. L. R. 22 Bombay cited above (b) resting their decision on the directory nature of the above texts, and on the doctrine of *factum valet*.

In a recent Allahabad case, the learned Judges observed that a uniform course of rulings, dating back to 1843, has laid down that the want of the guardian's consent would not invalidate a marriage actually and properly celebrated. Where a Hindu widow who was appointed guardian of the person of her minor daughter, eight or nine years old, married the minor, in disobedience of the order of the Civil Court directing the minor to be made over to the paternal uncle,

Judicial
decisions

(a) (1886) Khusalchand vs. Baimani, I. L. R., 11 Bom, 247.

(b) (1897.) Mulchand vs. Bhudhia, I.L.R., 22 Bom., 812 ; Bai Duvali vs. Moti (1890) I. L. R. 22 Bom. 509.

for the purpose of getting her married, it was held, that the principle of *factum valet* applied, and the courts said that neither the disobedience of the court's order, nor the disregard of the preferable claims of the male relations could invalidate the marriage (a). In a Madras case, the learned Judges, after reviewing the authorities, held that where a Vaishnava Brahman girl was given to the plaintiff in marriage by her mother, without the consent of her father, who subsequently repudiated the marriage, the plaintiff was entitled to a declaration that the marriage was valid, and to an injunction restraining the parents from marrying the girl to any one else (b). The learned Judges came to this conclusion, although it appeared that the mother falsely informed the Brahman, who solemnised the marriage that the father had consented to it.

In Bengal, it was laid down, in an old case, that a *kulin* father was not such a natural guardian of his child as the mother, and that the absence of his consent would not invalidate a marriage duly solemnised by the mother (c). In 1885, the same view was adopted by the Bengal High Court, in

(a) (1897). Ghazi vs. Shukru., I. L. R., 19 All., 515.

(b) (1890). Venkata vs. Ranga., I.L.R., 14 Mad., 316.

(c) Modhoosodun vs. Jadub chundra, 3 W. R., 194.

a case, where the question was raised, whether the marriage was valid, the girl having been given away by the mother, without the consent of the uncle, who under the texts above cited, had a right to give away in preference to the mother (*a*). In 1869, the Madras High Court held, that a divided brother had no exclusive right, as against the widow of a Hindu, to betrothe the infant daughters of the deceased, without the interference of the widow. It was pointed out in that case that the independent position of the mother, as the guardian of her daughters, and possessor of her husband's property, is inconsistent with the disposal of her daughters in marriage, by her husband's brother or other relation, without reference to her (*b*). It seems to us, that the texts cited above, do not confer a right on the particular relations of the girl, to give away, but they impose a duty on them; and viewed in this light, the texts do not appear to be mandatory, but merely directory. But in the Bombay High Court, it was held in one case, that the father was entitled to an injunction, restraining the mother, from giving their

(*a*) 1885) Brindaban vs. Chundra, I. L. R., 12, Cal., 140.

(*a*) S. Nama Sevayem Pillai vs. Annamai, 4 M. H. C. R., 339; (1900) Vaikuntham vs. Kallapiran, I. L. R., 23 Mad., 512.

daughter in marriage to a person with whom the mother has arranged marriage (a).

Preceptor's
daughter not
eligible for
marriage.

A preceptor's daughter is not fit to be taken in marriage. In the ancient constitution of Hindu society, a youth had to spend several years either 12, 24 or 36 years of his life, as the case may be, in the house of his preceptor. The pupil would be treated, as if, he were a member of the preceptor's family, and it is natural that a sacred tie would be formed between the preceptor and the pupil, which would be necessarily of the nature of a family tie, and would carry with it the same associations and the same order of feeling. The preceptor would be regarded as a father, and the preceptor's daughter as a sister. A sort of spiritual, akin to family, relationship would grow up. The same ideas which underlie the rule prohibiting marriage between a brother and sister, would bar union between a pupil and the preceptor's daughter. The Roman law, likewise, forbade marriage between god-parent and godchild, on the ground of *cognatio spiritualis*—a sort of spiritual kinship (b). The canon law also forbade the marriage of a sponsor with the baptized (c).

(a) Nana Bhai vs. Janardan, I. L. R., 12 Bom., 110.

(b) Justinian's Code, 5, 4, 26.

(c) Maine's Early History of Institutions, p. 240.

We have hitherto been considering the disqualifications which render a girl ineligible for marriage. It will now be convenient to deal with the rules regarding the incompetency of a male to marry. The minority of a boy is no bar to his marriage. We have already seen that, under the Hindu law, minority ceases at the end or at the beginning of the sixteenth year ; and for the purposes of marriage, the Hindu law remains unaffected, by the Indian Majority Act (IX of 1875). Manu lays it down, that a man can marry as soon as he finishes his period of studentship, which period is extremely elastic, ranging from thirty six years to nine years (*a*). But this text is not mandatory. In 1865, two learned Judges of the High Court of Bengal, were of opinion, that the marriage of a Hindu minor is a legitimate cause of expense, in regard to which his guardian has power to bind him (*b*). In this respect, the Hindu law presents a striking contrast to other systems of Jurisprudence, where the contract of marriage is, generally, only permissible between persons who have attained a certain age. In practice the natural guardian of the minor male arranges for his marriage.

Incompetency
of males to
marry.

Minority no
bar.

(*a*) Manu III. 1. *Ibid.* IX. 94.

(*b*) Juggessar vs Nilamber, 3 W. R., 217.

Impotent
persons and
eunuchs.

* Are eunuchs and impotent persons eligible for marriage? The fact that marriage was and is the only *samskara* for women and that the sages (a) enjoin the gift of girls to suitable bridegrooms suggest a negative answer. In verse 55 of the *Achāra Adhyaya* of the *smṛiti* of Yajñavalkya, we find the qualities which a bridegroom should possess. They are youth, talent, learning and manhood (b). The sage is very emphatic as to the possession of manhood, for he uses the expression यत्नात् परीक्षितः । Potency is to be definitely determined and must not be presumed to exist. Vijnāneswar in commenting on the verse says that there are three purposes of marriage, viz., the gratification of the senses, the procreation of children and the performance of religious acts. So far as the first two purposes are concerned, marriage of an impotent male or a eunuch is useless. "The man must," says Narada, "undergo an examination with regard to his virile and he shall obtain the maiden only when the fact of his virility has been placed beyond doubt" (c). After describing the different varieties of impotent persons and

(a) Manu, IX, 89.

(b) एतैरेव गुणैर्युक्तः सवर्णः श्रोत्रियो वरः ।

यत्नात् परीक्षितः पुंस्त्वे युवा धीमाञ्जनप्रियः ॥

(c) XII, 8.

the method of determining potency, he lays down, "women have been created for the sake of propagation, the wife being the field and the husband the giver of the seed. The field must be given to him who has seed. He who has no seed is not worthy to possess the field" (a). So, it is evident that, according to Narada, an impotent male is ineligible for marriage. Manu says, "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" (b). The expression "somehow or other" is significant and implies, as Kulluka interprets, that a eunuch and the rest are not fit to marry. Medatithi, in his commentary, observes that the rule may refer to cases where the disqualification arose after marriage. Narayana remarks that there cannot be a legal marriage with a eunuch. Kulluka and Narayana explain 'children' in the above verse to mean *kshetraja* sons. The *mantras* that are recited at the marriage also show that the bridegroom must always be a person capable of begetting children c).

(a) XII, 19.

b) IX, 204.

(c) रत्नोहं रत्नो सत्त्वं.....भव पम पुत्रायवेत्सुवे श्रियैपुत्रायवेत्सु-
 वव हि सुवृत्त । I am the living seed, thou art the bearer
 thereof —come thou unto me for bringing forth sons,
 wealth and progeny.

An opposite conclusion may, however, be said to follow from the text of Manu quoted last and similar texts (a) of other *Smṛiti* writers giving the issue of an impotent person the right of inheritance. The possibility of impotent persons having any issue was dependent on *niyoga* and when these sages condemn the custom in very strong terms, it may safely be asserted that they could not have meant to sanction the marriage of impotent persons. It is true that the commentators beginning with Vijnanesvara agree in treating the issue of eunuchs as legitimate. But they base their legitimacy on *niyoga*; and in the present age, this custom is distinctly prohibited (b). So it is extremely doubtful if their issue may now be treated as legitimate. It is, therefore, clear that eunuchs and impotent persons cannot any longer be said to possess the capacity to marry.*

Insane persons.

The question whether a marriage contracted by a really insane person is or is not invalid was raised in a very early case (*Daby vs. Radha* 2 Morl 99) and it was held that such a marriage was valid. In a recent

(a) Yajñavalkya, II, 141.

(b) Brihaspati, XXIV, 12, 13.

* The portion within asterisk is based on original research.

Bengal case, which was carried in appeal to the Judicial Committee, the question was raised but was not decided (*a*). The commentators are agreed that the dumb and those born deaf or blind are eligible for marriage and the issue of such marriage is legitimate *b*). This rule will also apply to the case of lunatics. But the rational view seems to be that the marriage with a lunatic ought to be declared a nullity for lunacy negatives a true consent, and there cannot be any acceptance of the gift of the girl by the lunatic husband. And accordingly we find under the early Roman law lunatics and idiots were absolutely incapable of contracting marriage.

In European countries a man who has one wife living cannot marry ; there is no such incompetence on the part of a married man under the Hindu Law, as polygamy was allowed even in Vedic times. Manu, while sanctioning polygamy, reserves it for exceptional cases, for instance, it is said that where a wife drinks spirituous liquor, is of bad conduct, is rebellious etc.,

Having a living wife, no incompetency in Hindu Law.

(*a*) 1911 Mouji Lall vs. Chandrabati, 14, C. L. J. 72.

(*b*) Mitaksara, Ch. II. Sec. X. 9 11. Dayabhaga, Ch. V. 18. Vivadachintamani, p. 244, P. C. Tagore's translation. Smṛiti Chandrika, (K. Iyer's Edition) Ch. V, 32 Vyavahar Mayukha Ch. IV. sec. XI, 11.

she may be superseded by another wife (*a*). The reason why polygamy is abhorred in European countries is, as pointed out by Bentham, that it is not consistent with peace (*b*). Similar reason has made polygamy very rare amongst the present day Hindus. In some castes polygamy is prohibited. Mr. Mandlik points out that in Vadananagar caste, a man cannot marry a second wife, if his first wife be living (*c*). A question recently arose in the Madras High Court how far the remarriage of a Hindu, having a Christian wife alive, was valid. The facts were that a Hindu convert to Christianity married a Christian woman, according to the rules of Roman Catholic religion. Subsequently, and during the life-time of the Christian wife, he reverted to Hinduism and married a Hindu woman in accordance with the rites of the class to which the parties belonged.

(*a*) Manu, IX., 80-81.

(*b*) Compare Daksha's case who had two contentious wives. Bentham says in the East polygamy is consistent with peace. If Daksha's instance had been known to Bentham he would not have made the remark ; but it is humbly submitted that in the East, as well as in the West, polygamy is not consistent with peace.

(*c*) Mandlik's Institutes of Yajnavalkya, p. 406. Bentham, p. 254.

It was held that the marriage was valid, and the offence of bigamy was not committed (a).

Having discussed the nature of the marriage relation in Hindu law, and the different forms of marriage therein, we have next to consider the modes of contracting marriage. The formalities and ceremonies attending marriages fall within this head of discussion. In early Roman law marriage was contracted by consent; and the betrothal accordingly consisted in consent. The transition from betrothal to marriage was effected by matrimonial cohabitation. Under the Hindu law, the marriage ceremony is preceded by betrothal, *viz* a promise by the guardian of a girl to give her in marriage (b). Narada says that previous to the union of man and wife, the betrothal takes place and the betrothal and marriage ceremony together constitute lawful wedlock (c).

Formalities
attending
marriage.

Betrothal.

A question has sometimes been raised as to whether the betrothment, or the mutual contract between two parties for a future

Betrothal is
revocable.

(a) (1911) Emperor *vs.* Antony, I. L. R. 33 Mad, 371.
3 M. H. C. R. App. VII. See, however Emperor, *vs.* Lazar, I. L. R., 30 Mad., 550.

(b) Compare the *Asirbad* ceremony in Bengal and *tilak* ceremony in Behar and Upper India which are ceremonies evidencing betrothal, before marriage

(c) XII, 2.

marriage between the persons betrothed, is a revocable contract, or, is one that cannot be rescinded. Sir Gooroo Das Banerjee points out that there is some authority in the Hindu texts for holding the view, that such a contract can not be revoked (*a*). But there are numerous texts which support the contrary view. For example, Manu says that the bridal contract is known by the learned to be complete on the seventh step of the married pair, hand in hand, after the nuptial texts had been pronounced (*b*). Other sages might also be cited in support of this view (*c*). Raghunandana cites a text from Vasistha to show that, if the intended husband of the girl die after betrothal, the girl is to be regarded as unmarried (*d*). A text of Yama is also cited by him to strengthen his own opinion, that *Vagdana* or betrothal is something distinct from marriage, and that the dominion of the husband over wife does not arise from betrothal, but from the actual gift of the

(*a*) Tagore Lectures, 1878, p. 84. Second Edition.

(*b*) Manu, VIII, 227.

(*c*) Vajnavalkya, I, 65. Vasistha cited in Colebrooke's Digest.

(*d*) अग्निर्वाचा प्रदत्तायां मिथेतीर्हं वरो यदि ।

न च मन्त्रीपत्नीता स्यात् कुमारी पितुरेव सा ॥

Udbahatattwa, p. 579.

bride at the time of marriage. Narada also ordains that the betrothal loses its binding force when blemishes are subsequently discovered (*a*). The courts have accepted the more sensible view of Raghunandana and other commentators, that a betrothment can be rescinded and is not irrevocable like marriage. In actual practice, such a revocation, if without any good cause, would be censured socially, but it would seem, that no action would lie for specific performance of a contract of betrothal. In the case of *Umedkika vs. Nagandas Narotam*, it was decided, after a very full discussion of the texts and the authorities, that the court would not order specific performance or compel the father to carry out a marriage with the person to whom the daughter had been betrothed (*b*). The same view was taken in Calcutta in an early case, and it was held that the ceremony of betrothal does not, by Hindu law, amount to a binding irrevocable contract of which the court would grant specific performance (*c*). It was suggested by Glover J., that an action for damages for breach of the contract would be the proper remedy ; and the Bombay

No specific performance of betrothal.

Damages, the proper remedy.

(*a*) XII, 3.

(*b*) 7 Bom H. C. R., O. C., 122.

(*c*) In the matter of Gunput, 1 L. R., 1 Cal, 74.

High Court, in a recent case, allowed damages for repudiation of a betrothal by the father of the betrothed girl (a).

Unwilling-
ness of the
girl to marry,
no defence.

We have seen already that the marriage of Hindu children is a contract made by the parents, and the children exercise no volition. This is equally true of betrothal, and there is no implied condition that fulfilment of the contract depends on the willingness of the girl at the time of marriage. It is true that a girl should not be forced into a marriage that would be odious to her; (b) but it is the duty of the father to use to the utmost his persuasive powers and his position as parent, in order to induce his daughter to be married to the person with whom he has entered into the contract of betrothal.

Vedic mar-
riage, a sim-
ple rite.

Having dealt with betrothal and its legal effect, we proceed to the actual marriage ceremony. The Vedic marriage ceremonial was extremely simple. Custom has introduced great changes upon the Vedic ritual. Even now the ceremonies differ according to the usages of castes and provinces. Mr. Mandlik notices twenty seven ceremonies including *vagdana* (betrothal) (c).

(a) Purshotam Das *vs.* Purshotam Das, I. L. R., 21 Bom, 23.

(b) Shirdhar *vs.* Hiralal, I. L. R., 12 Bom, 480.

(c) Mandlik's Institutes of Yajnavalkya, p. 401.

The Sanskara Tattwa of Raghunandana gives a number of the principal ceremonies. It is necessary to notice only three of them, the *Sampradan* or the gift, the *Panigrahan* or the acceptance of the bride's hand and the kindling of the nuptial fire, and the *Saptapadi* or the walking of seven steps by the married pair hand in hand. (*a*). The *Saptapadi* or the walking of seven steps is, according to some writers, the most material of nuptial rites, for they hold that marriage becomes irrevocable on the seventh step being taken, and not before.

The three principal ceremonies in marriage.

The question as to how far the performance of these ceremonies is necessary to constitute a valid marriage is of great importance from the legal point of view. The consideration of this question has engaged the attention of modern writers on Hindu Law. There is, however, no complete unanimity amongst them on this point. Mr. Mayne (*b*) maintains that in the actual marriage, there are numerous formalities and many recitals of holy texts ; but the operative part of the transaction consists

Performance of what ceremonies constitutes marriage.

(*a*) For a full description of these ceremonies, reference may be made to Sanskar Tatwa of Raghunandan, pages 383-385.

(*b*) Mayne's Hindu Law and Usage (7th Edition), p., 117.

Diverse opinions on the subject.

in the seven steps taken by the bridal pair. On the completion of the seventh step, the actual marriage has taken place. Till then, it is imperfect and revocable. Sir Gooroodas Banerjee(*a*) considers that according to the original authorities, all the ceremonies are necessary to constitute a valid marriage and that the status of wifehood does not come into existence without the *Saptapadi* and the recital of the nuptial texts. Mr. Colebrooke regards the ceremony of the bride's stepping seven steps as the most material of all the nuptial rites; for the marriage is complete and irrevocable, so soon as she has taken the seventh step and not sooner (*b*). On the other hand, Sir Thomas Strange's view is that the essence of the marriage rite consists in the consent of the parties (*c*). The bridal contract is, however, according to him, perfected upon the completion of the seventh step (*d*). According to Mr. Golap Chandra Sarkar (*e*), the secular gift and acceptance of the bride would be sufficient to create the relation of husband and wife between

(*a*) Tagore Lectures, 1878, pp. 94-95.

(*b*). Colebrooke's Miscellaneous Essays, Vol I, p. 218.

(*c*). Elements of Hindu Law, p. 44.

(*d*). Ibid, p. 37.

(*e*). Sarkar's Hindu Law (4th Edition), p. 113.

the acceptor and the girl. In his opinion, the status of wife-hood is created immediately after the gift of the girl and the acceptance by the bridegroom ; the ceremonies following the gift including *Saptapadi* are not essential parts of the marriage ceremony.

*It becomes necessary, therefore, to examine the original authorities on Hindu Law to see which of these views is borne out by them. "The gift of the daughters amongst Brahmans," says Manu (a), "is most approved if it is preceded by a libation of water, but in the case of other castes it may be performed by the expression of mutual consent." This lays down the manner how gift is to be made. The Brahmans are directed to pour water on the hands of the bridegroom before making the actual gift. The commentators of Manu are not agreed as to the extent of the application of this rule. Medhatithi and Kulluka limit it only to Brahmans and remark that, in other castes, the gift can be verbal, without the libation of water. Ram Chandra, however, would extend it to all the three regenerate classes, holding that the second part of the verse applies to intermarriages between different castes. "The ceremony of joining hands is prescribed for marriages with

Texts of
Manu.

(a) Manu, III, 35.

women of equal caste (*Varna*) ; know that the following rule applies to weddings with females of a different caste" (a). This declares how the gift is to be accepted. All the commentators are agreed that the rule applies to marriages with a girl of the same caste. From the verse that follows, it is manifest that the *samaskar* mentioned here is a physical act, or, as Narayan puts it, the taking of (the bride's) hand by (the bridegroom's) hand (b).

The next verse, bearing on the question, runs thus :—"For the the sake of procuring good fortune to (brides) the recitation of benedictory texts and the sacrifice to the Lord of creatures are used at weddings ; but the betrothal (by the father or guardian) is the cause of the husband's dominion over the wife" (c). The point of time, when the husband's dominion over the girl commences, is stated here. *Pradanam* is the cause of conjugal dominion. *Pradanam* may mean, either the oral gift *sampradan* immediately preceding the *homam* and the recitation of sacred texts, or the agreement to give, *bagdan* as it is commonly called. Medhatithi

(a). Manu, III, 43.

(b) करण करस्य ग्रहणम् पाणिग्रहणम् ।

Mandalik's Manu, p. 306.

(c) प्रयज्यते विवाहेषु प्रदानं स्वात्मकारणम् । Manu, V, 152.

does not give any explanation of the word *pradanam* but, from his comments on verse 151, it is clear that he understands it to mean what we have called *sampradan* (a). Kulluka comments that *bagdanam* is the essence of *pradanam* so the girl comes under the dominion of the bridegroom from the *bagdana*. He remarks further that such dominion does not clothe the girl with the rights of wifehood, without the performance of the *saptapadi*. One cannot, however, be certain as to the exact intent of the word *bagdana* used by Kulluka. Apparently, he also refers to the gift at the time of the celebration of the actual marriage ceremony and not to the previous agreement to give in marriage. Manu makes no mention of what Narada calls *varana*, the choice of the bride ; nor do we find any reference to the contract between the bride's father and the bridegroom previous to marriage.

In chapter IX, we have the verses : "If the maiden dies after she has been orally given, the husband's younger brother shall wed her according to the following rule. Having according to the rules espoused her (who must be) clad in white garments, and be intent on purity, he shall approach her once

(a) अतश्च न विवाहकाल एव दानं प्रागपि विवाहादरण्यकाले अस्ति-
दानं किमर्थं सार्द्धं विवाहः । Mandliks' Manu, p. 687.

in each proper season until issue (be had)" (a). From them, we get that the person, to whom the gift by words is made, becomes the husband (पतिः) of the girl; but in case of his death afterwards, she is to be married by the celebration of proper rites, to the younger brother of that person. Kulluka views such subsequent marriage as a form of *niyoga* and the issue thereof as the children of the deceased. From verses 71 and 72 (b), we find that, after a gift has been made to one person, any subsequent gift of the same girl is condemned; and that after the gift has been accepted, the girl may not be abandoned, except when she is labouring under certain specified disqualifications. In Kulluka's opinion, verse 71 solves a doubt that there could be a second gift, if the wifehood is not acquired by reason of the non-performance of the *saptapadi*, or, that a gift made, but not followed by other ceremonies of marriage, is a good one. As to verse 72, Kulluka says that the abandonment is not blameable, if it takes place before the *saptapadi*,

(a) Manu, IX., 69, 70.

(b) न दत्त्वा कस्यचित्कन्यां पुनर्दद्याद्विचक्षणः ।

दत्त्वा पुनः प्रयच्छन् हि प्राप्नोति पुरुषानृतम् ॥

विधिवत्प्रतिगृह्यापि त्यजेत्कन्यां विगर्हिताम् ।

व्याधितां विप्रदुष्टां वा क्लृप्तां चोपपादिताम् ॥

on the knowledge of the blemishes mentioned. By the use of past participle दत्वा, a distinction is made between the act of giving and a promise to give in future. From these texts it is clear that *pradanam* means *sampradan*; and the oral gift (preceded by a libation of water, in the case of Brahmans only) is sufficient to divest the giver of his dominion over the girl and to invest the bridegroom with the same. Marriage, so it would seem, is complete as soon as the gift is made.

“The nuptial texts,” says Manu, “are applied solely to virgins, and nowhere among men to females who have lost their virginity, for such females are excluded from religious ceremonies.” “The nuptial texts are a certain proof that a maiden has been made a lawful wife, but the learned should know that they and the marriage ceremony are complete with the seventh step of the bride” (*a*). These verses occur where Manu is dealing with rescission of completed transactions (*b*). They enjoin the recital of the nuptial texts in the marriage of virgins only, such recital ending with the taking of the seventh step (*a*). Kulluka says that they lay down, not that

(*a*) VIII, 226, 227.

(*b*) VIII, 228.

recitation of the *mantras* is prohibited in the marriages of girls who are not virgins, but that their marriages cannot be called religious ones, and so are reprehensible. He further remarks that the girl does not become a wife till after the *saptapadi*. In the time of Manu, marriage of non-virgins was also allowed ; and so, the limitation of the rule to virgins only shows that the recital of the *mantras* was not necessary for investing the girl with wifhood.

Yajnavalkya.

We next proceed to Yajnavalkya. In the Acharakanda, we find the following, "Once is a maiden given ; (he who) takes her after giving is liable to be punished as a thief ; if a bridegroom better than the previous one comes, even the given (maiden) may be taken away" (*a*). To the last portion of the verse, Vijnaneswara adds the comment that this can only refer to a gift which has not been followed by the walking of the seven steps. In other words, he suggests that the *saptapadi* is the most essential and material part of the marriage ceremony. Read in the light of Vijnaneswara's comment, the text undoubtedly supports the conclusion that marriage can be revoked,

(*a*) Sulapani is of opinion that this applies to Asura marriages only. See Jagannath (Colebrooke's Digest, Vol II, p. 604).

before the ceremony of the walking of seven steps has been completed. In the chapter on Vyavahara, we have the verse, "For detaining a damsel after affiancing (दत्त्वा) her, the offender should also make good the expenditure together with interest." Vijnaneswara explains 'affiancing' as a verbal gift. But Yajnavalkya regards such a girl as 'remarried' (a).

Narada, as we have already seen, makes a distinction between *varana* and *pani-grahana*. Like Manu, he enjoins the gift of a girl once for all (b), and provides for the punishment of one who, having promised to give her in marriage, does not do so (c) in the absence of blemishes in the bridegroom. "When a man, after having received a maiden, abandons her although she is faultless, shall be fined and shall marry the maiden, even against his will" (d). In this verse, Narada regards the acceptance following the gift as different from the actual marriage rites. Chronic disease, deformity and loss of virginity are the faults in a maiden for which she may be abandoned (e). Further, he classes maidens who have been 'disgraced

Narada.

(a) I, 67.

(b) XII 27, 28.

(c) XII, 32.

(d) XII, 35.

(e) XII, 36.

by act of joining hands' as *punarbhū*, or re-married women(*a*). So, it seems that Narada holds the marriage to be complete, but revocable for certain grounds, as soon as the gift is made.

Raghunandan's
opinion.

Raghunandana, in his Udbahatattwa defines marriage (विवाह) as acceptance where- by wifehood is created. He states that the status of wifehood is created by the gift followed by acceptance, and that marriage precedes *panigrahan* (ceremony of joining of hands). To support his position, he cites a text from Haribansa which runs thus :— “That evil-minded person who took away the wife of another after marriage thus thwarted the recitation of the nuptial texts” (*b*). From the text of Manu (*c*) ordaining that the *panigrahan* ceremony is not necessary in inter-marriages between different castes, he concludes that marriage and *panigrahan* are distinct things. With regard to the text of Manu, already quoted, to the effect that the nuptial texts are a certain proof of wedlock (*d*), he says that it only indicates that a special ceremony must be gone through after

(a) XII, 46.

(b) पाणिग्रहणमन्त्रानां विघ्नं चक्रे स दुर्मतिः

येन भार्या हता पूर्व्वं कृतीवाह्या परस्य वै ।

See Udbahatattwa, p. 570.

(c) Manu, III., 43, 44. (d) Manu, VIII, 227.

marriage. He then refers to a sentence from Ratnakar to the effect, that the recital of the nuptial texts is, one of the limbs of the ceremony, connected with marriage. A text of Laghuharita is also cited to show that *vivaha* is effected before the *panigrahan* ceremony. The girl given in marriage does not, however, change her *gotra* till after she takes the seventh step with her husband. So, it follows, that though, in Raghunandana's opinion, a valid marriage is constituted by gift and acceptance, yet the ceremonies following them are necessary for the complete acquisition of wifehood. The conclusion, then that we arrive at from the above discussion, is that the gift and acceptance create a valid marriage, and that the ceremonies following them are necessary, more as evidence of marriage rather than as essential ingredients for constituting it.*

The ceremonies, we have mentioned above, are requisite in all forms of marriage. In the Madana Parijata, (page 157, Bibliotheca Indica Series) it is said, "that it should not be doubted whether the relation of husband and wife is produced in the Asura and other forms of marriage by reason of the absence of *saptapadi* or seven steps ceremony therein. Even in those forms

Madana
Parijata.

* This is based on original research.

of marriage the observance of that ceremony is prescribed by way of command after acceptance."

Performance
of necessary
ceremonies
presumed.

Where a marriage in fact is established there is a presumption that these ceremonies had been performed (*a*). But where the validity and legality of the marriage are the most essential points in issue, as in a suit for restitution of conjugal rights (the validity of marriage itself being disputed), it must be proved affirmatively that the necessary rites and ceremonies were performed. It is not enough to find in such a case that the marriage in fact took place leaving it to be presumed that the necessary formalities must have been complied with (*b*). The presumption, it is said, might rightly arise in cases involving questions of inheritance, and legitimacy of the offspring of the marriage (*c*). In Bombay, it has been held that, if the evidence is sufficient to prove the performance of some ceremonies usually observed on such occasions, a presumption is always to be drawn that they were duly

(*a*) (1869) *Inderan vs. Ramaswamy*, 13. M. I. A., 141.

(*b*) (1900) *Surjyamoní vs. Kalikanta*, I. L. R., 28 Cal., 37 (50).

(*c*) See also (1885). *Brindaban vs. Chandra*, I. L. R., 12 Cal., 140; (1886) *Administrator-General vs. Ananda Chari*, I. L. R., 9 Mad., 466.

completed until the contrary is shown (a). In Madras, Grihapravesa and Rathasanti have been held to be ceremonies necessary for marriage ; and the expenses for performing them must be borne by the persons responsible in law to meet the charges connected with the girl's disposal in marriage, who in this case was the husband's undivided brother (b). The non-performance of Vivahahoma and Saptapadi, amongst castes in which these ceremonies are not necessary, cannot render the marriage invalid. This circumstance may be relied on to show that there was no valid marriage where they form, with or without others, the criterion of intention to enter into the contract of marriage ; but it cannot be relied on to prove that marriage was in any particular form (c). It is well to state here that generally the doctrine of *factum valet* is brought into requisition by the courts, to render valid marriages in which even the necessary ceremonies were not performed.

In early Roman law, the transition from betrothal to marriage was effected by matri-

Roman Law.

(a) (1896) Bai vs Moti, I. L. R., 22 Bom, 509.

(b) (1902) Vaikuntham vs. Kallipiram, I. L. R., 26 Mad., 497.

(c) (1909) Authi vs. Ramanijam, I. L. R., 32 Mad., 512.

monial cohabitation (a). But in Hindu law consummation is not necessary to complete marriage ; the law of England agrees in this respect with Hindu law (b).

Effect of
marriage.

The effect of marriage, according to most systems of law, was to produce a unity between the husband and wife with respect to their proprietary rights. It is said that in Hindu law the effect of marriage is to produce a unity between husband and wife for religious, and not for any legal and secular, purposes ; and a text of Manu (c) is cited in support of this view. Whatever may be the view of later *Smṛiti*-writers, it is clear, from some of the aphorisms of Jaimini (d), that one effect of marriage is to give each of the parties thereto control over the other's wealth. On the seven-

Co-ownership
of husband
and wife.

Jaimini's view

(a) Sohm's Institutes of Roman Law, pp. 470-71.

(b) Weldon vs Weldon, L. R., 9 P. D. 52. See Dadaji vs Rukmabai, I. L. R., 10 Bom., 301 (311).

(c) IX. 45-46. This text of Manu is translated by Buhler thus :—He only is a perfect man who consists of three persons united), his wife, himself and, his offspring ; thus (says the Veda), and learned Brahmans propound the maxim 'The husband is declared to be one with the wife.' The maxim is translated by Sir William Jones thus :—'The husband is even one person with the wife,' *for all domestic and religious, not for all civil purposes.*

(d) See chapter II, *ante*.

teenth aphorism (a), Sabar's comment is as follows :—"The wife is entitled to wealth earned by the husband and vice versa. Hence sacrifice must be performed by both jointly, because if one of them is unwilling to perform it, the gift cannot be valid. Therefore gift of money even earned by the husband is invalid if the wife's consent is not obtained." This quotation shows that both Jaimini and Sabar entertained as, if not more, liberal views with regard to the rights of the wife as did John Stuart Mill, one of the greatest of modern European thinkers. "Some people are," says Mill, "sentimentally shocked at the idea of a separate interest in money matters, as inconsistent with the ideal fusion of two lives into one. For my own part, I am one of strongest supporters, of the community of goods, when resulting from an entire unity of feeling in the owners, which makes all things common between them. But I have no relish for a community of goods resting on the doctrine that what is mine is yours but what is yours is not mine ; and I should prefer to decline entering into such a compact with any one though I were myself the person to profit by it" (b).

(a) See, p. 86, *ante*.

(b) Mill's Subjection of Women, p. 106-7.

Smrities and
the deterior-
ation of the
wife's right.

But the wife's equal rights in this respect with the husband, as follow from Jaimini's aphorism, seem to have been impaired in the period anterior to those of the *Smrities*, where we read the text "whatever is acquired by the wife belongs to the husband" (a). The position of the wife, under the Hindu law at this period, agrees in many respects with that of a wife under the common law of England, before the Married Woman's Property Act was passed. The effect of marriage, under the common law, was to constitute a sort of partnership between husband and wife, in which the husband had very extensive powers over the partnership property, while the wife had not only no power of alienating it, but was also incapable of making a will, or of entering into a contract on her own account (b). The position of a Hindu wife gradually improved. We find her possessed of separate property known as *Stridhan*, which she could dispose of by will or alienate, and which would be liable for her debts. We also find her endowed with the capacity of entering into a contract enforceable in courts of law. The contractual disabilities of women in England have been

Subsequent
improvement
of her rights.

(a) Manu, VIII. 416.

(b) Holland's Jurisprudence, p. 332 (9th Edition).

modified by recent legislation, especially by the Married Woman Property Act, 1882. But, even now, so far as the community of goods is concerned, the position of the wife under the Hindu law is not worse than that of the wife under the law of England. The husband can, under the Hindu law, take the *Stridhan* or peculiar property of the wife only in times of distress or famine ('a'), and there is no obligation on him to repay the same. The idea underlying the text of Manu, 'whatever a wife earns belongs to her husband,' is the basis of the arguments of the *purba paksha* (exponents of the view opposed to that of Jaimini) as appears from the nineteenth aphorism which runs thus, "The husband has full control over the wife as she is purchased or bought." Sabara expands this aphorism thus:— "Therefore her (wife's) ownership of wealth is apparent and not real. Her ownership of wealth is on behalf of her husband. Just as our cowherd is the master of our oxen, in the same sense has the wife ownership over her husband's wealth." This position is distinctly refuted in the seventeenth and eighteenth aphorisms which embody Jaimini's view and convey the idea that the wife is entitled to wealth earned by the husband, or vice versa; and that her

English Law
compared.

Apastamba's
view.

ownership in her husband's wealth is real. The notion of the community of interest, approved of by Mill in the passage quoted above, finds forcible expression in these two aphorisms of Jaimini. Apastamba, expresses a similar view in the three following *sutras*. "No division takes place between husband and wife, for, from the time of marriage, they are united in religious ceremonies. Likewise also as regards the rewards for works by which spiritual merit is acquired and the acquisition of property. For they declare that it is not a theft, if the wife expends money on occasions of necessity during the absence of her husband" (a). These *sutras* has been often construed to mean that there cannot be a division between the husband and the wife in respect of property, whereas it is clear that they refer to the division of ceremonies (b).

According to Jaimini, the wife a co-owner not in a subordinate sense.

We have already had occasion to indicate before that, according to Jaimini, the wife is a co-owner with the husband; and that her right in the husband's wealth is real, and not a fictitious one. She is not a co-

(a) Apastamba, Prasna II, Ka 14, Sc. 16, 17, 18, See West and Buhler's Digest, p. 531, 2nd Edition.

(b) (1904) Dular vs. Dwarka, I. L. R., 32 Cal., 234, (242).

owner in a subordinate sense, as some later commentators seems to have thought. The logical conclusion, that would follow from Jaimini's aphorisms, is that the wife's right in her husband's property would not be extinguished by his death. Jimutvahana comes to the same conclusion, when he says "nor is there any proof of the position that the wife's right in her husband's property, accruing to her from her marriage, ceases on his demise"; although he is careful to add that the cessation of the widow's right of property, if there be male issue, appears only from the law ordaining their succession(a). Later commentators have made the position of the wife in this respect considerably worse than it was in Jaimini's time. Mitramisra, the author of the Viramitrodaya, for instance, says :—"her (wife's) right is only fictional but not a real one ; the wife's right to the husband's property which to all appearances seems to be the same (as the husband's right) like a mixture of milk and water, is suitable to performance of acts which are to be jointly performed. But it is not mutual like that of the brothers, hence it is said that there may be separation of brothers but not that of

Jimutvahana's view.

Mitramisra's view opposed to Jaimini's.

(a) Dayabhaga, Chap. XI, sce. I., 26.

husband and wife" (*a*). He apparently makes the wife a co-owner in a subordinate sense with her husband; and, on, his authority, judicial decisions have laid down that a Hindu wife has no property or co-ownership in her husband's estate, in the ordinary sense, which involves independent and co-equal powers of disposition and exclusive enjoyment (*b*). In Bengal, it has accordingly been held that a Hindu wife is not a co-owner with her husband, in the sense that she can maintain a suit against him to establish her right to a share in his property and for partition, in the absence of any allegation that he refuses to maintain her, or has ceased to do so (*c*). The view accordingly has prevailed that the share which a widow takes on the death of her husband, on partition amongst her sons, is not taken from her husband's estate by way of survivorship in continuation of any pre-existing interest (*d*),

Judicial
decisions
follow Mitra-
misra.

(*a*) Viramitrodaya Translation by G. C. Sarkar.
p. 165.

(*b*) (1880) *Narbada vs Mahadeo*, I. L. R., 5 Bom, 99.

(1879) *Jamuna vs Machal*, I. L. R., 2 All, 315.

(1900) *Becha vs. Mathina*, I. L. R., 23 All, 86.

(1910) *Srinath vs Probodh*, 11 C. L. J., 580.

(*c*) (1903) *Punna vs. Radhikissen*, I. L. R., 31 Cal, 476.

(*d*) (1908) *Sorola vs Bhuban*, I. L. R., 15 Cal, 292.

Promotha vs Srimati Nagendra, 8 C. L. J., 489

but is taken in lieu of (or by way of provision for) her maintenance (a). This view is not warranted by the aphorisms of Jaimini already referred to, for the logical conclusion from them is that the wife gets the share, on partition, by virtue of the co-ownership which she acquires at the moment of her marriage.

All the commentators are agreed that the wife is entitled to get a share, at the time of partition between her husband and her sons. But there is a great divergence of opinion amongst them, as to the manner of allotting such share. In the Bengal school, where a father makes an equal division amongst his sons, his sonless wives are each entitled to a share, either equal to that of a son, or half of such a share, as the case may be, according as they are provided with *stridhan* or not (b). In the Benares School, the text of Yajnavalkya quoted below (c) is relied on as determining the principle of allotment of the share of a wife on partition. In commenting on this text, the Mitakshara says that, if the father divides the property equally

Wife's share on partition between her husband and his sons, and its extent.

In Bengal.

In Benares.

(a) (1889) Hemangini vs. Kedarnath, I. L. R., 16 Cal, 758 ; (1906) Hriday vs Behari, 11 C. W. N., 239.

(b) See Dayabhaga Ch. III, sec. II, 31 and 32. This is according to Srikrishna's gloss.

(c) “यदि कुर्व्याकमानंशान् पत्न्याः कार्य्याः समांशिका ।

न दत्तं स्त्रीधनं यासां भवा वा अशुभेन वा” ॥ II, 115.

In Bombay.

amongst his sons, all the wives must have equal share with his sons, provided they have got no *stridhan* or separate property ; and in case of their possessing *stridhan*, they will get half of the share of the sons. This half need not be an exact moiety, but so much of the property as together with *stridhan* would amount to the defined share (a). The Madana Parijat also takes this view. It says, "If stridhan had been given, then the mode of allotment should be understood to be that laid down in the chapter on *Adhivedanika*. The manner laid down there is this, *viz.*, if it had been given, a half is ordained. The word 'half' (in 'half is ordained') means a portion, not an exact moiety" (b). The Vyavahar-mayukha quotes the text of Yajnavalkya, and agrees with the Mitakshara in the view regarding the share which a wife is entitled to get on a partition between her husband and his sons, where the partition is equal (c). Nilkantha does not recognize unequal partition between the father and the sons, which

(a) Jodoo vs. Brojo, 12 B. L. R., 385. Viramitrodaya—Ch. II, pt. I, S. 10. G. C. Sarkar's Translation.

(b) 9 M. L. J., 99.

(c) Vyavahara Mayukha, Ch. IV, sec. IV, 15, p. 43, Mandlik's Edition.

he regards as a relic of a past age (a) ; for he says, "The partition by deduction is not proper in the Kali age." The Smṛiti Chandrika takes a view peculiar to itself, as will appear from the following comment on the text of Yajñavalkya referred to above :—

"The meaning of this text is, that where a father, even where he is old, chooses to render all, inclusive of himself, partakers of equal portions, then he ought to take on account of each of his wives, a share equal to that taken by himself" (b). The wives, according to this view, do not take a share but the husband takes it on their account. This, in fact, recognizes the complete identity between a wife and her lord, and removes the doubt as to whether the text of Yajñavalkya was not opposed to the passage of Harita, which declares, "Partition does not take place between a wife and her lord." In the case of equal partition by the sons, the Mithila school adopts the same rule as the Mitakshara.

In Madras.

In Mithila.

From the views of the different schools given above, as to the manner in which the allotment is made to a wife on partition, the

Difference between the Bengal and other schools.

(a) Ch. IV, Sec. IV, 11, p. 42, Mandlik's Edition (translation.)

(a) Smṛiti Chandrika (Kristnaswamy Iyer's Edition), Ch. II, Sec. 1, 39.

difference between the Bengal school and the other schools in one point is manifest. The distinction is that under the Bengal school only the sonless wives are entitled to a share on partition and not all the wives, as in the other schools.

One of the legal effects of marriage, then, on these authorities, is that there is a kind of identity between the wife and her husband in proprietary rights, by virtue of which she gets a share equal to that of a son, when a partition takes place at the instance of male members. It follows that the wife has such an interest in her husband's property that, when partition takes place between her husband and his sons, or his coparceners, the share of the husband may be appropriately made over to her, to be held by her during his absence (a).

Wife's right
to maintenance.

We have already had occasion to point out that the duty of maintaining the wife, the infant son and the aged parents is strictly enjoined by Manu and other sages as also by the commentators. Manu tells us "that the husband receives his wife from the gods ; (he does not wed her) according to his own will ; doing what is agreeable to the gods, he must always support her while she is faithful" (b). The right of a Hindu wife

(a) (1910) Srinath vs. Probodh, 11 C. L. J., 580.

(b) Manu, IX, 95.

to maintenance is not based on contract (*a*), but is connected with the right called co-ownership with her husband and rests on the same moral identity arising from the marriage relations ; but the two are rather co-ordinate rights than one the basis of the other (*b*). Mr. Justice Ashutosh Mookerjee has, however, in a recent decision, held that the wife's right to maintenance is to be attributed to a kind of identity with her husband in proprietary right, though of a subordinate character (*c*). Mr. Justice Sankarannair holds, that the right of a wife to maintenance is a matter of personal obligation, and that it rests on the identity arising from marriage relations and is not dependent on the possession of any property by the husband (*a*). It seems, to us, that in point of fact, the claim is based on the provisions of Hindu law which expressly govern rights and duties of the different members of the joint family. It may be stated here that the rights of a wife and a widow respectively to

Its basis.

Views of
Justice Mu-
kerjee.

(*a*) (1878) Sidlingapa vs. Sidava, I. L. R., 2 Bom., 624 ; (1900) Gopikabai vs. Dattatraya, I. L. R., 24 Bom., 386.

(*b*) (1880) Narbadabai vs. Mahadeo, I. L. R., 5 Bom, 99 (103).

(*c*) (1910) Srinath vs. Probodh, 11 C. L. J., 580.

(*d*) (1908) Surampalli vs. Surampalli I. L. R., 31 Mad, 338.

maintenance rest entirely on different grounds.

No agreement
evades the
right.

As pointed out by Mr. Justice West of the Bombay High Court, the right of maintenance and possibly to a share on partition, though it may not amount to more than an equity to a settlement, and is not the subject of contract until ripened and defined by events, is not to be evaded by any arrangement purposely made in fraud of it (*a*).

The husband
primarily
liable and his
relations in
certain cir-
cumstances.

The wife can claim the right to maintenance against the husband alone. Other relations are not bound to support her, except where the husband has abandoned her, and his property is in the possession of the other relations (*b*). She is entitled in such cases to receive maintenance to an extent not exceeding one third of the amount of assets of the husband in the hands of such relations. Legal cruelty, which would bar a claim by a husband for restitution of conjugal rights, will also justify a wife in deserting her husband's home and in claiming separate maintenance. When we deal with the law relating to restitution of conjugal rights, we shall discuss the question as to what constitutes legal cruelty.

(*a*) (1880) *Narbada vs. Mahadeo*, I. L. R., 5 Bom., 99.

(*b*) *Ramabai vs. Trimbak*, 9 Bom. H. C. R., 283;
Gopika vs Dattatraya, I. L. R., 24 Bom., 386.

Let us in the next place proceed to consider the circumstances under which the wife's right to maintenance may be forfeited. From the moment of marriage, the Hindu husband is his wife's legal guardian, even though she be an infant; and he has an immediate right to require her to live with him in the same house. As soon as she has attained puberty, her home is necessarily her husband's house. The duty imposed on a Hindu wife to reside with her husband, wherever he may choose to reside, is a rule of Hindu law and not merely a moral duty (*a*). A wife accordingly can not claim maintenance, if she refuses to live with her husband without any adequate reason. Mere unkindness or neglect, short of cruelty, would not be sufficient ground for leaving the husband (*b*). The reason is that a wife, in living apart from her husband without a justifying cause, commits a breach of duty which disentitles her to maintenance (*c*). As we shall see later on, there is no such obligation on the part of the widow to live

Forfeiture of maintenance.

Desertion of the husband.

(*a*) (1901) *Tekait Monmohini vs Basanta Kumar*, I. L. R., 28 Cal, 751.

(*b*) (1866) *Kullyanesuree us Dwarkanath*, 6 W. R., 115; (1875) *Sitanath vs Srimati Haimabutty*, 24 W. R., 377.

(*c*) (1908) *Surampalli vs. Surampalli*, I. L. R., 3 Mad, 338.

in her husband's house. A separate maintenance was allowed to the wife, although she left her husband's protection, on the ground that she was justified in so doing, when he habitually treated her with cruelty and such violence as to create the most serious apprehension for her personal safety (a).

Unchastity.

It is a settled principle of Hindu law that a Hindu widow's right to claim maintenance is forfeited upon her unchastity (b). But the question whether an unchaste wife can claim any maintenance has given rise to conflicting opinions ; and in this connection one has to keep in view the distinction between maintenance as a *dīves* and what has been styled as starving maintenance, that is, allowance of bare food and raiment. "An exceedingly corrupt wife," says Manu, "let her husband confine to one apartment, and compel her to perform penance which is prescribed for males in cases of adultery" (c). Kulluka explains the verse to enjoin physical restraint, perhaps, as Sulapani observes, for the purpose of preventing the recurrence of misconduct on the part of the

(a) (1891) Matangini Dasi vs. Jogendra Chundra Mallick, I. L. R., 19 Cal, 84.

(b) Ramanath vs. Rajanimoni, I. L. R., 17 Cal, 674 ;
 Moniram Kalita vs. Kerry Koletani, I. L. R., 5 Cal.,
 Kanlasami vs. Muru, I. L. R., 19 Mad, 6. (c) XI, 177.

wife. Vishnu, Vasistha and Brihaspati lay down that an adulterous wife becomes pure after the performance of the prescribed penances. She is, according to the last two sages, to be forsaken only when she had carnal commerce with a low class male, or with certain other persons mentioned by them (a). Narada directs that she shall have to lie on a low couch, receive bad food and bad clothing and her occupation shall be the removal of rubbish (b). "Deprived of her position," says Yajnavalkya, "in the family, clad in dirty clothes, living upon morsels barely sufficient for life and humiliated, an unchaste wife shall be made to lie down upon bare earth". Vijñaneswara explains this text as laying down the conduct she should be made to follow not for expiating her misdeed but for destroying her evil tendencies (c). A doubt has been raised whether this text will be regarded as mandatory, and not merely preceptive (d). One reason for regarding the text of Yajnavalkya

(a) Vishnu, LIII, 8 ; Vasistha, XXI, 8, 9 and 10 ; Brihaspati, XXIII, 14.

(b) XII, 91.

(c) हताधिकारं मलिनां पिण्डमात्रं पजीविनीम् ।

परिभूताम् अधःशय्यां वासाद्येद्व्यभिचारिणीम् ॥ I, 71.

(d) Muttamal vs. Kamakshy, 2 M. H. C. R., 337 ; Valu vs. Ganga, I. L. R., 7 Bom, 84 (89).

The texts,
mandatory or
preceptive.

as imposing a moral duty is supposed to be that there are texts, which show that an unchaste wife can be forsaken or abandoned by the husband and may be turned out of doors without any maintenance (*a*). And from this, it is said to follow that the other injunction about maintaining an unchaste wife cannot be imperative or obligatory. But, as has been pointed out by Mr. Mayne, the passages, upon which this dictum rests, refer to the maintenance either of the wife of disqualified heirs or of the widows of deceased coparceners. Mr. Golap Chandra Sarkar however refers to a text of Manu cited in the *Vivada Ratnakara* (*b*) to show that if a woman is licentious her abandonment is ordained; and in his opinion the provision made by Hindu law about starving maintenance of an unchaste but penitent wife is only a moral injunction on the husband (*c*). But, it is submitted, the text cited by Mr. Sarkar does not justify the proposition that a Hindu wife can be absolutely abandoned by the husband for unchastity. The author of the *Mitakshara* in his comment of the text of *Yajnavalkya*—"a

(*a*) *Yajnavalkya*, II, 142.

(*b*) P. 426; Asiatic Society's Edition.

(*c*) Mayne's *Hindu Law and Usage*, p. 66. (7th Edition).

woman guilty of adultery is purified by catamenia ; but her abandonment (*tyaga*) is ordained in case of conception by adultery, and in case of causing abortion or killing the husband as well as in case of committing heinous sins (*a*)"—explains *tyaga*, not as abandonment in the sense of being expelled from the husband's house, but as deprivation of all conjugal rights and religious ceremonies (*b*). The word *tyaga* or abandonment in the text cited by Mr. Sarkar should be interpreted similarly. In other words, the unchaste wife is to be kept apart in the house and is to be given such food and clothing as will keep body and soul together.

Commentators have maintained the opinion that the unchaste wife would be entitled to a starving maintenance only. The Viramitrodaya is in favour of an allowance of food and raiment to the unchaste wife. This appears from the following passage (*c*), "As for the allowance of food and raiment even to the unchaste wives, as is declared in the following text, namely,—'Also let one act in the same manner towards even the fallen wives ; food and raiment, however, should be allowed to them, if they reside in the

Views of
the commen-
tators.

(a) Sarkar's Hindu law, p. 367.

(b) Yajnavalkya, I, 72.

(c) Viramitrodaya, Translation by G. C. Sarkar, p. 153.

vicinity of the dwelling house' :—that, however, is to be explained as referring to the husband, consistently with what is ordained by Yogisvara after having premised the husband, as in the text.—'Deprived of her position * * bare earth' (a)". Nilkantha in the Prayaschitta Mayuka takes the same view. Referring to a text of Chaturvinshati Smriti, which provides that there should be no abandonment of any woman except in case of such sins as the murder of a Brahman and the like, he explains that even in such cases a woman should do penance in the house (b). Madhavacharya in the Parasara Dharma Smriti explains the law to the same effect (c).

Unchaste
wife entitled
to bare main-
tenance.

From what has been stated above, it is clear that Hindu legislators were humane enough to allow bare maintenance even to an unrepentant and unchaste wife, to save her from utter destitution. In no case is she to be forsaken and to be cast adrift on the world ; on the other hand, an opportunity is to be given to her for reformation.

(a) Yajnavalkya, I, 71.

(b) स्त्रीणाम् नास्ति परिव्यागी ब्रह्महत्यादिभिर्विना ।

तवापि गृहस्थे तु प्रायश्चित्तानि कारयेत् ॥ Prayaschitta

Mayukha, Benares Edition, p. 91.

(c) Parashara Dharma Sanhita, Sanskrit Bombay Series Ed. p. 352, Vol. II. part I.

It is difficult, as we attempted to show before, to distinguish between legal and moral injunctions in Hindu law. It is better to construe the texts about maintenance liberally in favour of an unchaste wife and to regard them as legal injunctions. Mr. Mayne apparently takes this view and he supports it with the text of Vasistha which treats even adultery on the part of a wife as an expiable offence. We have also the remark of Apararka in his comments on verse 70 and 72 of Yajnavalkya to the effect :—"She who has performed expiatory rites, becomes fit for conjugal and social association" (a).

The judicial decisions in Bengal and Madras lay down the rule that a wife though unchaste shall be entitled to a starving maintenance, if she has abandoned a vicious course of life at the time of the litigation (b). But, in Bombay, the course of decisions has not been uniform. In the case of Homana vs. Timannabhat (c), Sir Michael Westropp, C. J., expressed the opinion that a Hindu widow entitled to a bare or starving maintenance under a decree, was not to be de-

Judicial
decisions in
Bengal and
Madras.

(a) कृतप्रायश्चित्तात् संन्यवह्याया भवति । Apararka, Ananda-shrama Series, Vol. I., p. 98.

(b) (1895) Kandasami vs. Muruga, I. L. R., 19 Mad, 6 ; Ramanath vs Rajanimoni, I. L. R., 17 Cal, 674.

(c) (1877) I. L. R., 1 Bom., 559.

In Bombay.

prived of the benefit of that decree by the fact that she has since been leading an incontinent life. In *Valu vs. Ganga* (a), Sir Charles Sargeant, C. J., dissented from the above case and held that an unchaste widow was not entitled even to a bare maintenance. The Chief Justice, speaking of the right of the unchaste wife to maintenance, observed :—"It will have to be determined how far the texts which provide for maintenance will be regarded as mandatory and not merely preceptive and if the former to what extent the Courts will express them". This view was affirmed in a subsequent case (b). But, after more than a quarter of a century, two learned Judges of the Bombay High Court (*Chandravarkar and Knight, J. J.*), after a full consideration of all the Hindu law texts, seem to adopt the view of Sir Michael Westropp (c). The question of the maintenance of the unchaste wife was not directly in issue in all these cases. Should it ever come before the courts, it is submitted that the authorities we have referred to and those collected by Hemadri (d) will support the view that we have ventured to advance here.

(a) 1882) I. L. R., 7 Bom., 84.

(b) 1884, *Vishnu vs. Manjamma*, I. L. R., 9 Bom, 108.

(c) *Parami vs Mahadevi*, I. L. R., 34 Bom., 278.

(d) *Chaturvarga Chintamani*, *Parishesh kanda*, p. 846.

The Hindu sages lay down rules for regulating the amount of maintenance to the wife unjustly forsaken by the husband. Yajnavalkya says :—"He who deserts a wife that is obedient to his commands, diligent in her duties, mother of an excellent son and speaking kindly, shall be compelled to pay the third part of his wealth to her, if poor, to provide maintenance for her" (a). The amount of maintenance in such cases is fixed at one third of the property possessed by the husband. For other cases, no rule is prescribed as to the amount of maintenance to be awarded. We will discuss the principles on which the assessment of maintenance is to be made in the next chapter dealing with the status of widows—for the same principles will also govern the case of a wife. It may be stated here generally, that the amount which a wife is entitled to get for her maintenance would depend on the position in life of the husband, the extent of his property, and the claims of other members of the husband's family.

The right of a wife to maintenance is not transferable (b). But the question may

(a) Yajnavalkya, I, 76. See Mitakshara, comment on the same. See Vyavahara Mayukha, XX. I.

(b) (1880) *Narbada vs. Mahadeo*, I. L. R, 5 Bom, 99.

Decree for
arrears of
maintenance
transferable.

arise whether, where a decree has been obtained for arrears of maintenance against the husband, she is entitled to transfer it. It is submitted she can. It has been pointed out, in a very recent case, that it is settled law that, when the claim for maintenance has been merged in an actual judgment, the right under it is assignable (*a*). Debts of her husband take precedence over the maintenance of the wife. But a husband cannot make a wholesale gift of his estate, so as to deprive his wife of her maintenance (*b*).

Effect of
marriage.

In the next place, we proceed to the consideration of the behests of Hindu law as to the effect of marriage on the persons of the parties. Certain duties are reciprocal. “‘Let mutual fidelity continue until death,’ this may be considered as the summary of the highest law for husband and wife. Let man and woman, united in marriage, constantly exert themselves, that they may not be disunited and may not violate their mutual fidelity” (*c*). There is, thus, an obligation on the part of the wife to keep unsullied the bed of her lord and a like obligation on the part of the husband to be faithful to his wife. “It is a crime in them

Reciprocal
duties.

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- (*a*) *Asadali vs Hyder*, I. L. R., 38 Cal., 13 (20).
 - (*b*) (1879) *Jamna vs Machul*, I. L. R., 2 All, 315.
 - (*c*) *Manu*, IX, 101, 102.

both," says Narada, "if they desert each other or if they persist in mutual altercation except in the case of adultery by a guarded wife" (*a*). "If a man," says he in another place, "leaves a wife who is obedient, pleasant-spoken, skilful, virtuous and mother of male issue, the king shall make him mindful of his duty by inflicting severe punishment on him" (*b*). "He who forsakes a wife," says Yajnavalkya (*c*), "though obedient to his commands, diligent in household managements, mother of an excellent son and speaking kindly shall be compelled to pay the third of his wealth, or if poor to provide maintenance for that wife." "A man who deserts a faultless wife," says Vishnu, "shall suffer the same punishment as a thief" (*d*). Manu also lays down that he who casts a wife off unless guilty of a crime shall be fined by the king six hundred panas (*e*). The wife, likewise, cannot desert her husband; and the Hindu law is so strict in this respect that it lays down that, even where a wife has been legally superseded, she would be punished by the king, if she deserts her husband. "If a wife," says Manu, "legally superseded shall depart in wrath from the house, she must

(*a*) XII, 90.

(*b*) Narada XII, 95.

(*c*) I, 76.

(*d*) V, 163.

(*e*) VIII, 389.

either instantly be confined or abandoned in the presence of the whole family" (*a*). That, under the ancient Hindu law, the king's powers were very extensive in respect of the wrongful desertion of the husband by a wife appears from the following text of Manu :—"Should a wife proud of her family and the great qualities of her kinsmen, actually violate the duty which she owes to her lord, let the king condemn her to be devoured by dogs, in a place much frequented" (*b*).

Husband's
right of
chastisement.

Let us next consider the rights of the husband over the wife. Manu says that a wife * * who has committed fault may be beaten with a rope or a split bamboo, but on the back part of the body and never on the noble part. He who strikes them otherwise will incur the same guilt as a thief (*c*). But this rule of Hindu law is, now, of merely academic interest as the Indian Penal Code governs cases of assault of the wife by a husband, and makes such assault punishable. In England, a husband might, formerly, have chastised his wife for levity of conduct ; but his right to do so has recently been negatived by the Court of

(*a*) Manu, IX, 83.

(*b*) Manu, VIII, 371.

(*c*) Manu, VIII 299, 300.

Appeal (a). The husband, under the early Roman law, had full authority to chastise his wife and in some cases even to kill her. But under the Hindu law, his power of chastisement was subject to the limitation stated above.

The husband is the legal guardian of his wife's person from the moment of marriage. According to the custom of the caste or community to which he belongs, he may, however, be precluded from such custody until the wife be fit for marital intercourse (b). The husband protects her in youth, says Manu. Youth is interpreted by Kulluka to mean coverture (c). Yajnavalkya also says that a father should protect the maiden daughter, the husband (should protect her) when she is married (d). The husband has the right to the companionship of his wife. If a third party deprives him of her society he has his remedy in the courts of law. The infringement of this right of the husband to the custody of his wife is made criminally punishable under the Indian Penal Code. So, where the father of a minor girl of fifteen takes her away from her hus-

Husband the
legal guardian
of the wife.

(a) (1891) R. vs. Jackson, 1 Q. B., 671.

(b) Santosh vs. Gera, 23 W. R., (C. R.), 22 ;
Arumuga vs. Viraraghava, I. L. R., 24 Mad, 255.

(c) Manu, IX, 3.

(d) I, 85.

band without the latter's consent, such taking away amounts to kidnapping from lawful guardianship, even though the father may have had no criminal intention in so doing. The reason is that the husband, and not the father, of a married Hindu girl is her lawful guardian (a).

Restraint of
the wife's
liberty.

A Hindu husband would be entitled to exercise a certain amount of restraint on the liberty of the wife. In many parts of India, where the custom of *parda* prevails, the husband might require her to remain within the zenana. Under the law of England, a husband was up till quite recently allowed to restrain the personal liberty of the wife (b). Nothing will justify a wife in leaving her home except such violence as renders it unsafe for her to continue there or such continued ill-usage as would be termed cruelty in the English matrimonial Court.

The effect of marriage is the union of the bride and the bridegroom. There is a text of the Vedas to the following effect, "Bones (identified) with bones, flesh with flesh, and skin with skin, the husband and

(a) In the matter of Dhuronidhar Ghose, I. L. R., 17 Cal, 298. Tekait Monmohini vs. Basanta, I. L. R., 28 Cal, 751.

(b) But, see, Reg vs. Jackson, 1 Q. B., 671. (1891).

wife become as it were one person" (a). From the seventeenth and eighteenth aphorisms of Jaimini quoted in the previous chapter, it would appear that the husband and wife must perform sacrifices and all religious duties jointly. Vrihaspati also says, "In Scripture and in the Code of law, as well as in popular practice, the wife is declared to be half the body of her husband sharing the fruit of pure and impure acts ; of him whose wife is not deceased, half his body survives." Manu also says that the husband is as it were even one person with his wife (b). These passages show that the marriage tie is indissoluble and the wife must associate with the husband, and the husband with the wife, throughout their joint lives. The duty imposed upon a Hindu wife to reside with her husband wherever he may choose to reside is not only a moral duty but a rule of Hindu law. It has, accordingly, been held that an agreement at the time of marriage by the husband not to remove his wife from her paternal abode, being contrary to the principles of Hindu law and public policy, is invalid (c). Under

Wife must
reside with her
husband.

(a) Dayabhaga, Ch. IV, Sec. II, 14.

(b) Manu, IX, 45.

(c) Tekait Monmohini vs. Basanta, 28 Cal., 751 (1901.) Dadaji vs. Rukmabai, I. L. R., 10 Bom, 301 ; Binda vs. Kaunsilia, I. L. R., 13 All, 138.

English law
compared.

the English Law, an agreement providing for future separation is invalid, though an agreement for present separation is enforceable (a).

The rights of
the husband
capable of
legal enforce-
ment.

From what has been said in the previous pages of the chapter, it is manifest that the Hindu Law texts, so far they relate to conjugal cohabitation, and impose restrictions on the liberty of the wife, and place her under the control of the husband, are rules of law creating a legal right in the husband based upon the jural relation which exists between him and the wife. The reciprocal duties of the wife and the husband towards each other are not duties of imperfect obligation to be enforced by religious sanction. They are rules of law and were enforceable either by the sovereign or by the Brahman assessors appointed by him who, in ancient Hindu times, had to administer justice. Ample provision has been made for the punishment of a wife guilty of neglect of marital duties. In a text of Manu (b), it is ordained that a king could condemn a woman to be devoured by the dogs in a public place, if she actually violated the duty which she owed to her lord. Another text of

(a) (1879) *Marshall vs. Marshall*, L. R., 5. P. D. 19;
(1854) 1 H. L. C 538.

(b) VIII, 371.

the same sage also cited before (a) is to the effect that if a wife legally superseded shall depart in wrath from the house, she must either instantly be confined, or abandoned in presence of the whole family. The confinement may be by the husband at a time when redress was by self-help ; or it would be lawful confinement to be awarded by the king after some sort of judicial determination. Vishnu is, indeed, very harsh on a delinquent wife when he ordains that the king should put to death a woman who violated the duty which she owes to her lord, the latter being unable to restrain her (b). These texts of the Hindu sages lead to the conclusion that the king had extensive powers over a delinquent wife. He could punish her with capital sentence, if she violated her duties towards her husband ; and *a fortiori* he could order the wife to return to her husband on penalty. If in ancient times the Hindu king could condemn a deserting wife to be devoured by the dogs, it stands to reason that in modern times, our Courts must be held to have the much lesser power of imprisoning her if she, having illegally deserted her husband, refuses to obey a decree for res-

a IX, 83.

(b) Vishnu, V, 18.

Restitution of
conjugal
rights by the
courts.

titution of conjugal rights. It follows that, according to the spirit and letter of Hindu law, the enforcement of conjugal right by ordering restitution does not fall beyond the scope of the king's functions. A suit for restitution of conjugal rights, by a Hindu husband, is provided for by the Hindu law itself. Such a suit would be cognizable by a Hindu sovereign in ancient Hindu times and therefore would not be beyond the jurisdiction of civil courts in modern times. Mr. Justice Pinhey of the Bombay High Court was, therefore, it is submitted, in error in supposing that the practice of allowing suits for restitution of conjugal rights originating in England under peculiar circumstances was transplanted from England into India, and that under the Hindu law such a suit would not be cognizable by a civil court (*a*). The Hindu law texts, as we have seen above, amply support the jurisdiction of the king in ancient times to entertain a plaint for restitution of conjugal rights, and show the principles upon which it ought to be exercised.

Cases on the
point

The course of judicial decisions in this country on the question of the jurisdiction of the civil courts to entertain

(a) 1885) Dadaji vs. Rukhmabai, I. L. R., 9 Bom, 529.

In Calcutta.

a suit for the restitution of conjugal rights has not been uniform. In 1866, Jackson and Macpherson, J. J., of the High Court of Calcutta held that a suit would lie by the husband in the nature of restitution of conjugal rights, for a decree declaratory of those rights to be enforced in case of disobedience by the imprisonment of the wife, or the attachment of her property, or by both. Mr. Justice Seton-Karr, however, thought that a suit by a husband to recover possession of the person of his wife would be maintainable, a view in which the other two learned judges did not agree (*a*). A year later the same High Court followed the decision of the majority of judges in that case (*b*). In the same year, in a case between Mahomedans, the Judicial Committee of the Privy Council observed, that suits for restitution of conjugal rights would be entertained in the civil courts in India, and further remarked that disobedience to the order of the court would be enforceable only by imprisonment or attachment of property or both (*c*). Their Lordships referred to an earlier case in which it was laid down that a suit for resti-

a) (1866) Chotun vs. Ameer, 6 W. R., 105.

b) (1867) Koobur vs. Jan, 8 W. R., 467.

c) (1867) Moonshee Buzloor vs. Shumsoonissa, 11 M. I. A., 551 ; 8 W. R., P. C.) 3.

tution of conjugal rights between Hindus and Mahomedans did not lie in the ecclesiastical side of the Presidency Courts in India, and quoted with approval the following observations of Dr. Lushington, in that case :—
 “The civil courts in India can bend their administration of justice to the laws of the various suitors who seek their aid. They can administer Mahomedan law to Mahomedans, and Hindu law to Hindus ; but the ecclesiastical law has no such flexibility” (*a*). In 1875, Markby and R. C. Mitter, J. J., while admitting that a husband is entitled to a decree which declares him entitled to conjugal rights and orders his wife to return to his protection, held that such a decree was not enforceable by imprisonment or attachment (*b*). In the opinion of Mr. Justice Markby, a decree which orders a wife to return to her husband’s protection amounts to nothing more than a declaration that the relationship of husband and wife exists between the parties. In 1876, the Bombay High Court differed from this view and held that a suit for restitution of conjugal rights was within the jurisdiction of the civil courts and a decree ordering such

In Bombay.

(*a*) *Ardaseer vs. Perozeboye*, 6 M. I. A., 348, 390.

(*b*) (1875) *Gatha Ram vs. Moohita*, 23 W. R., (C. R.) 179.

restitution is capable of being enforced under section 200 of the Civil Procedure Code (*a*). In a later case, Sir Richard Garth entertained no doubts about the jurisdiction of the civil courts to try suits for restitution of conjugal rights in this country (*b*). On the other hand, in the year 1885, Mr. Justice Pinhey of the Bombay High Court was clearly of opinion that under the Hindu law, which was the religious law of the parties, a suit for restitution of conjugal rights would not be cognizable by a civil court (*c*). This decision was carried in appeal to the original appellate side of the Bombay High Court; and Sir Charles Sargeant, C. J., and Bayley, J., while feeling no hesitation in reversing the decree of Pinhey, J., based their judgment on the state of the case-law rather than upon any consideration of the texts. This settled the law for Bombay where the same view has since been always entertained (*d*). In 1890, the

(*a*) (1876) *Yamuna vs. Narayan*, I. L. R., 1 Bom, 164.

(*b*) (1879) *Jogendra vs. Hari dass*, I. L. R., 5 Cal, 500.

(*c*) (1885) *Dadaji vs. Rukhmabai*, I. L. R., 9 Bom, 529; on appeal, I. L. R., 10 Bom, 301.

(*d*) (1892) *Bai Sari vs. Sankla*, I. L. R., 16 Bom, 714; (1898) *Fakirguda vs. Gangi*, I. L. R., 23 Bom, 307.

In Allahabad. question of jurisdiction in such cases came up for decision before the Allahabad High Court (a) and Mahmood, J, after a review of the Hindu law texts on the point, came to the conclusion that the civil courts of British India as occupying the position in respect of judicial functions formerly occupied in the system of Hindu law by the king, have undoubtedly jurisdiction in respect of the enforcement of such rights and duties. In 1900, in a case before the Calcutta High Court the jurisdiction of the Civil Courts to entertain suits for the restitution of conjugal rights by Hindus was questioned by counsel. It was suggested, that in the Calcutta High Court, the point has never been in contest, and that it has been assumed rather than directly held that such a suit would lie. In reply to this argument, the learned Judges remarked as follows, "In Bengal there does not appear to have ever been any doubt that under Hindu law a husband had a right to have brought under his protection a wife who had run away from his house. The only matters about which there appears to have been doubt were what form of suit the husband could bring for relief and by what courts such a suit would

(a) (1890) *Binda vs. Kaunsilia*, I. L. R., 13 All, 129.

be heard" (a). It may now, therefore, be taken to be settled law for all the Presidencies that such a suit would lie between Hindus in the civil courts of the country. In a suit by the husband for restitution of conjugal rights, the Court within whose jurisdiction the husband resided would have jurisdiction to entertain the claim. In a recent Bombay case, objection by the wife, who was not residing within the territorial limits of the court where the suit was instituted, to the jurisdiction of the Court to entertain such a suit was overruled on the ground that as the cause of action consists in the wife absenting herself from her husband's house without his consent, it must be deemed to arise at his house only (b).

Place of
accrual of
cause of action
in such suits.

There are no texts of Hindu law which speak directly of the defences which the wife may raise in a suit for restitution of conjugal rights. But, it can not be disputed upon the authorities, that such defences are open to her as are possible under the principles of natural justice, read in the light of the Hindu law of marriage. In the case of *Bazloor Rahim vs. Shumsoonissa*, their Lordships of

Wife's de-
fences in such
suits

(a) (1900) *Surjyamoní vs. Kalikanta*, I. L. R., 28 Cal, 37.

(b) (1893) *Lalitagar vs. Bai Suraj*, I. L. R., 18 Bom, 316.

- (1) Cruelty. the Judicial Committee pointed out "that if cruelty rendering it unsafe for the wife to return to her husband's dominion were established, the Court might refuse to send her back. It may be, too, that the gross failure by the husband of the performance of the obligation which the marriage contract imposes on him for the benefit of his wife, might if properly proved, afford good grounds for refusing to him the assistance of the Court. And there may be cases in which the Court would qualify its interference by imposing terms on the husband" (a). As has been remarked by Mahmood, J., the general principles of humanity upon which our courts act in such matters, have led to a long course of decisions which recognise the rule that legal cruelty of the husband would be a sufficient cause for refusing restitution of conjugal rights. The question what constitutes legal cruelty is by no means free from difficulty. "The essential features of cruelty are," it was said in *Milford vs. Milford*, "familiar. There must be actual violence of such a character as to endanger personal health or safety, or there must be the reasonable apprehension of it. The Court, as Lord Stowell once said, has never been driven off

Features of
Cruelty in
English law.

(a) 11 M L A., 551, 615.

this ground. Nor do the cases cited in the argument, whatever general expressions may have fallen from the Court, affect to decide that any thing short of this will be sufficient to found a decree upon cruelty. The ground of the Court's interference is the wife's safety, and the impossibility of her fulfilling the duties of matrimony in a state of dread." In the recent case of *Russel vs. Russel (a)*, Lord Chancellor Herschell pointed out that it was not sufficient to prove cruelty in a popular or wide sense of the term, but that it was necessary to show that the conduct complained of was such as to have caused danger, or a reasonable apprehension of danger, to life, limb and health, which is far more comprehensive in scope than mere physical violence.

Judges have differed on the question whether the same state of circumstances which would be an answer to a suit for restitution of conjugal rights in the case of an European would be equally so in the case of a Hindu. Mr. Justice Melvill thought in an early case that the Hindu law on the question of legal cruelty would not differ materially from the English law (*b*). Sir Richard Garth in a

What constitutes cruelty in India.

(a) (1897) A. C., 395.

(b) 1876) *Yamuna vs. Narayan*, I. L. R., 1 Bom., 164.

later case took the contrary view (*a*). Mr. Justice Mahmood in *Binda vs. Kaunsilia* (*b*) agreed with Mr. Justice Melvill. The true rule, however, seems to have been stated by Mr. Justice Mookerjee, *viz.*, that although, by reason of a well-marked difference between habits and customs of the Indian and European communities, the same rules may not always be applicable in such a matter as a suit for restitution of conjugal rights, yet there can be no doubt that the principles upon which relief ought to be granted or refused would be substantially identical in the two cases (*c*). The courts in this country have refused to help the husband by way of restitution when he kept a concubine and by such conduct compelled the wife to leave his house, and also when the wife would herself run the risk of being put out of caste if she were to associate with him, he having been outcasted.

Dular *vs.*
Dwarka.

In the case of *Dular vs. Dwarka* (*d*), Mr. Justice Mookerjee in an elaborate judgment

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- (*a*) (1879) *Jogendra vs. Harrydass*, I. L. R., 5 Cal, 500.
 - (*b*) (1890) *Binda vs. Kaunsilia*, I. L. R., 13 All, 126, 160.
 - (*c*) (1905) *Dular vs. Dwarka*, I. L. R., 34 Cal, 971, 977.
 - (*d*) I. L. R., 34 Cal, 971.

reviewed all the earlier decisions (a) on the subject and came to the conclusion that where the husband, after he had transferred his favours to his concubine, habitually ill-treated the wife and grossly insulted her religious feelings by making his concubine live in his house as a member of his family, and subsequently drove the wife out of the family residence at the instance of the prostitute, his conduct amounted to a grave, weighty and serious matrimonial offence within the meaning of the law, which fully justified the wife in living apart from her husband. The decision of Sir Richard Garth in *Jogendranandini vs. Harrydass* does not conflict with the view of Mr. Justice Mookerjee. The husband, in that case, lived a profligate life and was in the habit of consorting openly with prostitutes, and, on several occasions, had insulted his wife by introducing one of them into her private apartment ; and the husband was given a decree for the restitution of conjugal rights, subject to the condition that the house to be provided for the wife must be, in every respect, fit for the reception of a virtuous and respectable lady. But it is clear from

(a) (1870) *Lalla Gobinda, vs. Dowlutbuttee*, 14 W. R., 451 ; (1885) *Paigi vs. Sheonarain*, I. L. R., 8 All, 78.

the judgment that the circumstance, which weighed with the court in granting a decree, was that the wife though she left her husband's roof had allowed her husband to visit her at her father's place and to cohabit with her as man and wife, and that this conduct on her part amounted to condonation and reconciliation.

In some cases, conduct short of cruelty is good defence.

It is to be noticed however that there may be cases where conduct, though short of legal cruelty, on the part of the husband may bar a suit for restitution. We need seek no better illustration of this than the case of *Moola vs. Nundy (a)*, where the Court refused to decree restitution to a husband who, after transferring his affections to a mistress, had ill-treated the wife and had refused her maintenance during the period of separation. This case was relied on as an authority for holding that the Court may, in exceptional cases, exercise judicial discretion by refusing restitution, although it was doubted whether the decision was in consonance with the spirit of Hindu law. In *Dular vs. Dwarka Mr.*, Justice Mookerjee held that there may be cases in which something short of legal cruelty may bar a suit for restitution; and this view is in consonance with the

(a) (1872) 4 N. W. P. 109.

law in England as expounded by judicial decisions (*a*).

* Mr. Justice Mahmood is probably right when he says that a decree refusing restitution of conjugal rights to the husband, in spite of the fact that the conduct of the husband fell short of legal cruelty, would be inconsistent with the tenor of Hindu law. Manu condemns a wife who shows disrespect to a husband who is addicted to an evil passion, is a drunkard or diseased (*b*) and in another place the same sage tells us that "though destitute of virtue or seeking pleasure elsewhere (*i.e.* in company with another woman) or devoid of good qualities yet the husband must be constantly worshipped as a god by a faithful wife" (*c*). Yajñavalkya also says that obedience to the husband is the supreme duty for the wife and that even where the husband is guilty of *mahāpataka* (most grievous sin or crime) she must wait till he performs penance or expiation (*d*). These texts lead to the inference that a wife can not at least abandon a husband when his conduct though reprehensible yet falls short of legal cruelty.

Text of the
sages on the
point.

(*a*) See observations of Lopes, L. J., in *Russel vs. Russel*. (1895) A. C., 384.

(*b*) IX, 78.

(*c*) Manu V, 154.

(*d*) Mitakshara, Ch. IV, 77.

The texts would rather support the broader proposition that, however wicked the husband may be, the wife cannot desert him. In allowing the wife to resist a suit for restitution of conjugal rights, on the ground of conduct in the past amounting not only to, but even falling short of, cruelty courts have acted on the principles of humanity.

Principles of
humanity re-
cognized in
Hindu law

Although under Hindu law, as the texts above cited would seem to suggest, the contravention of these principles of humanity would not justify a wife in deserting her husband, still it cannot be said that those principles are not recognized by Hindu law. There are several texts which enjoin, on the husband, the duty of honouring his wife. Yajnavalkya says (*a*) that women are to be honoured by their husbands and every member of their husband's family with ornament, food, raiment and flowers. Manu also says :—"The husband receives his wife from the Gods ; he does not wed her according to his own will : doing what is agreeable to the Gods, he must always support her while she is faithful (*b*). " These texts breathe a spirit of anxious tenderness and respect for the wife. Where these injunctions are violated, it would seem that the courts would

(*a*) I, 72. (*b*) IX, 95.

be justified in giving effect to the spirit of Hindu law by refusing restitution.

The texts cited above make it clear that the mere fact of marrying a second wife and the consequent unkindness to the first wife is not sufficient to disentitle a Hindu husband from claiming restitution of conjugal rights (*a*). It was pointed out by the Madras High Court that the husband's marrying a second wife does not justify desertion of the husband by the first wife. It follows, therefore, that the marriage with a second wife would not be any answer to a suit for restitution. Mere taking of a wife's jewel, or unkindness, or neglect short of cruelty on the part of the husband would similarly be no answer to such a suit (*b*). Unfounded imputations upon the wife's chastity would also seem to be no good defence to a suit for restitution (*c*).

Marriage with second wife no defence.

Nor is imputation upon wife's chastity

* Portion within asterisk is based on original research.

(*a*) (1863) Virasami vs. Apasami, 1 M. H. C. R., 375 ; (1872) Jeebodhon vs. Sundhoo, 17 W. R., 522.

(*b*) (1875) Sitanath vs. Haimabatty, 24 W. R. 377 ; Matangini vs. Jogendra, I. L. R., 19 Cal, 84, (1891) ; 4 C. W. N., 488 (489).

(*c*) Yamuna vs. Narain, I. L. R., 1 Bom, 164 (173).

Degradation
of husband
from caste—
how far a
good defence.

Another defence to a suit for restitution by the husband, under the Hindu law, appears to be that the husband has been turned out of caste since the marriage. The following texts seem to support this :—But she who shows aversion towards a mad or outcast husband * * * shall neither be cast off nor deprived of her property (*a*). “A husband, who is not an outcast, should not be forsaken by women desirous of happiness in another world” In the case of *Paigi vs. Sheonarain* (*b*), the learned judges of the Allahabad High Court however granted a decree for restitution to a husband who, in consequence of his having left his wife and cohabited with a Mahomedan woman, had been turned out of caste, subject to the condition that he should first obtain restoration to caste. Mr. Justice Mahmood thought, in a later case, (*c*) that this decision was not in consonance with the precepts of Hindu law. Mr. Justice Blair, refusing to follow it held that it is no defence in a suit for restitution of conjugal rights to say that the husband is out of caste nor ought a decree

(*a*) Manu, IX, 79. For the next text see colebrookes Digest Bk IV, verse LVIII. (*b*) I. L. R. 8 All, 78.

(*c*) *Binda vs. Kaunsilia*, I. L. R., 13 All, 126 (123).

to be made conditioned on his being restored to caste (*a*). The text of Devala—A husband may be forsaken by his wife if he be an abandoned sinner, or an heretical mendicant, or impotent, or degraded or afflicted with pthisis, or if he have long been absent in a foreign country (*b*)—would seem to support the decision in *Paigi vs. Sheonarain*. But notwithstanding all this, Manu's text about the marriage tie being indissoluble would rather tend to show that the later decision of Mr. Justice Mahmood is more in keeping with the spirit of Hindu law.

In English law, a wife has the right to petition against her husband for restitution of conjugal rights (*c*). The Hindu law also contemplates a similar right in the wife. Yajnavalkya ordains that the deserter of a faultless wife should be compelled to pay her a third part of his wealth, if poor, to provide her with maintenance. Narada also says :—
 "A man who forsakes a wife who is obedient, pleasant-spoken, virtuous and the mother of male issue the king shall make him mindful of his duty by inflicting severe punishment

Right of wife
to sue for
restitution of
conjugal rights
under Hindu
law.

(*a*) (1904) *Sahadur vs. Rajwanta*, I. L. R., 27 All, 96.

(*b*) *Colebrooke's Digest* Bk. IV., CLI Cal. Ed.

(*c*) *Orme vs. Orme*, 2 Addams, 382.

on him " (a). These texts amply support the proposition that the help of the king, and so of courts of justice, is available to the wife, under the Hindu law. Judicial decisions also recognise such right in her (b).

Defences open
to the hus-
band.

We will now deal with the defences which are open to a husband in a suit for restitution by the wife. Unchastity on the part of a wife is surely an answer to such suit, for the Hindu law ordains that an adulterous wife can be forsaken (c). When the Hindu law provides that a husband would be justified in forsaking a cruel and unkind wife, cruelty on her part would seem also to be an answer. Baudhayana says, "Prudent men forsake instantly a wife who speaks unkindly" (d). There is another text to the same effect, "Let him banish from his house a wife, who constantly dissipates wealth and who speaks unkindly" (e). There has been no reported case yet on the point ; and such a case can seldom arise in practice. The apostacy of one of the parties does not in the case of Hindus *per se* annul the marriage and a Hindu

(a) Narada, XII, 95.

(b) Binda vs. Kaunsilia. I. L. R. 13 All 125 ; See also, 28 Cal., 37. (c) Narada, cited in Digest Bk IV, LXIII.

(d) Colebrooke's Digest, Bk. IV, LXVI.

(e) Ibid B. K. IV. LXIV.

husband is entitled to demand the custody of his wife and does not lose his rights over her by the fact that she has renounced Hinduism. This position is supported by the following text of Manu :—"That neither by sale nor desertion can a wife be released from her husband,"—which, in other words, means that the marriage tie is under the Hindu law indissoluble. But, in an early case, Sir Adam Bittelson said that this text of Manu has reference to those who are within the pale of Hindu law (*a*). Act XXI of 1850 enacts that loss of caste or change of religion shall not inflict on any person forfeiture of *rights* and property ; and the question arises whether the word *rights* is not confined to proprietary rights and is intended to cover such personal rights as constitute the status of the individual. It seems to us that Act XXI of 1850 repeals and abrogates so much of the provisions of Hindu law as by reason of change of religion deprive any party either from continuing to hold property owned before conversion, or from succeeding to property as an heir after conversion. There seems to be no authority in the Hindu law itself for the proposition that an apostate is absolved from all civil

Renunciation
of religion by
wife no de-
fence in suit
by husband.

(*a*) Rahmed vs. Rokeya, 1 Norton's Leading Cases on Hindu Law, 12.

obligations, and so far as the matrimonial bond is concerned, such a view would be contrary to the spirit of Hindu law which regards that bond as indissoluble (Manu V, 156-158 IX, 46). The courts have accordingly dissented from the view taken by Sir Adam Bittelson (*a*). In *Muchoo vs. Arzoon Sahoo* (*b*), the plea of change of religion by the husband was held to be a good plea so as to bar a suit for restitution by him. If a wife, for instance, says that the husband has, by change of religion, placed himself in such a position that she cannot possibly associate with him without doing violence to her religious opinions and to her inherited social feelings and prejudices, it would be a good defence. Act XXI of 1866 has made some important provisions for dissolution of marriage when either spouse becomes a convert to Christianity. This will be noticed in its proper place.

No formal demand and refusal necessary before suing for restitution.

Unlike the law of England no formal demand and refusal is necessary before a suit for restitution by either spouse can be

(*a*) *Government of Bombay vs. Ganga*, I. L. R., 4 Bom, 330. *Administrator-general vs. Ananda-chari*, I. L. R., 9 Mad, 466 ; In the matter of *Ramkumari*, I. L. R., 18 Cal, 264. In *Re-Millard*, 10 Mad, 218.

(*b*) 5 W. R., 235.

commenced. In the case of *Binda vs. Kaunsilia*, the Allahabad High Court held that the personal law of the Hindus did not require an antecedent demand to sustain a suit for restitution of conjugal rights nor make restitution unenforceable against a minor. Mr. Justice Mahmood was of opinion in that case that the withholding of conjugal rights by either party is a continuing wrong and that article 120 read with section 23 of the Limitation Act provided the period of limitation ; in other words, he held that a claim for restitution is never barred by limitation. The Bombay High Court took the same view in the case of *Bai Sari vs. Sankla (a)*. These cases laid down, therefore, that article 35 of the Limitation Act (XV of 1877), which provided that a suit for restitution of conjugal rights must be brought within two years from the period when restitution is demanded and is refused by the husband or the wife, being of full age and of sound mind, did not apply to the case of Hindus. The reason of the Allahabad decision seems to be that article 35 can only apply to suits where demand and refusal are necessary and as this is not a necessary condition of a suit by a Hindu husband or wife the article has no application to such

Limitation
Act (XV of
1877).

(a) I. L. R., 16 Bom, 714.

Sir Lawrence
Jenkin's view
of the ques-
tion.

a suit. Sir Lawrence Jenkins, C. J., then Chief Justice of Bombay, said "that there is a fallacy underlying this train of reasoning," and his Lordship held that the correct view of the law would be to modify the ruling of the Allahabad High Court so far as to make the article applicable to Hindus and Mahomedans in case of suits preceded by demand and refusal (*a*). The Calcutta and Madras High Courts have since concurred in the view of the learned Chief Justice (*b*). This article does not find a place in the Limitation Act (IX of 1908). It is a usual thing in Hindu families for a wife to go and stay with her parents and brothers and if owing to any domestic quarrel, the wife should in a fit of temper refuse to return, the husband would have been compelled, so long as article 35 was in the statute book, to take the matter into court within two years. This often prevented reconciliation for as soon as the matter was exposed in court, it became difficult for the parties to come to amicable terms. Time heals many things; it heals the dissensions between the husband and the wife, and if the parties know that

Limitation
Act (IX of
1908).

(*a*) Dhanjibhoy vs. Hirabai, I. L. R., 25 Bom, 644 (F. B.)

(*b*) Asirunnessa vs. Buzloo, I. L. R., 34 Cal, 79 ;
Saravanai vs. Poovayi, I. L. R., 28 Mad, 436.

there is no period of limitation fixed for bringing a suit they might trust to time to get the same relief, which a court of law would grant, without the exposure which a suit entails.

There has been much controversy as to the mode in which a decree for restitution is to be enforced. Mr. Justice Markby was of opinion that a decree for restitution was a decree for declaration of rights of the parties as husband and wife. The Judicial Committee (see the case of *Buzloor Rahim vs. Shamsunissa* cited before) and all the courts in India agree that it is to be enforced by imprisonment of the spouse or attachment of the property. The mode in which a decree for restitution of conjugal rights is to be enforced is now provided for by order 21, rule 32 and 33 of the Code of Civil Procedure. Act V of 1908, rule 32, ch. (1) provides that where the party, against whom a decree for restitution of conjugal rights has been passed, has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced by his detention in the civil prison or by attachment of his property or by both. Rule 33 is new, and may be fairly compared with like provisions of the English Matrimonial Causes Act, 1884 (47 & 48 Vict., C. 68). Rule 33 runs as follows :—

Mode of enforcement of decree for restitution of conjugal rights.

Civil Procedure (Act of 1908.)
Pro-Code V of

- (1) "Notwithstanding anything in rule 32, the Court, either at the time of passing a decree for the restitution of conjugal rights, or at any time afterwards, may order that the decree shall not be executed by detention in prison.
- (2) Where the Court has made an order under sub-rule (1) and the decree-holder is the wife it may order that in the event of the decree not being obeyed within such period as may be fixed in this behalf, the judgment debtor shall make to the decree-holder such periodical payments as may be just, and if it thinks fit, require that the judgment-debtor shall, to its satisfaction secure to the decree-holder such periodical payments.
- (3) The Court may from time to time vary or modify any order made under sub-rule (2) for the periodical payment of money, either by altering the times of payment or by increasing or diminishing the amount or may temporarily suspend the same as to the whole or any part of the money so ordered to be paid and again revive the same, either wholly or in part as it may think just.
- (4) Any money ordered to be paid under this rule may be recovered as though it were payable under a decree for money.

In the last chapter we discussed in some detail the question as to how far the right of the wife to enter into contracts with third

persons and her liability on it are not affected by coverture (a). We need not repeat the discussion here. But we may add that a text of Yajnavalkya (b) makes it clear that a wife could borrow on her own account and the husband would not be liable for such debt unless the same was contracted for the benefit of the family. Yajnavalkya like Narada says that this rule does not apply to the case where debts are contracted by the wives of washermen, hunter etc. (c). The text cited also shows that a woman could contract a debt for the benefit of the family. It would thus seem that under the Hindu law a wife, merely as such, has no authority to bind her husband's credit. Under the common law of England a wife was incapable of entering into a contract on her own account. (d).

Right of wife to enter into contract previously dealt with.

English law on the point compared

If the wife could contract debts quite independently of the husband, if she could look after her own affairs and manage her own properties, it would seem to follow that she could sue and be sued alone in her own name. This rule has been adopted by the courts here and is based on manifest good

(a) Chapter II, *ante* pp. 159-160.

(b) Yajnavalkya, II, 46.

(c) *Ibid*, II, 48, Mitakshara or the same.

(d) Holland's Jurisprudence, 332.

For purposes
of contract
wife and hus-
band not one
persons.

sense (a). The Hindu law does not recognise the identity of husband with the wife for all purposes. The Civil law, unlike the common law of England treated the husband and wife as distinct persons ; and for the purpose of contracts at any rate Hindu law regards the wife as distinct from the husband.

Remarriage of
woman while
her first hus-
band is alive
—not per-
mitted.

It is one of the incidents of wifehood under the Hindu law that the wife is under an obligation not to marry again during the life-time of her husband. Remarriage by a woman while her husband is alive is so repugnant to the spirit of Hindu law, that the courts refuse to recognise such marriage even where there is a prevailing custom on the ground that such custom is immoral as legalizing adultery (b). In *Uji vs Hathi*, the Bombay High Court decided that the caste could not sanction a woman's remarriage without a divorce or without a proceeding to which both husband and wife were parties. In Madras, on the other hand, it has been held that there is nothing immoral in a caste custom by which divorce and remarriage are permissible on mutual

(a) *Bhrb vs Madhub*, 1 Hyde, 281.

(b) *Reg vs Sambhu*, 1 L. R., 1 Bom, 347. *Uji vs Hathi*, 7 Bom A. C. J 133. *Reg vs Kassan* (HC) 2 Bom, 124. *Bai Ugri vs Patel*, 1 L. R., 17 Bom, 400 (406).

agreement, on one party paying to the other the expenses of the latter's marriage. (*a*)

Marriage under the Hindu law does incapacitate a husband or wife from being competent witnesses against each other in a court of law. The husband cannot be a surety for the wife, nor can the wife be a surety for the husband. The following text of Yajnavalkya supports these two propositions :—“Of brothers, also of husband and wife, as well as of father and son, suretyship, indebtedness or witnessing of one with respect to the other has not been allowed while they are undivided (*b*). But these rules of Hindu law are now of academic interest, as the Evidence Act and the Contract Act govern matters of this kind respectively. सत्यमेव जयते

Wife incompetent witness for or against husband under Hindu law.

Manu has said that women under certain circumstances can give evidence in any cause (*c*). The Indian Evidence Act enacts that in all civil proceedings, the parties to the suit and the husband and the wife of any party the suit shall be competent witnesses. It further enacts that in criminal proceedings against any person, the husband

Except in certain circumstances.

Not so under Evidence Act.

a) Chetti vs. Chetti, I. L. R., 17 Mad, 479.

b) I, 52.

c) Manu VIII, 70.

Sec 122
Indian Evi-
dence Act
(I of 1872.)

or the wife of such person, respectively shall be a competent witness (a). In section 122 it is enacted that no person, who is or has been married shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married ; nor shall he be permitted to disclose any such communication, unless the person who made it, or his representative-in-interest, consents, except in suits between married persons or proceedings in which one married person is prosecuted for any crime committed against the other.

Husband
could not
make a gift
to wife under
the common
law of Eng-
land.

It is well known that under the common law of England, husband and wife were treated for most purposes as one person ; that is to say, the very being or legal existence of the woman as a distinct person was suspended during the marriage or at least was incorporated and consolidated with that of her husband. Upon this principle, of an union of person in husband and wife, depended almost all the legal rights, duties and disabilities which either of them acquired by the marriage (b). For this

(a) Sec. 120 of the Indian Evidence Act (I. of 1872 ; R. vs. Khyroollah, 6 W. R., Cr. R., 21 (1866). For a case under earlier law see R. vs. Gour Chunder, I. W. R., C. R., 17 (1864).

(b) Blackstone's Comm, Vol. I. 442.

reason a man could not make a gift of any property to his wife, for the gift would have supposed her to possess distinct and separate existence (a). On the same ground it is said that, if the wife be injured in her person or property during coverture, she could bring no action for redress without the concurrence of her husband, neither could she be sued without making her husband a party to the cause. All this is very different in Hindu law, where the husband and the wife are considered as two distinct persons for many purposes. It is true that Manu has said that a husband is even as one person with his wife, but the comment of Kulluka shows that this unity is for religious and not for civil purposes. Apastamba has ordained that there is no division between husband and wife.

Not so under
Hindu law.

Apastamba.

*This rule of Apastamba is true only in respect of the acts of religion—acts enjoined by the Vedas and Smrities in connection with sacrifices, but does not hold good with regard to partition of things. The sacrifices must be performed jointly with the husband, and so must many acts connected with it. The view of the commentators also seem to

(a) Under the Roman law also, mutual gifts between husband and wife were void. (Sohm's Institutes of Roman Law. p. 483.)

Jaimini on
unity of hus-
band and wife.

support the proposition that the unity is for religious purposes (a). We have also noticed in the foregoing chapter the comment of Sabar on the 21st aphorism of Jaimini. Sabar in commenting thereon quotes the following Vedic text :—"Let the wife unite with the husband in sharing fruits of sacrifice. Let both the husband and the wife join in taking the burden of performing the sacrifice. Let them commence brilliant and imperishable life in Heaven." The last portion of the Vedic text has been quoted by the author of Mitakshara as showing that the unity intended was one for religious purposes only. However that may be, Katyayana ordains that a husband can make a gift to the wife which becomes her absolute property, except perhaps immoveables which, under a text of Narada, she cannot alienate (b). Then again, as a consequence of this want of legal identity between a husband and his wife for some purposes the wife can be sued alone without joining the husband. Manus says whatever wealth is earned by the wife belongs to the husband and it is suggested that this can only be explained on the ground of recogni-

(a) See the comment of Mitakshara on Bk. II, 52 of Yajñavalkya.

(b) See Colebrooke's Digest Vol. V. 475.

tion by Manu of legal identity between the husband and the wife. But Jaimini, as we have seen already, strongly refutes the reasoning of this text and says that this text must be disregarded as it is opposed to *Sruti*, and that the *Sruti* must prevail over the *Smriti*. Even the later commentators confine the application of the text of Manu only to wealth acquired by the mechanical arts. But there can be no doubt that there is a sort of identity in proprietary relationship between a husband and his wife in the wealth of the husband and this would appear clear from the comment of Sabar on the 17th aphorism (a).*

We now proceed to consider what is the effect of marriage on the capacity of each of the parties to sue and to be sued by the other. The author of the *Mitakshara*, in commenting on a text of *Yajnavalkya* (b), cites a text from a *Smriti*, the authorship of which is unknown, which is to the following effect :—

Effect of marriage on the capacity of husband and wife to sue each other.

“But in the case of a strife between teacher and pupil, father and son, husband and wife or master and servant mutual litigation is not legal.” *Vijnaneswara* points out

(a) See page 86, second para. ante. of Jaimini.

* Portion within asterisks believed to be original.

(b) Verse 32. ch. II.

that the text does not mean that litigation is forbidden in a controversy between the husband and his wife, but that such litigation is not laudable and should be discouraged.

Katyayana.

To illustrate this, Vijnaneswara cites the text of Katyayana, which permits the husband to appropriate the wealth of his wife in case of famine and distress, and ordains that should he appropriate the wealth of his wife in the absence of such circumstances of necessity, and refuse to pay it on demand, though he is in a position to do so, a suit between the married couple would

Jagannatha.

be allowed. Jagannatha remarks that the real import of the text of the *Smṛiti* is that wives, pupils etc., should ordinarily and generally be discouraged by the king or the court, but in very important cases where the husband or the wife transgresses, suits by one spouse against the other may be entertained. But other writers hold that the *Smṛiti* text quoted above only prevents husbands from having recourse to the king or the court, for it is declared that wives committing faults may be corrected by their husbands. But if husbands transgress, there is no redress without an application to the king. But the view of the author of the *Mitakshara* that a suit would lie under the law at the instance of one spouse against

the other, although the court should discourage such suits generally, seems to be the right one. In England under the common law, such a suit would not lie but a wife might, in a court of equity, sue her husband and be sued by him (a).

English law compared.

Having considered the effect of marriage on the status of the wife, we may say a few words on its effect on the status of the husband. It has been stated that marriage fixes a boy in his own family, so that he cannot thereafter be adopted. There is, however, no text of Hindu law to support this statement. Those who maintain this view argue that under Hindu law certain religious ceremonies are necessary for the affiliation of a boy and marriage is the last of these. After marriage no ceremonies can be performed in the adoptive family, and therefore marriage is a bar to adoption, both amongst *Brahmans* or *Sudras*. The Bombay High Court, however, has taken an opposite view and hold that adoption of a married man is valid (b). These decisions are based on a passage in the Vyavahara Mayukha where Nilkantha expresses the opinion that there is no bar to the adoption of a married

Effect of marriage on the status of husband.

Marriage, no bar to adoption.

(a) See Story's Equity Jurisprudence, S. 1368.

(b) *Dharma vs. Ramkrishna*, I. L. R., 10 Bom, 80; I. L. R., 25 Bom., 250.

man. "According to my venerable father," says Nilkantha, "even one married and the father of a male issue is fit for adoption. And this is proper since there is nothing opposed to it.' The Allahabad High Court agrees with the view taken by the Bombay High Court (*a*). In the Allahabad cases, the parties were Jains and according to a custom prevailing amongst them, adoption of a married man is regarded as valid.

Husband's
right to marry
during life
time of the
wife.

As polygamy is sanctioned by Hindu law, there is nothing to prevent a married man from marrying another woman during the lifetime of the wife. The wife's position in this respect may be contrasted with that of the husband ; she has no such corresponding right, as has been noted before. It is not necessary for marriage with a second woman, that the first wife shall be abandoned or forsaken. "Neither by sale", says Manu, "nor by repudiation is a wife released from her husband" (*b*). Although the Hindu law permits a man to marry again during the lifetime of the first wife, the sages look upon such second marriage with disfavour where there are no justifying causes for superseding the first wife. These causes are indicated by

(*a*) *Manohar vs. Banarsi*, I. L. R., 29 All, 495 ;
Asharfi vs. Rupchand, I. L. R., 30 All, 197.

(*b*) Manu IX, 46.

Manu in the following text :—"She who drinks spirituous liquor, is of bad conduct, rebellious, diseased, mischievous or wasteful may at any time be superseded by another wife". "A barren wife, and a wife who gives birth to daughters only and a quarrelsome wife may also be superseded" (a). Baudhayana (b) and Yajnavalkya (c) also agree in the view taken by Manu. The sages ordain that a compensation (*Adhibedanika*) should be given to the superseded wife. This compensation is mentioned as one of the six kinds of *stridhan* enumerated by the sages. There is much diversity of opinion among the commentators as to the amount of compensation. The author of the Mitakshara says that the amount may be half of what is spent on the second marriage, provided separate property has not been given to her by the husband or the father-in-law ; where such property has been given she should get half. Srikrishna, the author of the Dayakrama sangraha, says that the superseded wife should get as much as is given to the second wife (d). Jagannatha

Diversity of opinion as to the amount of compensation to a superseded wife.

(a) Manu IX, 80 ; 81. (b) Baudhayana, II, 4, 6.

(c) Yajnavalkya, I, 73.

(d) Dayakrama sangraha, Ch. VI., 31. See also, Mitakshara, Ch. II., sec, XI, 34, 35. Dayabhaga, Ch. IV. Sec I, 14. Smriti Chandrika, I, Ch. IX, Sec. 1 (3-4).

says that this question yet remains to be settled ; Colebrooke agrees with the view of the Mitakshara.

Wife's subordination to husband modified by the principle of partnership.

With the husband's right to the companionship of the wife, is connected his right to decide all questions incident to married life. It is he who determines where they shall reside, for the wife shares in law her husband's domicile ; it is he who decides on the disposal and education of the children. It is he who decides on the nature and extent of the household expenditure. The sages ordain that the husband should employ the wife in the regulation of domestic expenditure. A Hindu marriage involves the principle of the wife's subordination to the husband, but it is modified by the infusion of the principle of partnership. It is the husband who has the right of giving away his son in adoption without the assent of his wife (c), but a wife cannot give away the son without the assent of her husband, for Vasistha lays down, "Nor let a woman give or accept a son without the assent of her lord." It is true that the son is the joint property of the father and mother for the* purposes of the gift in adoption.

Wife's right to give her son in adoption.

Vasistha.

(b) Yajnavalkya I. 52.

(c) Dattaka Mimansa, I., 22. ; Rangama *vs.* Atchama, 4 M. I. A., 2 ;

But where there is a competition between the father and the mother, the former has a predominant interest or potential voice in the act of giving away the son ; so that the husband may give away the son even against the will of the wife (*a*). A text from Baudhayana is cited in support of this position. But the mother cannot give in adoption in the *dattaka* form without the assent of her lord (*b*). As the adoption however is generally for the benefit of the son and is intended as an advancement of the child, it is not only natural, but reasonable in the highest degree, to presume that a mother would exercise a wise discretion in deciding whether the son should not in the circumstances of each case be given in adoption. The presumption being founded in natural affection and moral obligation, there need be no apprehension, that the mother would not properly exercise the discretion. But the wife's capacity to take a son in adoption in the *dattaka* form is far more restricted than her power to give in adoption. According to the doctrine of the Mithila School, a husband's assent is absolutely necessary for an adoption by the wife, *at the time of adoption*. The hus-

Baudhayana.

Wife's right to take in adoption.

Mithila school.

(*a*) Dattaka Mimansa, S. IV., 13.

(*b*) Jogesh *vs.* Nrityakali, I. L. R., 30 Cal., 965.

band must, therefore, join in the adoption by the wife. In the Vivada Chintamoni, we find it laid down that "a woman has no power to adopt a son even with the assent of her husband, for she cannot perform the rites of adoption." "The common saying, that a woman has no power to take or give a son but with the assent of her husband, shews that, as she can give a son with the assent of her husband, so she has power to adopt one with his assent. Consequently, it might be argued that she has power to perform the rites of adoption. This argument is reasonable. She has a right to do so in association with her husband, but not alone, since in such a case the rule, which empowers her to take a son with her husband but not to perform the rites of adoption will be infringed" (a).

Dattaka
Mimansa.

The Dattaka Mimansa supports this view (b) and explains the principle upon which the doctrine propounded by the Mithila School rests. The principle is that a wife in adopting a child acts simply as her husband's agent. The Bengal School does not admit the doctrine of agency. It accepts the rule laid down in the Dattaka Chandrika,

Bengal
School.

(a) Vivada Chintamoni, P. C. Tagore's Translation, 75.

(b) Dattaka Mimansa I, 16.

that women with the sanction of their husbands are competent to adopt ; in other words, a wife possesses the capacity to adopt in her own right, subject to the assent of the husband. The Benares School follows the Bengal School. Adoptions are generally made by widows and seldom by wives during the life time of their husbands. We will discuss, in the next chapter, the opinions in the different Schools, regarding the widow's right to adopt, and the theories on which they rest. We have dealt with the rights of husband and wife as against each other.

Benares
School.

We next proceed to state what are the rights which a husband has against third parties for an infringement of the right of the wife. Where, for instance, a person imputed unchastity to the wife, both husband and wife were held competent to commence a suit for defamation (a). It was held that not only was the wife defamed but the husband also. The words imputing unchastity to the wife were held to be actionable without proof of special damage. But where a person described the wife of another as a witch in a letter to her husband it was held that the husband had no cause of action as the

Action for
imputation of
unchastity to
wife.

(a) Sukan Teli vs. Bipal Teli, 4 C. L. J., 388.

imputation made was not defamatory of him, but that the wife was entitled to damages (*a*).

Divorce unknown to Hindu law.

It may be said that divorce is unknown to Hindu law generally (*b*). Divorce can not find a place in a system where the law says "neither by sale nor by repudiation is a wife released from her husband" (*c*). The marriage tie is indissoluble with the Hindus; so that although a wife can be forsaken for conjugal infidelity there is no divorce. The abandonment even of an incontinent wife is tantamount to cessation of all conjugal association with the husband; for as have been noticed before, according to Yajnavalkya, desertion (त्याग) would not even mean banishment from the house but cessation of conjugal rights and religious duties (*d*). The point of distinction between divorce and desertion is prominently brought out by the fact that a wife can marry again after divorce with her former husband, whereas, desertion under the Hindu law can lead to no such consequence. The reason why divorce

Distinction between divorce and desertion.

Reason why divorce is not allowed in Hindu law.

(*a*) *Shoobhagee vs. Bokhori*, 4 C. L. J., 390

(*b*) But Komalakara recognizes divorce especially in case of Sudra (See Mandlik. 434).

(*c*) Manu IX, 46.

(*d*) I, 72.

is not allowed is to be traced to the nature of the marriage relation under Hindu law which regards marriage as incapable of being dissolved during the joint lives of the husband and the wife. In commenting on the text of Manu cited above, Medhatithi points out that the meaning is that a wife, sold or repudiated by her husband, can never become the legitimate wife of another who may have bought or received her after she was repudiated. It is not, therefore right to say, as has been said in a well-known text book on Jurisprudence, that the fact that there was little or no divorce amongst Hindus was due partly to the expense of the wedding which was always celebrated with the utmost pomp, and partly to the possibility of polygamy (a). This statement ignores the fundamental conception of the marriage relation in Hindu law. Even where a husband repudiated a wife without just cause, its effect was not to terminate the marriage. Although the strict Hindu law recognized no divorce, custom has ingrafted it on certain sections of the community belonging to the lower castes in particular places where the right to bring about divorce

Professor
Lee's view.

Divorce
allowed
amongst lower
castes.

(a) Lee's Historical Jurisprudence, p. 129.

was dependent on mutual consent of the parties (a).

We have noticed already that neither apostacy nor excommunication from caste justify desertion by the husband or the wife. But it is different in the case of the conversion of either spouse to Christianity where a divorce would seem to be allowed by the provisions of Act XXI of 1866. Section 19 of the Act enacts that where a Hindu husband or wife is deserted or repudiated on the ground of his or her conversion to Christianity a decree for divorce can be made in favour of the person so deserted or repudiated and the parties can marry again, as if the marriage has been dissolved by death.

Conflict of authorities on the question whether Divorce Act applies to marriage celebrated before conversion.

The question, as to whether the Indian Divorce Act (IV. of 1869) applies to a marriage celebrated before the conversion of the parties to Christianity, has come before the Indian High Courts in several modern cases. While the High Court of Bengal would answer the question in the

(a) *Sankaralingam vs. Subban*, I. L. R., 17 Mad, 479.

As to the castes and localities in which such customs prevail, see Risley's "Tribes and Castes of Bengal"; Steele's "Law and Custom of Hindu castes"; Brooke's "Tribes and Castes of N. W. P. and Oudh."

affirmative(*a*) the High Courts of Madras (*b*) and the United Provinces *c*) take an opposite view.

A few words are necessary as to the effect of marriage on legitimacy. Hindu sages and commentators are all agreed that in order to constitute legitimacy there must be not only birth but also procreation in lawful wedlock (*d*). Their Lordships of the Judicial Committee thought it a very inconvenient doctrine and held that under the Hindu law procreation after marriage was not necessary to render a child legitimate. In the opinion of their Lordships the Hindu law was the same in this respect as English law (*e*). This must be accepted as the law on the subject, Hindu law texts to the contrary notwithstanding.

Effect of marriage on legitimacy.

As intermarriage between different castes is prohibited in the present age, we shall

(*a*) (1891) *Goberdhan vs. Jasada*, I. L. R., 18 Cal., 252.

(*b*) (1894) *Thapita vs. Thapita*, I. L. R., 17 Mad., 235 ; *Perianayakam vs. Pottukanni*, 14 Mad., 382.

(*c*) *Zuburdust khan*, 2 N. W. P., 370.

(*d*) *Manu*, IX, 166 ; *Apastamba*, II, 18, 1 ; *Vasistha*, XVII, 13 ; *Baudhayana*, II, 3, 14 ; *Vishnu*, XV, 2 ; *Yajñavalkya*, II, 123. See (1) *Mitākshara*, Ch. I. sec. XI ; (2) *Mayukha*, Ch. IV, sec. IV, 41.

(*e*) *Pedda Amani vs. Zemindar of Marungapuri*, L. R., II. A., 293.

consider only cursorily how far the offspring of such intermarriage may be legitimate.

Legitimacy of
the off-spring of
intermarriage.

We have seen already that under the Hindu law there are only four castes or classes, *viz.*, Brahmans, Kshatriyas, Vaisyas and Sudras, and that in former ages the marriage of a male of one caste with a female not only of his caste, but of any of the lower castes was valid and the children of a man by a female of a caste lower than his own were called *anulomajās*. Though a son by such union was regarded as perfectly legitimate, yet in competition with a son of the same father by a wife of the same caste as himself, the share of the former was less than that of the latter. Marriage of a male of one of the three lower classes with a woman of a caste higher than his own was however not recognized. The offspring of such union was illegitimate and were known as *pratilomajās*. The whole law on the subject, especially with reference to the caste of the issues of *anuloma* marriages, is elaborately discussed in the case of *Brindavana vs. Radhamani (a)*. Marriages in the *anuloma* form are however now obsolete, and under the present law, marriage is valid only as between persons of one and the same four leading divisions of caste. There are

(a) I. L. R., 12 Mad., 72.

however numerous subdivisions in each of the four castes and the question sometimes arises as to whether in marriages between different subdivisions of the same caste, the offspring of such marriages might be regarded as legitimate. The law on the subject has been recently discussed in the Madras case of *Ramasami vs. Sundara (a)* where it is laid down, following an earlier decision of the Judicial Committee in *Ramamani vs. Kulanthai (b)*, that a marriage between different subdivisions of the Sudra caste is valid by Hindu law and the issue of such marriage would therefore be regarded as legitimate. It is further laid down in that case that where a Sudra marries a woman of his caste but of an inferior class, as a *dagger* wife, in addition to his wife equal in caste to him, the rule of selection is in favour of his son by the latter by reason of the mother being of a higher class. The learned judges base their decision on this point on a text of Manu (c). There was an appeal to the Privy Council from this decision, but this point was left undecided (d). This view has

Legitimacy of offspring of marriages between different subdivision of the same caste.

(a) I. L. R., 17 Mad., 422.

(b) 14 M. I. A., 346.

(c) IX, 125.

(d) *Sundara vs. Ramasami*, I. L. R., 22 Mad., 515

not found favour with the profession in Madras (*a*).

Marriage
brokage con-
tracts under
Hindu law.

It remains now to consider that class of contracts and agreements respecting marriage by which a party engages to give another a compensation if he will negotiate an advantageous marriage for him. These contracts are termed "marriage brokage contracts" under the English law. There is no reference to this class of contracts either in the texts of Hindu sages or in the commentaries. In England such contracts would not be enforced at law (*b*). Indeed, contracts of this sort have been not inaptly called a sort of kidnapping into a state of conjugal servitude; and no act of parties can make them valid in a court of equity (*c*). Following the English rule, it has been held in India that such contracts are immoral and are against public policy (*d*). "Marriage brokers," it has been said, "should not be given a legal status such as would enable them to enforce their contracts by law."

Mr. Justice Jardine, in a later case,

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- (*a*) See a criticism of this decision in 9 M. L. J., 353.
 - (*b*) Hall & Kean *vs.* Potter, 3. P. W., 76.
 - (*c*) Story's Equity Jurisprudence, 262. (Second Eng. Ed.)
 - (*d*) (1884) Pitamber *vs.* Jagjivan, 13 Bom, 131 (note).

affirmed this view (a). In Madras, following the decision in *Pitamber vs. Jagjivan*, it has been held that an agreement to assist a Hindu in procuring a wife for reward is void as being contrary to public policy (b). The Calcutta High Court has in a very recent case taken the same view (c). It is true that in Bengal the marriage of boys and girls takes place through match-makers who receive reward for their services. But, having regard to the principles deducible from the decisions cited above, it is extremely doubtful if a match-maker will be able to recover the remuneration for his services in a court of law.

The Civil law does not seem to have held contracts of this sort in such severe rebuke ; for it allowed *proxenete*, or match-makers, to receive a reward for their services, to a limited extent. The Roman law, while it admitted the validity of contracts in a qualified form, had motives for such an indulgence, founded upon its own system of conjugal rights, duties and obligations very different from what in our age would be

Roman law
on the point
compared.

(a) (1888) *Dulari vs. Vallabdas*, I. L. R., 23 Bom, 126.

(b) (1893) *Vaithayanatham vs. Gangarazu*, I. L. R., 17 Mad, 9.

(c) (1905) *Baksi vs. Nadu*, 1 C. L. J., 261.

Secret contracts by parents or guardians for giving girls in marriage for consideration.

deemed either safe, or just, or even worthy of toleration (*a*). Of a kindred nature and governed by the same rules as the marriage brokerage contracts are secret contracts made with parents or guardians, or other persons standing in a peculiar relation to the party, whereby upon a treaty of marriage, they are to receive a compensation or security or benefit for promoting the marriage or giving their consent to it.

English law on the point.

Under the English law these contracts are also regarded as void. They are in effect equivalent to contracts of bargain and sale of children and other relatives, and of the same public mischievous tendency as marriage brokerage contracts (*b*). It is not easy to determine how far such contracts by parents or guardians of the bride and the bridegroom are enforceable where the parties to the suit have been Hindus,—a community in which consent of the marrying parties has rarely, if ever, anything to do with the marriage contract, which is generally arranged by the parents and friends of the parties before they are themselves of an age to give a free and intelligent consent. The validity and legality of contracts of this description have come

(*a*) Story's Equity Jurisprudence, S. 262.

(*b*) Keat *vs.* Allen, 2 Vern. 588.

before the different High Courts in several cases for decision, but not with uniform result. Let us now see how the matter stands on the original authorities on Hindu law. The texts of Manu and other sages cited below lead to the inference that an agreement by the father to give his daughter in marriage to a person in consideration of a sum of money to be paid by the latter to the father is opposed to the spirit of Hindu law. If such a contract is condemned by the Hindu sages and commentators, it follows that it would be contrary to morality and public policy ; for any thing contrary to the ordinances of the sages would furnish the criterion for determining what is contrary to public policy.

Manu on such contracts.

“No father who knows the law,” says Manu, “must take even the smallest gratuity for his daughter, for a man who, through avarice, takes a gratuity, is a seller of his offspring” (*a*). Apastamba (*b*), Vasistha (*c*) and Baudhayana (*d*) agree with Manu. “When the relatives”, says Manu, “do not appropriate for their own use the gratuity given, it is not a sale ; in that case the gift is only a token of respect and of kindness towards the

(*a*) III, 51.

(*b*) II, 13, 11.

(*c*) I, 37-38.

(*d*) I, 21, 23.

maidens" (a). The same sage tells us again when speaking of the duties of husband and wife that "nor, indeed have we heard, in even in former creations of such a thing as the covert sale of a daughter for a fixed price called a nuptial fee". Baudhayana (b) is very emphatic and says, "Those wicked men who, seduced by greed, give away a daughter for a fee, who thus sell themselves and commit a great crime, fall after death into a dreadful place of punishment and destroy their family up to the seventh generation". The same sage tells us that it is declared that a female who has been purchased for money is not a wife. She cannot assist at sacrifices offered to the gods or the manes. Kasyapa has stated that she is a slave. We have seen already, in the foregoing chapter, how Jaimini in his fifteenth aphorism points out that the gift of one hundred chariots, which is constant in all cases, is not paid as bride-price but paid in pursuance of a religious custom. Jaimini negatives the notion that the marriage contract involves any obligation on the part of the father of the bridegroom to pay money to the bride's father as the bride-price. It is not within the scope of the thesis to enter into a detailed examination of the judicial decisions on the point

Jaimini.

(a) III, 54.

(b) I, 21, 3

as the validity, or otherwise, of marriage broccage contracts does not affect, except incidentally, the position of women in Hindu law. All the judicial pronouncements of all the different High Courts on the point prior to 1905 were examined, in an elaborate judgment by Mr. Justice Asutosh Mookerjee in the case of *Bakshi vs. Nadu* (a) and, the following rules were deduced from a review of the authorities :—

Judicial decisions on the point.

(1) An agreement to pay money to the parents or guardian of a bride or bridegroom, in consideration of their consenting to the betrothal, is not necessarily immoral or opposed to public policy. Where the parents of the bride are not seeking her welfare, but give her to a husband otherwise ineligible, in consideration of a benefit secured to themselves, the agreement by which such benefit is secured is opposed to public policy and ought not to be enforced (b).

(2) Where an agreement to pay money to the parents or guardian of a bride or bridegroom, in consideration of their consenting to a betrothal, is under the circumstances of the case neither immoral nor

(a) 1 C. L. J., 261.

(b) *Visvanathan vs. Saminathan*, I. L. R. 13 Mad, 83 ; *Baldeo Sahai vs. Jumna Kunwar*, I. L. R., 23 All, 495 ; *Dholidas vs. Fulchand*, I. L. R., 22 Bom, 658.

opposed to public policy, it will be enforced and damages will also be awarded in breach of it (a).

(3) A suit will lie to recover value of ornaments or presents given to an intended bride or bridegroom in the event of the marriage contract being broken (b).

Conflict of
authorities.

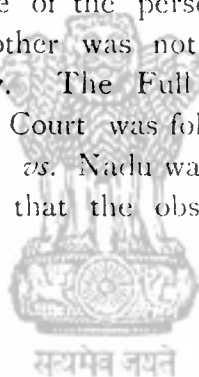
Since this decision of Mr. Justice Mookerjee, there have been two other decisions on the point, one of the Madras and the other of the Calcutta High Court. The Madras High Court expressly dissented from the earlier decision of the same court in the case of *Visvanathan vs. Saminathan* on which reliance was placed in the Calcutta Law Journal case. It was held that such contracts were immoral and opposed to public policy and that questions of this sort should be decided on general principles and not with reference to the special form of a particular contract. The learned judges observed that an enquiry in each case as to whether, having regard to the terms of a particular contract, the contract is or is

(a) *Umedkika vs. Nagen Das*, 7 B. H. C. R., O. C., 122; *Mulji vs. Gomti*, I. L. R., 11 Bom, 412; *Lallun vs. Nobin*, 25 W. R., 32.

(b) *Umed Kika vs. Nagen Das* cited above; *Rambhat vs. Timmayya*, I. L. R., 16 Bom., 673; *Visvanathan vs. Saminathan*, I. L. R., 13 Mad, 83.

not contrary to public policy would be very objectionable (a). In the Calcutta High Court, this point was raised before Sir Richard Harington, in a case (b) where a Hindu mother sought to recover a sum of money which the defendant had agreed to pay to her in consideration of her consenting to give her daughter in marriage to his son and his Lordship held that such a contract being for the purpose of the personal pecuniary gain of the mother was not enforceable in a court of law. The Full Bench of the Madras High Court was followed and the case of *Bakshi vs. Nadu* was distinguished on the ground that the observations were *obiter*.

Sir Richard Harington's view of the question.



(a) (1908) *Kalavagunta vs. Kalavagunta*, I. L. R., 32 Mad, 185.

(b) (1911) *Baldeo Das vs. Mohamaya*, 15 C. W. N., 447.

CHAPTER IV

STATUS OF WIDOWS.

Institution of Sati.

Sir Henry
Maine's opi-
nion.

Professors Pollock and Maitland in their famous book on the History of English law defined the position of widows in that law by one brief phrase : 'Private law with few exceptions put women on a par with men' (*a*). It is not possible to define the legal status of Hindu widows by any such general statement, so unique indeed is their position in Jurisprudence. I shall begin with an institution peculiar to Hindu widows—an institution which made it her duty to devote herself to a frightful death by burning herself with her husband's corpse. In the opinion of Sir Henry Maine (*b*) this institution had its origin in the Brahmanical dislike to the enjoyment of property by women and was intended to combat the ancient rule of Civil law which made her tenant for life in respect of her husband's property.

The practice of the burning of the widow either on the funeral pyre of her husband, or (in case she was away from the place where her husband died) separately as soon

(*a*) Vol. I., page 482.

(*b*) Early Institution, p. 335.

as she received news of the death of her husband obtained in India until quite recent times. This practice, which is popularly known as the custom of "*Sati*," was abolished during the government of Lord William Bentinck by Regulation XVII. of 1829 which declared the observance of it penal within British India. This practice is supposed to have a Vedic origin. But there has been no little controversy on the point, and it has been occasioned by the difference between the readings of a Vedic text. The passage in the Rig Veda, which has given rise to this controversy, has been quoted by Raghunandana in the first chapter of his *Sudhātattva* (a) as follows :

Raghunandana attributes to the custom a Vedic origin.

“ओम् इमा नारी रविधवाः सखोरञ्जनेन सपिषा संविशन्तु ।

अनश्नन्तीन्समीवा मृखा पारोक्षन्तु जलं योनिमग्ने ॥”

Colebrooke accepted this reading as correct and has translated it thus :— “Om : Let these women not to be widowed, good wives adorned with collyrium, holding clarified butter consign themselves to fire. Immortal, not childless, not husbandless, excellent ; let them pass into the fire whose original element is water” (b). Both Raghunandana

So does Colebrooke.

(a) Rig Veda, 7 As, M, 10, Su 18, verse 7 and 8.

(b) Colebrooke's Miscellaneous Essays, Vol I, p. 116.

and Colebrooke support the view that the practice of *Sati* had its origin in Vedic times.

Prof. Wilson
differs from
both.

Professor Wilson's reading of the text of the Rig Veda is as follows :—

इमा नारी रविषाः सुपत्नीरात्रनेन सर्पिषा संविशन्तु ।

अनश्रवीऽनमीवाः सुरवा आरीहन्तु जनयो धीनिमये ।

and he translates it thus :—“May these women, who are not widows, who have good husbands, who are mothers, enter with unguents and clarified butter without tears, without sorrow, *let them first go up into the dwelling.*”

Professor Wilson holds that *Sati* was unknown in Vedic times, and it is only by a misreading of this Vedic text that people have been led to ascribe to it a Vedic origin. Professor Maxmuller agrees with Professor Wilson, and thinks that the Vedic passage has been mangled and mistranslated and misapplied for the purpose of serving the interests of an unscrupulous priesthood (a).

Raghunandana in his *Sudhātattva* cites numerous texts from the *Smritis* (b) and from the *Puranas* and the *Mahabharata* to show that there is an obligation on the part of

(a) Journal of the Royal Asiatic Society, Vol. XVI, Essays on “On the supposed Vaidic authority for the [burning of Hindu widows.”

(b) Maxmuller's Selected Essays (1881) I, p. 335. Vishnu, XX, 39 ; XXV, 14.

widows either to ascend the pile of the husband and to be burnt along with him, or to ascend the pile after him as soon as she learned of the death of her husband. But there are exceptions in favour of women who are either pregnant, or mothers of infant children, who have not attained puberty or who are in their courses at the time. A widow of the Brahman caste may not commit herself to the flames when her husband died abroad.

Exceptions to
the rule of
Sati.

The question is now of academic interest as the custom has been abrogated by legislation. But there can be no doubt that the custom is of very great antiquity. During Mahomedan rule, the permission of the Governor used to be taken before a widow could burn herself as *Sati*. Tavernier, the French traveller, who came to India in the time of Aurangzeb, notices that "there is no woman that can burn herself along with her husband's body till she has the leave of the Governor of the place where she inhabits, who being a Mahomedan, and abhorring that execrable crime of self-murder, is very shy to permit them" (a).

There is another obsolete practice in connection with widows, on which a few words are necessary. In ancient times, a widow

(a) Tavernier's Travels in India, Book III, p 407.

Niyoga.

might by appointment (*niyoga*) raise issues by her husband's brother and the issue was regarded as the issue of the husband. Some hold that the offspring of the wife, by her husband's brother belongs to the husband according to the principle that "those who having no property in a field, but possessing seed corn, sow it in another's soil, do indeed not receive the grain of the crop which may spring up" (*a*). Others maintain that the issue of the seed sown in another's soil by the owner's permission is considered as belonging to both the owner of the seed and the owner of the soil (*b*). Manu notices this practice but condemns it severely (*c*). Other sages also condemn it (*d*). Yajnavalkya alone does not seem to refer to it in terms of disapproval (*e*).

Medhatithi in his commentary on verse 66, chapter IX. (Manu) says that the *Niyoga* is mentioned in Rig Veda. X. 40. 2. But this

(a) See Mitakshara comment on verse 127, Ch. II.

न देवरस्य भार्यात्वमापादयति । अतस्तदुत्पन्नसपत्यं
चेन्न स्तमिन एव भवति । न देवरस्य

(b) Narada quoted in Viramitrodaya, p. 109. (Translation) where the views of different sages are discussed.

(c) Manu, IX, 64—68.

(d) Apas, II, 27, 2-6 ; Baudhayana, II, 3, 34.

(e) Yajnavalkya, I, 68.

practice is forbidden in the *Kali Yuga*. Vrihaspati says, "The *Niyoga* has been declared by Manu, and again prohibited by the same ; 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" (a).

In ancient Hindu law, there was a practice resembling the Levirate of the Jewish law. Manu says :—"If the future husband of a maiden dies after troth verbally plighted, her brother-in-law shall wed her according to the following rule." But this is now regarded as an obsolete rule.

Levirate in
Hindu law.

The Hindu law imposed certain duties on widows who did not ascend the funeral pile after her husband, but chose to survive him. All the sages enjoin a life of severe discipline on the widow. "Until her death," says Manu, "let her be patient of hardships, self-controlled, and chaste, and strive to fulfil that most excellent duty which is prescribed for wives who have one husband only" (b). Then again it is said :—"At her pleasure let her emaciate her body by living on pure flowers, roots and fruit ; but she must never mention the name of another man after her husband has died" (c). "A

Texts of sages
on the duties
of widows.

(a) XXIV, 12.

(b) V, 158.

(c) Manu, V, 157.

virtuous wife," Manu says again, "who after the death of her husband constantly remains chaste, reaches Heaven, though she have no son, just like those chaste men." Vishnu says the same thing (a). The precepts of Hindu law which enjoin a Hindu widow to lead a continent life are not mere moral precepts. Unchastity of the widow affects not only her status but also her proprietary position. But the injunction to emaciate her body and to live on frugal and abstemious diet seems to be in the nature of a religious or moral injunction. In a suit which was brought by a Hindu widow for maintenance against her step-son the defendant pleaded that the amount claimed for maintenance was excessive and should be reduced considerably as by the *Shastras* she was bound to lead a very strict and austere life for which a far smaller allowance was sufficient. The court refused to accept the plea of the defendant and observed as follows : "As to the life of semi-starvation and wretchedness, which it is argued that according to the Hindu *Shastras* a Hindu widow ought to live, that is a matter of religious or ceremonial observance rather than one of law. A Hindu widow is in these days at all events entitled to decent food and clothing if the

They are
mere moral
precepts.

(a) XXXVI, 17.

head of the family is in a position to supply them" (a).

The question as to the power of a widow to adopt a son or give away a son in adoption should next claim our attention. In the first place, with regard to the power of a widow to adopt and its limitations there is divergence of opinion in the different schools of Hindu law. It is true that all the schools agree in basing their conclusions on the same text of Vasistha, *viz.*, "Nor let a woman give or accept a son unless with the assent of her lord," but the different schools interpret the text differently and this accounts for want of unanimity between them on the point. We cannot do better than quote the following observations of the Judicial Committee with respect to the widow's right to adopt in the different schools: "All the schools," say their Lordships, "accept as authoritative the text of Vasistha which says:—'Nor let a woman give or accept a son unless with the assent of her Lord.' But the Mithila school apparently takes this to mean that the assent of the husband must be given at the time of adoption, and therefore, a widow cannot receive a son in adoption, according to the Dattaka form," at

Power of a
widow to
adopt.

Divergence of
opinion in
different
schools,

Mithila.

(a) Horry Mohan Ray vs. Nayantara, 25 W. R. 474 ; See Baisini vs. Rup Singh, I. L. R. 12 All, 558.

Bengal
School.

Mahratta
School.

Benares
School.

Dravida
School.

all. The Bengal School interprets the text as requiring an express permission given by the husband in his lifetime, but capable of taking effect after his death; whilst the Mayukha and Koustoobha, treatises which govern the Mahratta School, explain the text away by saying, that it applies to an adoption made in the husband's lifetime, and is not to be taken to restrict the widow's power to do that which the general law prescribes as beneficial to her husband's soul. Thus on a careful review of all those writers, it appears, that the difference relates rather to what shall be taken to constitute, in cases of necessity, evidence of authority from the husband, than the authority to adopt being independent of the husband" (a). In the Benares School the widow's capacity to take a son in adoption is circumscribed by the same limitation as that of a widow under the Bengal School (b). In the Dravida School the widow has a right to adopt with the assent of the sapindas. The difference in the capacity or otherwise of the widow to adopt in the different schools has been very briefly and lucidly summarized by Mr. Mayne thus :—"The result is that in the

(a) The Collector of Madura vs. Mutta Ramalinga Sathupathy, 12 M. I. A., 435.

(b) Tulsi vs Behari, I. L. R. 12 All., 438.

case of an adoption by a widow, in Mithila, no consent is sufficient ; in Western India no consent is required ; in Bengal and Benares the husband's assent is required ; in Southern India the consent either of the husband or of the sapindas is sufficient" (a). When Mr. Mayne says that in Western India no consent is required he evidently refers to the case of a widow (b) who is heir to her husband's estate and not to that of a widow who has not the estate vested in her by reason of her husband being member of a joint family at the time of her death, in which case the permission either of the father-in-law or of the husband's coparceners is deemed necessary.

These different views are based on different theories as to the capacity of a widow to adopt. The theory of the Mithila School is peculiar to itself. "A woman," says Vachaspati Misra, "has no power to adopt a son, even with the assent of her husband, for she cannot perform the rites of adoption," and further it is said by the same author, "She has a right to do so with her

These different views based on different theories. Basic theory of the Mithila School.

(a) Mayne's Hindu Law and Usage, p. 143 (7th Edition).

(b) (1879) *Ranji vs. Ghaman*, I. L. R. 6 Bom. 498 (F. B).

husband, but not alone, since in such a case, the rule which empowers her to take a son with her husband but not to perform rites of adoption, will be infringed" (a). The theory of a widow's incapacity is based on her incompetency to perform religious ceremonies (*koma*), except jointly with her husband. Mr. Golap Chandra Sarkar points out that the view of the Mithila School as to the incapacity of widow to adopt accords with that of Nanda Pandita in the Dattaka Mimansa. But it is submitted, the basic theories are different (b).

of Bengal
School.

The Bengal School does not base the right of widows to adopt on the doctrine of agency. Women would appear, according to this school, to possess the capacity to adopt in their own right, but the husband's assent is absolutely necessary by reason of the text of Vasistha which requires such assent. The Benares School accepts the

of Benares
School.

(a) Vivada Chintamani, pp. 74 and 75, P. C. Tagore's Translation.

(b) Tagore Lectures on Adoption, p 228. According to Dattaka Mimansa, a woman in adopting a child acts simply as her husband's agent in the legal sense. As an agent's authority is revoked by the death of the principal, so is the husband's authority to his wife to adopt determined on his death. A widow cannot therefore adopt. See also Datt. Mim. I., 16 & 23.

same view of the widow's capacity to adopt (a).

* Let us in the next place examine what is the basic theory for the view of the Bombay school that the widow of a separated coparcener, who inherits her husband's estate, can adopt without the assent of her husband in the absence of an express or implied prohibition by him. We must turn to the Vyavahara Mayukha and other commentaries which obtain in the Bombay School in search for such a theory. After establishing the right of adoption of the Sudras, Nilkantha says "Even a woman has, like the Sudra, authority to adopt, because of the text 'women and Sudras are governed by the same rules'" (b). Then again he proceeds to say :—"The husband's permission is intended only for a woman whose husband is alive for evident worldly reasons. But a widow may adopt even

of the
Mahratta
School.

(a) In the *Viramitrodaya* which is received as an authority in the Benares School, it is stated, however, that a widow can adopt without assent of her husband in a case where her husband's authority is wanting. But the authority of the *Viramitrodaya* is disregarded on the ground that preference is to be given to Dattaka Mimansa and Dattaka Chandrika in matters of adoption. Viram. p. 116.

(b) Vyav. Mayukha, Ch. IV, S. 14-18, See page 57. Mandlik's edition.

without it by the assent of her father, or in his absence by that of her *juati* or clansmen." Then he cites the text of Yajnavalkya about the want of independence in women (a). The author then says, "In his absence, or owing to his infirmity on account of old age or otherwise, her dependence rests even on her sons, etc" ; Katyayana also (who says), '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' :—declares the permission of the husband applicable to particular states. Therefore that permission of the husband indicated for a particular state (by Yajnavalkya) is also laid down here (by Katyana following Yajnavalkya) and is not a new rule, laid down without prior authority. Hence it follows that a widow has authority to adopt even *without the permission of the husband.*" There are two ideas which seem to underlie the whole of this discussion. One of these ideas is that the adoption by the widow is in her own inherent right and not in the right of the husband which she has obtained by delegation from him. According to this view, the permission given by

the husband is not in the nature of a *power* given to the widow to adopt but is necessitated by the theory of dependence of women on the husband, son and clansmen in the different circumstances or situations respectively. The permission of the kindred is not unlike the *auctoritas tutoris* of the guardian under the early Roman law which was necessary to give the act of a woman a full legal character. The second idea which the passage suggests is that adoption is more a secular than a religious act, and therefore although religious acts might become fruitless unless done with the consent of the husband there is no such futility with regard to secular acts like adoption. In this connection a question has been raised, *viz*, when a widow adopts to whom does she adopt, to herself or to her husband? But a little reflection will show that the question in that form cannot arise so long as the identity of the husband and wife not only for religious purposes but also in proprietary rights (to a certain extent) is acknowledged. It follows from this moral or legal identity between husband and wife (a doctrine which finds recognition in some of the aphorisms of Jaimini cited in the previous chapter), that when the husband adopts, he adopts to her and when the wife or

Roman law
compared.

widow adopts she adopts for him and herself also. But then it may be said that the direction that she should obtain the permission of the husband in his life time negatives the theory that the capacity of a widow to adopt is one which she possesses in her right of wife-hood. But that is not so ; for she may have the power to adopt in her own right as wife or widow and at the same time be obliged to perform the paramount duty of implicitly obeying the commands and wishes of her husband. It is one thing to say that the right to adopt is not the widow's, but is exercised by her on behalf of her husband. It is another thing to say that the right to adopt is the widow's, subject of course to her duty to act according to the wishes of her husband. It thus appears that in the Bombay Presidency a widow's right to adopt to her separated husband is inherent and not merely delegated. Mr. Mandlik (a) quoted passages from the Viramitrodaya, the Sanskara Kousthubha of Ananta Deva, and the Nirnaya-sindhu of Kamalakara from which the widow's right to adopt in her own right and not by virtue of delegation from her husband can be legitimately inferred. Ananta Deva in fact goes further than the Mayukha and says, "In no

(a) See Mandlik's Institutes of Yajñavalkya, pages 464-65.

country is a female dependence on kinsmen even allowed by any learned men to restrain her in the observance of *Nitya* and *Kamya Vratas* ; whereas according to proposed interpretation, widows having no kinsmen would have no authority to observe *Vratas* and the like without the previous permission of the king in accordance with the text cited by the Mitakshara, *viz*, on failure of both sides (that is, kinsmen on the father's and husband's sides), the king is the supporter and lord of females." "There is no distinction between *Vratas* and the like and the adoption of a son ; but (in spite of this) much learning has been displayed on the subject by people devoid of any knowledge of the Dharma shastra."

The commentaries that are followed in the Bombay Presidency recognize, as we have shown above, a distinction between the theory which rests the widow's power to adopt on delegation from her deceased husband, and that which bases it on her own inherent right to adopt. As has been pointed out by Sir Lawrence Jenkins, Chief Justice, in Bombay (a) this distinction has more than an academic value. In that case the Chief Justice, while saying that the inclination of his opi-

Sir Lawrence
Jenkins' view.

(a) (1899) *Laksmi vs. Sarasvati*, I. L. R. 23 Bom. 789.

nion was that in the Bombay Presidency the widow's right is inherent and is not merely delegated, reserved to himself the right to reconsider the matter hereafter. But it is submitted, with great respect, that the authorities to which reference has been made, fully justify his Lordship's opinion.*

Reasons for
the Bombay
view.

It is now necessary to examine the reasons for the view which obtains in Bombay with regard to the powers of the widow of a deceased coparcener, who was member of a joint undivided family, to adopt. The leading case on the subject is *Vithoba vs Bapu* (a) where Mr. Justice Candy traced the development in the Bombay Presidency of the law regarding the right of a widow not having permission of her husband to adopt a son. The learned judges in Bombay laid down that the decision of the Judicial Committee in the *Ramnaad* case (b) which applied to the *Dravida* country would govern cases of adoption by widow of a deceased united coparcener. They quoted the following observations from the judgment in the *Ramnad* case:—"Where the husband's family is in the normal condition of a Hindu family *i. e.* undivided that question is of compara-

(a) (1890). I. L. R. 15 Bom, 110.

(b) *Collector of Madura vs. Mootoo Ramalinga Sathupathy*, 12 M.I.A., 397.

tively easy solution. In such a case the widow, under the law of all the schools, which admit this disputed power of adoption, takes no interest in her husband's share of the joint estate, except a right to maintenance. And though the father of the husband, if alive, might as the head of the family and the natural guardian of the widow, be competent by his sole assent to authorize an adoption by her, yet if there be no father, the consent of all the brothers, who, in default of adoption, would take the husband's share would probably be required, since it would be unjust to allow the widow to defeat their interest by introducing a new coparcener against their will." The passage from the Vyavahara Mayukha to which we have referred to above shows that the widow can adopt either with the permission of the father or her husband's kinsman. The author of the Viramitrodaya insists upon the necessity, if the husband were dead, of the assent of those upon whom the widow is dependent and they, in the case of an undivided family, would clearly be the coparceners from whom she obtains her maintenance. The necessity for the sanction of the husband's kindred, as existing in the Mahratta School, is mentioned by Sir Thomas Strange, a) and

Vyavahara
Mayukha.

(a) Strange's Hindu Law, Vol. I., 77, 80.

by Mr. Colebrooke (*a*). It is now established in the Bombay Presidency that the widow of a deceased coparcener, who was member of an united family at the time of his death can adopt either with the assent of her husband or the consent of her father-in-law, or her husband's undivided coparceners (*b*).

Madras or Dravida School.

In Madras it has been established ever since the Ramnaad case was decided, that a widow can adopt with the assent of the Sapindas, when the consent of the husband is wanting. In the case where the husband's family is in the normal condition of a Hindu family the consent of the father of the husband, if alive, or if there be no father at all the brothers who in default of adoption, would take her husband's share, would probably be required. Where the widow has taken by inheritance the separate estate of her husband there is greater difficulty in laying down the rule. The assent of the kinsmen seems to be required by reason of the presumed incapacity of women for independence. Where the father-in-law is alive, the consent of the father-in-law to whom the law points as the natural guardian protector of the widow would be sufficient.

Ramnaad case.

(*a*) Strange's Hindu Law, Vol. II, 92.

(*b*) Ramji vs. Ghaman, I. L. R. 6 Bom, 498 (F.B.)
Dinkar vs. Ganesh. I. L. R. 6. Bomy, 505. F. B.

"It is not easy," said their Lordships of the Judicial Committee, "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 bonafide performance of a religious duty, and neither capriciously, nor from a corrupt motive" (*a*). The next case from Madras which was carried in appeal to the Judicial Committee was the Berhampore case (*b*). In that case the adoption by the widow which was made with the consent of the divided sapinda was challenged on the ground that the consent of the undivided coparcener had not been obtained, the Judicial Committee on appeal, observed that there were very strong reasons for the conclusion that a widow cannot travel out of the undivided family and obtain the authorization required from a separated and remote kinsman of her husband. Those reasons are stated by their Lordships to be these :—"An undivided Hindu family is ordinarily joint, not only in estate but in food and worship ; therefore, not only all the concerns

Berhampore
case.

(*a*) Rāmnaad case, 12 M. I. A., 397.

(*b*) Raghunatha vs. Brojo Kishore, 3 I. A., 154.

of the joint property, but whatever relates to their commensality and their religious duties and observances, must be regulated by its members, or by the manager to whom they have expressly or by implication, delegated the task of regulation. The Hindu wife upon her marriage passes into, and becomes a member of, that family. It is upon that family that, as a widow, she has claim for maintenance. It is in that family that, in strict contemplation of law, she ought to reside. It is in the members of that family that she must presumably find such counsellors or protectors as the law makes requisite for her".

Motives of the widow for adoption—its effect on the validity thereof.

The question whether the motives of the widow for the adoption can affect the validity of the adoption was not settled until quite recently. The passage in the judgment of the Privy Council in the Ramnad case to the effect 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 bonafide performance of a religious duty and neither capriciously nor from a corrupt motive", had for some time been misunderstood in India and this notwithstanding the fact that in the Guntur case (a) their

Guntur case.

(a) Vellanki vs Venkata Rama, 4 I. A, 113 ; S. C., 1 Mad., 174.

Lordships said that it would be dangerous to introduce into the consideration of these cases of adoption, nice questions as to the particular motives operating on the mind of the widow." Chief Justice Farran of the Bombay High Court thought that the question as to the relevancy of the adopting widow's motives was left open in the Guntur case (*a*).

In Bombay, where the widow is left free and unfettered to exercise her own choice in the matter of adoption, a series of authorities laid down that evidence would be admissible to show whether the widow acted from a corrupt or sinful motive in making the adoption (*b*). But a recent Full Bench of the Bombay High Court have removed all doubts which these decisions might have created by laying down that in the Bombay Presidency, a widow having the power to adopt, and a religious benefit being caused to her deceased husband by the adoption, any discussion of her motives in making the adoption is irrelevant (*c*).

Evidence as to motive of widow in making the adoption is not relevant.

(*a*) Ram chandra vs. Mulji, I. L. R. 22 Bom., 558 (564).

(*b*) Vithoba vs Bapu, I. L. R. 15 Bom, 110 (134) ; Patel vs. Monilal, I. L. R. 15 Bom, 565 ; Mahableshvar vs. Dargabai, 22 Bom, 199 ; Bhimawa vs. Singawa, I. L. R. 22 Bom, 106.

(*c*) (1896) Ram chandra vs Mulji, I. L. R. 22 Bom., 559.

And it seems, in the latest decision of the Privy Council (*a*) in an appeal from Madras, their Lordships appear to suggest that unless there is some express prohibition by the husband, the wife's power, at least with the concurrence of sapindas in cases where that is required, is co-extensive with that of the husband quite irrespective of the motives of the widow in making the adoption. The adoption in this case before the Privy Council was of an only son and therefore sinful and irreligious and yet their Lordships held that this circumstance did not affect the validity of the adoption. And this decision of the Judicial Committee, which does not consider the question of motive as relevant, is, it is humbly submitted, in accord with the spirit of Hindu law as contained in the texts of the sages and the writings of the commentators as there is nothing in them to suggest that an enquiry into motive is essential.

Assent of
sapindas
necessary, in
what cases.

But if the consent of the sapinda is obtained by a false representation that the widow has authority from the husband, the assent is not sufficient to support an adoption (*b*) ; so will it be if the consent of the sapinda is purchased for a consideration.

(*a*) Sribalasv, I. L. R. 22 Mad 398.

(*b*) Karunabddhi *vs.* Gopala, L. R, 7 I. A, 173

The reason underlying the former of these propositions is that the consent is given by the kinsmen, not in the exercise of an independent judgment on the expediency of the proposed adoption, but rather as the ratification of the non-existent authority of the deceased husband. In Madras, where the assent of the sapindas is necessary to support the adoption by the widow of a separated coparcener, a question arises whether the assent of all the sapindas are necessary. In the Ramnad case the consent of the majority of sapindas was considered sufficient. But where one sapinda out of several arbitrarily refused to assent to the adoption, the opinion of such a sapinda was altogether disregarded as prompted by capricious considerations (*a*). It is not necessary that the consent of all presumptive reversionary heirs should be given, it is sufficient if the assent of those presumptive heirs of the husband, who are the nearest of kin to him be obtained provided the same be given bonafide and not from any corrupt motive and recently the Judicial Committee held in appeal from the last case that where a widow, without obtaining the consent of the

Assent of
nearest pre-
sumptive heirs
of husband
necessary.

a Venkata vs. Annapurnamma I. L. R. 23 Mad. 486 (490); Subrahmaniam vs. Venkamma I. L. R. 26 Mad. 627 (635).

nearest kinsman of her deceased husband, made an adoption with the consent of a remote reversioner to whom she had falsely represented that she had obtained her husband's authority, the adoption made by her was invalid (*a*).

Power to
adopt may be
given either
verbally or in
writing or by
will.

A power to adopt may under the Hindu law be given either orally or by writing (*b*). It may be given also by will (*c*); where the authority is given in writing, it must now be engrossed on a stamp paper of rupees ten and be registered. The authority must be given to the widow alone, it must not be given to the widow and other persons jointly; where this was done, the power or authority was held to be invalid (*d*). But the husband may direct that the widow may consult another in the matter of selection of the boy to be adopted. The authority is void if it directs adoption by the widow under circumstances in which the husband if alive, would have been incompetent to adopt (*e*). But it has been held in several cases that a man who is himself incompetent to adopt a son by

(*a*) Venkama vs. Subramaniam, I. L. R. 30 Mad, 50.

(*b*) Ramireddi vs. Rangamma, 11 M. L. J., 20;
Mutsaddi vs. Kundan, 33 I. A., 55; S. C. 28 All., 377.

(*c*) Saroda vs. Tincowry, I Hyde, 223.

(*d*) Amrito vs. Surno, I. L. R. 27 Cal., 996.

(*e*) Gopec vs. Chandrabole, 19 W. R. (P. C.) 12.

reason of the existence of his son, can give authority to his widow to adopt a son in the event of the death of that son, or to adopt several sons in succession, provided one was not to be adopted till the death of the other (*a*).

The authority given by the husband must be strictly followed. The power will be exercised subject to the restrictions and limitations that the husband may have laid down. If the widow is authorized to adopt *one* son, she cannot adopt a second on the death of the first adopted son. But where it appears that the authority given by the husband evinces a general intention to be represented by a son, there the authority should be liberally construed and a second adoption made by the widow on the death of the first adopted son should be regarded as valid (*b*). To take a contrary view would be to lay down that by the first adoption all spiritual benefit to be derived from the act was

Authority must be strictly followed.

(*a*) *Bhoobun vs Ram Kishore*, 10 M. L. A., 279 ; *Jumona vs. Bama*, 3 I. A, 72 ; S. C. I. L. R. 1 Cal., 289 ; *Vellanki vs. Venkata*, I. L. R. 1 Mad, 174 (P.C.)

(*b*) *Kannepali vs. Pucha*, 33 I. A, 145 ; *Laksmi vs. Raja*, I, L. R. 22 Bom, 996 ; *Surjyanarayana vs. Venkata*, I. L. R, 26 Mad, 681. *Surendra vs. Sailaja* I. L. R. 18 Cal, 385 ; *Ramsundar vs. Surbanee*, 22 W. R, 121. See, however, *Gournath vs. Annapoorna* to the contrary, S. D. A. 1851-52, p. 332.

secured to the deceased and that the adoption of the second boy was therefore supererogatory—a view for which there was some authority in one of the early Bengal cases, but which has recently been disapproved by the Judicial Committee in the case last cited.

Limits of the
widow's power
to adopt.

I will now proceed to deal with the limits within which a power of adoption may be exercised by a Hindu widow. The answer to the question as to what are the limits to be assigned to a widow's power of adoption is deducible from a series of decisions of the Judicial Committee of the Privy Council. The first case in which the question arose was that of *Bhoobunmoyee vs. Ramkishore*. One Gour kishore died leaving a son Bhabani and a widow Chandrabalee, to whom he gave express authority to adopt in the event of his son's death. Bhabani married, attained his majority and died leaving a widow, but no issue. Chandrabalee then adopted a son Ramkishore who sued Bhabani's widow Bhoobunmoyee to recover the estate. The Judicial Committee held that her estate could not be divested by the subsequent adoption. Although the deed of permission to adopt did not assign any limits yet their Lordships held that some limits must be assigned, The principal reason on which the judgment of the Judicial

*Bhoobun-
moyee vs.
Ramkishore*,
10 M. I. A.
279.

Committee is based appear to be that, when the son died leaving a widow, the power of adoption vested in the mother came to an end. It is true their Lordships gave another additional reason, viz, that the adopted son having lived to an age which enabled him to perform all the religious services which a son could perform for his father, the spiritual benefit was exhausted. In the case of *Puddo Kumare Debi vs. Court of Wards* which arose out of the same adoption their Lordships made it clear that in the previous case they intended to lay down that upon the vesting of an estate in the widow of Bhabani the power of adoption was at an end and incapable of execution. They further added that the vesting of the estate in the widow of Bhabani was a proper limit to the exercise of the power. In the case of *Thayammal vs. Venkatrama (a)*, their Lordships expressed their entire concurrence in the view of the law laid down in *Puddo Kumari vs. Court of Wards*. This view was reaffirmed by the Judicial Committee again in the case of *Tara Charan Chatterjee vs. Suresh Chander Mookerji (b)*. The effect of the decision of the Judicial Committee in

*P u d d o
Kumare vs.
C o u r t o f
Wards, I.L.R.
8 Cal. 302
(P. C)*

*Thayammal
vs.
Venkatrama.*

*Tara Charan
vs. Suresh
Chander.*

(a) (1887) I. L. R. 10. Mad, 205

(b) (1889) I. L. R. 17 Cal, 122.

Bhubun Moyee's case was considered by a recent Full Bench of Bombay High Court and it was held that the language of the judgment in Bhubun Moyee's case is so explicit that it is impossible to construe it otherwise than as meaning that there is a limit to the period within which a widow can exercise her power of adoption and that once the limit is reached the power is at an end (*a*).

In 1906 in a Bengal case (*b*) a Hindu lawyer of note raised the contention that their Lordships of the Judicial Committee in Bhubun Moyee's case intended merely to decide that the power of adoption vested in the mother did not come to an end but remained suspended during the life time of the widow left by the son, so that after the widow's death when the estate of the father would revert to the mother as heiress of her son, the power would revive. It was contended that the death of the widow of the original owner was the limit of time with which the power could be exercised subject to two

(*a*) (1902) *Ramkrishna vs. Shamrao*, I. L. R. 26 Bom., 526 (F. B.) ; *Krishnarav vs. Shankarrav*, I. L. R. 17 Bom., 164 ; also per Ranade, J, in *Venkappa vs. Jivaji*, I. L. R. 25 Bom., 306 (310).

(*b*) *Manikyamala vs. Nanda Kumar*, I. L. R. 33 Cal., 1306.

conditions, viz, failure of male issue in the male line and vesting of the estate in the widow, no matter whether the estate vests in the adopting widow just after the death of the son or after the death of the widow of the son. This case was heard before Sir Francis Maclean, former Chief Justice, Mr. Justice Mookerjee and Mr. Justice Holmwood. In giving judgment, Mr. Justice Mookerjee after an elaborate review of the authorities (a) remarked as follows : "In view of these decisions of the Judicial Committee it is impossible for us to uphold the contention of the appellants that the power of adoption vested in the mother did not come to an end but remained suspended during the life time of the widow left by the son" (b). The question raised in this case

a Vellanki vs. Venkata, Mad. 1 174 ; Jamna Bai vs. Ray chand, 7 Bom, 225 ; Ravji vs. Lakshmi Bai, 11 Bom, 383 ; Gavdappa vs. Girimallapa, 19 Bom, 331 ; Payappa vs Appana, 23 Bom, 327 331).

(b) Mr. Golap Chandra Sarkar has given certain reasons for the view contended for but not accepted in this case, see his Hindu Law, 136-139, (Ed. 1910). Mr. Sarkar thinks that when the foundation of the decision or obiter dicta in Bhubanmayee's case, viz, exhaustion of religious services by a son attaining a particular age fails then the whole superstructure of the obiter dicta must fail, Mr. Justice Mookerjee shows that is not the only reason, far less the principal reason, for the decision.

is of some nicety and is not altogether free from difficulty.

Original
authorities on
Hindu law
silent on the
point.

In conclusion we should state that the original authorities on Hindu law do not either directly or indirectly touch the point as to the limit to the exercise of the power by the widow and the law on this point has to be gathered from the judicial decisions to which reference has been made above.

It is hardly necessary to add that where after the death of a son who was succeeded by the widow as his mother she made an adoption, the adoption would be valid, as it divested no estate but her own.

Minority of
widow no bar
to her power
to adopt.

We shall now deal with a few less debatable points. The minority of a widow is no bar to her exercising the power of adoption provided she is duly authorized by the husband to adopt (*a*). We have noticed already in a previous chapter that the Indian Majority Act (IX of 1875) does not purport to affect matters relating to adoption. Mr. Mayne notices that in the Bombay Presidency a widow under the age of majority cannot adopt (*a*). The reason for the difference between the Bengal and the Bombay view is, as pointed out by Mr. Mayne, that, in Bombay, the adoption is the act of

Not so in
Bombay.

Reason for
this difference
between Bom-
bay and Ben-
gal.

(*a*) *Mondakini vs Adinath*, I. L. R. 18 Cal., 69.

(*b*) *Mayne's Hindu Law and Usage*, 148 (6th. Ed.)

the widow for which no authority or consent is required, whereas in Bengal the act is the husband's and she is merely the instrument. It is the authority which is the essence of adoption and the incapacity of the person entrusted to carry out the authority is of no consequence.

Unchastity of the widow is a bar to her exercising the right of adoption even with the express authority of the husband, and there is good reason for the rule. Unchastity renders a widow incapable of performing the necessary religious ceremonies. It is true that this incapacity may be removed by performance of penances, proper for expiation. But so long as the widow is pregnant she is incompetent to perform even penances. Therefore, an unchaste widow cannot, under any circumstance, adopt so long as pregnancy continues (*b*).

Unchastity of the widow is a bar to her exercising the right to adopt.

Amongst the twice-born classes where the performance of religious ceremonies by the widow would be necessary to support an adoption, the pollution of the widow at the time of the adoption would render the adoption invalid. In Madras, where a widow of the Vaisya caste adopted a son while her husband's corpse was still in the house, it

Pollution of widow of twice-born classes renders adoption invalid.

(a) *Shyamalal vs. Saudamini*, 5 B. L. R., 362; see also *Kerry vs Moniram*, 13 B. L. R., 14.

was held that the adoption was bad as she could not perform the religious ceremonies, and the *datta homam* in particular during the period of pollution (*a*). In the case of Sudras, pollution is no bar to a widow's adopting as no religious ceremonies are necessary in an adoption by them.

Effect of adoption by a widow on her status and proprietary position.

We shall now deal with another question of great importance, viz.—what is effect of the adoption by a widow on her status and proprietary position as well on the status of her co-widows. Let us first consider the case of a widow who is herself heir to the husband. The result of an adoption in such a case is that her limited estate as widow at once ceases. The adopted son at once becomes full heir to the property and the widow's rights are reduced to a mere claim for maintenance (*b*). This follows indeed from the legal fiction that the adopted son is the posthumous son of the husband. Where the adopted son is a minor, she will continue to hold possession of the property as trustee for him.

(*a*) *Ranganayakamma vs. Alwar*, I.L. R. 13 Mad, 214 (222). Recently, in Bombay, it has been held that the performance of *dattahomam* is not necessary for adoption by twice-born classes.

(*b*) *Dhurm das Pandey vs. Mt. Shama Soondri*, 3 M. I. A., 229 ;

Where there are several widows, holding jointly, it has been held that a son adopted by an elder widow, without the consent of the younger, is entitled to take the whole estate of his adoptive father and to defeat the interest of the younger widow (*a*). This is the law in the Bombay Presidency where, in such a case, no permission or authority of the husband is necessary in order to validate an adoption by the widow. In Bengal, an adoption by a widow with the express permission of her husband has the same effect, viz : it divests both her own estate and that of the co-widows (*b*). In Madras, where the adoption by the widow can be made with the assent of sapindas, the same view has prevailed (*c*). The adoption by a widow would *a fortiori* divest all estates which follow that of a widow, such as the right of a daughter. But where the estate vests in the adopting widow by inheritance from her son, and she then adopts, the adoption will be valid and the widow will be divested of the estate according to the

Effect of adoption by a widow on status of co-widows.

Its effect where the estate vests in the adopting widow by inheritance.

(*a*) *Rukhmabai vs. Radhabai*, 5 Bom. A. C., 181.

(*b*) *Mondakini vs Adinath*, I. L. R. 18 Cal., 43 ; see also the decision of *Ameer Ali*, J, in, C. W. N. 121.

(*c*) *Sreeramulu vs. Kristamma*, I. L. R. 26 Mad., 143 (1902).

Mitakshara School (a) of Hindu law. In Bengal, there seems to be some conflict although the weight of authority is in favour of the view stated above. In the case of *Rai Jotindranath Chaudhuri vs. Amrita Lall Bagchi*, (b) it has accordingly been held that a Hindu widow adopting a son under the authority of her deceased husband upon the death of a son begotten or adopted whose estate she inherited as mother, divests herself of that estate by the act of adoption in favour of the son last adopted by her and such son takes the estate immediately on such adoption. Both Mr. Mayne and Mr. Golap Chandra Sarkar take an opposite view, although the latter considers the view now taken as equitable. But where one of the two co-widows adopts to her husband after the estate has vested in the other co-widow as heir to her own son, it has been held that such adoption does not divest the co-widow of the property which he has obtained by inheritance. The adoption by one of the widows has not in such a case the

(a) *Jamna Bai vs. Raychand*, I. L. R. 7 Bom., 225 ; *Ravji vs. Laksmibai*, I. L. R. 11 Bom., 381 ; *Lakhmi vs. Gatto*, I. L. R. 8 All, 319 ; *Manik Chand vs. Jagat Settani*, I L R. 17 Cal., 518.

(b) 5 C. W. N. 20.

effect of divesting the interest of the other widow in the estate—interest which has vested in her as heir to her son (*a*).

But, in Bombay, a question was raised viz, whether the consent of the co-widow in whom the whole estate had vested by inheritance from her son, would divest the co-widow of her interest in the estate (*b*). Sir Lawrence Jenkins, Chief Justice, was of opinion that the consent would be of no avail for the power (of the adopting widow) to adopt was at an end, when the estate vested in her co-widow.

Conflict of
authorities in
Bombay on
the point.

But there seems to be a conflict of authorities on the point in the Bombay High Court. In the case of *Dharnidhar vs. Chinto* (*c*) where Venubai, the widow of a predeceased son of Dharnidhar adopted a son to her husband after the estate had vested in Laksmibai, the widow of Dharnidhar after his death with the assent of Laksmibai, it was held that the assent of Laksmibai could not validate for the purposes of inheritance an adoption which, as the right to property, was *ab initio* invalid. But an opposite view was taken by Farran, C. J. in the case of

(*a*) See *Faizuddin vs. Tincowri*, I. L. R. 22 Cal., 565.

(*b*) *Anandi Bai vs Kashi Bai*, I. L. R., 28 Bom., 461 (465).

(*c*) I. L. R. 20 Bom. 250.

Babu Anaji *vs.* Ratnoji (*a*). This conflict led to a reference to the Full Bench in the case of Vasudeo *vs.* Ramchandra (*b*) but the point remained unsettled and the effect of the assent was undecided as it became unnecessary to pronounce any decision on the effect of the assent as the assent was found to be invalid. In a later case Mr. Justice Ranade thought that an adoption made by a widow, with the assent of the person in whom the estate is vested, will divest him of that estate (*c*).

Subject to the limitations stated already a son adopted by the widow will divest not only the widow, or widows if there are more than one, though the adoption was made by only one of them, but also either in whole or in part an undivided coparcener of the father on whom the estate had devolved by survivorship (*d*).

Another question of importance, which is not altogether free from difficulty, is that which relates to the validity of an agree-

(*a*) I. L. R. 21 Bom., 319.

(*b*) I. L. R. 22 Bom, 551.

(*c*) Payapa *vs.* Appanna, I. L. R., 23 Bom, 327.

(*d*) Surendra *vs.* Sailaja, I. L. R. 18 Cal., 385.
Vithoba *vs.* Bapu, I. L. R. 15 Bom., 110. Sri Raghunatha *vs.* Sri Brojo, I. R., 3 I. A, 154 ; Sri Virada *vs.* Sri Brojo, I. L. R. 1 Mad., 69.

ment made by the widow, with the natural father of the adopted son before the adoption, whereby she makes a reservation in regard to her life-interest. However imperative might be the terms of the authority by the husband to the widow to adopt, it is not obligatory on her to do so. One cannot compel a Hindu widow to adopt. Her interest in most cases would be not to adopt as thereby she would divest herself of the estate of her husband. At the same time, it may be her moral duty to carry out the wishes of her husband expressed in the authority to adopt. She may, therefore, contrive means by which she may be enabled to carry out the wishes of her husband, without depriving herself of all interest in her husband's property. On the other hand, adoptions under such conditions might also be beneficial to the son to be adopted. It seems therefore that an agreement which is fair and equitable in its terms and which takes into consideration the interest both of the adopted son and the adoptive widow might be enforced. But where the agreement is essentially repugnant to the status created by adoption, it ought not to bind the adopted son. For instance, if the agreement deprived the adopted son of all right to the property of the husband of the widow to

Ante-adoption agreement—how far binding on adopted son.

whom adoption is made, and so left him without any means of performing the necessary religious offices towards the manes of his adoptive father and his ancestors, it may well be that the Courts would regard the condition as essentially repugnant to Hindu law and would refuse to uphold it.

No text of
Hindu law on
the point.

There is, however, no text of Hindu law which either recognizes or prohibits such agreements being entered into and we must look for the law on the point to the judicial decisions—decisions which have not been quite uniform.

Judicial deci-
sions thereon.

In the case of *Chitko vs. Janaki (a)* which is one of the earliest cases on the point, it was held by the Bombay High Court that an agreement on the part of the father, that his son's interest shall be postponed till the death of the widow, was valid and binding. In the case of *Ramasami Aiyan vs. Venkataramaiyan (b)* referring to the above decision of the Bombay High Court, the Privy Council observed :— "In this case their Lordships think it enough to decide that the agreement of the natural father which has been set out was not void, but was, at the least, capable of ratification when the son became of age." In 1887 the

(a) 11 Bom. H. C. R., 199.

(b) I. L. R. 2 Madras., 91.

Bombay High Court again affirmed the validity of such agreement and held that it could be entered into by the adoptive father so as to bind him and the adoptive widow (*a*). In 1888 in a case before the Judicial Committee it appeared that a second deed of adoption was executed subsequent to the adoption by which the adopting widow purported to revoke the first deed of adoption on the allegation that it ought to have contained a provision postponing the interest of the adopted son until her death and their Lordships held that such an agreement did not affect the rights of the adopted son. Their Lordships said that even if it amounted to a condition, the analogy, such as it was, presented by the doctrines of the English courts of equity, relating to the execution of the powers of appointment, would rather suggest that the adoption would have been valid and the condition void (*b*). It is to be noticed that in this case the agreement was subsequent to the adoption and therefore the observations were *obiter* so far as the point under discussion is concerned. In 1892 the Madras High Court apparently relying on this dictum of their Lordships held that an agreement made before adoption

Conflict of
authorities in
Madras on the
question.

(*a*) Ravji vs Laksmibai. I. L. R. 11 Bom., 381.

(*b*) Bhaiya Rabidat vs. Indar. I. L. R. 16 Cal., 556.

which had the effect of postponing the rights of the adopted son to the death of the widow was not valid (a), although the said decision was in conflict with the *ratio decidendi* in two earlier cases Lakshmi *vs.* Subramanya (b) and Narayanasami *vs.* Ramasami (c). These conflicting views prevailed in Madras till 1904 when a Full Bench of that Court (d) decided in favour of the agreement and overruled the case in 16 Madras series cited above. It is hardly necessary to add that the decision of the Madras Full Bench is just and equitable and accords with the spirit of Hindu law.

Ante-adoption agreement upheld by authority of the caste.

Such dispositions are also commonly made and are upheld by the authority of the caste and the consciousness of the people (e). In Allahabad, a condition in the deed of adoption to the effect that the widow was to be the owner and manager of the estate during her life has been held to bind the adopted son (f).

In cases of adoption after the death of the adoptive father by his widow under his

(a) Jagannadha *vs* Papamma, I. L. R. 16 Mad, 400.

(b) I. L. R. 12 Mad., 490.

(c) I. L. R. 14 Mad., 172.

(d) Visalakshi *vs* Sivaramien, I. L. R. 27 Mad., 577.

(e) See the decision of the Full Bench in 27 Mad. series cited above.

(f) Kali *vs* Bijai, I. L. R. 13 All., 391.

authority every lawful disposition of property made by him even by a will would be binding on the adopted son for the obvious reason that those dispositions become operative from the moment of the death of the testator, while the adoption must necessarily take place at some moment subsequent to death, and rights accruing by virtue of such adoption are only in that part of the estate which remains undisposed of at the moment of adoption. For the like reasons alienations by a widow of her life interest made before the adoption will also bind the adopted son (a); on like principles in Bengal, where the father is the absolute owner of property, ancestral or self-acquired, it has been held that where the power of adoption to a Hindu wife directed her to remain in possession of all properties of her husband during her life, the widow took a life interest in those properties with remainder to the adopted son (b). The preceding discussion suggests or rather assumes that where an adoption is made by the widow after her husband's death the rights of the adopted son accrue after such adoption. The decision of the Judicial Committee in the case of *Bamandas Mookerjee vs. Mussamat*

Alienations
by widow be-
fore adoption
of her life-in-
terest binding
on adopted
son.

(a) *Sreeramula vs. Kristamma*. I. L. R. 26 Mad 143.
(b) *Bipin vs Brojo*, I. L. R. 8 Cal., 357.

Tarinee (a) supports this view. It affirms that the rights arise from the date of the adoption and not before. Although by a legal fiction the adopted son is considered to be the posthumous son of the adoptive father still the date of the birth is not carried back by another fiction to the death of the adoptive father. The rights of an adopted son spring up on the date of adoption. The adopted son therefore can not question the mesne acts of the widow between the death of the last full owner and the adoption. But, of course, in the case of widows, the acts must be such as a limited owner could legally do so as to bind the next takers after the widow. For instance, the widow can, in the absence of legal necessity, make an alienation which will remain good during her life and not beyond. In a case where such an alienation was made before adoption the adopted son was held not entitled to recover possession during her life (b).

Effect of
adoption on
Stridhan.

Before we part with the subject we should state that adoption by a widow does not divest her of her *Stridhan*.

We have already had occasion to refer to the authority of a widow to give a son in

(a) 7 M. I. A., 188.

(b) Sree Ramulu vs. Kristamma, I. L. R. 26 Mad.,

adoption (*a*). As has been pointed out by the Judicial Committee in a recent case this authority differs in the different schools of Hindu law (*b*). We have also stated before what are the views of the different schools on the question. We indicated before that in the Bombay school there is a difference of judicial opinion as to the nature of the basis of the right of the widow to give a child in adoption. We shall simply here confine ourselves to an examination of the original authorities on the question. Manu declares :—"He is called a Dattrima son whom his father or mother affectionately gives as a son, being alike, and in a time of distress confirming the gift with water" (*c*). Yajnavalkya (*d*) and Vishnu (*e*) Baudhayana (*f*) and Vasistha (*g*) each ordains that each parent has independently of the other the power of giving a son in adoption and that when the husband is alive the wife must obtain his assent. But these texts do not stand alone and there are two texts of Vasistha and Baudhayana which

Original
authorities on
widow's power
to give in
adoption.

(*a*) See Page 147. ante.

(*b*) Sri Balusu vs Sri Balusu, I. L. R. 22 Bom, 408

(*c*) IX, 168. (*d*) Yajnavalkya, II, 131.

(*e*) Vishnu, XV, 18-19.

(*f*) Baudhayana, III, 2. 3, 2c.

(*g*) XVII, 29-29.

seem to impose further restrictions on the power of the widowed mother to give in adoption. Both Vasistha (*a*) and Bandhayana (*b*) after stating, that the son produced from the virile seed and uterine blood is an effect where of the father and mother are the cause, and that the mother and the father are consequently competent to give, sell or abandon him, adds :—"But a woman shall neither give nor accept a son, except with the assent of her husband." Referring to the above text of Manu, Nilkantha observes that "from the word *va* (or) it means that if the mother be absent, the father alone may give him away, and if the father be dead, the mother may do the same, but if both be alive, then even both : so [says] Madana" (*c*). The Mitakshara (*d*) says that the mother may give in adoption without his father's assent after his decease. The Viramitrodaya contains the following remark : The mother and the father may give either separately or jointly.

Nanda Pandita considers, as we have seen already, that widows are incompetent to adopt. The same argument ought to apply

(*a*) Vas, XV 1-5 (*b*) Parisistha, VII, 5, 2-6.

(*c*) Vyavahara Mayukha, ch. IV. V. 50, (Mandlik's Edition.)

(*d*) Mitakshara, I, 11, 9.

(*e*) Mr. G. C. Sarkar's translation. Page 115.

to a widow's power to give as both capacities are founded on the same text of Vasistha ; but he maintains that a widowed mother has a right to give as the assent of the husband must be presumed and he relies on a text of the *Veda* as justifying the legality of the gift (a).

On the texts of the sages and the writings of the commentators it is clear that the widowed mother has a right to give in adoption. According to the texts this right results from the maternal relation and is not derived by delegation from her husband. It is however necessary to notice another theory which the text of Vasistha might seem to suggest viz., that the capacity of a man to give his son in adoption is the survival of the *patria potestas* of ancient law, according to which a man could exercise absolute dominion over the persons placed under his power viz, his wife and children whom he could sell or give away : and the right of the widow to give a boy in adoption would, in this view, be regarded as a right of disposition, a portion of the *patria potestas*, which comes to the widow by reason of her connection with the deceased husband's estate (b). But as against this

Capacity to give in adoption, how far a survival of patria potestas

(a) Dattaka Mimansa, 4. 12.

(b) See Justice Ranade's view in Panchappa vs Sanganbaswa, I. L. R. 24 Bom. 94.

Vyavahara
Mayukha
denies owner-
ship over wife
and children.

view it must be said that Vasistha wrote at a time when the earlier sages like Manu had already shown the sinfulness of selling a child and when there was no trace of the *patria potestas*. There is a very instructive discussion in the Vyavahara Mayukha which leads to the conclusion that there is no ownership over a wife as there is in a cow, and therefore there cannot be any property in the children begotten on her (a). The Vyavahara Mayukha denies that the wife and children can ever be the subject of ownership. According to this then Mr. Justice Ranade's view that the right of adoption is a right of disposition and a portion of the *patria potestas* does not seem to be justified. Besides it is extremely doubtful if at any time since the beginning of Indian history the power of the *pater familias* over the children ever extended to giving them away or selling them. Vachaspati Misra and Jimutvahana support Nilkantha in his view with regard to the absence of ownership of a man over his wife and children. The Mitakshara and the Viramitrodaya, while maintaining that the wife and children can be the subject of ownership, hold that the children could never be given

(a) Chap IV. Sec 11 see Page 35 (Mandlik's translation.)

away or sold by reason of express prohibitions in the *Smritis* and the *Srutis*. Adoption is generally regarded as an advancement of the child and the mother can safely be entrusted to decide whether or not she would give away the child in adoption.

I now propose to touch upon the right of a Hindu widow to maintenance. In the different schools of Hindu law, the widow inherits the property of her husband under varying conditions. It is only when she does not so inherit that she becomes entitled to maintenance. Her right to maintenance, however, unlike that of the wife, is dependent on the possession of her husband's property by her husband's heir whether by survivorship or by inheritance. Amongst the persons who, according to a text of Manu cited before, must be maintained even if the person whose duty it is to maintain does not possess any inherited or ancestral property, a widow is not mentioned. The *Smriti Chandrika* says that in order to maintain the widow, the elder brother or any of the others above mentioned must have taken the property of the deceased; the duty of maintaining the widow being dependent on the possession of property. The *Mitakshara* by laying down that 'where there may be no property but what has been self acquired,

Right of a Hindu widow to maintenance.

Smriti Chandrika.

Mitakshara.

Viramitrodaya

the only persons whose maintenance out of such property is imperative are aged parents, wife and minor children" (a) suggests that the obligation to maintain the widow (who is not named there in) is dependent on the possession of the property of the deceased by those that are entitled to succeed to his property. The Viramitrodaya says on the point as follows :—"But of a sonless (deceased) person who was unseparated or reunited, even the chaste wife is entitled to mere subsistence by reason of the text of Narada and others such as "If any one amongst brothers die without issue" (b). The text of Narada which is not quoted in full in the Viramitrodaya may be translated as follows :—Among brothers if any one die without issue or enter a religious order let the rest of the children divide his wealth except the wives separate property. Let them allow maintenance to his women provided these preserve unsullied the bed of their Lord but if they behave otherwise, the brethren may resume that allowance.

Obligation
to maintain
widow not
absolute.

According to all the schools of Hindu law the obligation to maintain the widow is not absolute but is conditioned on the fact

(a) Mitakshara in the Chapter on substruction of Gifts.
(b) Page 153 G. Sarkars translation.

of the person against whom maintenance is claimed having inherited the property of her late husband, and that where that condition is not satisfied the widow's claim for maintenance cannot prevail.

In the Benares School of Hindu law the question of a widow's maintenance arise more frequently than in the Bengal School and the reason is obvious. Under the Mitakshara a widow can only inherit the property of the husband when he died without issue and was not a member of an undivided family but was separate from his coparceners at the time of his death. In Bengal she succeeds in default of son, grandson or great-grandson whether her husband was a member of joint family or not^(a). Cases of maintenance of widows are therefore less frequent in Bengal than in Benares. A Full Bench of the Allahabad High Court ^(b), which lays down that where there is no joint property, the widow of a son has no legal claim for maintenance against her father-in-law, has settled the law for the Benares School. The subject of a Hindu widow's right to maintenance has been dealt with in a very careful and learned exposition of the law by Mr. Justice Mahmood who

Benares
School.

(a) Hema vs Ajoodhya, 24, W. R., 474.

(b) Janki vs Nanda Ram. I. L. R. 11. A. 194 (F.B).

after examining the texts and authorities on the point held that there was no legal obligation on the father-in-law to provide for the son's widow out of his self-acquired property, but that there was only a moral obligation. The Full Bench laid down another proposition of very great importance viz : that when upon the death of the father-in-law who was merely under a moral obligation to maintain his widowed daughter-in-law, the property devolved on his sons they came under a legal obligation to carry out this moral obligation of their father and could be compelled to do so.

Moral obligation in the ancestor to maintain ripens into a legal obligation in the heir.

Bengal School.

This decision has been followed in Bengal in several cases (a). In the more recent case of *Siddheswari Dasee vs Janardan Sarkar* (b), Chief-Justice Sir Francis Maclean pointed out that in regard to a Hindu widow's right to maintenance there is no difference between the *Dayabhaga* and the *Mitakshara* schools. All these decisions rest on the principle that an heir does not take property for his own benefit but for the spiritual benefit of his predecessor, and both the schools are governed by the same principle of spiritual benefit.

(a) *Kamini vs. Chandra Pote*, I. L. R. 17 Cal., 373; *Devi Pershad vs. Gunwanti*, I. L. R. 22 Cal., 410.

(b) I. L. R. 29 Cal., 557.

In Bengal one of the earliest and leading cases on the subject is the case of *Khetramani vs Kasinath* (a). In that case the majority of the Judges held that the claim of a widowed daughter-in-law, who after her husband's death went to reside in her father's house, for maintenance against the father-in-law could not be supported as the son left no property of his own. This Full Bench has settled the law for Bengal.

Judicial
decisions on
the point.

In Bengal.

In Bombay it was formerly held that a Hindu father-in-law was legally bound to maintain his deceased son's widow, notwithstanding that no property left by the son may have come into his hands (b). But this decision was overruled by a Full Bench (c) which laid down that in the Bombay Presidency a Hindu widow voluntarily living apart from her husband's relations is not entitled to a money allowance as maintenance from them if they were separated in estate from him at the time of his death nor is she entitled to such maintenance from them whether they were separated or unseparated from him at the time of his death if they have not any ancestral estate belonging to them in their hands.

In Bombay.

(a) 10 W. R. (F B) 89. 2 B. L. R. A. C. (15)

(b) *Udaram vs Sonkabai*, 10. Bom. H. C. 483 (1873)

(c) *Savitri vs Laksmi*, I. L. R. 2 Bom., 573.

This has settled the law for Bombay (*a*). Where, however, after the death of the father-in-law his self-acquired property devolved either on his son or his widow, they were under a legal obligation to maintain his widowed daughter-in-law (*b*) on the principle stated before viz.,—that the moral obligation of the father-in-law became a legal obligation which his heirs inheriting his property were bound to discharge. The ripening of the moral obligation into a legal obligation on devolution by inheritance is due to the operation of principles peculiar to the doctrines of Hindu law which regards as *quasi* trustee for the family, and for the spiritual benefit of the deceased owner, a member into whose hands property comes by virtue of his status as a member of the family.

Devisee not bound to maintain if relieved by the testator.

But property acquired by valid testamentary disposition is not governed by the rules of the Hindu law of inheritance, and when the power is unrestricted it is difficult to conceive any consistent ground on which the devisee could be held bound by an obligation from which the testator had power to relieve him and by the bequest

(*a*) *Kalu vs Kashibai*, I. L. R. 7 Bom., 127.

(*b*) *Adhibai vs Cursandas*, 11 Bom., 199. *Yamunabai vs Manu*, 23 Bom., 608 ; *Rashid vs Sherbanoo* 29 Bom 85

had actually relieved him. It has accordingly been held in Bombay that the widow of a predeceased unseparated son has no right to maintenance from a person to whom her father-in-law has bequeathed the whole of his self-acquired property (*a*).

In Madras the text of Smriti Chandrika In Madras.
viz :—that the rule of maintaining the widow is dependent on the taking of the property—is strictly followed (*b*) and in the case of *Ammakanu vs. Appu* (*c*) it has been laid down that a Hindu is under no legal obligation to maintain his son's widow out of his self acquired property. In a recent case the Madras High Court has laid down that the moral obligation to support the daughter-in-law to which her father-in-law was subject would, on his death, have acquired the force of a legal obligation as against his assets in the hands of his heir (*d*). In the same case it has been held that a testamentary disposition of the self-acquired estate made in favour of volunteers by a person morally bound to provide maintenance cannot affect the position of a party whose moral claim

(*a*) *Bai Parbati vs. Tarwadi*. I, L. R. 25 Bom. 263.

(*b*) *Smriti Chandrika*, XI, 1. S. 34.

(*c*) I. L. R. 11 Mad., 91.

(*d*) (1898) *Rangammal vs. Echammal*. I. L. R. 22 Mad., 305.

Comment on
the decisions.

has become a legal right. This view is indirect conflict with that taken by the Bombay High Court in the case previously cited (*a*). It is submitted that the better view is that of the Madras High Court. To a Hindu not penetrated with European notions and still retaining the spirit of ancient Hindu law as contained in the texts of the sages and commentators the exposition of law of the Bombay High Court, regarding the absence of the right of a Hindu widowed daughter-in-law to maintenance as against the devisee of her father-in-law who possessed only self acquired property, would seem to be harsh and unsympathetic. The position of a Hindu widow especially of the more respectable classes is one of utter helplessness. She is incapable of earning her livelihood. Her life is one of seclusion. Her experience of the outside world is extremely limited. If those then whose moral duty it is to maintain make a bequest of property, the presumption is that the bequest is made subject to her right to be maintained. This view accords with the feeling of the Hindu community.

Where property is obtained by a person by inheritance from his maternal grandfather, he is liable to maintain his widow or

(*a*) Bai Parbati vs. Tarwadi, I. L. R. 25 Bom.

his widowed daughter-in-law out of that property, since such property is regarded as ancestral property in his hands.

This brings us to consider whether residence of a Hindu widow in the house of her husband is requisite to sustain a claim for a separate allowance, as it is in the case of a similar claim by the *wife*. In some of the early Bengal cases the view prevailed that residence in the husband's family was necessary in order to sustain a claim for maintenance (a). But it is now settled by a decision of the Judicial Committee that "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, unless she is guilty of unchastity, or other disreputable practices, after she leaves that residence" (b). Their Lordships point out "that the case of a widow is very different from the case of a wife. A wife of course can not leave her husband's house when she chooses and require him to provide, maintenance for her elsewhere ; but the case of a widow is different." In Bombay the question as to whether maintenance is to

Residence in her husband's house not necessary to sustain a claim for maintenance.

Wife's right in this respect contrasted.

(a) 24 W. R. 474.

(b) *Pirthee singh vs. Rani Raj Koor*, 20 W. R. 21. (P. C).

be allowed to a widow who resides away from her husband's family, not for unchaste or improper purposes has been held in one case to be a matter entirely in the discretion of the courts (*a*). This decision is inconsistent with an earlier Full Bench decision of the Bombay High Court (*b*) where it seems to have been considered as settled by authority that, so long as a widow remains chaste she is entitled to maintenance (where there is family property) whether she continues to live in the husband's family or not (*c*).

No separate maintenance where property is small.

But a widow cannot claim separate maintenance where the family property is so small as not reasonably to admit of allotment to her of a separate maintenance (*d*).

It may be an exception to the general rule that when a widow is directed by her husband's will to reside in his family house, or in that of her father, she is not entitled to separate maintenance if she resides elsewhere (*e*).

Obligation to maintain extends to king.

The obligation to maintain a widow extends even to a king when he takes the

(*a*) Ranga vs. Yamuna Bai I. L. R. 3 Bom. 44.

(*b*) Savitri vs. Lakmi, I. L. R. 2 Bom., 573.

(*c*) See Kastur Bai vs. Shivaji. I. L. R. 2 Bom. 372.

(*d*) Godavari vs. Sagun Bai, I. L. R. 22 Bom., 52.

Gokhi bai vs Laksmi, I. L. R. 14 Bom., 390.

estate of her husband by escheat or by forfeiture (*a*).

Let us now proceed to the consideration of the principles on which the amount of maintenance of a widow would be fixed. The Privy Council pointed out that the extent of property is not a criterion of the amount of maintenance to be fixed in the sense that no ratio exists between the one and the other (*b*). In a Bombay case the court proceeding on the analogy of the amount of maintenance allowed by the sages to a deserted wife fixed the amount of the widows maintenance to a third of her husband's share in the estate (*c*). In a recent Allahabad case it has been laid down that in estimating the amount of maintenance which should be allowed to a Híndu widow out of her husband's estate regard should be had to the value of the estate as gauged by the annual income derivable therefrom, to the position and status of the deceased, and to the position and status of the widow and the expenses involved by the religious and other duties which she has to discharge (*d*) Mr. Justice Mahmood, in giving

Principles on which amount of maintenance are fixed.

(*a*) Golab vs. Collector of Benares 4 M. I. A. 246.

(*b*) Nitto Kishore vs Jogendro, 5 I. A. 55.

(*c*) Adi bai vs Cursondass, I. L. R 11 Bom, 199.

(*d*) Baisni vs. Rup sing 12 All., 558.

a separate judgment said : "The amount of maintenance should not be determined with reference to the principle that the life of a Hindu widow should be of a peculiarly ascetic character, and that she should have only "a starving allowance". The austerities enjoined on Hindu widows are matters not of legal obligation but only of moral injunction and cannot be enforced by courts of justice. The courts should bear in mind that Hindu widows are by ancient custom debarred from remarriage and should fix the maintenance at a sum sufficient to obviate the danger of the widow being driven to immorality (a). In calculating the amount of maintenance to be awarded to a widow her *stridhan* must be taken into account. But clothes and jewels which do not bring any income shall certainly not be taken into account but only such kind of *stridhan* as is of a reproductive character (b).

Suit for arrears
of main-
tenance.

It used at one time to be questioned whether a suit for arrears of maintenance would lie. But these decisions are of no effect after the decision of the judicial committee in the case of Pirthee singh vs Ram

(a) See also *Devi vs. Gunwanti*, I. L. R. 22 Cal., 410; *Mahesh vs. Dugpal* 21 All., 232.

(b) See Mr. Justice West's decision in *Savitri vs. Laksmi*, I. L. R. 2 Bom., 584.

Raj Koer cited above where an opposite view was taken (a) :

It now remains to consider the somewhat vexed question as to the extent to which the claim for maintenance is an actual charge on the family property which binds it in the hands of the purchasers and transferees of the said property. We have in a previous chapter (Page 179-80) quoted texts from Manu, Narada, Vrihaspati which enjoin on a Hindu the duty of being just before he is generous by forbidding him from alienating the family property to such an extent as to deprive the dependent members of his family of maintenance. But the commentators have regarded these texts which relate to gifts as merely preceptive (b).

Maintenance
—how for a
charge on
family pro-
perty.

For the law on the point we must look to the judicial decisions. Mr. Justice Wilson, in giving judgment in the case of *Sorola vs Bhuban* (c) said, "The wife's right to maintenance after her husband's death is, in one sense, undoubtedly a charge on the estate, and she may sue to enforce it and have it secured. But it is not a charge in the fullest sense of the term, because it does not in every case necessarily bind any

Judicial deci-
sions.

(a) Venkapatdhaya vs. Kaveri, 2 Mad H. C. 36. also I Bom H. C. 194. (b) Jagannatha Digest 2, 132. Dayabhaga ii sec 28. (c) I. L. R. 15 Cal., 292.

part of the property in the hands of a purchaser. Mr. Justice West, after a careful examination of the original text and the previous decisions, held that mere notice of a claim for maintenance cannot be sufficient to bind a purchaser, and that the claim even of a widow for maintenance is not such a lien on the estate as binds it in the hands of a bonafide purchaser for value without notice (*a*). The learned Judge held that in the absence of a specific charge on the family estate as to the future maintenance of a Hindu widow the sale of ancestral property of the heir in possession, for discharging the valid debts of her husband, his father or grand-father, is valid, and the bonafide purchaser for value is not affected although he may have had notice of her claim to maintenance (*b*). A similar view has been taken in Bengal (*c*). A Full Bench of the Allahabad High Court has held that until fixed and charged by decree of court or contract on particular property maintenance is not a charge on the estate to be enforced against a bonafide purchaser without notice (*d*). This principle has been

(*a*) *Laksman vs Satya Bhama Bai* I. L. R. 2 Bom 494.

(*b*) *Lakshman vs Satyabhama*. 2 Bom 494.

(*c*) (1884) 11 Cal 102 (105)

(*d*) 4 All 296 (299)

extended to a Hindu widow's right to maintenance, and it has been held that if the property of her deceased husband is transferred to a bonafide purchaser for value even with the knowledge of the widow's claim the widow's right is liable to be defeated provided that the transfer was not made with the intention of defeating the widow's claim (a). The real question in all cases of this description will always be, as has been indicated by Mr. Justice West in the case *Laksman vs Satyabhama*, (b) whether the vendor of the deceased husband's estate was acting in fraud of her rights and further whether the purchaser had notice not merely of the widow's claim but also of the fraud which was being practised on her claim.

Section 39 of the Transfer of Property Act substantially embodies the principles contained in the judgment of Mr. Justice West. But this section, it has been held, does not protect a transferee for consideration where the property has already been declared by a

Sec. 39 of the
Transfer of
Property Act
(IV of 1882.)

(a) *Ram Kunwar vs. Ram Dai*, I. L. R. 22 All., 326 (329), also *The Bharatpur Estate vs. Gopal*, I. L. R. 24 All 160 (163); see also *Mani Lal vs. Bai*, I. L. R. 17 Bom., 398 where mortgage by her deceased husband of the family house not in fraud of her rights was held to prevail against the claim for maintenance.

(b) *Lakshman Rámchandra vs. Satyábhamaibai*, I. L. R. 2 Bom., 607.

decree of Court as subject to a charge for maintenance (a).

Widow can
not be de-
prived of
maintenance
by will in
Bengal.

Although a father in Bengal can make a testamentary disposition of all his property so as to deprive his son even of maintenance (b) he cannot by will deprive his widow of her right to maintenance. The reason for this difference is obvious. It is only the infant son that has a right to be maintained by the father in accordance with a text of Manu cited before. The adult son has no such right. But with regard to the widow different considerations arise. The right to maintenance of the widow arises by marriage. It is a legal obligation which attaches on the property of her husband. Jaimini in the aphorisms cited in a previous chapter affirms that there is a community of interest of the wife in her husband's wealth. After the death of the husband she is at least in a subordinate sense co-owner with her husband and there can be no doubt that in this view she would at least be entitled to be maintained by those who would take her husband's property.

In Bengal it has accordingly been held that a widow cannot be deprived of her

(a) (1899) *Kuloda vs. Jogeshar*, I. L. R. 27 Cal., 194.

(b) *Tagore vs Tagore*, 4 B. L. R. (O. C. J.) 132, 159,

right to maintenance by any provision in a will of her husband. In the case of *Sorola Dasi*(a) Mr. Justice (now Sir Arthur) Wilson remarked that the husband has full power of disposition of his property by will subject only to any question of the maintenance of his widow. In the more recent case of *Promotha vs Nogendra* (b) the question was raised but does not seem to have been finally decided, as will appear from the following passage in the judgment in that case:—"The most difficult question, however, is whether the widow can challenge the express provisions for her maintenance. It is unnecessary for the purposes of the present litigation, to consider whether she could challenge a will if no maintenance had been allowed to her"; but the learned judges went on to add: "and it seems, on the authorities, that a widow cannot be deprived of her right to maintenance by any provision in a *Dayabhaga* will. But in our opinion these larger questions do not arise in the present case."

A husband cannot make a wholesale gift

(a) I. L. R. 15 Cal., 292 (300).

(b) 15 C. W. N. 808.

(c) See *Joytara vs. Ramhari*, I. L. R. 10 Cal., 638; *Debendra, Brojendra I. L. R. vs.* 17 Cal., 886; *Bhuban mojee vs. Ramkissore* S. D. of 1860. I P 489.

A husband cannot make a gift of all his property without providing for maintenance for his widow after his death.

inter vivos of his estate without reserving maintenance to his widow and, in such a case, it has been laid down that the donee takes the property subject to her right to maintenance (*a*). Nor can the holder of ancestral property alienate it where there exists a widow entitled to maintenance out of such property—so as to defeat the rights of the widow (*b*). But it has been held that where a donee takes the gift in consideration of discharging certain debts due from the donor, the widow's right of maintenance cannot stand in the way of such a gift (*c*).

Madras decisions on the point.

In Madras it was laid down in one of the early cases that a Hindu widow had a right to reside in the family dwelling house and a judicial sale of the dwelling house was subject to such right (*d*). But where the sale is valid against the widow as having been made for the benefit of the family or with her consent or in circumstances which would sustain a plea of equitable estoppel against her, the purchaser is entitled to eject her (*e*). In Bombay the general rule of Hindu law

(*a*) *Jamuna vs Machul*, I. L. R. 2 All., 315.

(*b*) *Becha vs. Mothina*, I. L. R. 23 All., 86.

(*c*) *Gurdayal vs Kaunsila*, I. L. R. 5 All., 367.

(*d*) *Venkatammal vs. Andyappa*, I. L. R. 6 Mad.,

130.

(*e*) *Ramanadan vs Rangammal*. I. L. R. 12 Mad 260 (F. B.).

that a coparcener's widow is entitled to reside in the family house seems well settled (*a*). In Bengal, however, Sir Barnes Peacock held in one of the early cases that an adopted son could not convey to a stranger such a right to the family dwelling house as to deprive the adoptive mother of her right of residence (*b*).

Bombay
decisions
thereon.

It remains now to consider the effect of unchastity on the widow's right to maintenance. The following text of Narada cited by Jimutvahana in (*c*) his Dayabhaga : "let them allow a maintenance provided they keep unsullied the bed of their lord. But if they behave otherwise, the brother may resume that allowance" would go to show that the right of maintenance was liable to resumption or forfeiture at least in Bengal. The Judicial Committee of the Privy Council in the case of Moniram Koleta vs. Keri Koletani (*d*) has expressed an opinion to that effect. Following this obiter dictum of the Privy Council it has been laid down that it is a settled principle of Hindu law that a Hindu widow's right to claim maintenance is forfeited upon her un-

Effect o
unchastity on
the widow's
right to main-
tenance.

She forfeits
her right to
maintenance.

a) Bai Devkore vs. Sanmukhram, I. L. R. 13, Bom., 101; Dalsukhram vs. Lallubhai, I. L. R. 7 Bom 282.

(b) Mongola vs. Dinonath, 4 B. L. R. O. C. 72.

(c) Ch. XI. Sec I. V. 48. *(d)* I. L. R. 5 Cal, 776.

chastity (*a*). In Allahabad and Bombay it has been held that a decree obtained by a Hindu widow declaring her right to maintenance is liable to be set aside or suspended in operation on proof of subsequent unchastity (*b*). The question next arises whether an unchaste widow is not entitled to what been styled as a *starving maintenance i. e.* bare food and raiment. The texts, which we have cited in this connection when dealing with the maintenance of the wife, would seem to suggest that she is so entitled. But, as has been pointed out in *Romanath vs Rajonimoni* (*c*), cited above, the question is yet unsettled (*d*). But it will accord with the spirit of the Hindu law texts if she be allowed her bare necessities of life, though unchaste. In Bengal the leaning of the Courts has been to allow her food and raiment provided she does not persist in her incontinence at the time when she commences her suit for maintenance.

Widow
marriage.

We now proceed to deal with another topic affecting the status of a Hindu widow viz., her right of remarriage.

(*a*) *Romanath vs. Rajonimoni*, I. L. R. 17 Cal. 674.

(*b*) *Daultakuari vs Meghu*, I. L. R. 15 All 382.

Vishnu vs. Majamma, I. L. R. 9 Bom., 108.

(*c*) I. L. R. 17 Cal., 674.

(*d*) The Allahabad High Court suggests she will not get even starving maintenance (15 All 382 cited ante.)

In the vedic period widow-marriage seems to have been allowed, as would appear from the following passage in the Rig Veda : "When a woman has had one husband before, and gets another, if they present the Aja Panchaudana offering they shall not be separated. A second husband dwells in the same world with his rewedded wife if he offers the *aja Panchaudana*" (a).

Vedic text.

When we descend to the *smṛiti* period we find ordinances prohibiting remarriage of widows. "In the sacred texts," says Manu, "which refer to marriage the appointment of widows is nowhere mentioned, nor is the remarriage of widows prescribed in the rules concerning marriage" (b). We have no evidence as to how this change of ideas came about. But in most of the *smṛitis* no indication of the marriage of widows is to be found. Some passages of Manu would, however, seem to permit the marriage of virgin widows according to the interpretation put upon it by some European scholars (c). But the Institutes

Manu.

a) Rig V. IX, 5, 27 & 28 (Muir's Sanskrit texts 306 & 458 vol 5).

(b) Manu IX, 65 ; See also Manu, V. 161-165, which texts imply an obligation on widows not to marry again.

(c) Manu IX, 69 ; See Sacred Books of East, Vol. XXV. 339 and Ind Ed.

Parasara.

of the sage Parasara contain a verse which in the most explicit terms permits a widow to remarry. That verse runs as follows :—

नष्टे मृते प्रव्रजिते क्लौवे च पतिते पतौ ।

पञ्चस्त्र।पत्सु नारीनाम् पतिरन्यो विधीयते । (a)

Now according to a verse cited in a previous chapter (page 23. ante) the Institutes of Parasara were specially ordained to be the law for the Kaliyuga (present age). If that is once conceded then widow remarriage seems to be meant exclusively for the present age. The whole subject of the sanction by the *shastras* of the remarriage of Hindu widows formed the subject of a controversy which more than half a century ago convulsed Hindu society. That distinguished Sanskrit scholar Pandit Issur chandra Vidyasagar, whose name is a household word in Bengal, published his famous tracts on widow marriage in which he attempted to show that the remarriage of widows had its sanction in the Hindu *shastras*. Pandit Issur chandra based his argument on the famous text of Parasara cited above and he contended that a text occurring in the Institutes of Parasara must be held to be specially binding in the present age. These tracts are remarkable no less for their close and vigorous reasoning

Pundit Issur
Chandra
Vidyasagar's
views on the
question.

(b) Institutes of Parasara, Ch. IV, verse 27.

as for the deep erudition and research that they evinced. On the other side those Pandits who denied the legality of widow marriage also displayed considerable learning. They relied on the commentary of Madhaviya, the only commentator of Parasara who took the view that the much canvassed text of Parasara was not intended to apply to the Kaliyuga, and they added that the text did not refer to the marriage of widows but to the marriage of betrothed girls whose husband died before the actual marriage. It is difficult to say at this distance of time which side came off best in the fight. But the result of the controversy was that Vidya-sagar had a large number of supporters who forwarded a memorial to Government praying for the removal of legal obstacles to widow marriage and Act XV of 1856 which was styled "An act to remove all legal obstacles to the marriage of Hindu widows" was passed. The act legalized Hindu widow remarriage and enacted that the issue of such marriage would be legitimate, any custom and any interpretation of Hindu law to the contrary notwithstanding (see sec I.) This is a short act consisting of a few sections. The second section, which is the most important in the whole of the act, deals with the effect of remarriage on the rights of

Madhaviya.

Widow.
Marriage act
(XV of 1856.)

Effect of marriage on widow's rights of inheritance and maintenance.

inheritance and maintenance which the widow possesses in the property of her husband or his lineal successors at the time of her remarriage. It has been said that it is always dangerous to paraphrase an enactment. We will therefore give *in extense* the section itself which reads as follows :—

Sec. 2, Act XV of 1856.

"All rights and interests which any widow may have in her deceased husband's property by way of maintenance or by inheritance to her husband or to his lineal successors, or by virtue of any will or testamentary disposition conferring upon her, without express permission to remarry, only a limited interest in such property with no power of alienating the same, *shall upon her remarriage*, cease and determine as if she had then died ; and the next heirs of her deceased, husband, or other persons entitled to the property on her death, shall thereupon succeed to the same" (a).

Interpretation put on it by different High Courts.

This section deprives the widow of any right of interest which she *had at the time* of her remarriage either in the property of her husband or son so that where after the remarriage of a Hindu widow her son by a former marriage died leaving property she succeeded to his estate on the ground that section 2 does not deprive her of any right or interest which she had not at the time of remarriage (b) In Bombay the same view

(a) See II of Act XV of 1856.

(b) Akora vs Boreani, 2 B. L. R. A. C. 199.

has been taken by a Full Bench of the of the Bombay High Court(a). Sir Lawrence Jenkins who presided over the Full Bench put his decision on the ground of *stare decisis*. His Lordship in giving judgment said : "whatever might have been my view had the matter been uncovered by authority, it would (in my opinion) be wrong to disregard a rule affecting rights of property established as far back as 1868 by a decision of a Full Bench of the Calcutta High Court in *Akorah vs Boranee*." In Madras the same view has been taken and it has been held that the right of a Hindu widow who remarries during the life time of her son, to succeed by inheritance to the ancestral property of such son on his death is not within any of the exceptions referred to in section 2 of Act XV of 1856 (b). There is thus a complete unanimity in all the High Courts of India in so far as they hold that where the son's death is subsequent to the remarriage of the widow she is entitled to succeed to her son.

Decisions on
the point uni-
form.

A question was raised in a recent Calcutta case, viz., whether this section is not of general application to all Hindu widows remarrying, but is limited only to Hindu

(a) *Basappa vs Rayava*, I. L. R. 29 Bom. 91 (1904); see also *Chamar vs Kashi*, 26 Bom., 388 (1902).

(b) *Lakshmana vs. Siva*, I. L. R. 28 Mad., 425.

Scope of Sec.
2 of Act XV
of 1856.

widows remarrying as Hindus under Hindu law as provided by the act. The Full Bench which had to decide this held that the section was of universal application and was not limited in the manner suggested in the question aforesaid. Where a Hindu widow inherited the property of her husband taking therein the estate of a Hindu widow, and afterwards married a second husband, not a Hindu, in the form provided by Act III of 1872, having first made a declaration as required by section 10 of the act that she was not a Hindu, it was held that by her subsequent marriage, she forfeited her estate in her husband's property in favour of the next heir (a).

Act III of
1872.

Conflict of
decisions in
the different
High Court
on the point,
viz. whether
Sec. 2 applies
to cases where
remarriage
was allowed by
caste custom
prevailing be-
fore act XV
of 1856 was
enacted.

There is however no such complete uniformity on the question as to the effect of section 2 of act XV of 1856 in cases where previous to its enactment the remarriage of a widow in a Hindu caste was permitted, and according to the custom of her caste such marriage did not entail a forfeiture by the widow of her interest in the husband's estate. It has been held in Bengal that even though, according to custom prevalent in her caste, a remarriage is permissible still a Hindu widow on her remarriage forfeits her interest in her first husband's estate,

(a) Matungini vs Ramrulton, I. L. R. 19 Cal., 289.

obtained by inheritance (a). The Madras High Court, like the Calcutta High Court puts the wider interpretation on the words of section 2 and holds that the operation of the section cannot be restricted to that class of widows who laboured under a customary disability which this act was intended to remove (b) whereas the Allahabad High Court (c) and the Bombay High Court (d), in some of its earlier decisions, held that the intention of the legislature was to restrict the scope of the section to those castes only where remarriage was forbidden by custom. But in a recent Full Bench of the Bombay High Court a contrary view has been taken and it has been held that a Hindu widow belonging to a caste in which remarriage has been always allowed, who has inherited property from her son, forfeits by remarriage her interest in such property in favour of the next heir (e). The later

Madras and Calcutta High Courts in favour of a wider interpretation.

The Allahabad and earlier Bombay decisions restrict the scope of the Section.

(a) Rasul Jahan vs Ramsurum. I. L. R. 22 Cal 589; (1895) Nitya vs. Srinath, 8 C. L. J., 542 (545) (1907.)

(b) Murugayi vs Viramakail, I. L. R. 1 Mad., 224.

(c) Harsaran vs. Nandi, I. L. R. 11 All, 330 : Ranjit vs Radharani, 20 All, 476. Khuddo vs. Durga Prasad vs. 29 All, 122 ; Gajadhar vs. Kaunsila, 31 All, 161 (166).

(d) Parekh vs Bai Bhakat, I. L. R. 11 Bom., 119.

(e) Vithu vs Govinda, I. L. R. 22 Bom., 321.

Later Bombay decision agrees with the Calcutta view.

Bombay decisions are of course in conformity with the view of the Calcutta and the Madras Courts (a).

Effect of marriage of widow on her capacity to give in adoption.

This brings us to consider the effect of remarriage on the capacity of the widow in regard to adoption. It has been held in Bombay that a Hindu widow has no power to give in adoption her son by her first husband unless he has expressly authorised her to do so (b). Mr. Justice Ranade gave the following reason for this conclusion, *viz.*, "The right to give a boy in adoption is a right of disposition, a portion of *patria potestas*, which comes to the widow by reason of her connection with her deceased husband's estate, and being a part of the rights and interests she acquires as a widow, it is included within the provisions of section 2 and 3 of the act, and is not a reservation which the act concedes to the widow." It is, however, humbly submitted that it is extremely doubtful if the legislature intended to attach such a wide meaning to the words "rights and interests" so as to include the right to give a boy in adoption. The question is whether the maternal relation does not continue with the son even after

(a) Panchappa vs. Sangabaswa, I. L. R. 24 Bom., 89.

(b) Pachappa vs. Sangabaswa, I. L. R. 24 Bom. 89 (94).

remarriage and the right to give in adoption should be regarded as an incident of the maternal relation.

A Hindu widow can undoubtedly make an alienation of her husband's property which will not enure beyond her life. Where she does so alienate and then remarries the question arises if the reversionary heirs of her husband can sue to recover possession from the transferee immediately on such remarriage or must they wait till the death of the widow. Mr. Justice Mookerjee has, in a recent case, laid down that in the case of remarriage of a Hindu widow, the very fact of remarriage operates as her death in the eye of law so far as her husband's estate is concerned. This proposition is consistent with the principles of Hindu law and follows also from the provisions of the Hindu widows remarriage act (a).

Effect of remarriage on alienations by widow.

In conclusion we repeat, what we said in the beginning of this chapter, that the position of a Hindu widow is unique in jurisprudence. The ancient custom of *Sati*, the abrogation of the same by statute, the obsolete practice of *Niyoga* or raising of issue by appointment condemned by some sages and not disapproved of by others, the once prevalent practice of

Status of widow has passed through varying stages of development.

(a) See 8. C. L. J. 542.

Levirate, of which we find a parallel in the Jewish law, the texts enjoining on the widow the life of an ascetic, the judicial interpretation that these texts are mere moral precepts, the legal effect of unchastity on her status, the reference in the vedas to the existence of the practice of remarriage, the prohibition of the same in the *Smritis*, the legislation during British rule validating such remarriage, her varying capacities in different schools to give and take in adoption are the salient ideas with which we associate the widow when we consider her legal position in the past and the present. We can find no system of jurisprudence, where the status of the widow has passed through such varying stages of legal development as in Hindu law.

सत्यमेव जयते

CHAPTER V.

PROPRIETARY POSITION OF WOMEN.

(Inheritance.)

* The proprietary position of women in Hindu law must be determined by its rules concerning the dominion of women over things or the equivalent of things. There are several modes by which such dominion may be acquired. Manu mentions seven lawful means of the acquisition of property (*a*) ; and he places inheritance at the top of them of all. Accordingly we shall deal in this chapter with rights acquired by inheritance and shall reserve for the next chapter the discussion of proprietary rights acquired by women by other means.

In order to find out the early legal conceptions relative to the inheritance of women in Hindu law, we must turn to the evidence furnished by the Vedas ; for, they

Early legal conceptions relative to the inheritance of women in Hindu law.

* Portions between asterisk are based on original research.

(*a*) See Manu X, 115, where inheritance, finding or friendly donation, purchase conquest, lending at interest, the performance of work, and the acceptance of gifts from virtuous men are mentioned as the seven lawful modes of acquiring property.

represent the first phase in the evolution of Hindu Jurisprudence. It has been affirmed in two of the leading commentaries, Dayabhaga and Viramitrodaya, that there is a text of the vedas which is ample authority for the general exclusion of women from inheritance. The writers of these two treatises base their conclusion on a text of Baudhayana, the reputed founder of one of the schools of the Black Yajurveda, who says that females are generally incompetent to inherit and quotes in turn a passage of his Veda to support his opinion. That text is as follows : *Nirindriya hyadayadah strio nritam* (a). It may be translated thus :—devoid of prowess and incompetent to inherit, women are useless. The commentators have differed not a little as to the precise meaning of this text. Some of them contend that the text can have no possible application to the inheritance of women (b).

Upon this Vedic text has been based the theory that, from the earliest times reached by written Brahmanic records, one

Vedic texts
concerning in-
heritance.

(a) निरिन्द्रियाद्यादायादाः स्त्रियोऽनृताम् । Baudhayana, II, 2, 3, 46.

(b) The meaning of the vedic text according to some of these writers is "women are considered disqualified to drink the *soma* juice and receive no portion of it at the sacrifice."

of the fundamental principles of the Hindu law of inheritance has been the general exclusion of the female sex. This theory has been adopted by most of the modern writers on Hindu law ; and the true meaning and authenticity of the text upon which it is based will require serious discussion, before the theory can be set aside in favour of another. It is, therefore, necessary to examine how the text has been interpreted by the leading commentators. It will be further necessary to consider whether the passage quoted by Baudhayana does really occur in the *Vedas*. Jimutvahana refers to this Vedic text in order to support his conclusion that the text of Manu, "To the nearest kinsman (sapinda) the inheritance next belongs," excludes female sapindas. He says :—"Accordingly Baudhayana, after premising 'A woman is entitled,' proceeds 'not to the heritage'; for females, and persons deficient in an organ of sense or member, are deemed incompetent to inherit'. The construction of this passage is 'a woman is not entitled to heritage.' But the succession of the widow and certain others, viz., the daughter, the mother and the paternal grandmother, takes effect under express texts, without any contradiction to this maxim" (a).

Theory of the general exclusion of women from inheritance based on same.

Interpretation of Vedic text by leading commentators.

Jimutvahana.

According to the author of the Dayabhaga, then, the meaning of the Vedic text, we are discussing, is that women are generally incompetent to inherit. The disability of widow and other females is, in the opinion of Jimutvahana, removed by express texts.

Mitramisra,
author of
Viramitrodaya

In the Viramitrodaya, the Vedic text quoted by Baudhayana is noticed in three places. Mitramisra concludes his discussion as to the right of inheritance of the widow thus :—“As for the text of *Sruti* viz., ‘Therefore women are devoid of the senses (*nirindriya*) and incompetent to inherit’ and for the text of Manu based upon it, namely, ‘Indeed the rule is that women are always devoid of the senses and incompetent to inherit’ ;—these are both to be interpreted to refer to those women whose right of inheritance has not been expressly declared. Haradatta also, has explained these texts in this very way in his commentary on the Institutes of Gautama, called Mitakshara. But some commentators say that the term ‘incompetent to inherit’, implies censure only by reason of its association with the term ‘devoid of the senses’. This is not tenable ; because it cannot but be admitted that the portion, namely, ‘incompetent to inherit’ is prohibitory and not condemnatory, for it cannot be held to be an absolutely superfluous precept in as much

as the taking of heritage by women may take place under the desire for property. But the portion 'devoid of the senses' is to be some how explained as being a superfluous precept, and purporting the dependence of women on men ; for the negation, what is contrary to the nature, meaning as it does of things, is objectionable. Hence what has been said above forms the best interpretation. The venerable Vidyaranya, however, has in his commentary on the Institutes of Parasara, explained the above text of *Sruti* in a different way :—The term 'incompetent to inherit' indicates that the wife is not entitled to a share in case of her retirement to a forest ; the term *Anindriyas* (rendered above into 'devoid of the senses') embodies the reason for the same ; for it appears from the text, viz., 'The *soma* juice indeed is the *indriya*,' that the term signifies also the *soma*, hence that those are not entitled to it are *anindriyas* i.e., not entitled to taste the soma juice : the text being laudatory of the retirement of the wife into a forest on the death of the husband"(a). Then again in another place where the author deals with the right of paternal grandmother to inherit, he comments as follows on the same Vedic text cited above :—"Agreeably, however, to the inter-

(a) Page 175. Mr. Golap chandra Sarkar's Translation.

pretation put upon the text of *Sruti*; 'Therefore women are devoid of the senses etc.' by the venerable Vidyaranya, which has previously been cited, this text does not at all prohibit women's right of succession: So there can neither be a doubt as to their competency to inherit nor an answer to such doubt. But it should be remarked that how can that interpretation be accepted when it is in conflict with the text of Baudhayana? For although the term *indriya* may be taken in any of its acceptations, still there is nothing else in the text of *Sruti* to support women's incompetency to inherit, and it cannot be held that the text of *Sruti* has nothing in it to support the position that women are not entitled to inherit; hence it cannot but be held that the text of *Sruti* does prohibit women's right of succession, in as much as otherwise the quotation by Baudhayana of that text as establishing the position would be unreasonable; just as in this instance:—
"Therefore an unknown embryo being killed a man becomes a murderer of Brahmana" (a).
 Mr. Mandlik translates the last sentence in the above passage of the Viramitrodaya differently (b) and it is submitted that Mr.

(a) See Page 199, Mr. G. C. Sarkar's translation.

(b) "Therefore by the birth of a child without his knowledge, a man is degraded from Brahmanhood"

Mandlik's translation is not correct and that which we have given from Mr. Golap Chandra Sarkar's book is right. The last sentence is the translation of a passage quoted from the Vedas *The text of revelation is as follows* :—तस्माद्भर्मे नाविज्ञातेनऽनेन ब्रह्म-
हेत्यत्रवेति ऋयम् । It is interesting to compare this passage with the 7th aphorism of Jaimini (at page 64 ante), in which Jaimini embodies the argument of his opponents who hold that men only are entitled to perform sacrifices, and women are not so entitled. The Vedic text cited by Baudhayana is noticed again in another place in the Viramitrodaya where the author, after noticing that the daughter-in-law and other females are entitled to food and raiment only since the nearness as a sapinda is of no force when it is opposed by express texts, concludes the discussion thus :—"Therefore women are devoid of the senses and incompetent to inherit", and a text of Manu, founded upon it, says, "Indeed the rule is that, devoid of the senses and incompetent to inherit women are useless." The conclusion arrived at by the author of the Smṛiti Chandrika, Hara Datta and other Southern commentators as well as by all the oriental commentators

Views of
Jaimini and
Mitrāmishra
compared.

is how Mr. Mandlik translates the passage. (See page 363-4, Mandlik's Edition of the Institutes of Vajnavalkya.)

such as Jimutvahana, is, that those women only are entitled to inherit, whose right of succession has been expressly mentioned in texts such as,—“The wife and the daughters also &c.”—but that others are certainly prohibited from taking heritage by the texts of the *sruti* and of Manu (a).

The five-fold importance of the discussion of the Vedic text in the Viramitrodaya

We have been at pains to quote these long extracts from the Viramitrodaya because they are significant and aid us in the direction of obtaining a true theory regarding the inheritance of women. The discussion in the Viramitrodaya of the Vedic text is important in more ways than one. In the first place, it is important as showing that there have been other commentators of repute like Vidyardhaya and others who have interpreted the Vedic text differently and who consider that it has nothing to do with inheritance ; in the second place, it shows that the author does not accept the text in its entirety but qualifies it by applying it to those females only who are not named as heirs. In the third place, the discussion illustrates the habit of Hindu commentators and logicians to endeavour to reconcile the Vedic text which excludes women from inheritance altogether with the text of the later sages which allows certain female relations like widow, mother

(a) See page 244. Mr. G. C. Sarkar's Translation.

and daughter to inherit. And fourthly, it betrays the reluctance of the author of the Viramitrodaya to assent to the theory that the Vedic text incapacitates women generally from inheritance. And lastly, it shows that Mitramisra would not have put that construction on the Vedic text which would make it refer to the incompetency of women to inherit if he had not supposed that he was supported by a text of Manu, which conveys the same idea as is contained in the Vedic text. But Mitramisra apparently misquotes Manu ; for the reading given by Kulluka differs entirely from the one given in the Viramitrodaya. None of the commentators of Manu (*a*) accept the reading given by Mitramisra, but they all proceed on the assumption of the correctness of the reading given in Kulluka's commentary (*b*).

The Smṛiti Chandrika, the leading authority of the Southern school, also notices this text of the *śruti* in three places. The text

Smṛiti Chandrika.

(*a*) See Mandlik's edition of Manu, p. 1125, note on IX, 18.

(*b*) (Verse IX. 18.) Reading given by Kulluka.

नास्ति स्त्रीणां क्रियासन्धैरिति चर्को व्यवस्थितः ।

निरिन्द्रिया ह्यसन्धाश्च स्त्रियो वृत्तमिति स्थितिः ।

Reading by Mitramisra. The first line of the couplet is the same. The second line is अनिन्द्रिया ह्यदायादा स्त्रियो निव्यमिति स्थितिः । See Page 72 (Golap Ch. Sarkar's Ed.) of Viramitrodaya.

is introduced for the first time to support the position that females are not entitled to the heritage, that is, to wealth descending from the owner and admitting of partition. In this connection the Smṛiti Chandrika observes :—"By saying that persons deficient in an organ of sense or member and females are deemed incompetent to inherit, it is to be understood that the substance of the Veda called Taittirīyam to the effect that females and persons wanting in an organ of sense or member are incompetent to inherit has been recited." Here Devananda Bhatta is confronted with an objection, viz. :—If females are incompetent to inherit, how then did Yajñavalkya say—'of heirs dividing after the death of the father, let the mother also take an equal share.'—How did Vyasa say : 'even childless wives of the father are pronounced equal shares.' This objection he meets thus :—The reply is, they are fully correct. 'With regard to those that are incompetent to inherit, passages directing the allotment to them of heritage may be incorrect, but not those which simply direct portions to be given to them. *Amcam* signifies a portion and not a share in the heritage (Daya). We find it inserted in law books that a portion (*Amcam*) may be given out of property belonging in common

to several" (a). Here the *Smriti Chandrika* says, that the widow does not get a share in the heritage but simply gets a portion by reason of the above text of the *Sruti*. Devanand Bhatta refers to this Vedic text again, while dealing with the widow's right of succession and says : "the *Sruti* in question is merely exaggeratory and refers consequently to females other than *Patni* and the like, whose competency to inherit has been expressly provided for. Thus all is unexceptionable" (b). The author here lands himself in an inconsistency. In the extract first given the widow's right to inherit is negatived, on the authority of the Vedic text, whereas in the extract last given, the text of the *Sruti* has been said not to apply to widows and other females expressly named in other texts. The third place where the Vedic text is noticed is in connection with the succession of the *Gotrajas* (gentiles or kinsmen) (c) ; on the authority of this text of the *Sruti*, female *Gotrajas* have been held disentitled to inherit.

These passages from the *Smriti Chandrika* make it abundantly clear that, in the opinion of the author, the Vedic text quoted

(a) *Smriti Chandrika*, Ch. IV. Sec. 6. 7. 8

(b) *Smriti Chandrika*, Chap XI, S. 1., 56.

(c) *Smriti Chandrika*, Chap. XI, Sec V.

by Baudhayana indisputably refers to inheritance.

Mitaksara
does not
notice the
Vedic text,
nor does
Vyavahara
Mayukha.

The Mitakshara does not notice the Vedic text mentioned above, nor does the Vyavahara mayukha make any reference to it. The Vivadachintamani, the leading authority of the Mithila school, is silent on it. On the other hand, it is clear that Baudhayana's interpretation of the Vedic text relating to the exclusion of women from inheritance has not been adopted by Vijananeswara, for the discussion in chapter II, sec. 1, placita 24, 25, 26, of the Mitakshara recognises the general competency of women to inherit, and if it be contended that those *placita* relate only to the widow, whose rights are the subject of that section, the reply is, that his subsequent introduction in sec. V of the paternal grandmother and paternal great-grandmother amongst the *gotraja sapindas* as heirs shows that those *placita* are not to be confined to the widow. Nilkantha does not obviously accept the interpretation of the Vedic text by Baudhayana, for he puts the competency of women to inherit as *a sapinda* beyond doubt, by expressly naming the paternal grandmother as the first of the *Gotraja sapindas* for the purposes of inheritance. Thus we see that the three leading commentators of

Vivada chinta-
moni silent on
it.

the three different schools respectively not only do not refer to the Vedic text relating to the exclusion of women from inheritance, but on the other hand hint at the opposite view which recognises their capacity for inheritance. Vidyaranya, an author of great reputation and learning while commenting on the Institutes of Parasara, says expressly that the word "Indriya" in the Vedic text means *somajuice*. (a). Messrs West and Buhler say that the Vedic text may be translated thus : "women are considered to drink the soma-juice and receive no portion of it at the sacrifice." The Virmitrodaya, as has been seen already, observes that there are commentators who say that the term incompetent to inherit implies censure only, and is not intended to be a rule excluding women from inheritance. Apararka takes the Vedic text as an explanatory text only (*Artha Vada*) and not as a rule (*Vidhi*). He says : "Therefore women are feeble and incompetent to inherit, has to be applied conformably to circumstances in corroboration of rules otherwise established. It must be referred therefore to the case where there are sons" (b). The foregoing considerations are sufficient to show that the

Apararka takes the Vedic text as explanatory text and not as a rule (*Vidhi*) and refers it to the case where there are sons.

(a) Viramitrodaya, Page 175 ; translation.

(b) Dr. Jolly's Tagore Lectures 1883 Page 218,

weight of authority is rather against the interpretation which Baudhayana has put upon the Vedic text. Baudhayana, Mitra-Misra, Jimutvahana, and Devananda Bhatta are unfavourable to women's capacity for inheritance, whereas the opposite view has the support of Vijnaneswara, Nilkantha, Vachaspati-Misra, Vidyaranya, Apararka and a few other commentators referred to, but not named, in the Viramitrodaya. If where the commentators differed, the voice of the majority were to decide, then the theory that the Vedas contained the rule of general exclusion of women from inheritance should be rejected.

Weight of authority is against the theory of general exclusion of women from inheritance.

New light thrown on the question by the aphorisms of Jaimini.

But, as has been observed before, new light is thrown on this question by the aphorisms of the sage Jaimini. In the sixteenth aphorism (p 79 ante) Jaimini states that a certain Vedic texts shows that women have the capacity of owning and possessing wealth. No distinction is made between wealth acquired by inheritance and wealth obtained by other modes of acquisition. If the Vedic text cited by Baudhayana be interpreted so as to refer to the exclusion of women from inheritance there can be no doubt Jaimini would have alluded to it while he was dealing with the *Adhikarana* which relates to the equal rights

of men and women to perform sacrifices. That this right (to perform sacrifices) depends on the capacity to own or *possess* wealth is manifest from the tenth aphorism (p 72 ante.) The method of interpretation of the Veda by Jaimini must prevail over any other, and when we find the want of any reference to this Vedic text in Jaimini's aphorisms it may be legitimately inferred that it has nothing to do with the inheritance of women—inheritance being undoubtedly one of the modes of acquiring property.

It is difficult to formulate a definite theory, but the following seems a plausible one. In the Vedic world sacrifices played a very important part. Wealth was produced for the sake of solemn sacrifices so said an ancient *Smṛiti*. So long therefore as women were allowed to join in sacrifices, the various modes of acquisition of wealth including that by inheritance would be open to them. But when the right to participate in the offering of sacrifice came to be denied to women, it would seem to follow that attempts would be made to divert the wealth of a person from passing by inheritance to female relations as they would no longer be able to use it. In the period of the *smṛitis* they were no longer competent to utter Vedic formulæ and consequently to join in sacrifices. With this

Difficulty of
formulating a
definite theory
—a plausible
theory sug-
gested.

Baudhayana.

degradation in their status, women's right to inherit the property of another would be gone and we find accordingly Baudhayana laying down that women are incompetent to inherit (a). Besides it is somewhat difficult to suppose that the passage in the Yajurveda cited by Baudhayana can refer to the exclusion of women from succession when we find that the school of Vajasaṁhitā's followers of the white Yajurveda were specially favourable to them. Professor Maxmüller points out that the famous dialogue ascribed to Yajñavalkya with Maitreyi points to a division, by that sage, of his property between his two wives when he was himself retiring from the world. This dialogue goes to show that wives inherited property in the Vedic age; for retirement was tantamount to civil death (b). If the preceeding argument is sound then it would appear that the Vedic

(a) This theory receives some support from a text of the *smṛiti* below quoted in the *Mitakhsara*, Chap II sec 1, 14. हिजाति धनस्य यज्ञार्थत्वात् स्त्रीणां च यज्ञेऽनधिकारात् धनग्रहणमयुक्तम् तथाच केनापि स्मृतम् ।

यज्ञार्थं द्रव्यमुत्पन्नं तच्चानधिकृतास्तु ये
 अरिक्थं भाजन्ते सर्वे यासांश्चादनभाजनाः ॥
 यज्ञार्थं विहितं वित्तं तस्मात्तद्विनियोजयेत्
 स्थानेषु धर्मजुष्टेषु न स्त्रीसूखं विधर्क्येत्

(b) Professor Maxmüller's *History of Sanskrit Literature*, p. 199, 349.

text has been misinterpreted so as to make it applicable to inheritance. We have hitherto proceeded on the assumption that Baudhayana has cited this Vedic text for the purpose of supporting his position as to the incapacity of women to inherit. But the researches of oriental scholars show that the text of Baudhayana is in great confusion (a) Professor Maxmuller translates the text of of Baudhayana as follows :—The Veda declares 'therefore, women are considered destitute of strength and of a portion.' The translation shows that the text of the vedas has nothing to do with inheritance. Dr. Jolly is also of opinion that the Vedic text refers to exclusion from participation in the drinking of soma juice at solemn soma sacrifices (b).

Text of Baudhayana is in great confusion.

It remains to answer certain possible objections to the theory we have propounded viz., that there is no authentic text in the Vedas which lays down any rule unfavourable to the succession of women generally. This theory is opposed to the view of most of the modern writers on the subject and we would not have ventured to put it forward if it had been wanting in plausibility or semblance of

Certain possible objections to our theory answered.

(a) Sacred Books of East, Vol. XIV., Baudhayana. See also Book I. Chap. II. Sec. 14. West & Buhler's Digest, Third Edition.

(b) Dr. Jolly's Tagore Lectures, 1883 Page 40.

An objection based on Yaska's comment on the Vedic text about exclusion of women.

authority. But we have seen that incontrovertible evidence is furnished by Jaimini's aphorisms in favour of this theory. Besides, there is a dissidence of opinion amongst the commentators themselves, as to the true meaning of this Vedic text. It is objected by those who hold the opposite view that the following comment of Yaska on the Vedic text(a) viz : "Some hold that daughters do not inherit. Therefore it is known that a male is the taker of wealth, and that a female is not the taker of wealth," furnishes evidence of the usage prevailing in the Vedic period ; for it is argued that Yaska was the author of Nirukta or the Vedic glossary and he must have made the above remark in accordance with early tradition which was opposed to female succession. It is a sufficient answer to this objection to say that the remark of Yaska about the general incompetency of women to take wealth is a mere inference which does not necessarily follow from the Vedic text commented on by him. The original text rather lays stress on the fact that all *sons without distinction* between them must succeed to the property of the father, but it does not say that daughters shall not be entitled to

(a) अविशेषेन पुत्रानां दायो भवति धर्मतः ।

Inheritance properly belongs to the sons without distinction. Roths Edition of Yaska 53.

inherit in default of sons because of their general incapacity for inheritance. It is important to remember in this connection the view propounded by Professor Roth, the founder of Vedic philology, that the aim of Vedic interpretation is not to ascertain the meaning which Sayana or even Yaska who lived eighteen centuries earlier (about 400 B. C.) attributed to the Vedic hymns, but the meaning which the ancient poets themselves intended, and that such an end could not be attained by simply following the lead of the commentators. Yaska's comment might have reflected the view of his own time, when women's status had been lowered. Professor Macdonell rightly points out that there is a distinct tendency in his writings towards misinterpreting the language as well as the religious, mythological and cosmical ideas of a vanished age by the scholastic notions prevalent in his own (a). Yaska's observation therefore does not assist the adherents of the theory opposed to our own.

Yaskas remarks criticised.

We are fortified in our conclusion by a verse in one of the hymns of the Rig Veda(b) which is as follows :—As a virtuous maiden growing old in the same dwelling

(a) Macdonell's Sanskrit Literature, P. 60.

(b) Asth. II. M. II. Ch 6. Anu. II., Sukta VI Verse 7, Mr Dutt's Ed., p. 519.

A passage from the Rig Veda cited in support of our theory.

house with her parent claim from them her support, so come I to thee for support. Sayana commenting on this says that the daughter, in these circumstances, could claim a share of her father's estate (a). This verse at least indicates that, in the Vedic period, women were not, by reason of their sex, debarred from inheriting. It also renders the interpretation of the Vedic text *Nadayada etc.* by Vidyaranya more acceptable than that of Baudhayana. While seeking support for the theory of the general competency of women to inherit from the above hymn in the Rig Veda, we are not unmindful of another verse (3 mandal 31 h, 2nd verse), which has been supposed by a distinguished Sanskrit scholar, (b) to lay down the principle of female exclusion in unmistakable terms. We venture to submit, however, with the greatest deference to this eminent writer, who is also a lawyer, that the text is wholly indecisive of the present question. I will here reproduce the text as it has been translated by this learned writer himself :—"The son does not vacate the inherited wealth of the sister ; he makes her

An objection based on Professor Krishnakamal Bhattacharyya's reading of another Vedic text.

(a) पतिं अलभमाना सती दुहित्वा समानात् आत्मनः पित्रोश्च साध-
रणात् सदसः गृह्णात्.....यथा भागं याचते । सायणः ।

(b) Krishna Kamal Bhattacharjya's Tagore Lectures,
(1884-85) p. 122.

the repository of the issue of him who takes her ; although the parents procreate both the males and the females ;—the one is a worker of good deeds ; the other is graceful."

It is submitted that there is no principle of female exclusion underlying this Vedic text. It suggests that the son inherits in preference to his married sister who passes into another family and bears sons to her husband. Professor Bhattacharjee is forced to admit that this "verse is almost riddle-like." There may be one or two sentences in Sayana's comment of this verse which imply that the daughter is a mere ornamental member of the family, fit for no useful purposes and that it is not therefore inequitable to postpone her to the son in the matter of inheritance ; but surely there is nothing in the comment which indicates a principle of female exclusion. Even if Sayana has hinted at such exclusion, his opinion can be dismissed with the remark that he has misinterpreted the Vedic text being influenced by the conceptions that prevailed in his own time (1400 A.D.)—conceptions which were certainly opposed to the succession of females in general. It may be added, in confirmation of this view, that Sayana flourished in Southern India and was a member of the Baudhayana school in the fourteenth

Prof. Bhattacharyya's remarks commented on.

century (a). It is natural to expect that he should adhere to the doctrine of female exclusion as laid down by the founder of his school. Besides Mr. Bhattacharjya is careful to add that some portion of Sayana's explanation of the above Vedic verse might probably be taken exception to by European scholars, who justly deny infallibility to Sayana in the matter of Vedic interpretation (b).

A third objection based on the analogy drawn from other patriarchal societies.

Another objection to our theory will have to be met—an objection based on the analogy drawn from other patriarchal societies which recognize the general unfitness of women for heritage. It is said that in India where the society in its early stage was patriarchal, the same rule of female exclusion must have prevailed. The reason for which nations descended from patriarchal groups followed the principle of female exclusion, consisted in this that the weaker sex was incapable of performing useful work, the most important part of work to be done at the patriarchal stage being the fighting business. But the argument derived from analogy can be of no use ; for the reason stated by later *smṛiti* writers for the exclusion of

(a) See Prof. Macdonell's History of Sanskrit Literature, p. 259.

(b) Tagore Lectures, 1884-85. p. 121.

women was their incompetency to join in sacrifices. Vijnaneswara notices a text of the *smṛiti* to the following effect : 'wealth was produced for the sake of solemn sacrifices ; and they who are incompetent to the celebration of these rights, do not participate in the property, but are all entitled to food and raiment' (a)—a text which embodies the reason why women could not inherit. When there is a fundamental difference between the reasons on which the principle of exclusion of females is based in India and the ground on which it rests in other patriarchal societies, the argument derived from analogy can hardly be accepted. It will appear from the text of the *smṛitis* just cited that the view of Dr. Mayr as to the mode in which the widows right of succession grew up historically out of her right to an allotment for maintenance is open to serious doubt (b).

Argument derived ; from analogy of no use in this case.

Dr. Mayr's view criticised.

Even in Jaimini's time, women had the right to perform sacrifices and consequently the right to inherit ; but it would seem the movement had just then begun the object of which was to declare their incapacity to perform sacrifices and their consequent in-

Superior position of women in Jaiminis time.

(a) Mitakshara. Ch II, Sec, I, 14. pe.

(b) Mayr P 179, cited in Mr. Mayne's book at p 689 (6th. Ed.)

competency to inherit and in the time of Baudhayana, it is probable, the movement had achieved its final triumph. In the *Dharma shastra* of Gautama (though entitled a *Dharma shastra* it is in style and character a regular *Dharma Sutra*) we find an indication of the beginnings of this movement. Gautama says :—"of one without the issue, the wealth is given to those who are connected with him by *sapinda* relationship by *Gotra* or *Pravara* as well to the wife" (a) It thus appears that at the period when Gautama lived, the widow of the deceased was not permitted to inherit independently of the male relations. She was allotted a share along with the male *sapinda*. This was the thin end of the wedge which in Baudhayana's time led to the extinction of her right to heritage altogether. That the *Dharma shastra* of Gautama is older than that of Baudhayana, there can be no doubt ; for the latter has been shown to contain passages based on or borrowed from Gautama's work (b). The position of women was reduced to the level of Sudras they were forbidden to utter Vedic Mantras and to join in sacrifices ; simultaneously

Degradation
of their status
during the
period Bau-
dhayana flour-
ished.

(a) Gaut XXVIII, 24.

(b) Prof. Macdonell History of Sanskrit Literature p 260).

with this diminution of their status their right to inherit was extinguished on the principle stated in the *smṛiti* quoted in the Mitakshara. It is difficult at this distance of time to discover the reason which led to the degradation of the status of women in the *sūtra* period. We have however suggested a likely reason in a preceding chapter. The foregoing argument that the position of women was at its worst in Baudhayana's time, assumes that Jaimini flourished earlier than Baudhayana. That Jaimini is a sage of very great antiquity would appear from a verse in the Srimad Bhagbat Purana where Jaimini is described as the revealer of the Sam Veda (a). Besides modern research shows that Jaimini's *sūtras* were composed at a time when no *smṛiti* works in any elaborate shape existed, and that his aphorisms must date before the existing metrical works of Manu and the rest (b). There is also internal evidence in the writings of the sage which renders it probable that he preceded Baudhayana, for instance, the name of many sages like Badari Labukayana, Badarayana, and Aitisayana are mentioned in Jaimini's *sūtras* but not that of

Relative age
of Jaimini and
Baudhayana.

(a) सप्तमो जैमिनिः कवि.—Sk. I Ch. IV (V. 21.)

(b) See Kishore Lal Sarkar's Tagore Lectures, 511.

Baudhayana. It would also be a singular thing for Jaimini not to notice the view of Baudhayana about women's incapacity to inherit, when he was dealing with the proprietary capacity of women in the aphorisms cited in the second chapter, if Baudhayana had really lived before his time. The foregoing reasons make it probable that the theory of female exclusion from inheritance originated with Baudhayana. Apastamba, whose *sūtras* are more recent than those of Baudhayana, adheres to the principle enunciated by the latter. Apastamba says "that on failure of sons, the nearest *sapinda* takes the inheritance (II. 6, 14, 2) The word *sapinda* is used in the masculine and precludes the idea of a female being included in the word." It is true that he mentions the daughter as capable of inheriting in default of other heirs (II. 6, 14, 4) but he assigns to her the last place in the line so as to save an escheat to the crown.

Apastamba.

Position of
women during
the age of
the metrical
Smritis.

When we pass from the *sūtra* period to the age of the metrical *smritis* we find a considerable change of popular feeling regarding the proprietary position of women at the time and certain near female relations are admitted to the order of succession by Manu, Yajnavalkya, Vrihaspati, Narada and other *smṛiti* writers. Manu expressly re-

Manu.

cognises the right of the mother (a) and the daughter (b) to inherit ; and if the interpretation of the text of Manu : *anantara sapindatja tasya tasya dhanam bhabeta* (c) by Kulluka be right then Manu would seem to admit female sapindas in general to the order of succession.

Yajnavalkya expressly admits the widow, the daughter, the mother and the *Gotrajahs*, to the order of succession. If the word *Gotrajah* (gentile) be held to include both male and female, then Yajnavalkya's view would seem to be extremely favourable to the succession of women in general (a).

Yajnavalkya

Vrihaspati says, "The wife is declared to succeed to her husband's property, and in her default, the daughter" (e). "When a man dies", says the same sage, "without leaving 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" (f). Narada, in his chapter on Inheritance does not mention any female as

Vrihaspati.

Narada.

(a) Manu, IX, 217,

(b) Ibid, 130. But all the commentators say that this text refers to the succession of appointed daughter.

(c) Manu IX, 187.

(d) Yajnavalkya II. 135, 136.

(e) Vrihaspati, XXV, 55.

(f) Ibid,.....XXV, 63. „

Vasistha. entitled to inherit save the daughter (a). It is the appointed daughter only, from amongst the numerous female relations of a deceased person who finds a place in Vasistha's enumeration of his heirs. Vasistha apparently must be taken as opposed to the succession of females.

Commentaries on the theory of position of women in the field of inheritance.

From the list of female heirs as given in the *smritis* we now turn to the commentaries which complete the development of the theory of the position of women in the field of the law of inheritance. It is in them that we shall find the modern law of female succession for the different schools respectively. Some of these commentaries are stronger advocates of women's rights than the others. They have attempted to base their conclusions on the texts of the *smritis*, which in some cases cannot be easily reconciled with one another. It will be convenient to begin with the widow, for she is mentioned by Yajnavalkya as the first in the line of heirs of a sonless man. The author of the Mitakshara maintains that when a man, who is separated from his coheirs and not reunited with them, dies leaving no male issue, his widow, if chaste, takes the estate in the first instance. He bases this right of the widow to inherit on

Widow.

Mitakshara on the widow's right to inherit.

(a) Narada,.....XIII, 50.

the following well known text of Yajñavalkya :—“The 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 amongst these, the next in order is indeed heir to the estate of one, who has departed for heaven, without leaving male issue” (a).

He also cites texts from Bridha Manu, Brihad Bishnu (b), Katyayana and Vrihaspati in support of his view that a chaste widow is entitled to succeed to the property of her deceased husband. He notices three objections to his view and refutes them. The first of these objections is to the effect that the texts of Yajñavalkya and others were intended to ordain the succession of the widow of a separated brother provided she had authority from her husband to raise issue by appointment (*Niyoga*). In support of this the objectors rely on certain texts of Narada, Manu, Sankhya and Katyayana which according to them are adverse to the widow's claim to inherit ; as also on the text of Vasistha, which enjoins a widow not to raise issue by appointment from a covetous motive. The main ground the objectors urge is that the widow's succession to the

Chaste widow entitled to succeed.

Three objections to this view considered.

(a) Mitaksara, Ch. II. S. 1, 2.

(b) XVII, 47 ;

estate is in right of such an appointment. He meets this objection by saying that the raising up of an issue by the widow is not a condition precedent to inheritance but is an alternative which the widow might adopt, and in doing so observes : “besides it is fit, that a chaste woman should succeed to the estate rather than one appointed to raise up issue, reprobated as this practice is, in law as well as in popular opinion. The succession of a chaste widow is expressly declared and an authority to raise up issue is expressly condemned by Manu”. In meeting the principal reason of the objectors, viz :—that the widow's succession to the estate is in right of appointment to raise issue—Vijnaneswara propounds the theory of female ownership. He remarks:—“But, it is said, women have a title to property, either through the husband, or through the son, and not otherwise.” That is wrong, for it is inconsistent with the following text and other similar passages. “What was given before the nuptial fire, what was presented in the bridal procession, what has been given in token of affection, what has been received by a woman from her brother, her mother, or her father, are denominated the sixfold property of woman”. These remarks show that Vijnaneswara

Theory
of female
ownership as
propounded
by Vijnane-
swara.

refutes the notion entertained by some that there are only two modes by which women can acquire property, viz., either through the husband or through a son.

The second objection is that "since the wealth of a regenerate man is designed for religious uses, the succession of women to such property is unfit, because they are not competent to the performance of religious rites," Second objection.

Vijnaneswara answers this by saying that the premise that wealth was designed for religious uses is wrong and he supports his opinion by texts of Yajnavalkya, Gautama and Manu. He also cites a text from the Vedas which gives indirect support to his view. He then lays down a proposition of far-reaching importance, a proposition which is not assented to by many of his numerous followers when he says that the text of Narada, which declares the dependence of women, is not incompatible with the acceptance of property. The conclusion of the author is that the text that wealth was produced for the sake of solemn sacrifices must be explained thus :—wealth which was obtained in charity for the express purpose of defraying sacrifices, must be appropriated exclusively to that use by sons and others.

Third objection.

The third objection is that of Sricara viz., that the widow's succession is restricted to cases where the estate of her deceased husband is small. But to this it is replied that there are express texts which declare that "of heirs dividing after the death of the father, let the mother also take an equal share." Vijnaneswara states emphatically that it is a mere error to say that the wife takes nothing but subsistence from the wealth of her husband, who died leaving no male issue,

The theory of the Mitakshara that succession is confined to the widow of a separated brother commented on.

The view of the Mitakshara, that the widow of a separated brother shall succeed and not that of a joint or reunited brother, does not find any support from the numerous texts of the sages he has cited in connection with a widow's right to inherit. The only reason he gives for such a conclusion is that "partition has been discussed previously and reunion will be subsequently considered." The reason is obviously insufficient. Later writers have supported Vijnaneswara's opinion by the text of Vrihaspati and Katyayana (a) but these seem not to have been known to him.

No texts of sages cited by him in support of his theory.

(a) Katyayana cited in Smṛiti Chandrikā, Ch XI. S 1, 35. K. Iyer's Ed. p. 158. "But if her husband have departed for heaven, the widow obtains food and raiment, or she receives a share of the undivided wealth so long as she lives."

This theory of the Mitakshara is, as we shall see presently, universally accepted except by Jimutvahana.

This theory is
assented to by
all except
Jimutvahana.

The Viramitrodaya says that "there are also many other passages of law, establishing the preferable right of the wife to succeed to the estate of her sonless husband *who was separated but not reunited* and cites in support the well-known text of Vrihaspati :— 'In the Vedas and in the *smritis* as well as in popular practice, a wife is declared by the wise to be half of the body of her husband equally sharing the fruit of pure and impure acts etc' ; but the text of Vrihaspati does not impose the limitation suggested by the latter part of the proposition which is given in italics (*a*). In another place Mitra misra gives the same reason for the limitation as the Mitakshara does. He says : "The text, namely,—'The wife and the daughters also' is relative to the estate of one who was separated and not reunited ; for partition of a joint family has previously been treated, and partition after reunion, has by way of an exception to all other cases, been subsequently dealt with by Yajnavalkya, consequently this is the only case which remains to be discussed" (*b*). It is there pointed out that this

Viramitrodaya
supports it.

(*a*) Translation by Mr. G. C. Sarkar, P. 143.

(*b*) Translation by Mr. Sarkar, P. 154.

is also the opinion of many other writers besides Vijnaneswara e. g. Laksmidhara Viswarupa, Medatithi, the author of the Madanratna. The Mayukha also agrees with the Mitakshara and confines the application of the text of Yajnavalkya, we are dealing with, to the case of the widow of a person who died separated and not reunited and left no male issue (a).

Mayukha also agrees with it.

Smriti Chandrika supports it by two texts of Vrihaspati and Katyayana.

It is only when we come to the Smriti Chandrika that two texts are cited, one of Vrihaspati (b) and the other of Katyayana, which lend support to the view taken by the Mitakshara and agreed to by the Mayukha and Viramitrodaya. The text of Vrihaspati is as follows :—“Whatever property a man possesses of every kind after division, whether mortgaged or other, the wife (*Jaya*) shall take after the husband with the exception of fixed property”. Upon this text the Smriti Chandrika observes :—“The purport of this text is, whatever is the property of the deceased husband, whether consisting of moveables or immoveables whether pledged or otherwise, the widow alone takes, where the husband was a divided member of the

(a) Vyavahar Mayukha, Ch. IV., Sec. VIII (1-4) 76-78 Mandlik's Ed.

(b) Smriti Chandrika, Ch. XI., S. I P. 23. Page 154 (K. Iyer's Ed.)

family". It is somewhat difficult to understand how the text of Vrihaspati can bear this interpretation. The text would rather seem to preclude the widow of a divided brother from inheriting her husband's immoveable property. Madhava construes this text differently from the Smṛiti Chandrika and considers that it relates to the prohibition of sale or other transfer of real property by widow, without concurrence of the heirs (a).

Madhava interprets the texts of Vrihaspati differently from the Smṛiti Chandrika.

To us the genuineness of the texts of Vrihaspati and Katyayana seems open to question; for it is hard to believe that Vijñāneswara would not have mentioned these texts in support of his opinion that the succession of a widow of divided and not reunited brother is what is ordained by the famous text of Yajñavalkya.

Vachaspati Misra lays down the same law for the Mithila school. After stating that there are certain texts of Vrihaspati, and Vṛiddha Manu on the widow's succession, he says that "what has been said above is applicable in the case of a husband who has taken his share from the co-heirs." And again he tells us: "When the husband dies without par-

Vachaspati Misra takes the same view as the Mithila shāstra.

(a) Vyavahara Mayukha, chap. IV., S 8; P 3, Page 77 (Mandalik's edition.)

tition with his cosharers he has no share at all what then could his wife receive" (a).

Dissentient
opinion of the
founder of
the Bengal
School.

It remains to consider the dissentient opinion of the founder of the Bengal School. He combats the theory of the Mitakshara regarding the exclusion of the widow of deceased brother who was either joint or reunited with his other brothers. He maintains that such a theory, so far as it affects the right of the widow of a reunited coparcener, would be in conflict with a text of Vrihaspati which declares that the widow of a reunited coparcener succeeds in preference to his reunited brother. He holds that whether the deceased be divided or undivided, his next heir is the widow if he leaves no male issue. After noticing the contradictory texts regarding the widow's succession Jimutvahana cites the texts of Vrihaspati referred to above and says :—
"Some reconcile the contradiction by saying, that the preferable right of the brother supposes him either to be not separated or to be reunited ; and the widow's right of succession is relative to the estate of one who was separated from his coheirs and not reunited with them." That is contrary to a passage of Vrihaspati, who says, "Among brothers, who become reunited, through

(a) Vivada chintamani, Pages 290. 291.

mutual affection after being separated, there is no right of seniority, if partition be again made. Should any one of them die, or in any manner depart, his portion is not lost but devolves on his uterine brother. His sister is also entitled to take a share of it. *The law concerns one who leaves no issue, nor wife, nor parent.* "Joint property," says Jimutvahana, "is referred severally to the unascertained portions of the aggregate. Both parceners have not a proprietary right to the whole for there is no proof of their ownership over the whole." Jimutvahana denies the fundamental principle of the Mitakshara that several undivided brothers are like joint tenants each having an unascertained interest in the whole of joint property, so that when on the death of one of the brothers the joint property belongs exclusively to the survivors, since the ownership of the other brothers is not divested. On the contrary he holds that several coparceners are like tenants in common, each having a right to an aliquot though unseparated portion, so that on the death of one, there is no right of survivorship to intercept his widow's right of succession under the text of Yajñavalkya (a). He gives an additional reason in support of

Jimutvahana denies the fundamental principle of the Mitakshara that several undivided brothers are like joint tenants.

(a) Dayabhaga Ch XI., Sec. I, 25-26).

his opinion when he says (a) :—"the assumption of any reference to the condition of the brethren as unseparated and reunited, not specified in the text—(of Yajnavalkya) is inadmissible being burdensome and unnecessary. Therefore the doctrine of Jiten-driya, who affirms the right of the wife to inherit the whole property of her husband leaving no male issue, without attention to the circumstance of his being separated from his coheirs, or united with them, (for no such distinction is specified) should be respected."

His opinion marks the era when the patriarchal system lost its hold.

This opinion of Jimutvahana seems to mark the era when the patriarchal system which is the foundation of the Mitakshara, appears to have lost its hold.

Summary.

To sum up :—the conclusion arrived at by the author of the Mitaksara is, that the widow is entitled to inherit to her husband, if he dies separated and not reunited, and leaving no male issue. All the commentators except Jimutvahana have adopted this doctrine. The Judicial decisions recognise that this rule governs the succession of the widow, in all provinces except where the authority of Jimutvahana prevails (b).

(a) Dayabhaga, Chap. XI; Sec. I, 46.

(b) As to Madras; Katama Nachiar vs Raja of Sheivagunga, 9 M. I. A. 543 is the leading case. As to Benares school; Moharanee Hiranath vs Baboo Burm

In the Dayabhaga school a widow is entitled to inherit to her husband in all cases whether he was joint or separate, in the event, of course, of his dying without male issue.

But it must be noticed that even under the Mitaksara the widow succeeds to the self-acquired property of her husband even where he died undivided. If he left both joint and self-acquired property the joint property would pass to the other members of the undivided family by survivorship, whereas the self-acquired property will be inherited by the widow. This proposition was settled in the Sivagunga case (9 M. I. A., 543.) and has been adopted in many subsequent decisions of the Judicial Committee (a).

Another question in connection with the succession of a widow under the Mitakshara school has not unfrequently arisen viz., whether an agreement to partition, even

narayan 17 W. R., 316; Chowdhury Chintamon vs. Nowlukho 24 W. R. 255 (P. C.) Rup singh vs Baisni, II I. A ; 149. As to Mithila school see Pudmavati vs Baboo Boolar, 4 M. I. A, 259; Anundee vs Khedoo, 14 M. I. A, 416. As to Bombay, see Goolab vs Phool, I Bom ; 154, also Govinddas's case 241; Mankooneras vs Bhuggoo 2 Bom, I. L. R, 139.

(a) Sivagnana Tevar vs Periasami, 1, Mad., 312 (P. C.) Doorga Pershad vs Doorga Konwari 4 Cal. 190 (P. C.).

when it is not carried out by actual separation, entitles the widow of a deceased brother to succeed to his share in preference to the surviving cosharer ? An affirmative answer should be given to this question both on the texts and on the authorities. In Chapter II, section XII, paras 1, 2 of the Mitakshara, having explained the partition of heritage, the author next propounds the evidence by which it may be proved in case of doubt. "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." In this passage the author is discussing the modes of proof of a partition. It is to be proved by oral or written evidence, or by separate enjoyment of a house or field. It would follow from this passage of the Mitakshara that partition may be proved either by proving an oral or written agreement to divide by metes and bounds. In the case of *Appovier vs. Rama subba Anjan* (a) the Judicial Committee held, that although the agreement for partition had not been carried out by actual separation, it was, nevertheless binding upon the contracting parties, and operated as a division of the family property. The same principle

An agreement for partition operates as a division of the family property.

(a) 11. M. L. A., 75..

was reaffirmed by the Judicial Committee in *Suraneni vs Suraneni* (a) and *Gajapathi vs Gajapathi* (b). The proper test to apply in such cases is not whether the property is actually divided or not divided, but whether there had been a division of title so as to give each member a certain and definite share to receive and enjoy in severalty. The same principle underlies the class of cases of which *Chidambaram Chettiar vs. Gauri Nachiar* (c) is the type. In that case there was a partition decree which settled that a particular property was partible, and fixed the shares of the parties. A reference was made to the commissioner to effect the division. Before this division could take place the plaintiff died, and an objection was raised that the partition suit failed. The Privy Council, however, held that on the death of the plaintiff, his own heirs succeeded in preference to the defendants who were separated coparceners (d).

In the most recent case on the point the Judicial Committee held, affirming the principle in *Appovier's case*, that where the

(a) M. I. A., vol. XIII, 113.

(b) M. I. A., vol. XIII 497.

(c) I. L. R. 2 Mad. 83.

(d) 6 C. L. J. 735 ; 4 Cal., 434. 24 Bom., 182.

members of a joint Hindu family executed instruments in writing providing that part or whole of the joint family property should belong to, and be enjoyed by different members of the family in certain specified shares, the effect of it is that, as to property so dealt with there is a division of rights, the status of the family is changed, and the previously undivided family becomes by operation of law divided (a).

Chastity is a condition precedent to the right of succession of the widow.

Mitakshara.

According to all the commentaries it is the chaste widow alone who is entitled to succeed to the estate of a man who dies without leaving any male issue. The Mitakshara cites the texts of Vriiddha Manu and Katyayana in support of this view. "The widow of a childless man", says Vriiddha Manu, "keeping unsullied her husband's bed, and persevering in religious observances, shall present his funeral oblation and obtain his (entire) share." Katyayana also says, "Let the widow succeed to her husband's wealth, provided she be chaste" (b).

Dayabhaga.

In the Dayabhaga, another text of the sage Katyayana is cited which is as follows :—
"Let the childless widow, keeping unsullied

(a) Musst. Parbati *vs* Chaudhri Naunihal, 10 C.L.J., 121. P. C. see also Balkissen *vs* Ramnarain L. R. 30 I. A. 139. (b) Mitakshara, Ch. II. sec. I., 6.

the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. After her death, let the heirs take it" (*a*). From these and other texts of like import it is now firmly established in all the schools that the chastity of the widow is a condition precedent to her taking her husband's property by inheritance. The Mitakshara expressly lays down:— "Therefore, it is a settled rule that a wedded wife, being chaste, takes the whole estate of a man, who, being separated from his coheirs, and not subsequently reunited with them, dies leaving no male issue" (*b*). Although unchastity is a cause of disinherison, a widow who has once succeeded to the estate of her deceased husband cannot be afterwards divested of it by reason of subsequent incontinence. This question, upon which there was formerly a conflict of authorities, was settled by a Full Bench of the Bengal High Court consisting of ten Judges (*c*) and was carried in appeal before the Judicial Committee of the Privy Council, who affirmed the view of the majority of the Full Bench. Mr. Justice Dwarkanath Mitter, who was in

Subsequent unchastity is not a cause of disinherison.

(*a*) Dayabhaga, Ch. XI., s. V, 56.

(*b*) Colebrook's Mitakshara, Ch. II., S. I. p. 39.

(*c*) (1873) *Kerry Koletanee vs Moniram*, 19 W. R., 367. F. B.

the minority, examined with great fulness and care all the original texts on the point; and came to the conclusion that under the Bengal school of Hindu law, a widow, who has once inherited the estate of her deceased husband is liable to forfeit that estate by reason of her unchastity. His judgment is a learned exposition of all that can possibly be said in support of his opinion which has now been set aside and is no longer law. The other view was exhaustively considered and discussed by Sir Richard Couch, Chief Justice of Bengal. It seems unnecessary to repeat at length the arguments used by them on both sides of the question and impossible to add thereto. It appears, however, that Mr. Justice Mitter was not quite accurate when he remarked :—"It has been said that under the Hindu law an estate once vested cannot afterwards be divested. Now there is no work on Hindu law that I am aware of in which it is laid down in so many terms that an estate once vested cannot be divested." For we find that the Viramitrodaya when dealing with the subject of exclusion from inheritance, observes as follows :—"The exclusion, again, of these, takes place, if their disqualification occur previously to partition (or succession ;) but not also if subsequently to partition or succes-

Criticism of
Mr. Justice
Mitter's view
on the point.

sion ; *for there is no authority for the resumption of allotted shares*" (a). The portion in italics is significant ; it shows beyond doubt that the Hindu law does recognise the rule that an estate once vested cannot be divested. The view of the majority of the Full Bench has been affirmed by the Privy Council (b). The same view had been taken previously by the Bombay High Court (c). In Allahabad a Full Bench of the High Court, while dealing with the inheritance of a widow under the Benares school also adopted the rule laid down by the Calcutta Full Bench (a). So it may now be taken to be firmly established that under all the schools, a widow, who has once inherited the estate of her husband, is not liable to forfeit that estate by her subsequent unchastity.

Dr. Mayr thinks that the condition of chastity which the Brahmin lawyers engrafted upon a widow's right of succession is wholly unsupported by the early text of the Vedas (e).

Dr. Mayr's view.

I have already dealt with the question as to what is the legal effect of remarriage by a

Legal effect of remarriage by the widow on her deceased husband's estate.

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- (a) Viramitrodaya, p. 253 G. C. Sarkar's translation.
 - (b) Moniram vs Keri Koletani, I. L. R. 5 Cal., 776.
 - (c) Parbati vs Dhikhu, 4 Bom. H. C. R. A. C. 25.
 - (d) Nehalo vs Kishen lall, I. L. R. 2. All., 150.
 - (e) Mayr. 181.

Hindu widow upon the estate which she has inherited from her deceased husband in an earlier chapter and I need not here restate my views on the point.

Succession by several widows.

It has been shown that the widow is the heir to the deceased husband's estate in default of male issue. But where there are several widows each will inherit equally. The Mitakshara says :—"The singular number "wife" in the text of Yajnavalkya, is used to designate a class," and adds "where there are several wives of the same or different castes they divide and take the property according to their shares" (a). The Viramitrodaya says likewise "but the wives of the same class with the husband shall take the estate dividing it amongst themselves" (b).

Mitakshara.

Dayabhaga.

In the Dayabhaga certain texts are cited which go to show that it is the eldest wife alone who is entitled to inherit. The inclination of the opinion of Jimutvahana is to lay down that that wife alone inherits who can be ranked as *Patni i.e.* wife who can associate with her husband in the performance of religious rites (c). But this view of Jimutvahana has not been accepted anywhere. It is settled under the Mitakshara school of Hindu

(a) एकवचनं च जायामिप्राविण। Mitakshara. Sec II, 1, 5.

(b) Page 153. of Mr. G. C. Sarkar's translation.

(c) Dayabhaga Ch. XI, Sec. 1, 15 & 47.

law that the estate of several widows, who take their husband's property by inheritance is one estate, The right of survivorship is so strong that the survivors take the whole property. They are therefore, in the strictest sense, coparceners (*a*). The whole law as to the rights of co-widows in their husband's state in Madras was considered in the judgment of the Madras High Court in the Tanjore case (*b*) and it was laid down "that the sound rule of inheritance is that two or more lawfully married wives (*patnis*) take a joint estate for life in their husband's property, with rights of survivorship and equal beneficial enjoyment." The Judicial Committee of the Privy Council, in a later case, referred to this decision, and approved of the proposition of law stated above (*c*). The Smriti Chandrika (*d*) seems to support this view. In the Vyavahara Mayukha it is said that "if there be more than one, they will divide the wealth and take shares." Mr. Justice Melvill was not sure, if under this

Madras decision. Tanjore case.

(*a*) Bhagwandeem vs Myna Bae, 11 M. I. A. 487. (1866-67).

(*b*) Jijoyiamba Bayi vs Kamachi, 3 Mad. H. C. R., 424.

(*c*) Gajapathi Nilamani vs G. Radhamoni, I. L. R., 1 Mad., 290.

(*d*) Ch XI, Sec I, p 57.

Vyavahara
Mayukha on
the same.

text of Nilkantha (a) the widows would take a joint estate. But whether they took joint or several estates, the learned judge thought that as regards the devolution of the estate, the result would be the same. "If the widows take," said his lordship, "a joint estate, the surviving widow takes the undivided share of the other widow by survivorship. If they take several estates the surviving widow would take the divided share of the deceased widow by right of inheritance, as her husband's next heir" (b). The position of a senior widow would give her, as in the case of other coparceners, a preferable claim to the care and management of the joint property (c). But where the property is impartible, as in the case of a Raj, the senior widow will inherit and the other widows will only be entitled to maintenance.

The daughter
comes next
after the
widow.

In the text of Yajnavalkya the heir who comes next after the widow is the daughter. The Mitakshara cites texts of Vrihaspati and Katyayana to show that the daughter succeeds in default of the widow. Katyayana says, "Let the widow succeed to her husband's wealth, provided she be chaste ; and

(a) Vyavahara Mayukha, Ch. IV, Sec 4. p. 119.

(b) Bulakhidas vs Keshablal, I. L. R., 6 Bom, 85.

(c) Tanjore case, 3 Mad. H. C. R., 424.

in default of her, let the daughter inherit, if unmarried. (a). Vrihaspati says : "The wife is pronounced successor to the wealth of her husband ; and in her default, the daughter. 'As a son, so does the daughter of a man proceed from his several limbs. *How then should any other person take her father's wealth* (b)" ? The author of the Mitakshara, by his above mentioned quotation from Vrihaspati—"as a son, so does the daughter of a man proceed from his several limbs"—appears to rest her heirship on consanguinity. From the latter part of the text of Katyayana, cited above, the Mitakshara deduces the rule that the unmarried daughter succeeds in preference to the married daughter. A text of Gautama :—"A woman's separate property goes to her daughters, unmarried or unprovided," is quoted in support of the proposition laid down by the Mitakshara, "that if the competition be between an unprovided and enriched daughter, the unprovided one inherits ; but, on failure of such, the enriched one succeeds." Vijnanes-

Mitakshara.

Unprovided daughter preferred to the wealthy one.

(a) "पत्नी भर्तुर्धनहारी या स्यादव्यभिचारिणी ।

तदभावे तु दुहित्वा यद्यनूद्धा भवेत्तदा ।"

(b) अङ्गादङ्गात् सम्भवति पुत्रवदुहिता वृणाम् ।

तस्मात् पितृ धनं तस्यः कथं गृह्णीत मानवः ॥

Mitakshara, Ch. II, Sec. 2, p. 2. (Colebrooke's Translation).

wara bases the right of the indigent married daughter to succeed to the inheritance of her deceased father in preference to the married daughter who is wealthy, on the analogy drawn from the text of Gautama which obviously applies to the succession of daughter to her mother's *Stridhan* only. This rule of the Mitakshara has been accepted by the Judicial Committee of the Privy Council (a). But no preference is given to a daughter who has or is likely to have male issue, over a daughter who is barren or childless widow—a rule wherein the Benares School differs from the law of the Bengal School on the point (b). And this difference would follow from the divergence between the two schools as to the basis of the right of a daughter to inherit to her deceased father. As we shall see later, Jimutvahana would rest the daughter's right to inherit on her capacity to offer oblations. A daughter could offer no religious oblations herself, but she produced sons who could present such oblations; where therefore the daughter had either no sons or was incapable of having sons at the time the succession opened, she was

No preference to a daughter likely to have issue over barren or childless daughter.

Divergence between the two schools—Bengal and Benares—on the point.

(a) *Wooma Dayee vs. Gokoolanund*, I. L. R. 3 Cal., 587. (P. C.)

(b) *Ibid.*

held not competent to inherit. But Vijnaneswara intended to ground the daughter's right of succession on consanguinity and such intention would not be in conflict with his general doctrine that *Sapindaship* is based on the community of particles rather than on the capacity to offer funeral oblations.

We have seen already that the widow is by her incontinence debarred from inheriting the estate of her husband, and the question arises whether the same rule applies to the succession of a daughter to the estate of her father. In the text of Katyayana quoted by the Mitakshara, the chastity of the widow is made the express condition on which she can take, but there is no such provision as to the daughter. And applying the principle embodied in the maxim "*expressio unius est exclusio alterius*" to this case it might be fairly contended that incontinence of a daughter is no bar under the Mitakshara to her succeeding to her father's estate. It may be also stated here in support of this view that "incontinence" is not mentioned by Vijnaneswara as one of the causes of exclusion from inheritance (a). A text of Narada is cited in the chapter on exclusion from inheritance, which declares

Incontinence of the daughter is no bar to her succeeding under Mitakshara.

(a) Ch. II. Sec. X.

that "an outcaste" and "one addicted to vice" cannot inherit; and it may be said that an incontinent daughter might come within one or other of these two classes of persons. As regards "Vice", it is one of the grounds of exclusion which has been made applicable to men and to women. But the rule must be regarded as obsolete for no man has ever been held disqualified from inheritance on the ground of "incontinence." The practice of the people and the courts have firmly established that incontinence is no reason for excluding men, why should a different rule prevail with regard to women? Suppose the incontinence of the daughter was followed by expulsion from her caste, Act XXI. of 1850 would protect her and would not deprive her of the right, which she otherwise would have had, to inherit to her deceased father. The preceding argument makes it clear that under the Mitakshara a daughter is not prevented by unchastity from succeeding to the estate of her father. The matter, however, is an open question so far as the Calcutta and Allahabad High Courts are concerned, as there has been no cases directly speaking to the point.

Mayukha on
succession of
daughters
agrees with
Mitakshara.

The doctrine of the Mayukha as to the succession of daughters is in complete uniformity with that of the Mitakshara. Nil-

kantha cites a text from Manu :—"The son of man is even as himself, and the daughter equal to the son ; how then can another inherit his wealth, but she who stands as if it were himself" (a). With regard to the text of Gautama *Stridhanamaprattanam apratitisthanam*—Nilkanta says that those acquainted with traditional law hold that the term *Stri* denotes the (*Pita*) father also (b).

The Judicial decisions in Bombay lay down that in Western India there is no bar to an unchaste daughter's succeeding to her father's estate. The leading case on the subject is *Advyapa vs Rudrapa* (c). In this case Sir Michael Westropp, Chief Justice, after examining in great detail the view of the Mitakshara and the Mayukha on the question, said, "But, if as is the fact, there be neither text nor case which shows that, according to the law as it prevails in Western India, a daughter is by her incontinence, debarred from succession to the estate of her father, we do not think that the analogy derivable from the case of the widow would justify us in imposing such a disqualification upon the daughter"

Bombay decisions affirm the same.

A somewhat peculiar case arose recently

(a) IX, 130. (b) स्त्री पदं पित्रण्यपलक्षितं साम्प्रदायिका ।

(c) I. L. R. 4 Bom., 104. See also *Bai Mangal vs. Bai Rukhmini*, I. L. R. 23 Bom., 291.

in Bombay. A Vaghya (male dedicated to the god Khandoba) had three daughters, one of whom was a Murali (female dedicated to the God Khandoba) and two married. After the death of the male his Murali daughter, who lived by prostitution and had children by promiscuous intercourse, claimed her father's property as heir to the exclusion of her sisters under the rule of Hindu law that an unmarried daughter inherits to her father before his married daughter. The High Court held, that a woman, who in her maiden condition becomes a prostitute, being neither a *Kanya* (unmarried) nor a *Kulastri* (married) but being at the same time notwithstanding her prostitution a qualified heir under the ruling in *Advyapa vs. Rudrapa* would be entitled to succeed to her father's property, only in default of either married or unmarried daughters (a).

Principle of
succession as
between
married
daughters.

In *Baku vs. Mancha Bai* (b) it was held that in the Bombay Presidency, as between married daughters, succession was regulated by their comparative endowment or nonendowment. In a recent case it has been laid down that though the Courts ought not to go minutely into the question of comparative

(a) *Totawa vs Basawa*, I. L. R. 23 Bom., 229.

(b) *Baku vs Moncha*, 2 Bom. H. C. R., 5 ; see also *Poli vs Narotum*, 6 Bom. H. C. R., 183.

poverty, yet where the difference in wealth is marked, the whole property passes to the poorest daughter (a).

No preference is given to a daughter, who has or is likely to have male issue over a daughter who is barren or a childless widow.

The Vivada Chintamani says that "on failure of wives the heritage devolves on the daughters" and cites a text of Narada to the effect "on failure of male issue, the daughter inherits for she is equally a cause of perpetuating the race; since both the son and the daughter are the means of prolonging her father's line". Vachaspati Misra relies also on the same texts of Manu and Vrihaspati which are relied on in the passages in the Vyavahara Mayukha and the Mitakshara respectively which refer to a daughter's right to succeed. He refutes the opinion that the text of Manu (b) refers to an appointed daughter. For his opinion that the maiden and unmarried daughters take the heritage successively he cites a passage from Parasara:—"Let a maiden daughter take the heritage of one who dies without leaving no male issue; if there be no such daughter, a married one shall inherit" (c).

Vivada
Chintamani.

Vachaspati
Misra.

(a) Tara vs Krishna, I. L. R. 31 Bom, 495.

(b) See P. 292, p. 293. P. C. Tagore's Translation.

(c) IX, 130.

It would thus appear that in the Mithila school no distinction is recognised between poor and rich daughters in the matter of succession, as is the case both in the Benares and the Western schools.

The Mithila School on the daughter's incontinence.

It seems to us that in the Mithila school incontinence will prevent a daughter taking her father's estate. And this view is supported by the following passage from the Vivada Chintamani :—"But what kind of daughter, is competent to receive her father's heritage, is declared by the same author (Vrihaspati). Being of equal class and married to a man of like tribe, and being *virtuous and devoted to obedience*, she (namely, the daughter), whether appointed or not appointed to continue the male line, shall take the property of her father who leaves no son, nor widow" (a) The words साध्वी शुश्रूषणे रता (virtuous and devoted to obedience) imply that the daughter must be chaste in order to be entitled to inherit. The words, *to obedience*, would, of course, mean devoted to the husband. In the Mitakshara this text of Vrihaspati is not referred to, perhaps deliberately as it is not intended by Vijñaneswara that the daughter should be under the same obligation to

(a) सप्तमी सप्तमीनां साध्वी शुश्रूषणे रता

कृता कृता वा पुत्रस्य पितृर्द्धनहरी भवेत् ॥

chastity as a widow. But when Vachaspati refers to it, the legitimate inference to draw is that his intention was to exclude an unchaste or incontinent daughter from inheritance. I have not been able to find any case on the point we are now discussing, but when the question arises, it will have to be considered whether under the Mithila school, chastity is not a necessary condition for the daughter's succession.

Passing from the law of the Mithila school on this point, we turn to the Smṛiti Chandrika, which is the leading authority of the Dravida or Southern school of Hindu law. In the other three schools noticed before, the daughter's right to inherit is, as we have seen, based on consanguinity alone. In the Smṛiti Chandrika the principle of religious efficacy is introduced as an additional reason for the inheritance and it seems the author has followed the Dayabhaga on the point.

With regard to precedence amongst daughters *inter se* the Smṛiti Chandrika lays down the following rule : "Where there is a competition between a daughter unprovided and one unmarried, both being of the same class with their father, and possessing the *other qualifications* mentioned in the text, the unmarried alone first takes ; the

Daughter's
succession in
the Dravida
or Southern
School.

Smṛiti Chan-
drika on pre-
cedence in
succession
among daugh-
ter's *inter se*.

maintenance of such daughters out of the wealth of the father being indispensable. On failure of such a daughter, the unprovided takes, such a daughter being destitute of the means of subsistence owing to the inability of the husband to maintain her, although he is bound to do so. In default of unprovided daughters, the daughter provided or enriched and possessing the qualifications of equality of class,—etc. takes, such a daughter, though provided, being competent to inherit" (a). The author of the *Smriti Chandrika* holds that "barren daughters are not at all entitled to inherit their deceased father's estate, they being incapable to confer on him spiritual benefits through the medium of their offspring (b). The Madras High Court has refused to accept this opinion of the *Smriti Chandrika* in the case of *Simmani Ammal vs Muttammal* (c). In this case Mr. Justice Muttusami Ayyar, in giving judgment said : "In the absence, therefore, of a regular course of decisions or other evidence of usage, indicating a consciousness in the country that this opinion of the author of the *Smriti Chandrika* is living law, we do not feel warranted in

View of
Smriti Chandrika regard-
ing succession
of barren
daughters.

Madras High
Court does
not accept it.

(a) *Smriti Chandrika*, Ch. XI. Sec. 11., 28.

(b) *Ibid*, Ch. XI., Sec. II, 21.

(c) I. L. R., 3 Mad., 265.

departing from the doctrine of the Mitakshara". So contrary to the rule laid down in the Smriti Chandrika it has been held in Madras that sonless or barren daughters are not excluded from inheritance by their sisters who have male issue. And the principle of this decision has been affirmed in a very recent case (a).

The High Court of Madras has rejected the authority of the Smriti Chandrika in another matter connected with the principles on which the daughter's right of succession is based. It holds contrary to what would seem to follow from the Smriti Chandrika, that chastity is not a preliminary condition to a daughter's succession to her father's estate (b). The Smriti Chandrika, after quoting the text of Vrihaspati relied on in a passage in the Vivada Chintamani already cited, insists upon "the daughter being virtuous and devoted to obedience". There can be no doubt, for the reasons which we have stated when we were dealing with the opinion of Vachaspati Misra on the point, that the author of the Smriti

Is chastity
a preliminary
condition to
a daughter's
succession?

(a) (1908) Vedammal vs Vedanayaga, I. L. R. 31 Mad., 100 (108.)

(b) Kojiyadu vs Lakshmi, I. L. R. 5 Mad., 149; Angammal vs Venkata Reddy. I. L. R. 26 Mad., 509; Vedammal vs Vedanayaga, I. L. R. 31 Mad., 100 (106).

PROPRIETARY POSITION OF WOMEN—INHERITANCE.

Chandrika imposes the condition of chastity on the daughter's right to inherit

Principles of
succession of
daughters in
the Bengal
School.

It remains now to consider the principles of succession of daughters in the Bengal school. Jimutvahana introduces the rule of religious or spiritual efficacy in determining the rules of their inheritance to their father's estate. After quoting the text of Narada:—"On failure of male issue, 'the daughter inherits for she is equally a cause of perpetuating the race : etc etc,'" Jimutvahana says: "It is the daughter's son, who is the giver of a funeral oblation, not his son ; nor the daughter's daughter ; for the funeral oblation ceases with him. Therefore the doctrine should be respected, which Dicshita maintains ; namely that a daughter, who is mother of male issue, or who is likely to become so, is competent to inherit ; not one, who is a widow, or is barren, or fails in bringing male issue as bearing none but daughters, or from some other cause" (*a*). Jimutvahana says again, "A daughter's right of succession to the property of her father is founded on her offering funeral oblation by means of her son" (*b*). And he adds "the daughter is heiress of her father's wealth in right of the funeral

(*a*) Dayabhaga, Ch. XI., Sec. II, paras 2 and 3.

(*b*) Ch. XI. Sec, II, p. 15.

oblation which is to be presented by the daughter's son" (a). These passages are sufficient to show that the right of the daughter to inherit is dependent on the spiritual merit of being able to produce one who can offer oblations to the deceased father.

According to the Dayabhaga, the unmarried daughter is first entitled to inherit, and the reason given is that "should the maiden arrive at puberty unmarried, through poverty, her father and the rest would fall to a region of punishment as declared by the holy writ" (b) and Jimutvahana supports this opinion by a text from Vasistha. But if there be no maiden daughter the succession devolves on her who has, or is likely to have male issue. Daughters who are barren, or widows without male issue, or mothers of daughters only can under no circumstances inherit, agreeably to the opinion of Dicshita referred to above.

Order of succession among daughters according to Dayabhaga.

The Judicial decisions have in laying down the Bengal law of succession of daughter, accepted these rules of the Dayabhaga regulating precedence amongst daughters *inter se*.

The question, whether under the Hindu law of the Bengal school a daughter is pre-

(a) Ch. XI. Sec. II. P. 17.

(b) Dayabhaga, Chap. XI. II, 6.

Dayabhaga regards chastity as a necessary condition to the right of the daughter to succeed.

cluded from inheriting the property of her father by reason of unchastity, now claims our attention. In the Dayabhaga the author, in treating of the daughter's succession, quotes the text of Vrihaspati which states that the daughter should be *virtuous and devoted to obedience* (a). The passage in the original साध्वी शुश्रूषणे रता which Colebrooke has translated as "virtuous and devoted to obedience" in some editions of the Dayabhaga has a slightly different reading viz, भर्तृशुश्रूषणे रता of which the correct rendering is "devoted to obedience to the husband." But whichever reading is adopted, there is not much difference in meaning, chastity being evidently the qualification intended by both. The author of the Dayabhaga, by citing the above text of Vrihaspati as the basis of the married daughter's right to inherit evidently intended to deduce the rule that chastity is a necessary qualification for entitling her to take her father's estate. We have seen already that in more than one place it is said in the above mentioned treatise that the daughter's right of succession to her father's property is founded on her offering funeral oblation by means of her son, that is, on her capability of having a legitimate male issue, and for the existence of this foundation of

(a) सङ्गी सङ्गोनीदा साध्वी शुश्रूषणे रता ।

her right, chastity is an essential condition. There is another passage in the Dayabhaga bearing upon this question towards the end of the section treating of the succession of the daughter and the daughter's son. Jimutvahana, after stating that the daughter, like the widow, takes a qualified interest in the estate which at the death of either goes, not to her heirs, but to the next heir of the last full owner, and after giving in support of that view a certain reason, adds another and a better reason in these words :—"Or the word 'wife' is employed with a general import : and it implies, that the rule must be understood as applicable generally to the case of a woman's succession by inheritance" *a*). Raghunandana, whose authority is accepted in Bengal, in commenting on this passage of the Dayabhaga says : "The word 'wife' implies females generally. In the text of Katyayana : 'Let the childless widow, preserving unsullied the bed of her lord and abiding with her venerable protector, enjoy with moderation the property until her death. After her let the heirs take' ; and in the first half of the next text of the same sage, namely, 'the wife who is chaste takes the wealth of her husband,' the word 'wife' is illustrative." The above passage

(a) Dayabhaga Chap. XI. Sec. II, 31.

from Jimutvahana (Ch. XI, Sec II, 31) read along with the gloss of Raghunandan leaves no room for doubt that chastity is an essential condition for the daughter to inherit to her father under the Dayabhaga.

Judicial
decisions con-
firm the view.

The decisions of the Bengal High Court are in conformity with this view (a) of the Dayabhaga. The last of the two cases cited above accordingly lays down that according to the Bengal school of Hindu law, a daughter who is unchaste is precluded from inheriting the property of her father.

Mother's right
to succeed.

The mother is the next female heir who is mentioned in the text of Yajñavalkya as coming after the daughter. Her claim to succeed to her son is recognised by Manu in express terms in the following verse :—"Of a son dying childless the mother shall take the estate : and the mother also being dead the paternal grandmother shall take the estate" (b). Kulluka, in commenting on this text, says that the mother inherits only on failure of son's widows, daughters, and that the mother and father inherit conjointly. Narayana, another commentator of Manu, places the mother before the father in the order of succession. One theory is that the

(a) Ramnath vs Durgasundari, I. L. R. 4 Cal., 550 ; Ramananda vs Rai Kissori, I. L. R. 22 Cal., 347.

(b) Manu, IX. 217.

gloss of Kulluka marks the changes in the law since the time of Manu (*a*). Amongst the other Smriti writers, Vishnu, Vrihaspati and Katyayana recognise the claim of the mother to succeed, but they do not agree as to the order in which she takes the inheritance. Vrihaspati places her after the wife and male issue (*b*); Vishnu places her after the male issue, the widow, the daughter and the father (*c*). Yajnavalkya, as we have seen already, places both parents after the daughter and there is a divergence of opinion amongst the commentators as to the preference between father and mother to succeed.

Divergence of opinion amongst commentators as to right of mother to succeed in preference to father.

Viswarupa, the earliest commentator on Yajnavalkya Smriti, says that the mother has priority (*d*); so does the Mitakshara (*e*).

The Mitakshara states that the preference of the mother to the father is due to her greater propinquity. It is said: "The father is a common parent to other sons, but the mother is not so: and since her propinquity

(*a*) Mayne's Hindu law and Usage, P. 707. (7th. Ed.)

(*b*) XXV. 64. Sacred Books of East, Vol. 33, p 379.

(*c*) Vishnu, XVII, 2.

(*d*) See translation by Sitaram Sastri, Mad. Law Journal, vol. 9 p. 420.

(*e*) Chap. II., Sec. III., 3.

Mitakshara
prefers mother
to father.

is consequently the greatest, it is fit, that she should take the estate in the first instance conformably to the text '*To the nearest sapinda, the inheritance next belongs*.' The portion in italics indicates that the ground of her (mother's) claim is *sapinda* relationship by reason of connection with her deceased son through particles of the body (a). Nilkantha considers that this exposition of Vijnaneswara is unsound, because it is opposed to the texts of Vishnu and Katyayana and holds that in default of the daughter's son comes the father, in default of him, the mother (b). The author of the Smriti Chandrika, after noticing three different views of the mother's right, rejects them all and comes to the same conclusion as the Vyavahara Mayukha. Some argue, says the

Mayukha
prefers father
to mother.

(a) The word *Sapinda* does not mean one who is connected by funeral oblations as Colebrooke thinks. In the Acharkhanda of the Mitakshara it is distinctly stated, therefore one ought to know that wherever the word *sapinda* is used, there exists (between the persons to whom it is applied) a connection with one body, either immediately or by descent. (See comments of Vijnaneswara on Book I, verse 52.) See Colebrooke's translations of Mitakshara, Ch. II., sec. III., P. 4. See Umaid Bahadur vs Udai chand, I. L. R. 6 Cal., 119 F. B. ; also per Mookerjee J. in Sham singh vs. Kishun sabai, 6 C. L. J., 198 (201).

(b) Vyavahara Mayukha, Ch. IV., Sec. VIII., 14.

author, that the mother alone succeeds to the estate, notwithstanding the existence of the father for she confers greater benefits on the son by bearing the child in her womb and nurturing him during his infancy and because it is argued "a mother surpasses a thousand fathers in point of veneration" (a). Others argue that the father is a common parent to the sons of a rival wife also, but the mother is not so; and hence mother's propinquity is more immediate compared with the father's. "A third class of authors," says Devananda Bhatta, "advocate the great propinquity of the mother, by saying that such propinquity is inferrible from a text relating to the succession of the property of a uterine brother." All these three opinions are controverted in the Smriti Chandrika by weighty arguments to the contrary. The opinion of Sricara that both the parents may divide between them and take the inheritance has not been accepted.

Smriti Chandrika agrees with Mayukha.

The Vivada Chintamoni places the mother before the father and before the daughter's son, who comes in even after the father. In placing the daughter's son after the parents, the author has practically changed the order of succession as laid

Vivada Chintamoni also places mother before father.

(a) Smriti Chandrika, Ch. XI., S. III., 3.

down by Yajnavalkya's text. But the Sudder Dewany Adalat has disregarded this opinion of the Vivada Chintamani, and after a full examination of the views of the Mithila legal writers, declared the right of the daughter's son to come in after the daughter as in the other schools (*b*). So under the Mithila school of Hindu law the mother succeeds to a childless man in default of the widow, the daughter, and the daughter's son.

In the Bengal school father preferred to mother.

Under the Dayabhaga school the mother comes in after the father, because the latter presents to others two oblations in which the deceased participates ; and because in a comparison of the male with the female sex, the male is pronounced superior.' Here again, as in the case of the daughter, the author of the Dayabhaga introduces religious or spiritual merit as the test of succession. He rejects the notion that 'superior title to veneration is the reason of a right of inheritance, on the ground that, if it were so, the succession would devolve on the spiritual preceptor before the father for the former is more venerable of the two.'

We have thus seen that there is a divergence of opinion in the different schools of

(a) Page. 293. P. K. Tagore's translation.

(b) Surja Kumari vs. Gundharp singh, 6 S. D., (168-179) New Ed.

Hindu law as to the order in which the parents take. Nowhere is this divergence more easily noticeable than in the Bombay Presidency—in some portions of which, the Mitakshara is the paramount authority, while in the other parts of the Presidency it gives way to the Mayukha. It has accordingly been held (*a*) that in the Ratnagiri District of the Bombay Presidency, where the Mitakshara is obeyed, the rule of the Mayukha, that the father is to be preferred to the mother, being directly opposed to the Mitakshara, cannot prevail; while, on the other hand, in Guzerat, where the Mayukha is of special authority, the father succeeds in preference to the mother (*b*). In Bengal, it is firmly established that the father takes before the mother (*c*). For the same reasons for which a daughter in Bengal is under an obligation to chastity in order to inherit, an unchaste mother will be precluded from succeeding to her son. Raghunandana has pointed out that the word “wife” in the text of Katyayana—“the wife who is chaste takes the wealth of her husband,” applies to females

Effect of unchastity on mother's right to inherit.

In Bengal.

(*a*) Balkrishna Bapuji vs. Laksman Dinkar, I. L. R. 14 Bom, 605.

(*b*) Khodabai vs. Bahdhar, I. L. R. 6 Bom, 541.

(*c*) Hemlata vs. Goluck, 7 S. D, 108.

In Bombay
and Madras.

in general and would consequently include the mother. In the case of Ramnath Talapatro (*a*) this point expressly came up for decision and it was held that an unchaste mother is incapable of succeeding as heiress to her son. On the contrary, it has been held in Bombay and Madras that the rule which requires chastity as a necessary condition for inheritance is confined to the widow only and does not apply to the mother (*b*). In a very recent case it has been held in Madras, however, that a mother who has been party to the murder of her son, cannot succeed by inheritance to the property of such son (*c*). In Allahabad the matter has recently been decided in accordance with the Bombay view (*d*).

In Allahabad.

Mother does
not include a
step-mother.

According to Jimutvahana the word "mother" in the text of Yajnavalkya cannot include a step-mother (*e*). It has accordingly been held by a Full Bench of the Calcutta High Court that a step-mother does not in-

(*a*) I. L. R. 4 Cal, 550. See also Nogendra vs. Benoy, I. L. R. 30 Cal. 521.

(*b*) Adyapa vs. Rudrapa, I. L. R. 4 Bom, 104. Koyudu vs. Laksmi, I. L. R. 5 Mad, 149.

(*c*) (1907). Vedammal vs. Vedanayaga, I. L. R. 31 Mad, 100.

(*d*) Dal vs. Dini, I. L. R. 32 All, 55 ; Baldeo vs. Mathura, I. L. R. 33 All, 702.

(*e*) Dayabhaga, iii. 2. 30. also Ch, XI Sec VI, 3.

herit the estate of her step-son (a). In this Full Bench case it has also been laid down that she cannot succeed either under the Mitakshara or the Mithila school of Hindu law. The reasons for this view are that under the Mitakshara, a step-mother is not included in the term mother and not having been expressly named amongst female heirs, cannot inherit to her step-son. This view had also been adopted in Allahabad (b). And quite recently the Calcutta High Court has held approving the earlier Full Bench decision, that in the Bengal Presidency under the interpretation of the Mitakshara law as accepted in the districts governed by that law, a step-mother is not entitled to succeed to her step-son either as *gotraja sapinda* or in preference to the father's sister's son (c). In Bombay although the step-mother cannot be introduced as an heir under the term "mother," yet as the widow of a *Gotraja sapinda* of the *propositus*, and, therefore, according to the doctrine of the Mitakshara and the Mayukha, a *gotraja sapinda* herself, she cannot be regarded as altogether excluded from succession to her

Step-mother
not an heir in
Bengal.

Step-mother
not excluded
from succession
in Bombay.

(a) *Lala Joti vs Msst. Dooranae*, Weekly Reporter Sp. No. 173.

(b) *Ramanand vs Surgiani*, I. L. R. 16 All. 221.

(c) *Tahaldai Kunri vs Gayapershad*, I. L. R. 37 Cal., 214.

step-son (*a*). In the case last cited her exact position in the line of heirs was not determined. Messrs. West and Buhler (*b*) however, say that the step-mother ought to be placed on account of her near relationship to the deceased, immediately after the paternal grandmother, up to whom only the succession is settled by special texts. And the Bombay High Court has recently adopted this view (*c*). A step-mother has been held entitled to succeed in preference to the paternal uncle's son on the principle enunciated by Messrs. West and Buhler.

In Madras the course of decisions has been against the step-mother's right (*d*). The leading case on the subject is the Full Bench decision in *Mari vs. Chinammal* (*e*). In this case it has been decided that a step-mother does not succeed to the estate of her step-son in preference to a *Sagotra sapinda*, *e. g.* a paternal uncle. All the judges composing the Full Bench were agreed that the

(*a*) *Kesserbai vs Valab.* I. L. R., 4 Bom., 118.

(*b*) West and Buhler. P. 472 (3rd. Edition).

(*c*) *Russoobai vs Zoolekhabai*, I. L. R., 19 Bom., 707 (1895). See also *Bhimacharyya vs Ramacharya*, I. L. R., 33 Bom., 452 (462).

(*d*) *Kumarbelu vs Virana*, I. L. R. 5 Mad., 29 ; *Multammal vs Vengalakshiammal*, Ibid 32.

(*e*) I. L. R., 8 Mad., 107.

term "mother" in the Mitakshara did not include a step-mother. The majority thought that the claim of the step-mother as a *Gotraja sapinda* had not been established. Mr. Justice Muttusami Ayyar, while entertaining no doubt that she was a *Gotraja sapinda* in the Mitakshara sense of *sapinda* relationship, was not sure if all female *sapindas* were heirs in that Presidency. The learned judge nevertheless agreed with the Full Bench because there was no sufficient warrant for departing from decided cases, and also because there was absence of evidence of usage in favour of the step-mother's right.

In Bengal the sister is not recognised as an heir. She finds no place in the scheme of succession laid down by Jimutvahana as she cannot offer any oblations which may be of any spiritual benefit to his brother. The solitary text of Sankha and Likhita viz: "The daughter shall take the female property, and she alone is heir to the wealth of her mother's son who leaves no issue" might support her claim as heiress. But it has not been quoted by any commentator as authority for the sister's right to succeed. Besides Jagannatha points out that the latter part of the text applies to the appointed daughter only, while Mr. Mayne suggests (a)

Sister is not an heir in Bengal.

Sankha and Likhita may be cited in support of her right to succeed.

(a) Mayne's Hindu Law and Usage, P. 719. (7th Edition).

A text of
Vrihaspati in
support of
sister's right.

that the latter part of the text of Sankha and Likhita may refer to the *Stridhanam* which had passed from the mother to the son ; but the wide difference in these suggested explanations prevents either from being received with confidence (a). There is a text of Vrihaspati which may be said to support the right of the sister. That text runs thus :—
“on the death of a reunited brother his portion is not lost, but devolves on his uterine brother and his sister is also entitled to take a share in it. This law concerns him who leaves no issue, nor wife nor father, nor mother.”
Although Jimutvahana refers to this text for another purpose, he does not regard it as authority for the succession of the sister. She does not fulfil the condition of religious efficacy required by him and must be omitted from his scheme of succession.
In the Benares school the sister does not inherit her brother's estate. The Mitakshara does nowhere expressly mention her. But the text of the Mitakshara, “on failure of the father, *brethren* share the estate” has been so interpreted by Nanda Pandita and Ballambhatta, as to bring in the sister immediately after the brother in the line of

Sister not an
heir in the
Benares
School.

(a) Per Turner. C. J., in *Iakshmanammal* 25. Tiruvengada, I. L. R. 5 Mad., 244.

heirs (a). They maintain that sisters are included in "brethren" according to the true rules of Sanskrit exegesis. But this interpretation of the two ancient commentators has not been accepted by the Judicial Committee of the Privy Council (b), in an appeal from the North Western provinces ; nor has it been admitted by Nilkantha who upholds the sister's heirship on another ground (c). All the other commentators and writers of *Nibandhas* who are followers of the Mitakshara differ from this opinion of Ballambhatta. It has been held in Bengal that a sister is not in the line of heirs according to the Mitakshara (d). In the case of Koer Golab singh *vs.* Koer Kurun singh (e), the question whether a sister can succeed by inheritance to her brother according to the law as received in the North Western Provinces was raised, but their Lordships of the Judicial Committee refused to decide the question as this point had not been raised by the issues in the suit. A similar view has been

(a) Mitakshara, Ch. II. Sec. 4. P. 1. & 7 (note).

(b) Thakoorain sahiba *vs.* Mohun lall, 11., M. I. A., 386.

(c) Vyavahara Mayukha, Ch, IV., S. 8., P. 16.

(d) Jullessur *vs.* Uggur, I. L. R. 9 Cal., 725 ; Must. Gunram *vs.* Srikant 2 Sec., 460.

(e) 14 M. I. A. 176,

In Bombay
on the other
hand sister is
an heir.

Vyavahara
Mayukha.

taken in Allahabad (a). In Bombay, on the other hand, the sister's right to succeed is beyond controversy. The authorities most regarded in Bombay favour her claim to inherit. Her right has been held to rest not only on the Vyavahara Mayukha, but also on the special interpretation of the Mitakshara by Nanda Pandita and Ballambhatta already referred to (b). The passage of the Mayukha (Ch. IV., Sec viii., p. 19), in which Nilkantha introduces the sister has been translated as follows :—"In case of the non-existence of that (the paternal grandmother) the sister takes according to the dictum of Manu that 'whoever is the nearest *sapinda*, his should be the property ; and according to the text of Brihaspati, that where there are many *Jnati Sakulyas* and *Bandhavas*, among them whoever is the nearest should take the property of the childless ; she, the sister, also being born in the brother's *Gotra* and so there being no difference of *Gotrajatva* (the state of being

(a) See Full Bench, Jagat *vs* Shee Das, I. L. R. 5 All., 311.

(b) Vinayak *vs*, Laksmibai. 9. M. I. A., 516. It has been said in a recent case, as, we shall see later, that this decision must be confined to those parts of the Presidency where the Mayukha is the reigning authority *viz*—Guzerat and Island of Bombay I. L. R., 32 Bom. 300.

born in the *Gotra*). But (says an objector) there is no *sagotrola* (being in the same *gotra*). True, but neither is that stated here as a reason for taking the property": Thus we see that the Mayukha places the sister in the order of heirs as a *sapinda* (*gotraja*) *i. e.* *sapinda* by birth as distinguished from those who according to the Acharkhanda of the Mitakshara become *sapindas* by marriage. *Sapindaship* by birth is the reason which induced Nilkantha to give the sister so high a place in the order of succession. She is preferred to the wives of male *gotraja sapindas*, for *sapindaship* by birth is a qualification which the latter do not possess (*a*). Custom seems to have given to natural birth in the family of the *propositus* precedence over the second birth by marriage though the latter also is a source of heritable right (*b*). The Mayukha places the sister after the paternal grandmother. But Sir Michael Westropp, C. J., held that according to the special interpretation given to the Mitakshara by Nanda Pandita and the lady commentator, the position of the sister would be next after the brother in the line of heirs. She would, therefore,

Mayukha places the sister in the line of heirs as being a *sapinda* by birth.

(*a*) *Sakharam vs, Sitabai*, I. L. R. 3 Bom. 353 (361.)

(*b*) *Kesser bai vs Valab Raoji*, I. L. R. 4 Bom., 188 citing from Messrs. West & Butler.

be preferred even to the half-brother (*a*). It is true that this was a case from Konkan, where the Mayukha is the paramount authority, but the observations of the learned Chief Justice are general and seem to lay down the law for the whole Presidency.

Bombay decisions on the sister's right to inherit.

Vinayak v. Laksmi Bai.

The leading case on the rights of a sister in the Bombay Presidency is *Vinayak Anandav vs. Laksmi Bai* (*b*). In this case sisters were held by the Judicial Committee to take absolutely the immoveable property of their brother (who died without leaving male issue) in preference to first cousins, who were the sons of his paternal first uncle. This decision was rested as well on Nanda Pandita's and Ballambhatta's construction of the term "brethren" in the Mitakshara, as upon Nilkantha's mode of bringing the sister as an heir. The doctrine laid down in this case was considered in two earlier cases to give the general rule of succession as to sisters in the whole of the Bombay Presidency. In one of these Sir Michael Westropp, C. J., on the strength of the interpretation of Ballambhatta and Nanda Pandita, held that sisters came immediately after brothers and excluded even a half-brother (*c*).

(*a*) See the case last cited. *Sakha vs Sita*.

(*b*) 9 M. I. A., 516.

(*c*) *Sakha vs Sita*, I. L. R. 3 Bom, 353.

In the later case the learned Chief Justice(*a*) reiterated the fact of the acceptance in the Bombay Presidency of Ballambhatta's doctrine.

These decisions have been subjected to a critical examination by Sir Lawrence Jenkins, Chief Justice, in the case of *Mulji Purshotum vs Cursandas Natha* (*b*) and the conclusion arrived at by his Lordship as to the legitimate scope and effect of these decisions can best be given in his own words. His Lordship said:—"From this examination of the cases, it will, I think, be seen that the authority in favour of the view that Ballambhatta's doctrine has been accepted in Bombay is Sir M. Westropp's opinion to that effect. That opinion is entitled to the greatest respect even though it may not have been necessary for the decision of the case in which it was pronounced. But so far as it purports to rest on *Vinayak Anandraya's* case and that seems to be its real basis—I think it proceeded on a misapprehension of what was decided in that case. The conclusion, therefore, to which I come on a consideration of all the authorities, is that there is no actual decision that Ballambhatta's doctrine has

Examination
of earlier
decisions by
Sir Lawrence
Jenkins, C. T.

(*a*) *Kesserbai vs Valab*, I. L. R. 4 Bom., 188.

(*b*) I. L. R. 24 Bom, 563.

been accepted here, though there are the opinions to which I have referred in favour of that view". It was held in this case that both under the Mayukha and under the Mitakshara, the sister comes in as a *gotraja sapinda* and, as such, must be postponed to a brother's son who is a sapinda. Sir Lawrence Jenkins, C. J., also said that the decision in *Sakharam vs Sitabai* was right for whether the Mitakshara as interpreted by Ballambhatta or the Mayukha, in fact governed the case, the result would have been the same, for according to each, the sister is entitled to preference to a half-brother.

In a recent case, (a) which came from that part of Bombay where the Mitakshara is paramount, it has been held that a sister comes in as an heir to a deceased Hindu immediately after the grandmother, so that where the competition is between her and a half-brother's son, the latter being higher in the line amongst heirs specifically mentioned in the Mitakshara is entitled to preference over her as heir, though it would be otherwise in cases purely governed by the Vyavahar Mayukha. Mr. Justice Chandravarkar examined the full passage in Ballambhatta's commentary bearing on the question of

Sister comes in after grandmother in some parts of Bombay.

(a) *Bhagwan vs Warubai*, I. L. R. 32 Bom, 300.

sister's right to inherit and pointed out that neither the Supreme court of Bombay nor the Privy Council had before them this full passage while they were dealing with Vinayak Anandrav's case, but that they proceeded on the remarks as to Ballambhatta's doctrine in a foot note by Colebrooke in the translation of the Mitakshara. The learned judge declined to accept Ballambhatta's interpretation on two grounds: viz., firstly, that an examination of Ballambhatta's order of succession showed that it introduced a sweeping change in the order given in Yajnavalkya's text relating to obstructed succession as explained in the Mitakshara, and secondly, that in the Mitakshara itself there were clear indications that Vijnaneswara did not think that the word "brothers" necessarily included "sisters." In support of these two grounds two passages from the Mitakshara were referred to. The first of these passages is Vijnaneswara's exposition of two texts of Yajnavalkya (Nos 157 & 158) given in the sixth chapter of the section on "Rituals". The second passage is in placitum 36 at page 424 of Stoke's Hindu Law Books. In giving judgment in this case, Mr. Justice Chandravarkar said :—"These passages from the Mitakshara are, in our opinion, conclusive as showing that Ballambhatta's interpretation

Balla
mbhatta's theory
examined and
rejected by
Bombay High
Court.

is inconsistent with and contrary to Vijnaneswara's meaning of the word 'brothers.' The *dicta* in the decisions of this court, accepting that interpretation, must therefore be held to be erroneous and founded on a misapprehension of not only what Ballambhatta has said in support of his doctrine but also of the Mitakshara itself." The effect of this decision is that in those parts of the Bombay Presidency where the Mayukha is the "reigning authority," sister takes precedence over the half-brother whereas in those parts which are governed by the Mitakshara the order is reversed.

Sister preferred to half-brother where Mayukha paramount, not so in other parts of Bombay.

But it is settled that even outside Gujarat and the Island of Bombay the sister must be conceded a position not lower than that given her by Nilkantha, so that she is entitled to preference over the paternal first cousin (*a*), the step-mother (*b*) and the brother's widow (*c*).

In Bombay the doctrine of the Viramitrodaya, viz., where there has been an intervening holder between a brother and a sister, the sister is excluded by the next male heir, has not been accepted (*d*).

(*a*) Lakshmi vs Dada, I. L. R. 4 Bom ; 210 ; Biru vs Khandu, I. L. R. 4 Bom ; 214. (*b*) Ibid.

(*c*) Rudrapa vs Irava, I. L. R. 28 Bom ; 82.

(*d*) Dhondur vs Gangabai, I, L. R. 3 Bom., 353.

In Madras the right of the sister to inherit her brother's estate was not formerly admitted on the ground of its being in opposition to existing usage (a). In the case of *Chelikani vs Suraneni* (6 M. H. C. R. 278) Mr. Justice Holloway expressed a strong opinion that in the view of the author of the *Mitakshara* the sister came in after the brother in the absence of preferable heirs, though he appeared to admit that in the Madras Presidency her right was not allowed. In the year 1875 her right to succeed was for the first time recognised in the case of *Kutti Ammal vs Radha Kristna Aiyan* (b). She came in, not as a *sapinda* but as a relation falling within the description of "as well as other relations" in the text of the *Mitakshara* (Para 4, Ch II, sec 3) where the author deals with the rule of propinquity. The real ground of her right as an heir seems to have been "that all *relatives* however remote, must be exhausted before the estate can fall to persons who have no connection with the family." The learned judges do not in this case assign to the sister any special place in the line of heirs; they

Sister's right to inherit in Madras.

Sister's right to inherit not originally recognised in Madras.

Sister subsequently admitted as heir.

(a) *Chinnasamner vs K. Chuma*, M. S. D (1859) P. 247; *Nagalinga vs Vaideimja*, M. S. D. (1859). P. 247.

(b) 8 M. H. C. R. 88.

concede to her a right of succession superior to that of strangers in blood.

Mr. Mayne's criticism of Kutti Ammal's case.

Madras High Court rejects Mr. Mayne's view.

The propriety of this decision has been questioned by Mr. Mayne (a). This decision and the criticism of it by Mr. Mayne has been noticed in a later Madras case (b). Sir Charles Turner, C. J., in giving judgment said that there were grounds other than those mentioned by Mr. Mayne which would have to be considered before the ruling in Kutti Ammal's case could be pronounced erroneous. The learned Chief Justice held that the sister was a *sapinda* and had at one time a place in the line of *sagotra sapindas* but came afterwards to be regarded as a *bhinna gotra sapinda*. His Lordship added: "As a *Bhinna gotra sapinda* a sister falls within the definition of *Bandhu*, and, except on the construction of the rule respecting female inheritance, that it absolutely excludes all but certain excepted females, and does not merely postpone their claims, there seems no sufficient reason for refusing her the position to which this court has declared her entitled" The underlying principle of this decision is

(a) Mayne on Hindu law and Usage, pp. 725-6, (7th. Ed.)

(b) Lakshmanammal's case, I. L. R. 5 Mad., 241 (247.)

that Vijnaneswara, the author of the *Mitakshara*, recognises the claims of female heirs generally ; that he nowhere expressly accepts the position that the claims of such females only are to be admitted as have the support of express texts, and that he has made consanguinity the basis of title to succession in the absence of preferential male heirs. This case settles the law for Madras as to the sister's right of succession as a *Bandhu*.

In Madras a half-sister has been held not entitled to succeed in competition with a *sapinda* of the deceased (a). In Bombay, on the other hand, a half-sister has been held entitled to inherit (b). According to the received doctrines of the Bengal and Benares schools, women are held incompetent to inherit, unless named and specified as heirs by special texts. This exclusion is founded on a short text of Baudhayana which we have discussed at the commencement of this chapter. The principle of the general incapacity of women for inheritance founded on the text of Baudhayana has not been adopted in Western India and we accordingly find that a large number of females are admitted to succession in Bombay, who have no place in the line of heirs either in Bengal or in

Half-sister as an heir in Bombay.

Principle of general exclusion of women from inheritance not accepted in Western India

Brother's

(a) *Kumara Velu vs Virana*, I. L. R. 5 Mad., 29.

(b) *Kesserbai vs Raoji*, I. L. R. 4 Bom., 188.

widow and
uncle's widow
are not heirs
under the
Benares and
Bengal
Schools.

Benares. Different effects flow from these different principles. In Bengal, the son's widow and the wives of *gotraja sapindas* in the descending and in the collateral lines are not heirs according to Mitakshara (a). In another case it has been held that according to the law and usage of the Benares school the brother's widow is not in the line of heirs at all (b). Similarly, in Allahabad, it has been decided that the widow of the paternal uncle of a deceased Hindu not being expressly named as heir, is not entitled to succeed to his estate (c). In Bombay, on the contrary, the wives of *gotraja sapindas* have been held competent to inherit. In 1869, in the case of *Lakshmibai vs Jayram Hari* (d), their right to succeed was rested on the following text of the Mitakshara: "On failure of the paternal grandfather's line, the paternal great-grandmother, the great-grandfather, his sons and their issue inherit" (e), and the gloss upon it by Visveswara, the author of *Subodhini*, the most celebrated commentary of the Mitakshara.

Contrary rule
in Bombay.

If this case is rightly decided it must be taken as conclusive of the rights of widows of *gotraja sapindas* to succeed next in order

(a) *Ananda vs. Nownit*, I. L. R. 9 Cal. 315. (b) *Jagadamba vs. Secretary of State*, I. L. R. 16 Cal. 367. (c) *Gouri vs. Rakho*, I. L. R. 3 All. 45. (d) 6 Bom. H. C. R. 244. O. C. J. (e) Ch. II, S. 5, p. 5.

to their deceased husbands representing collateral lines according to the law of the Mitakshara. This case was examined in the leading case of *Lallubhai vs Mankuvarbhai (a)* by Mr. Justice West, who said with reference to it as follows:—"Seeing how uniformly, as cases have arisen, the Hindu law officers have construed the Mitakshara as admitting the widows, it cannot, we think, be said that the case was wrongly decided." The recognition of the widows of *gotraja sapindas* as themselves *gotraja sapindas*, however slender the basis on which it rested so far as collaterals are concerned, has become a part of the customary law, wherever the doctrines of the Mitakshara prevail and the Courts must give effect to it accordingly. The whole question as to the claims of the widows of collaterals to inherit was exhaustively considered by Chief Justice, Sir Michael Westropp and Mr. Justice West. The views of the Mitakshara and Mayukha were analysed by Mr. Justice West with the result that he was led to the conclusion that "if the foundation of the rights of widows of *gotrajas* under the Mitakshara is slender, under the Mayukha it may be called almost shadowy". The learned Judge points out "that Nilkantha, while he admits the paternal grandmother, makes no provi-

Rights of widows of gotraja sapindas to succeed by inheritance very slender under the Mitakshara and Mayukha.

sion for the paternal great-grand-mother by his subsequent arrangements, if they are to be considered in any way exhaustive he rather implicitly excludes her.

The admission of the paternal grandmother stands as the sole recognition of wives and widows in the family as *gotrajas*, and this itself is met by a disposition apparently excluding or suggesting the exclusion of all females more remote than the paternal grandmother" (a). But notwithstanding

these observations unfavourable to the right of the wives of *gotraja sapindas* to succeed on the authority of the Mitakshara and Mayukha, Mr. Justice West allows their claim on the ground of positive acceptance and usage. In concluding his judgment in this case, the learned Judge said : "But we must, in matters of inheritance, administer to the Hindu community such a law, however vague and nebulous, as it has been content to devise for itself, or to accept from tradition. By that law the widow of the *gotraja sapinda* of a nearer collateral line appears entitled to precedence over the male *gotraja* in a more remote line". These observations amply justify the remark of Sir Lawrence Jenkins, Chief Justice, that "the widows of *gotraja*

Mr. Justice West admits them as heirs on the ground of positive acceptance and usage.

(a) See Vyavahara Mayukha, Ch. IV. S. VIII., p. 1. 20.

sapindas were admitted by this High Court as heirs in spite of the texts rather than because of them ; the texts were bent to fit in with the established customs and conscience of the people" (a). The decision of the Full Bench in *Lallu Bhai vs Mankuvar bhai* was affirmed by their Lordships of the Judicial Committee in appeal, who, in giving judgment said :—"Their Lordships do not find any satisfactory grounds which should induce them to dissent from the conclusion of the High Court that the doctrine which has actually prevailed in Bombay is in favour of the right of the widow ; nor any sufficient reason for holding that the doctrine which has so prevailed has not the force of law" (b). Thus we see that the eligibility for inheritance of female *gotraja sapindas*, who have become such by marriage is no longer open to dispute in Bombay.

The decision of the Privy Council has also settled that where the contest lies between a female *gotraja* representing a nearer line and a male *gotraja* representing a remoter line of *gotraja sapindas*, the former inherits by preference over the latter. The question, however, as to who is entitled to

Female
gotraja sapin-
das in the
nearer line
succeed in
preference to
male *gotraja*
sapindas in
the remoter
line.

(a) *Vallabhdas vs Sakarbai* I. L. R. 25 Bom, p. 281 (286.)

(b) *Lallubhai vs Cassibai*, I. L. R. 5 Bom., 110.

preference where the competition is between the male and female *gotrajas* belonging to the line of the same ancestor of the *propositus* is one which cannot be treated as covered by the decision in *Lallubhai vs Mankuvarbhai* (a). It has accordingly been held that the sons of a paternal uncle inherit in preference to the widow of another paternal uncle of the *propositus* (b). The grand-son of the paternal uncle of the *propositus* is entitled to succeed in preference to the widow of the son of a younger paternal uncle, the principle being that a widow is postponed to a male *gotraja sapinda* in the same line with herself. A widowed daughter-in-law is entitled to succeed to the property of her father-in-law after the death of the mother-in-law in priority to the paternal first cousin of her deceased husband (c).

The widow of a collateral succeeds in the Bombay Presidency because she is a *gotraja sapinda* of her husband's family and so of the *propositus*. The widow of a daughter's son is not a *gotraja sapinda* of her husband's

(a) See I. L. R. 2 Bom., 388 (420.)

(b) *Rachava vs Kalingapa*, I. L. R. 16 Bom., 716.

(c) *Vithaldas vs Jeshubai*, I. L. R. 4 Bom., 219.
Madhaoram vs Dave, 21 Bom., 739 (744).

maternal grand-father and therefore her claim to succeed to his estate was rightly rejected in a recent Bombay case (a). The fact of her being a *gotraja sapinda* of her husband and his agnates, does not affect the situation, since the maternal grand-father is not one of her husband's agnatic relations. In Madras it is firmly established that the widows of *gotraja sapindas* are not in the line of heirs at all. In 1864 in the case of Pedamuttu *vs* Appu Rau, (b) the learned judges held that the authoritative text of the Mitakshara that 'a wife takes the whole estate of a man, who being separated from his coheirs, and not subsequently reunited with them, dies leaving no male issue,' (c) recognises the widow's right to succeed *only* as the *immediate heir* of her husband. She can only succeed to property vested in her husband prior to his death as his widow, and not to a *sapinda* who survives her husband, as a female *gotraja sapinda*. This view has been approved in the recent case of Balamma *vs* Pullayya, where it has been decided that in the Madras Presidency all *gotraja sapindas* such as brothers' and paternal uncles' widows are excluded from the

In Madras widows of *gotraja sapindas* are not in the line of heirs.

(a) Vallabhdas *vs* Sakarbai, I. L. R. 25 Bom, 281.

(b) 2 M. H. C. R., 117.

(c) Ch. II. Sec. 1, p. 39.

table of heirs as prescribed by the Mitakshara (*a*).

Females
admitted as
heirs in Bom-
bay and
Madras but
not in Bengal
and Benares.

It is necessary to notice the case of some female relations who are admitted as heirs in Bombay and Madras but cannot inherit under the Bengal and Benares schools. While a man's daughter is an heir under all the schools, his daughter's daughter (*b*), brother's daughter (*c*), uncle's daughter (*d*), or nephew's daughter (*e*) are excluded from inheritance both under the Benares and Bengal law, and this follows as a necessary result of the adoption by the Eastern lawyers of the principle enunciated by Baudhayana that women are incompetent to inherit. The only Hindu commentator who supports the rights of inheritance of the daughter of all male *sapindas*, the daughter's daughter and the sister's daughter is Ballambhatta. But as the learned writer was herself a woman it is natural that she would advocate

(*a*) 1, L. R. 18 Mad., 168 ; see also Thayammal vs Annamalai, I. L. R. 19 Mad., 35.

(*b*) Koomud chunder vs Seetakanth, W. R. S. P. No. (F. B. Ruling). 75. Nanhi vs Gauri, I. L. R. 28 All, 187. See contra, Bansidhar vs Ganeshi, I. L. R. 22 All ; 338.

(*c*) Gobind vs Mohesh, 23 W. R. 117.

(*d*) Guru vs Anad, 18 W. R. (F. B.) 49.

(*e*) Kashi vs Raj Gobind, 24 W. R., 229 ; Radha vs Durga, 5 W. R. ; 131.

the rights of all women. Indeed it has recently been said by a learned judge that her advocacy of the rights of women is thought by Hindus to be more or less extravagant(*a*). The reason, she advances for the view, namely, that the male gender includes the female gender, has not anywhere been accepted.

In Bombay, however, the son's daughter, uncle's daughter and nephew's daughter have obtained recognition as heirs on the ground of their being *gotraja sapindas*. In Madras the son's daughter (*b*) and the daughter's daughter (*c*) are entitled to succeed to the estate of their grandfather because both are regarded as *Bandhus* on the principle that consanguinity may be recognized as the basis of title to succession in the absence of preferential male heirs.

We now proceed to consider the nature and extent of the rights of women over inherited property. The texts of Yajnavalkya and Vishnu under which the widow, the daughter, the mother and other females are recognized as heirs do not seem to make any distinction between the estate taken by

Rights of
women over
property in-
herited by
them—nature
and extent of.

(*a*) Per Chandravarkar in *Bhagwan vs Wambai*,
I. L. R. 32 Bom, (300—312.)

(*b*) *Nallanna vs Ponnal*, I. L. R. 14 Mad, 149.

(*c*) *Ramappa vs Arumugath*, I. L. R. 17 Mad, 182.

Smritis do not restrict the rights of women in inherited property.

them and the estate taken by male heirs who take under the same texts. If the male heirs took an absolute estate, it would seem to follow that women would do the same. One would therefore *prima facie* suppose that so far as the *smriti* authority goes there is indeed very little in it to support the limited estate of women in inherited property. But at the same time the doctrine of the qualified right of the widow in the estate inherited by her from her husband is so firmly established by judicial decisions that it would be heresy to doubt it. It is equally settled that the same principle should govern estates inherited by the daughter and other females except in the Bombay Presidency where the sister is said to be an absolute heir, as well as the daughter. Nothing is more interesting than the development of this branch of Hindu law regarding the extent of the rights of females in inherited property. The assertion can be made without rashness that the cases relating to the extent and nature of woman's estate which come before our Courts are more numerous than the other cases on Hindu law put together. We shall first deal with the nature and extent of an estate inherited by a widow from her husband ; for the same limitations and res-

trictions apply to the estate of other female heirs, the only exception being the estate of a sister and a daughter in Bombay. The text of Vrihaspati which declares that a widow is the surviving half of her husband, the text of Yajnavalkya and Vishnu laying down the order of succession and the text of Vrihat Manu :—"the widow of a childless man, keeping unsullied her husband's bed and persevering in religious observances shall present his funeral oblation and obtain *his entire share*"—do not suggest any limitation on the rights of the widow. But it is said that the texts of Katyayana and Narada quoted below negative the absolute right of the widow in inherited property. Katyayana says :—"The childless widow preserving unsullied the bed of her lord, and abiding with her venerable protector, should enjoy with moderation the property until her death. After her the heirs should take it" (a). "Women are not," says Narada, "entitled to make a gift or sale ; a woman can only take a life-interest, whilst she is living together with the rest of the family such transactions of women are valid when the husband has given his consent, in default of the husband, the son, or in default

Nature and extent of an estate inherited by a widow.

Katyayana.

Narada.

(a) See Katyayana quoted in the Dayabhaga, Ch. XI., Sec. 1, p 56.

of the son, the king. She may enjoy or give away goods according to her pleasure except immoveables, for she has no proprietary rights over the fields and the like" (a).

Mahabharata.

A text from the Mahabharata viz., "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" (b) with the gloss of the Vivada Chintamani that waste means "sale and gift at their own choice," has also been relied on in support of the doctrine of the qualified right of the widow in the estate inherited by her from her husband.

Comment on
the *smriti*
texts.

With regard to the text of Katyayana all that need be said is that it is only by stretching the language of the text that it can be made to support the theory of the restricted estate of a Hindu widow. One fails to see why alienation of property should not be regarded as one of the modes of enjoyment. In many cases where the widow inherits moveable property, conversion may be essential to its enjoyment. The authority of the text quoted from the Mahabharata is considerably weakened when we remember that the text occurs in a chapter on "the Religious

(a) Institutes of Narada by Dr. Jolly, Verse 28-30.

(b) Vivada Chintamani, P. K. Tagore's translation

merit of gifts" (a) and could not consequently have been intended to lay down a legal injunction. Besides this the Mahabharata is a *Purana* and as a source of law is regarded as of lesser authority than the *smritis* so that the passage in the Mahabharata cannot prevail over express texts of the *smritis* like those of Yajanavalkya, Manu, etc., to the contrary ; and, more over, people generally look to the Mahabharata not for legal rules but for rules of ethics and morality in which it does truly abound. With regard to the texts of Narada it is clear that it is stated so broadly that it cannot really represent the true view of the law. His verse would apply even to *Stridhan* over which women have undoubtedly absolute right of disposition. Besides they are not cited by any commentator, not even by the Dayabhaga, in support of the theory which curtails the rights of women in inherited property.

Passing from the *smriti* texts to the commentaries we find that the Mitakshara does not impose any restraint on the widow's power of disposition of her deceased husband's estate. On the other hand, it would appear clear from a plain reading of

The commentaries on the widow's power of disposition of her husband's estate.

The Mitakshara.

(a) Viramitrodaya, p. 137. Mr. G. C. Sarkar's translation.

certain texts of the Mitakshara to which we shall presently invite attention, that the widow of a member of a divided family takes the whole estate of her deceased husband, which devolves on her by inheritance absolutely. In chapter II., section 1, the Mitakshara cites the texts from Yajnavalkya, Vrihat Manu, Vishnu, (to which we have referred before) which are in favour of the unqualified right of the widow. He does not cite the text of Katyayana to which we have just referred. On the contrary, he cites another text of the same sage, viz :—"Let the widow succeed to her husband's wealth, provided she be chaste, and in default of her, the daughter inherits if unmarried." There is in this text of Katyayana no suggestion of any restriction on her estate. But paragraph 1 of the 2nd chapter of the 11th section of the Mitakshara which defines woman's property, leaves no doubt that Vijñaneswara could not possibly have intended any such limitations on woman's estate obtained by inheritance.

The important part of the paragraph is:—"The author now intending to explain fully the distribution of woman's property, begins by setting forth the nature of it. What was given to a woman by the father, the mother, the husband, 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 any other (separate acquisition), is denominated a woman's property. The word in the original text is (ādi) आदि. The Mitakshara interprets the word "ādi" to include property which she may have acquired by *inheritance*, partition, purchase, seizure or finding, which according to the author, is also denominated by Manu and the rest as woman's property or *Stridhan* (a). Vijñaneswara tells us that when he uses the word "*Stridhan*" he uses it not in its technical sense for "if the literal sense is admissible, a technical one is improper". The interpretation by the Mitakshara does afford a strong foundation for the argument in favour of the right of women to the entire interest in property acquired by inheritance which has been classed as *stridhan* or woman's property. This is quite in harmony with the view of Vijñaneswara that women are generally competent to inherit. But the mode of devolution of *stridhan* (including inherited property) as given in the Mitaksara (b) fully supports the view

The Mitakshara on the nature of woman's property.

(a) पितृ मातृ पति आह दत्त मध्ययुगागतम् ।

आधिवेदनिकायं च स्त्रीधनं परिकीर्तितम् ॥

आद्यशब्देन रिक्तयुक्तं संविभागं परियुद्धाधि-

गमप्राप्तमेतत् स्त्रीधनं मन्वादिभिरुक्तं । Mitaksara Ch. II,

Sec. XI, 2.

(b) Ibid Ch. II, Sec. XI, p. 8.

Yajnavalkya
on the devo-
lution of *stri-
dhan*.

that the widow takes an absolute estate. For he says : "A woman's property has been thus described. The author (Yajnavalkya) next propounds the distribution of it. Her kinsmen take it if she die without issue" which means that her estate descends to her own heirs and not to the heirs of the last male owner. Dr. Julius Jolly points out that all the evidence which has been collected from hitherto unpublished works tends to confirm this theory of the Mitakshara. He refers to the opinion of Kamalakara, Ballambhatta, Nanda Pandita, Visweswara in his Subodhini, Saraswati Vilasa and Apararka (a).

The Viramitrodaya on the widow's right of disposition of her husband's estate.

The Viramitrodaya has a long discussion on the point. Mitra Misra says that the restrictions against alienation applies only to gifts to player, dancers etc. for secular purposes. After noticing several texts of Katyayana, and the text from Mahabharata, he sums up the discussion thus : "Therefore, it is established that in making gifts for spiritual purpose as well as in making sale or mortgage for the purpose of performing what is necessary in a spiritual or temporal point of view, the widow's right does certainly extend to the entire estate of her husband ; the restriction, however, is intended to

(a) Pages 248-251. T. Lectures 1883.

prohibit gifts to players, dancers and the like, as well as sale or mortgage without necessity" (a). Again the same author tells us : "On this it is to be said. Is it, that even when a gift or the like disposition of her husband's property is made by the widow,—this is *per se* invalid? This, however, is not reasonable, since her succession to the entire estate of her husband being declared in the texts of Manu and other sages, her proprietary right arises thereto ; hence it would be contradictory to say that gifts made by her are *per se* invalid" (b). The whole aim of the discussion is to show that a moral offence or sin is committed if she spends property for useless purposes.

Nilkantha, in his Vyavahara Mayukha, also says that gifts of money to *Bandis*, *Charan* and the like triflers are prohibited, but gifts for religious or spiritual objects and mortgage and the like for those purposes are, of course, permitted (c). The Smriti Chandrika is of the same opinion (d). It is only when we come to the Dayabhaga that we get for the first time a definite pronouncement imposing a restriction on the widow's

Nilkantha

(a) Viramitrodaya, p. 141 ; G. C. Sarkar's translation.

(b) Ibid. p. 138. (c) Ch IV, See VIII 4.

(d) Ch. XI, Sec, 1, pp. 28, 29, 30, 31.

Dayabhaga on the widow's power of disposition of property inherited from the husband.

right to alienate property inherited from her husband. Jimutvahana says "But the wife must only enjoy her husband's estate after his demise." Thus Katyayana says, "Let the childless widow, preserving unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. After her let the heirs take it. Abiding with her venerable protector, that is, with her father-in-law or others of her husband's family, let her enjoy her husband's estate during her life ; and not as with her separate property, make a gift, mortgage or sale of it at her pleasure" (a). The Dayabhaga thus makes it clear that property inherited by a widow from her husband is not woman's property ; whereas the Mitakshara would treat such property as *Stridhan*. But the Dayabhaga doctrine, which was meant to be confined to those places that obey the authority of Jimutvahana, has been extended to provinces governed by the Mitakshara by the highest judicial tribunal in the realm.

Property inherited by a widow is not woman's property, according to the Dayabhaga.

Extension of the Dayabhaga doctrine to provinces governed by the Mitakshara.

This brings us to the decisions of the Courts of justice on the point. In the case of the Collector of Masulipatam *vs* Cavalry Venkata (b) the Judicial Committee considered,

(a) Dayabhaga, Chap. XI, Sec. 1, 55-57.

(b) 8 M. I. A. 529.

it "clear" that under the Hindoo law the widow, though she takes as heir, takes a special and qualified estate. Their Lordships took it as "admitted on all hands" that if there were collateral heirs of the husband, the widow cannot of her own will alien the property except for religious and charitable purposes. The reason for the fetter on the widow's power is, in the opinion of their Lordships, not merely the protection of the material interests of her husband's relations but the state of perpetual tutelage to which every woman is subject according to numberless authorities from Manu downwards. This case before the Judicial Committee was governed by the Mitakshara, and their Lordships came to this conclusion although the argument, it is submitted, was rightly pressed on them that there was nothing in the Mitakshara to support the distinction between the estate taken by a male and that taken by a female, both of which stood on the same footing. In the case of *Thakoor Dayhee vs Rai Baluck Ram* (a) the same view was taken by the Privy Council as in the case last cited. Their Lordships while conceding that the portion of the Mitakshara which had been translated by Colebrooke is silent as to the disabilities

Widow, taking as heir takes a qualified estate.

*Thakoor Day -
hee v. Rai
Baluck Ram.*

(a) 11 M. I. A., 139.

of woman or as to the interest which she takes in her husband's estate, observed that they might be dealt with in other parts of the work, which had not then been translated. In this case their Lordships further held that the texts of Narada and Katyayana must prevail against the unambiguous text of the Mitakshara. It is submitted, with the greatest respect to their Lordships, that in deducing the rule restricting the widow's right from the texts of Katyayana and Narada, and not from what was said in the Mitakshara, their Lordships disregarded the principles which they laid down for the guidance of European Judges administering Hindu law in the case of *Collector of Madura vs Moothoo Linga Sathu Pathi* (a). In the case of *Bhagwandeem vs Myna Baee* (b), adopting the principle of the two earlier decisions, just mentioned, their Lordships held that by the Hindu law prevailing in the Benares school, no part of the husband's estate, moveable or immoveable, forms part of his widow's *Stridhan* and she has no power to alienate the estate inherited from her husband, to the prejudice of his heirs which devolves on them. In giving judgment their Lordships said :—"The reasons

*Bhagwandeem
v. Myna Baee.*

(a) 12 M. I. A., 397.

(b) 11 M. I. A. 487.

for the restrictions which the Hindu law imposes on the widow's dominion over her inheritance from her husband, whether founded on her natural dependence on others, her duty to lead an ascetic life, or on the impolicy of allowing the wealth of one family to pass to another, are as applicable to personal property invested so as to yield an income as they are to land. The more ancient texts importing the restriction are general." In this case it was again argued that the text of the Mitakshara was explicit, and that it included under the head of *Stridhan* all property inherited from the husband and that from the fact of its inclusion the power of disposition over it was *prima-facie* to be inferred, but their Lordships overruled the contention by referring to the text of Katyayana : The childless widow preserving unsullied the bed of her lord etc :— It may therefore be taken to be settled law that a widow takes only a limited estate and that at her death it passes to her husband's heirs. No exception is made to this rule in Bombay, save perhaps in regard to moveable property (*a*). Mr. Justice West,

Restrictions on widow's dominion over inheritance from her husband apply to landed and other property.

Exception to the general rule in Bombay.

(a) *Pranjeevandas vs Dewcoverbaee*, 1 Bom H. C. 130; *Jaimayabaram vs Bai Jamna* 2 Bom. H. C. R. 10; *Laksmi Bai vs Ganpat*, I. L. R. 4 Bom, 163; *Bhaskar vs Mahadeo*, 6 Bom H. C. 1. *Harilal vs Pranballav Das*, I. L. R. 16 Bom., 229.

Mr. Justice West's view regarding the restriction on widow's inheritance.

Early Bombay decisions with regard to moveables inherited from husband.

The view of the Full Bench.

however, is of opinion that this restriction on the widow's estate can only be justified by a strained construction of the famous text of Katyayana. In giving judgment in the Full Bench case of Bhagirthi Bai *vs.* Kahnu jirav (a) this distinguished judge said:—"From the mass of decisions, Sir M. Westropp deduced the general rule that all widows, inheriting in their family of marriage, take only *duranti viduitate* (b). The logical cogency of the learned judge's argument cannot be denied, though it leads to a conclusion unrecognized by the native jurists of the Western school." In some of the early decisions of the Bombay High Court, the widow's power over moveables inherited from her husband was held to be absolute in the sense that the undisposed residue at her death passed to her heirs (c) but a Full Bench (d) decided that "the ruling of the Privy Council, that the property inherited by a widow from her husband devolves on his heirs at her death, must have effect given to it throughout the

(a) I. L. R. 11 Bom, 285.

(b) Tuljaram *vs* Mathuradas, I. L. R. 5 Bom., 662.

(c) Damodar v. Purmanandas, I. L. R. 7 Bom, 158.

(d) Gadadhar *vs* Chandra Bhaḡabai, I. L. R. 17 Bom., 690. See also Sha Chamanlal *vs* Doshi, I. L. R. 28 Bom, 453.

Presidency with regard to the devolution of moveables so inherited, and to that extent, if the decision in *Damodar vs Purmanandas* is to be regarded as necessarily giving the moveables that remain to the widow's heirs, it must be treated as of no authority". This Full Bench leaves the question of the widow's power of alienation of moveables inherited from her husband open in that Presidency.

Widow's power over moveables in the Mithila school.

In the Mithila school of Hindu law it seems a widow has an absolute power over moveables inherited from her husband. This view is amply supported by the two commentaries which are the leading authorities for that school. Vachaspati Misra maintains that the two texts of Katyayana (*a*) cited below apply to the moveables and immoveables "inherited" by a widow from her

Commentaries support the view that it is absolute.

(a) "The husband's *daya* (gift or heritage), a woman may deal with according to her pleasure when her husband is dead ; but when he is alive, she shall carefully preserve it ; otherwise (*i.e.* when he has no property) she should remain with his family."

"A son's widow keeping unsullied the bed of her lord, and abiding by her venerable protector, shall, being moderate, enjoy until death ; afterwards the heir shall take it."

For a full discussion on the point See Mr. Golap Chandra Sarkar's Hindu law Pages 407-411. The cases on this point have already been cited at page 157 *ante*.

husband, because the term "*daya*" in these texts may mean either heritage or gift. The Vivada Ratnakara cites a text of Narada to show that a wife has full power over the moveables given to her by her husband as well as the two texts of Katyayana just referred to and comes to the same conclusion as the Vivada Chintamani. So that according to the Mithila school the wife's right to moveables inherited from the husband is absolute (a). Under the Bengal, Benares and Madras schools, the widow has no larger power of disposition over moveables than she has over immoveables (b).

Not so in
B e n g a l,
Benares and
M a d r a s
schools.

In Pandharinath *vs.* Gobind (c) it has been held that a widow does not, under the Mitakshara law, take such absolute interest in the moveables as to be able to make a valid gift of it.

सत्यमेव जयते

It may now be taken to be settled beyond controversy that the mother and grandmother inheriting from a son or grandson take an estate subject to the same limitations and restrictions as the estate of a widow inheriting from her husband. This statement correctly represents the law as laid down in

Character of
estate inher-
ited by mother
and grand-
mother.

Same as that
of widow.

(a) P. K. Tagore's Translation p. 262.

(b) Durga *vs.* Chintamani, I, L. R. 31 Cal, 214; Narasimha *vs.* Venkatadri I. L. R., 8 Mad, 290; Buchi *vs.* Jagapati, *Ibid* 304.

(c) I. L. R. 32 Bom., 59.

the judicial decisions in all the Presidencies(*a*) except the Bombay Presidency where the general rule was stated, by a recent Full Bench to be, that females inheriting take the full estate transmissible to their own heirs, an exception being the case of a widow inheriting from her husband (*b*).

In Bombay, females inheriting take the full estate except widow.

The nature and extent of the interest taken by a daughter in property inherited from her father next claims our attention. Analogy would suggest that the same reasons, which exist in the case of the widow for holding that her estate is special and qualified, exist equally in the case of the daughter, as they rest upon "the principle of her natural dependence on others," and "on the impolicy of allowing the wealth of one family to pass to another" and the necessity of preserving the estate for the heirs *i. e.* heirs of the last male holder. The leading case on the subject in the Bengal High Court is Chotay lal *vs.* Channoolal (*c*) where Chief Justice Sir Richard Couch reviewed all the authorities on the point

Nature and extent of daughter's inheritance.

(*a*) See as to Mithila, Panchananda *vs.* Lalshan, 3 W. R. 140. As to Madras, Bachiraju *vs.* Venkatappadu, 2 Mad. H. C., 402 ; Kutti *vs.* Radhakrishna, 8 Mad. H. C. 88. Vellanki *vs.* Venkata, I. L. R., 1 Mad, 174. (P.C..)

(*b*) Gandhi *vs.* Bai Jadab, I. L. R. 24 Bom., 192 (217).

(*c*) 14 B. L. R., 235 ; 22 W. R. 496.

and came to the conclusion that there was an uniform current of decisions in all the Presidencies except Bombay which lay down that the estate inherited by a daughter from her father resembles a widow's estate both in respect of the restricted power of alienation, and of its descent after her death to her father's heirs and not her own. This was a case under the Mitakshara, and this would of course be the law under the Dayabhaga, where it is expressly stated that the right of the daughter, who succeeds on the failure of the widow, is weaker than that of the latter (Dayabhaga, Chap. XI., Sec. 2., 30). This decision has been affirmed by the Judicial Committee of the Privy Council (*a*) and settles the law on the point in Bengal as regards cases falling under the Mitakshara, the Mithila and the Dayabhaga schools. The Madras High Court has taken the same view in the case of *Muttu Tevar vs. Dora Singha Tevar* (*b*). The Judicial Committee, in confirming this decision of the Madras Court said, "No attempt has been made to distinguish this case from that of *Chotailal*, except the suggestion that decisions upon the Mitakshara as applicable to Benares are

Decision of Privy Council in *Chotay Lal v. Channulal* settles the law in Bengal both under the Mitakshara and Dayabhaga and also in Mithila.

(*a*) I. L. R. 4 Cal., 744.

(*b*) I. L. R. 3 Mad., 309.

not decisions upon the Mitakshara as applicable to the Carnatic. But if there be any ground for making such a distinction, it would be favourable to the restriction of Katama's interest in her father's property. For there are two commentaries which are received as authority in the Carnatic, the Smriti Chandrika and Dayabibhaga by Madhavya, neither of which follow the cited passage of the Mitakshara in assigning to a woman as her *Stridhan* property inherited by her. Their Lordships think then that the Judges of the Courts below were quite right in holding that Katama's interest ceased with her life, and that on her death the root of title is to be sought not in herself but in her father" (a).

Privy Council holds the same view as regards the Madras school.

In Devkuvarbai's case the Supreme Court of Bombay in 1859, after consideration of all the accessible authorities, and after consulting the shastris both in Poona and in the Sudder Adalat of Bombay held that daughters in Western India taking by inheritance take the estate absolutely (b). In the case of Vinayek *vs.* Laksmibai (c) Sausse, C. J., of the Supreme Court said that the sisters take the estate absolutely. But the reasoning, by which sisters are

Early decisions in Bombay with regard to the daughter's estate.

(a) I. L. R. 3 Mad., 290. (P. C.)

(b) 1 Bom. H. C. Rep O. C. J. p. 130.

(c) 1 Bom. H. C. Rep., 128.

given an absolute estate, is that their right is like that of the daughters. The Judicial Committee of the Privy Council in affirming the judgment of the Chief Justice adopt his reasoning and thus give their implied assent to the proposition that daughters take a complete estate by inheritance. Both the Supreme Court and Privy Council measure the *quantum* of the estate of the sisters in no other way than by reference to that of the daughter. This was the uniform doctrine of the Bombay High Court till the decision of the Privy Council in the Madras case, *Muttu Vadu vs. Dorasinga Tevar*. Messrs. West and Buhler are of opinion that the effect of this decision of the Privy Council is that "the heritage taken by daughter must in future be regarded as but a life-interest whether with or without the extensions recognised in the case of the widow, except in cases governed by the Vyavahara Mayukha" (a). In one case the Bombay High Court seems to have adopted this opinion of the learned authors of the Digest (b). The question was referred to a Full Bench and Mr. Justice West after an elaborate examina-

(a) West and Buhler's Digest of Hindu Law. 3rd. Ed. 432.

(b) Dalpat vs Bhagwan, I. L. R. 9, Bom., 301.

tion of the authorities came to the conclusion that under the Hindu law as prevailing in the Presidency of Bombay, a daughter inheriting from a father or mother takes an absolute estate, which passes on her death to her own heirs, and not to those of the preceding full owner. Mr. Justice West said that it may be inconvenient that the Mitakshara should be received in different senses in different parts of India ; but it is the acceptance and the acceptation, which for each part constitute its law (*a*).

In Bombay daughters take absolutely.

In Bombay sisters take an absolute estate. In the case of Devkuvarbai, daughters were held by the Supreme Court of Bombay to inherit as full and complete an estate as a male and the rule as to daughters was by analogy extended by both the Supreme Court and the Privy Council, to sisters. In the case of Vinayek *vs* Laksmibai, (*b*) the Judicial Committee say "that as against male cousins, the sisters are the heirs of the brother. The consequence is that the entire interest in the property must be viewed as vested in the widow (*i.e.* the mother of the deceased) and her daughters (*i.e.* the

Nature of estate taken by sister.

Vinayek v. Laksmibai.

(*a*) Bhagirathibai *vs* Kahnujirav, I. L. R. 11 Bom., 285. (1886) ; Jankibai *vs* Sundra, I. L. R. 14 Bom., 612 (1890) ; Gulappa *vs* Tayawa, I. L. R. 31 Bom., 453. (1907).
 (*b*) 9 M. I. A. 520.

deceased's sisters) or some or one of them and that therefore the appellants here, the sons of the brother of the testator, (cousins of the deceased son *i.e.* the *propositus*) are suing in a matter in which they have not the slightest interest, nor with which they have any concern". The question raised by the pleadings was: In whom is the absolute interest in the property now vested? Sausse C. J., determined that if the mother took less than the absolute interest, the sister, at any rate, took absolutely *i.e.* without any ulterior right of other persons to be satisfied out of the property. He contrasts the absolute with the life estate. "As to the mode in which sisters take," said the Chief Justice, "it would appear by analogy that they take as daughters." In affirming this judgment of the Supreme Court, the Privy Council declared that the cousins had no interest at all and in so doing recognised implicitly the right of the sister to take an absolute estate by inheritance.

Widow entitled to usufructuary enjoyment of property.

It is beyond doubt that a widow has an estate vested in her for life, (*a*) and is entitled to the absolute usufructuary enjoyment of the whole of such property (*b*). As we have seen

(*a*) *Raja of Shivagunga vs Katania Natchiar*, 9 M. I. A., 604.

(*b*) *Kamavadhani vs Joysa*, 3 M. H. C. R. 116.

already, the injunctions of the Hindu *shastras*, which enjoin on the widow the duty of strict frugality in her expenditure for worldly purposes, and which limit her rights as regards her own expenditure to the simple enjoyment during life, of a moderate amount of the husband's property for plain clothing and maintenance, are regarded as religious or moral precepts having no legal force whatever. It is true that Mr. Justice Dwarkanath Mitter said in the case of *Kery Kolitany vs Moneeram*(a) that the widow took the inheritance in trust, as it were, for the spiritual welfare of her husband, and that accordingly so far as her own personal expenses were concerned, her control over the income derived therefrom, was limited to such abstemious use as befitted the ascetic life to be led by her in her bereaved condition, the *corpus*, as well as the unspent income, without reference to the form in which the latter stood saved, constituting but one inheritance which on her death, reverted to her husband's heirs. But the Judicial Committee has rejected this "fanciful analogy of trusteeship" in appeal from that decision, and the view of Mr. Justice Mitter is now completely abandoned. Nevertheless it would seem that the spirit of that doctrine has not

Limits in Shastras to the personal expenditure of the widow are moral injunctions and have no legal force.

Mr. Justice Dwarkanath Mitter's view discussed.

Widow's
power as re-
gards accumu-
lations.

altogether ceased to exercise a subtle and unconscious influence on judicial opinion with reference to some of the matters connected with the widow's income and we accordingly find that although the widow is free to spend or give away the whole of the income derived from her husband's property, yet where she does not do so and accumulates some portion of the said income, a question arises whether she loses control over the unexpended portion or she is as free to deal with it as with the current income. This question is not altogether free from difficulty. The same texts of Katyayana, Narada and the Mahabharata, which were utilized by the Dayabhaga for supporting the view that the widows took a restricted estate in inherited property were relied on by the Bengal Pundits in an early case to curtail her rights over the income derived from such property. In a case set out at page 64 of Babu Shama Charan Sarkar's Vyavastha Darpana, the reply of the Pundits states that a widow is not at liberty to make a will affecting the landed and other property left by her husband into the possession of which she came on his death, nor affecting the profits of it, nor affecting her own acquisitions made by means of landed property to which she had succeeded or by means of its profits. The texts of Narada on which

the Pundits relied were all texts declaring the dependence of women in the disposal of her husband's property. They did not suggest any restriction on her right to the income derived therefrom. From the text of Katyayana: "a gift, pledge or sale of lands, houses or slaves, by a dependent person is invalid or inefficient" the Pundits seemed to draw the inference that the widow, being a dependent person, any gift or alienation made by her is invalid. But in doing so, they failed to seize the distinction between the want of independence and want of ownership—a distinction recognized both in the Mitakshara (Ch II, Sec 1, 25) and the Dayabhaga (Ch I. Paras 15-17). The absolute right of the widow to the usufruct from her husband's estate being admitted, *prima facie* she ought to be able to spend the income or to alienate property purchased with such usufruct. In any event, according to the doctrine of *factum valet* enunciated by the author of the Dayabhaga her alienation of property derived from the income from her husband's estate ought not to be regarded as invalid in law.

Distinction between want of independence and want of ownership recognized in Mitakshara and Dayabhaga.

The earliest case in which the extent of the widow's right in accumulations was in question is the case of Soorjeemonee Dasse vs Dinobundhoo Mullick (a). It was decided

Judicial decisions.

Soorjeemonee Dasse vs Dinobundhoo Mullick, 9 M. I. A. 123.

(a) 9. M. I. A., 123. See the case of Horry Dass

by the Privy Council in the year 1862. The facts of this case, so far as are necessary for our present purposes, are these :—A Hindu testator's estate was under administration, and there was dispute as to the interest taken by some of the parties. One of them died during the litigation, leaving a widow. He was ultimately declared to be entitled to an absolute interest in a share of the property, and the question then arose, how the income which had accrued from his share should be disposed of. The Supreme Court held that both the income which accrued during his life and that which accrued after his death should be held to be of the same character. On appeal that decree was varied, and it was declared, that so far, as regarded the accumulations after the death of the legatee, his widow was entitled to them absolutely in her own right. The next case on the subject is that of *Chundrabulee vs Brody* (a) decided by the High Court at Calcutta in the year 1862. In giving judgment in this case Mr. Justice Glover said "no amount of accumulations which a Hindu widow

*Chundrabulee
vs Brody,*
9 W. R. 584.

Dutt vs Rungunmoney Dassee (Selvestre 657) which is earlier still in which the question did not directly arise but where there are certain observations against the widow's right to accumulations.

(a) 9 W. R., 584.

may leave behind her at the time of her death can be considered as belonging to her, but that they must go to swell the estate. But it was never contemplated that she should expend the produce of her estate wastefully, or do more than support herself in a decent and proper manner ; and that she should leave to her own relatives, or convert into her own *streedhun*, the accumulations she might have made, appears to me opposed to every principle of Hindu law as applied to widows".

In the case of *Grose vs. Omirtomoyee* (a) which was decided in the year 1869, a similar question arose. Mr. Justice Macpherson, in giving judgment said : "According to all the older authorities on Hindu law, accumulations should be treated in the same way as *corpus* ; and I think they should be so treated now in the absence of any distinct authority to the contrary". We are not however told what these old authorities are. This decision seems to be inconsistent with the decision of the Privy Council in *Surjomonee s case*.

Grose vs Omritomoyee
12 W. R. A.
O. J. p. 13.

In the case of *Gonda Koer vs. Koer Oodey Singh* (b) in 1874 the question arose before the Privy Council whether immove-

Gonda Koer vs Koer Oodey Singh. 14 B. L. R. 159.

(a) 12 W. R. A. O. J. p. 13.

(b) 14 B. L. R. 159 (1874.)

able property purchased by a Hindu widow with the profits of her husband's estate, formed an increment to that estate. The counsel for the appellants contended that they did not form part of the husband's estate but belonged to the widow absolutely and were at her absolute disposal, either by gift in her life-time, or by will. Soorjemony's case was cited in support of this contention. In reply to this contention their Lordships remarked, "Although the decree in that case, as so altered, made a distinction between the principal funds to which the widow was entitled as heiress of her husband, and the accumulations of income which had arisen therefrom since his death, and, in terms, treated her right to the latter as absolute and unqualified, it is nevertheless to be observed that there were no questions in that case as to any conflicting rights between her heirs and the reversionary heirs of her husband. The case, moreover, was governed by the law of Bengal, and the accumulations of income, to which the widow was declared absolutely entitled, were the produce of a reserve fund. Their Lordships cannot, therefore, regard this case as a conclusive, or even a direct authority upon the questions raised in this appeal". Their Lordships negatived the contention of the appellants that the widow,

who always maintained the validity of holding her son's adoption as heir to her deceased husband, and treated him as entitled to succeed to her deceased husband's property must be presumed to have intended to make her purchases as accretions to the property. Their Lordships, however, kept the question open as to what might have been the effect of a distinct intention on her part to appropriate to herself, and to sever from the bulk of the estate, such purchases as she made with her husband's property.

In 1875, in the case of *Bholanath vs Bhagabati* (a) their Lordships made certain observations unfavourable to the rights of the widow over accumulations. In giving judgment their Lordships said :—"If she took the estate only of a Hindu widow, one consequence no doubt would be that she would be unable to alienate the profits, or that at all events whatever she purchased out of them would be an increment to her husband's estate". These observations, it must be remarked, were extrajudicial. In 1876 in the case of *Puddomonee vs Dwarkanath* (b), McDonell and Jackson JJ. following broadly the principles laid down in *Soorjomonee's* case, observed : "a Hindu widow, having purchased land with the money de-

Judicial decisions on the widow's right over accumulations.

Bholanath v. Bhagabati.

Puddomonee v. Dwarkanath

(a) L. R. 2. I. A. 255.

(b) 25 W. R. 335.

rived from the income of her husband's estates is competent afterwards to alienate her right and interest in whole or in part, to reconvert the land into money, and to spend it if she chooses." This decision was clearly favourable to the widow's right in accumulations.

*Isri Dutt
Koer v. Hans-
batti.*

The whole subject was examined in 1883 by their Lordships of the Judicial Committee in the leading case of *Isri Dutt Koer vs Hansbatti (a)*. The case of *Soorjmoni Dasi* was again cited before their Lordships and referring to that case their Lordships said: "the widow had not saved the income in question; she had never had the option of saving or spending it; and all that was done was to recognize her right to the full usufruct and control over it." After reviewing the other decided cases their Lordships came to the conclusion that a widow's savings from the income of her limited estate are not her *stridhan*; and if she made no attempt to dispose of them in her life time there can be no doubt that they follow the estate from which they arose. Their Lordships pointed out the difficulty in fixing the line which separates accretions to the husband's estate from the income held in suspense in the widow's hands, as to

(a) I. L. R. 10 Cal. 324. (P. C.)

which she has not determined, whether or not she will spend it. Towards the conclusion of their judgment their Lordships say : “These are circumstances which, in their Lordships’ opinion, clearly establish accretion to the original estate, and make the after-purchases inalienable by the widow for any purpose which would not justify alienation of the original estate.” From this it is apparent that their Lordships rested their decision on the *intention* on the part of the widow that the subsequent purchases made by her should form part of the original estate—an intention which could be inferred from the circumstances of the case. The principle of this decision was reaffirmed by the Judicial Committee in the case of Sheolochun Singh *vs* Saheb Singh which decided that when a widow, not spending the income of her widow’s estate in the property which belonged to her husband when living, has invested such savings in property held by her without making any distinction between the original estate and the after-purchases, the *prima-facie* presumption is that it has been her intention to keep the estate one and entire, and that the after-purchases are an increment to the original estate (a). But there is no room for any

*Sheolochun v.
Saheb Singh.*

(a) I. L. R. 14 Cal, 387.

*Saodamini
v. Administrator-General
of Bengal.*

such presumption where the *corpus* of the estate never came to the widow but was taken by an executor under a will. This was laid down in the case of *Saodamini Dasi vs. Administrator-General of Bengal* (a) the latest decision of the Privy Council on the subject. The facts were these: The executor of the will of a Hindu testator made over to the widow of the latter an aggregate sum consisting of accumulations of income accrued during eight years from her husband's death, undisposed of by his will. The money was not received by her as a capitalized part of the inheritance, but as income that had been accumulated during her tenure of her widow's estate. The widow did not act showing an intention on her part to make this sum of money, the greater part of which she invested in Government securities, part of the family inheritance for the benefit of the heirs. After the lapse of about twenty years she disposed of it as her own. The Judicial Committee decided that the money so invested by the widow belonged to her as income derived from her widow's estate and was subject to her disposition. The main fact which distinguishes this case from the two earlier cases before the Judicial Committee consisted in this that here "there was

(a) L. R. 20, I. A. 12; *s. c.* I. L. R. 20 Cal, 433.

no estate of her husband in the widow's hand for her to augment". The circumstance that the widow placed the fund received from the executor in investment of a permanent nature was considered immaterial. The leaning of the Madras High Court in recent years has been to regard the remarks of the Judicial Committee in Isri Dutt's case (concerning the presumption that the widow must *prima facie* be taken to have intended to treat the accumulations as part of her husband's estate) as an *obiter dictum* (a). A Hindu widow inherited certain property from her husband and with the income thereof acquired land on usufructuary mortgage for 52 years. She assigned the unexpired portion of the term of the mortgage for consideration and subsequently died. The reversionary heirs to her husband then sued her assignees for the property. There was no evidence that the widow had ever indicated an intention to make the property part of her husband's estate for the benefit of his heirs. The Madras High Court, in these circumstances, upheld the title of the assignees of the widow and made the following observations which are very pertinent to the subject under discussion (b). "The acquirer

Madras decisions on the widow's right over accumulations.

(a) Subramanian vs Arunachelam. I. L. R. 28 Mad, 1 (5.)

(b) Akkanna vs Venkayya. I. L. R. 25 Mad. 351 (1901.)

of property", say the learned judges of the Madras High Court, "presumably intends to retain dominion over it, and in the case of a Hindu widow the presumption is none the less so when the fund with which the property is acquired is one which, though derived from her husband's property, was absolutely at her disposal. In the case of property inherited from the husband, it is not by reason of the limited nature of the widow's estate under the Hindu law that she has only a limited power of disposition. But her absolute power of disposition over the income derived from such limited estate being now fully recognized, it is only reasonable that, in the absence of an indication of her intention to the contrary, she must be presumed to retain the same control over the investment of such income. The mere fact that properties thus acquired by her are managed and enjoyed by her without any distinction, along with properties inherited from her husband, can in no way affect the presumption. She is the sole and separate owner of two sets of properties so long as she enjoys the same, and is absolutely entitled to the income derived from both sets of properties. She can not but enjoy both sets of properties alike". It seems to us that these observations are in

conflict with some of the remarks made in the case of Isri Dutt. The presumption, according to this decision, is that the widow wants to retain control over the investment of the income, even though the investment might have been made in funds of a permanent character. In this case, however, the property obtained by the savings from the income was alienated during the lifetime of the widow. In a later case the same High Court enunciated the principle upon which it would act in cases dealing with the right of widows over accumulations. After stating that *dicta* are to be found in the decisions of the Bengal Courts or those following them to the effect that until the contrary is shown, savings or purchases with savings, effected by a widow should presumably be treated as increments to the *corpus* of the husband's estate and to pass together with it, Sir Subrahmania Aiyar, officiating Chief Justice, proceeded to say : "It is impossible to see how, consistently with the present state of the law, which in truth completely dissociates the income from the *corpus* in such cases, the presumption referred to could be supported. Now that it has definitively been established that the widow is entitled to use her entire net income at her pleasure or give away the whole or any part thereof

Comment on
the Madras
decision.

as she chooses *inter vivos* or by testament, and that, with reference to the exercise of such right it is immaterial whether the income is formed into a fund or kept invested in this or that form, how could it be supposed that *prima facie* it merges in the estate merely because she has not actually disposed of it."

"The true foundation of a presumption is either some policy or general conformity with fact (compare Thayer's, 'Preliminary Treatise on Evidence', page 314), but neither of these can possibly be invoked in favour of that supposition. For it cannot be said that the merging of the unalienated portion of the income of a widow with the estate out of which she derived it, is required by any policy with reference to the community concerned. As to conformity with fact, who can doubt that if the wishes and intentions of widows in the class of cases under consideration have any relevancy in the matter they would in ninety-nine out of a hundred cases be found to be against a merger; such persons being of course naturally desirous that the income and the acquisitions made therewith should, to the last, remain within their power and pass on their death to their own heirs, especially the issue of their body. Nor could it be supposed that, as a matter of abstract reasoning, there

is any necessary connection between the limited nature of the estate which a widow takes in her husband's property and the interest accruing to her in the income derived by her as such limited owner. In the absence of any clear provision of Hindu law, defining the character of her interest in the income, it must, on general grounds, be held that what becomes vested in her in her own right and what she can dispose of at pleasure is her own property, not limited but absolute, exclusive and separate in every sense and devolving as such.

"Should the precise question which has been just discussed arise for determination in this Court, this would be the conclusion to be arrived at on principle." The learned Chief Justice further said : "As to the *obiter dictum* in *Isridutt Koer vs. Mussumut Hansbutti Koerain*, (a) on which much stress was laid in the argument on behalf of the defendants, that is more than counterbalanced by the actual decision of their Lordships in the much later case of *Saodamini vs. the Administrator-General of Bengal*" (b). In these observations of the Chief Justice his colleagues Benson and Russel JJ. concurred (c). But

Comment of
the Madras
High Court on
Isridut's Case.

(a) L. R., 10 I. A., 150. (b) L. R., 20 I. A., 12.

(c) *Subramanian vs. Arunachelam*. I. L. R., 28 Mad, 1.

it has been held that "where a female having the limited interest of a daughter or widow in an estate, spends the income which is her absolute property in the erection of buildings on lands belonging to the estate, it must be presumed that she intended the buildings to be an accretion to the estate and to devolve, as such, on the persons who would be entitled to succeed to the estate" (a).

*Rivett-Carnac
vs. Jivibai.*

In the case of *Rivett-Carnac vs. Jivibai* (b), Sargent. C. J. said that the decision in *Isri Dutt's* case left open the question as to what constitutes savings or accumulations, and seemed to suggest that all unexpended income at the death of the widow was not "savings" within the rule laid down by the Judicial Committee in *Isri Dutt's* case. The Chief Justice concluded his judgment in this case thus: "The cash balance in question does not amount to more than half the yearly income, and had not been separated from the general account so as to form a distinct fund which could be regarded as 'savings'. There is further an entire *absence of any outward sign of an intention to accumulate*; whilst on the contrary the existence of debts rebuts any such intention, and points to the conclusion that

*Isri Dutt's
case leaves
open the
question as to
what consti-
tutes accumu-
lations.*

(a) *Raja Venkata vs Raja Surenani*. I. L. R. 31 Mad, 321.

(b) I. L. R. 10 Bom, 478.

the balance was held in suspense by the widow at the time of her death,—to use the language of the Privy Council in *Isri Dut Koer vs. Mussumat Hansbutti Koerain* (a). The reason of this decision seems to be that there was no “accumulation” but rather an accidental balance of the type described in *Puddomonee vs. Dwarkanath* (b).

But these restrictions would not apply to property which has passed to a widow not as heir, but by deed or other arrangement conferring on her absolute powers (c).

Having dealt with the rights of widows over accumulations of income the next step for inquiry would be the purposes for which a Hindu widow can mortgage or sell or make a gift of the property she has inherited from her husband. In deciding what these purposes are *Jimutvahana* does not depart from his theory of spiritual benefit. He says “that since a widow benefits her husband by the preservation of her person, the use of property sufficient for that purpose is authorized. In like manner (since the benefit of the husband is to be consulted) even a gift or other alienation is permitted for the

Powers of
Hindu widows
to alienate.

Jimutvahana.

(a) 10 I. A. at p. 158. (b) 25. W. R. 335.

(c) *Bhagabutti vs Chowdhury*, 2 I. A. 256.

Guru vs Nafar 3 B. L. R., 121; *Nellai kumar*
vs Narakathammal, I. L. R. 1 Mad. 166.

completion of her husband's funeral rites. Accordingly the author says : 'Let not women make waste,' Here 'waste' intends expenditure not useful to the owner of the property. Hence, if she be unable to subsist otherwise, she is authorized to mortgage the property ; or, if still unable, she may sell or otherwise alien it : for the same reason is equally applicable." Besides these things which benefit her husband spiritually the widow is directed to give to the paternal uncles and other relatives of the husband presents in proportion to the wealth, at her husband's funeral rites in accordance with an express text of Vrihaspati to that effect(a).

*Vyavahara
Mayukha.*

The Vyavahara Mayukha permits gifts and mortgages or other kinds of alienation for religious or spiritual objects. The author cites a text of Prajapati and a text of Katyayana to support this position. The text of Katyayana is to the following effect : "A widow always engaged in meritorious observances and fasts, constant in the duties of celibacy, intent upon restraining her passions and making holy gifts, shall reach the heavenly abodes even if she have no son"(b). Nilkantha states that gifts to *Bandis*, *Charanas*, dancers and the like are prohibited.

(a) Dayabhaga, XI, Sec I, 61-63.

(b) Chap. IV. S. VIII. p. 78. Mandlik's Translation.

Mitra Misra takes a similar view after a long discussion on the subject. He concludes thus : "Therefore it is established that in making gifts for spiritual purpose as well as in making sale or mortgage for the purpose of performing what is necessary in a spiritual or temporal point of view, the widow's right does certainly extend to the entire estate of her husband ; the restriction, however, is intended to prohibit gifts to players, dancers and the like, as well as sale and mortgage without necessity" (a).

Mitra misra.

The Smriti Chandrika says that the widow is competent to make gifts for religious and charitable purposes, such as the maintenance of old and helpless persons, but not for purely temporal purposes such as gifts to dancers and the like (b).

Smriti Chandrika.

The Vivada Chintamani after citing a text from the Mahabharata says that women cannot make sale and gift at their own choice (c). This is the state of the original authorities on the subject. Let us now turn to the judicial decisions.

Vivada Chintamani.

In the case of the Collector of Masulipatam *vs* Caval Vencata, (d) their Lord-

(a) Mr. G. C. Sarkar's translation of the Viramirodaya. p. 141. (b) Ch. XI, S. I, 29.

(c) Page 212. P. K. Tagore's translation.

(d) 8. M. I, A 529, (551) ; Cal. p. 563.

*Collector of
Masulipatam
vs Cavalry
Vencata, lead-
ing case on
the subject.*

ships of the Judicial Committee said, that "the widow cannot of her own will alien the property except for special purposes. For religious or charitable purposes, or those which are supposed to conduce to the spiritual welfare of her husband, she has a larger power of disposition than that she possesses for purely worldly purposes. To support an alienation for the last she must show necessity. On the other hand, it may be taken as established that an alienation by her which would not otherwise be legitimate, may become so if made with the consent of her husband's kindred. But surely it is not the necessary or logical consequence of this latter proposition that in the absence of collateral heirs to the husband, or on their failure, the fetter on the widow's power of alienation altogether drops. The exception in favour of alienation with consent may be due to a presumption of law that where that consent is given the purpose for which the alienation is made must be proper." In these observations of the Judicial Committee is summed up the whole law on the subject. They show that the widow's power of alienation can be exercised in two classes of contingencies, one class comprising cases of necessity and the other class, cases of raising money for spiritual purposes. The tendency

*Widow's
power of alie-
nation can be
exercised in
case of neces-
sity and for
spiritual pur-
poses.*

of the Courts has been to determine what is included in "religious or charitable purposes" with reference to the spiritual welfare of the husband of the widow. Accordingly gifts or alienations for the completion of the funeral rites of the husband have been held good on the ground of absolute necessity. Although pilgrimages to Gaya for the purpose of performing *Sradh* of her deceased husband should be performed by the widow, she is not absolutely bound to do so, still alienations of a moderate part of the husband's estate for such pilgrimages have been supported as they conduce to the spiritual welfare of the husband (a).

Expenses for pilgrimages by the widow justify alienation of a portion.

Mr. Mayne describes these pilgrimages as "religious benefits which are more in the nature of spiritual luxuries". The test of religious purposes is the spiritual benefit to the husband (b) so that where the widow sold her husband's property with the object of securing her own spiritual welfare the alienation has been held to be invalid. In the case of *Ram Kawal vs Ram Kishore*, where the widow dedicated some land to the

(a) *Ashruf vs Brojessuree* 19 W. R. 426 ; See, however, *contra* I. W. R. 252. where alienation for pilgrimage to Benares was disallowed. *Muteeram vs Gopal*. 20 W. R. 187.

(b) *Dayabhaga*. Ch. XI, Sec. I P. 61.

idol established by her mother, the alienation was set aside on the ground that the dedication was *prima facie* one, more for the widow's own spiritual welfare than for that of the husband (*a*). On a similar ground the sale by a daughter of her father's estate for the *Sradh* of her mother was set aside (*b*).

A Hindu widow has a right to alienate any portion of the property in her possession if the benefit of her husband's soul required such a sacrifice even though the act by which that benefit was to be secured was to be actually performed by a male member of the family ; so that where a widow sold property to defray the expenses of the *Sradh* of her mother-in-law performed by her husband's brother, the sale was held good (*c*). Although a Hindoo widow is capable of alienating a portion of her deceased husband's estate for purposes supposed to be conducive to his spiritual benefit the question arises whether the gift of the entire estate of her husband for a religious or charitable purpose can be supported.

The Hindu law allows the alienation of

Whether gift of the entire property of the husband for religious and charitable purposes is valid.

(*a*) I. L. R. 22 Cal, 506 ; see also Lakshminarayana vs. Dasu I. L. R., 11 Mad, 288.

(*b*) Raj Chunder vs Sheeshoo 7 W. R. 146.

(*c*) Chowdhry Junmenjoy vs. Rasmoyee 10. W. R., 309.

her husband's estate by a widow for pious purposes, of which none can be more sacred in her case than the payment of her husband's debts. And it makes no difference if the debts are barred by limitation. It has accordingly been held in a series of cases (a) that the alienations made by a widow for the purpose of paying the barred debts of the husband are legal and binding on the rever- sionary heirs. In this respect a widow stands in a different position from that of a manager of a joint family. The latter can act only with the assent, express or implied, of the body of co-parceners. In the widow's case, the co-parceners are reduced to herself, and the estate centres in her (b).

But this rule is subject to this qualifica- tion, that she must have acted *bonafide* and not capriciously. If the widow, for instance, preferred a creditor, whose debt was barred by limitation with the view of defrauding another creditor whose debt was not so barred, the alienation in the circumstances, would not be supported. In the case of Rangilbhai *vs.* Vinayak, Mr. Justice West

Alienation by widow of hus- band's estate for pious pur- poses.

Alienations by widow for paying barred debts of the husband are legal.

Position of widow and manager of a joint family contrasted.

Qualification of the above rule.

(a) Bhala *vs.* Parbhu, 2 Bom., 67 ; Chimnaji *vs.* Dinkar, 11 Bom., 320 ; Bhau *vs.* Gopala, 11 Bom., 325 ; Kondappa *vs.* Subba, 13 Mad., 189 ; Udai *vs.* Ashutosh, 21 Cal., 190.

(b) Mr. Justice West's remarks in 11 Bom., 320.

Mr. Justice
West's view.

described the position of the widow in relation to the creditors of her deceased husband in these words : "She took the estate as an aggregate, assets and debts together. Her first duty was to pay her deceased husband's debts, and to pay them, as far as she could, equally according to the obligation with which the succession had devolved on her. She may be regarded as in some degree a trustee, or at any rate, under a legal obligation for this purpose, and not at liberty to deal capriciously with the estate which she may alienate at all only for special purposes indicated by the law. She ought not, in performing the duty cast upon her, to prefer one valid claim to another, as her husband might have done, because from him the favoured creditor could have obtained as much by his diligence" (*a*). Such transfer would also be voidable at the option of the creditor defrauded under the provisions of section 53 of the Transfer of Property Act (Act IV of 1882). It has been said that the marriage of a son's daughter before puberty is necessary for the spiritual welfare of the grandfather and an alienation by a widow for defraying the expenses of such marriage is valid (*b*).

S. 53 of the
Transfer of
Property Act.

(*a*) I. L. R., 11 Bom., 666 (679).

(*b*) Ram Coomar *vs.* Ichamoyee, I. L. R., 6 Cal, 36. Debi Dayal *vs.* Bhan Protap. I. L. R., 31 Cal, 433.

In the case of *Kasinath Basak vs. Harasundari*, which, went up to the Privy Council, the Court Pandits said that "religious purposes include a portion to a daughter, building temples for religious worship, digging tanks and the like" (a).

What are religious purposes

In the case of the Collector of Masulipatam *vs* Cavalry Vencata, their Lordships of the Privy Council whilst fully recognising the general principle that a Hindu widow as a general rule, has no power of alienation, and that the exception lies in case of legal necessity, draw a clear distinction between religious purposes and worldly purposes. Their Lordships point out that the power of the widow to alienate property for worldly purposes is much more limited than in the case of the former. Mr. Justice Mahmood doubted in one case (b) whether the original texts of the Hindu law recognise the validity of alienations by a widow for any purposes other than those which are conducive to the spiritual benefits of her deceased husband. The attention of this learned and distinguished judge was not apparently drawn to the passage of the *Viramitrodaya* cited before, "that in making sale and gift for the purpose of perform-

Distinction in regard to power of alienation between religious purposes and worldly purposes.

(a) S. C. Sarkar's *Vyavastha Darpana*. 101. bottom.

(b) *Indar vs. Lalta*, I. L. R., 4 All, 532 (541).

Virāmitrodaya
on the point.

ing what is *necessary* in a *spiritual or temporal* point of view, the widow's right does certainly extend to the entire estate of her husband," which shows that the original authorities on Hindu law did contemplate cases of necessity arising from worldly purposes. But "legal necessity" is hard to define. It is only by instances that an idea of what amounts to legal necessity—can be gathered from Hindu law texts and the numerous decisions to be found in the reports. Each case of legal necessity must be judged on its own facts (*a*).

What is legal
necessity has
to be gathered
from instances.

Is Litigation a
legal necessity?

The question whether litigation can be regarded as a legal necessity, is one which seems to be involved in considerable difficulty. A distinction should be drawn between litigation undertaken to protect the property and litigation the object of which is to obtain a possible benefit to the estate. The former class of litigation would no doubt amount to legal necessity. In the recent case of *Karimuddin vs. Gobind Narain* (*b*) the Judicial Committee has held that the preservation of the estate of her husband and the costs of litigation for that purpose were objects which

(*a*) (1908) *Bejoy vs. Girindra*, 8 C. L. J. 458.

(*b*) (1909) I. L. R. 31 All, 497; *Amjad vs Moniram*, I. L. R. 12 Cal, 52; *Debi Dayal vs Bhan* I. L. R. 31 Cal, 433.

justified a widow in incurring debt and alienating a sufficient amount of property to discharge it. Where there is an actual pressure on the estate, *e. g.* the danger of an unsatisfied decree outstanding against the widow as representing the husband or an impending sale for arrears of government revenue, a transfer by way of mortgage or sale will be justified provided there was no money in the hands of the widow sufficient to meet them (*a*). But with regard to the latter class of litigation it may be stated, that if such litigation ends in actual benefit to the estate, any alienation made by the widow which may have been necessary for prosecution of the litigation will be binding on the reversioner, for he who enjoys the benefit ought to bear the burden also. It does not lie within the province of the widow to enter upon speculative litigation, however much the motive may be to benefit the estate. But although cost of litigation for preserving the estate is a recognised head of necessity, this does not mean that a widow engaged in litigation has an unlimited power of borrowing (*b*).

Costs of litigation for the preservation of the estate justify alienation.

Costs of litigation for the purpose of obtaining possible benefits justify alienation if such litigation ends in actual benefit.

It has been held by a Full Bench of the

(*a*) *Lalla Baijnath vs Bissen*, 19 W. R. 80.

(*b*) *Bhimardi vs Bhaskar*, 6 Bom., L. R. 628. *per* Jenkins, C. J.

Calcutta High Court that the necessary repairs of houses by a daughter in possession of her father's estate, are a necessity which will not only support an alienation of property by her for that purpose, but will give to the person making such repairs a charge on the property in the hands of the reversioners (*a*). The power of a widow or other female in regard to alienation is not less than that of a manager of joint family property or of an infant's estate. In the celebrated case of Hunooman Pershad *vs* Musst Babooe, the Judicial Committee laid down the principles on which the manager of an infant must act in dealing with the estate of the latter. Their Lordships say :—"The power of the manager of an infant heir to charge an estate not his own, is, under the Hindu law, a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make in order to benefit the estate, the *bonafide* lender is not affected by the precedent mismanagement of the estate" (*b*). These rules have been held applicable to widows or other female owners

Principles governing the action of the manager of an infant in dealing with the estate of the latter, laid down in the case of Hunooman Pershad *vs*. Musst Babooe,

and held applicable to the case of widows and other female owners.

(*a*) Hurry Mohan *vs* Gonesh Chandra, 1 I. L. R. 10 Cal., 823.

(*b*) 6 M. I. A. 393 (423).

of limited estate. In the case of Kameswar Prasad *vs* Run Bahadoor Singh (*a*), their Lordships of the Privy Council say :—"Their Lordships in no degree depart from the principles laid down in the case of Hunooman Persad Panday *vs* Mussummat Babooee Munraj Koonweree which has been so often cited. They have applied those principles in recent cases not only to the case of a manager for an infant, which was the case there, but to transactions on all fours with the present, namely alienations by a widow and to transactions in which a father, in derogation of the rights of his son under the Mitakshara law, has made an alienation of ancestral family estate." Following the principles laid down in these cases it has been held that a permanent lease granted by the widow of her husband's estate was binding on the reversioners, it having been found that the lease was for the benefit of the estate (*b*). It has, however, been held in Bombay that a permanent alienation of immoveable property by a widow, not for the purpose of preserving the estate, but for improving it, is invalid. It was pointed out in that case that "necessity" involves some notion of pressure from without and not

Permanent leases granted by the widow for the benefit of the estate are valid.

Not so however in Bombay.

(*a*) I. L. R. 6. Cal, 843.

(*b*) Dayamani *vs*. Srinibash, I. L. R. 33 Cal., 842.

merely a desire to better or to develop the estate ; for this last implies vast powers of management which in practice would not easily be distinguishable from an authorization to embark on speculative ventures (a).

Responsibility
of a *bonafide*
creditor as
laid down
in Hunooman
Persad's case.

The Judicial Committee have, in the case of Hunooman Prasad, laid down the rule that the lender dealing with the manager of an infant's estate should not advance the money without reasonable enquiries as to the existence and nature of the necessity although he is not bound to see to the application of the money. The judgment in that case ends thus :—"Their Lordships do not think that a *bonafide* creditor should suffer when he has acted honestly and with due caution, but is himself deceived" (b). The same rules have been held to apply to the obligation of a lender dealing with a qualified female heir in respect of the estate. It has accordingly been held that, in order to sustain an alienation of the property held by a Hindu widow for her widow's estate, it must be shown either that there was legal necessity or at least that the grantee was led, on reasonable grounds to believe that there

(a) Ganap vs. Subbi, I. L. R. 32 Bom., 577. (1908).

(b) 6 M. I. A. 393 ; see also Ghansham vs. Badiya Lal. I. L. R., 24 All., 547.

was such necessity (a). The burden of proving necessity would of course lie on the grantee. In the case of *Sham Sunder Lall vs Achhan Kunwar*, the Judicial Committee said that it is not incumbent on the defendant who relies on the absence of legal necessity for the borrowing by a woman holding her limited estate, to plead or prove such absence : but it is for the plaintiff to state and to prove all, that will give validity to a charge (b).

Burden of proving necessity is on the creditor or purchaser.

In order to establish necessity it must be proved that there were no funds in the hands of the limited owner sufficient to meet the demands (c).

If the widow elects to sell, when it would be more beneficial to mortgage, the sale can not be set aside as against the purchaser provided the widow and the purchaser are both acting honestly. The test of validity of the sale is, as pointed out by Mr. Justice West, that both parties must have "acted fairly to the expectant heirs" (d). Sir Charles Sargent C. J., in a later case said : "A Hindu

Test of the validity of the sale by the widow.

(a) *Amarnath vs. Achan Kuar*, I. L. R. 14 All., 420.

(b) I. L. R. 21 All., 71 ; See also *Roy Radha Kissen vs. Nauratan Lall*, 6 C. L. J., 490.

(c) *Dharam Chand vs. Bhawani Misra*, I. L. R. 25 Cal. 189. (P. C).

(d) *Chimanji vs. Dinkar*, I. L. R. 11 Bom. 320 (324) ; see also *Phool Chand vs. Rughobhans*, 9 W. R., 108.

widow like the manager of a Hindu family must be allowed a reasonable latitude in the exercise of her powers, provided, as Mr. Justice West says, she acts fairly towards expectant heirs" (a).

Unsecured
debts, how far
binding on
reversioners.

The question whether the debts contracted by a widow or daughter for a proper purpose will bind the estate in the hands of the reversionary heirs, although such a debt was not secured by a mortgage or charge on the estate has given rise to conflicting opinions. The Calcutta High Court has held that if the debt was contracted for a legal necessity the reversioners will be liable (b). In the High Courts of Madras and Allahabad the weight of authority is against the liability of the estate in the hands of the reversioners, and this freedom from obligation on their part is attributed to the legal inability on the part of the widow to make the estate liable in the absence of a specific charge (c). In the early Bombay decisions a similar view was taken. (d). In the

Conflict of
judicial opi-
nions.

(a) Venkaji vs. Vishnu, I. L. R. 18 Bom., 534 (536); see also Bejoy vs. Girindra 8 C. L. J., 458.

(b) Ram Coomar vs. Ichamoni, I. L. R., 6 Cal., 36; Hurry Mohan vs. Gonesh Chunder, I. L. R., 10 Cal., 823 (F. B).

(c) Ramasami vs. Sellattammal, I. L. R. 4 Mad., 375; Dhiraj vs. Mangammal, I. L. R., 19 All., 300.

(d) Gadgeppa vs. Apaji I. L. R., 3 Bom., 237.

case of Sakrabai vs. Maganlall (a), Sir Lawrence Jenkins, Chief Justice, examined all these cases in some detail and after a careful consideration of that portion of the Mitakshara which deals with debts, came to the conclusion that a widow, like a manager, can, when there is necessity, borrow on the credit of the business assets so as to make them liable even after her death. In this case, it is true, the debts were trade debts properly incurred by a Hindu widow on the credit of the assets of the business to which she had succeeded as heiress of her deceased husband. But the observations of the learned chief justice are general. In giving judgment in this case his lordship said: "The cases show that the manager of a family business can make its assets liable for a trade debt, without a specific charge, and Kameswar's (b) case shows that the ability of a widow to charge the inheritance so as to affect it in the hands of reversioners, is judged by the same principles as are applicable to a charge by a manager. I do not think that it was intended to disturb that principle when it was said in Sham Sundar vs. Achhan Kunwar (c) that 'the position of a Hindu widow or

Full Bench
decision of the
Bombay High
Court.

(a) I. L. R. 26 Bom. 206. (1901).

(b) I. L. R., 6 Cal 843. (c) I. L. R., 21 All., 71.

daughter is not by any means the same as that of the head of an undivided family,' for it appears from the rest of the judgment that, as in the case of a manager, so in relation to a widow, the touchstone is "necessity".

In the absence of legal necessity a widow can alienate property with the consent of her husband's kindred.

"In the absence of legal necessity, a Hindu widow can alienate property to which she has succeeded on the death of her husband with the consent of her husband's kindred." This was laid down by the Judicial Committee in the case of the Collector of Masulipatam *vs.* Cavaly Vencata (a). "The kindred in such case", their Lordships observe in a later case, "must generally be understood to be all those who are likely to be interested in disputing the transaction. At all events, there should be such a concurrence of the members of the family, as suffices to raise a presumption that the transaction was a fair one, and one justified by Hindu law" (b). Upon the practical application of this general principle there has been much discussion in the High Courts in India. A Full Bench of the High Court at Allahabad, in the case of Ramphal Rai *vs* Tulakuari (c)

(a) 8 M. I. A. 529.

(b) Raj Lukhee Dabea *vs* Gokool Chunder. 13 M. I. A. 209 (228).

(c) I. L. R. 6 All., 116.

considered that "the plain principle deducible from these rulings of the Privy Council is, that in order to validate an alienation by a Hindu widow of her deceased husband's estate for purposes other than those sanctioned by Hindu law, it must have the consent of all those among his kindred who can reasonably be regarded as having an interest in questioning the transaction." And they accordingly held that the consent of the heir presumptive to an alienation by a widow was not sufficient to defeat the rights of a more remote reversioner. The High Court of Calcutta has taken a different view. In the case of *Nobo Kishore Sarma Roy vs. Harinath Sarma Roy* (a) a Full Bench held that under the Hindu law current in Bengal "a transfer or conveyance by a widow upon the ostensible ground of legal necessity, such transfer or conveyance being assented to by the person who at the time is the next reversioner, will conclude another person not a party thereto, who is the actual reversioner upon the death of the widow, from asserting his title to the property".

Consent of the reversioner for the time being—how far sufficient.

In a subsequent case the same High Court held that the consent must be of the whole body of persons constituting the next reversion. The decision of the Full Bench

(a) I. L. R. 10 Cal., 1102.

seemed to follow as a logical consequence from another well-established rule of Hindu law, *viz.*, that the widow is competent to relinquish her estate to the next male heir of her husband. As Sir Richard Garth puts it : "If it is once established, as a matter of law, that a widow may relinquish her estate in favour of her husband's heir for the time being, it seems impossible to prevent any alienation, which the widow and the next heir may thus agree to make" (a).

*Beharilall vs.
Madho Lall
(P. C.)*

The ground on which the Calcutta Full Bench based its decision receives support from the following observations of the Judicial Committee in the case of *Behari Lall vs. Madho Lall* (b) :—"It may be accepted that, according to Hindu law, the widow can accelerate the estate of the heir by conveying absolutely and destroying her life estate." The Calcutta decision has been followed in Madras in so far as it lays down that a widow can effect a valid surrender of her entire estate to the next reversioner for the time being (c) ; but the Madras Court does not admit that alienation of a part of the estate with the consent of the then

(a) See F. B. decision in 10 Cal., 1102.

(b) I. L. R. 19 Cal., 236 (241).

(c) Marudamuthu vs. Srinivasa. I. L. R., 21 Mad.,

presumptive reversioner is valid. The question has been recently considered by the High Court of Bombay in the case of *Vinayak vs. Gobind (a)*. In giving judgment Sir Lawrence Jenkins, C. J., says :—"There can be no question, that apart from legal necessity a widow can validly alienate land that has devolved upon her from her husband with the consent of the reversioner. The basis on which this rests is a matter of controversy : the High Court of Calcutta, on the whole, appears to favour the view that the consent derives its effect from the power supposed to reside in a widow of accelerating, by the surrender of her own interest, the interests of the reversioners. It is impossible not to feel some difficulty as to this doctrine : for it would seem to rest on the application to a Hindu widow's estate of the English doctrine of the merger of a particular estate, with a result that the devolution of a property according to law is influenced by the acts of those who are simply in the possible line of succession."

Question recently examined in Bombay

"The other view is that the consent of the persons interested to oppose the transaction evidences its propriety, if not its actual necessity. This has a parallel in the law

(a) I. L. R. 25 Bom., 129. (133).

relating to a widow's adoption under certain circumstances and it finds support in the texts (a). This view has, too, in a large measure the sanction of the Privy Council.... Turning, then, to Bombay, the High Court here appears to have accepted this view rather than that which finds favour in Calcutta.' This was the state of authorities in India, when the question was raised before the Privy Council in the case of Bajrangi Singh vs. Manokarnika Bakhsh Singh (b). Their Lordships after reviewing the decisions of all the High Courts stated that the principle enunciated in the case of Raj Lukhee Debia (c) was admitted in India and that the only question that required consideration was "the *quantum* of consent necessary." Their Lordships in determining this question said :—"The High Court of Allahabad, indeed, does not recognize the validity of surrenders in favour, or alienations with the consent, of presumptive reversioners so as to

Question set at rest by the Judicial Committee in Bajrangi vs Manokarnika.

(a) Here the chief justice quotes a text of Narada cited in Dayabhaga XI, I, 54 cited before, and a text of Jimutvahana : "In the disposal of property by gift or otherwise she is subject to the control of her husband's family after his decease and in default of sons."

(b) 6 C. L. J., 766.

(c) 13 M. I. A., 209.

to defeat the title of the actual reversioner at the time of the widow's death. But this restriction is at variance with the principle itself, and is not in accordance with the practice in other parts of India in which the Mitakshara law prevails. Their Lordships have not been referred to any cases in the province of Oudh in which this restriction has been acted upon : and though they would be unwilling to extend the widow's power of alienation beyond its present limits, they cannot adopt the further limitation which the Allahabad High Court has sought to establish. They agree with the High Court of Calcutta (*Radha Shyam vs Joy Ram*) that ordinarily the consent of the whole body of persons constituting the next reversion should be obtained, though there may be cases in which special circumstances may render strict enforcement of this rule impossible."

This decision settles that the consent of the next reversioner or reversioners, as the case may be, will render an alienation valid. It makes no difference if the consent of the entire body of reversioners is obtained after the alienation, on the principle embodied in the maxim "every ratification of an act already done has retrospective effect, and is equal to a previous request to do it." In the

Alienation by widow with the consent of the next reversioner is valid.

(a) I. L. R. 17 Cal. 896.

Alienation by widow of a portion of husband's property with the consent of next reversioners is valid.

Madras High Court thinks otherwise.

case before the Privy Council the alienation of the whole estate was effected piece-meal by the widow by successive deeds. The case accordingly may be regarded as a good authority for the proposition that a Hindu widow may validly alienate *a portion* of her husband's property with the consent of the next reversioners (*a*).

But the Madras High Court considers otherwise, and adheres to the view taken by the Full Bench of that Court in which it has been held that the alienation in order to be effective must comprise the whole of the limited estate (*b*). In a recent case the learned judges of the Madras High Court negatived the contention that the said Full Bench has been virtually overruled by this decision of the Judicial Committee (*c*). There is thus a conflict between the Calcutta and Madras decisions on the question of the interpretation of the decision in Bajrangi's case on this point.

(*a*) Pulin Mandal v. Bolai Mandal. I. L. R. 35 Cal. 939 ; see also 12 C. W. N. 49.

(*b*) I. L. R. 21 Mad., 128.

(*c*) Rangappa vs Kamti, I. L. R. 31 Mad. 366 (F. B.) ; See also : Muthuveeru vs Vythilinga, I. L. R. 32 Mad. 206 ; see however the remarks of Wallis, J., in the order of reference at page 376 of 31 Mad. where he considered the Full Bench decision in Marudamuthu's case overruled by the P. C.

But whether the transfer is of the whole or part of the estate, the actual reversioner at the death of the widow would certainly be estopped from questioning the alienation made with the consent of the next reversioner, in case the former was claiming through the latter (a).

Where, however, the next reversioner is herself a female whose interest is the limited one of Hindu widows, her consent to an alienation will not bind the male reversioner who takes an absolute estate. In a recent case (b) it has been held in Bengal that the consent of daughters to the sale of immoveable property by the widow does not raise any presumption of law that the purpose for which the alienation was made was proper so as to pass an absolute and indefeasible estate to the alienee. Mr. Justice Lalmohan Doss in giving judgment in this case said—"For the same reasons, if the widow had, with the concurrence of the daughters, alienated the property in favour of a stranger, the alienee would not have taken any larger estate than the limited and qualified estate of the widow or of the daugh-

Where next reversioner is a female, her consent will not bind the male reversioner.

(a) *Bajrangi vs Manokarnika*, 6 C.L. J. 766; *Rangappa vs Kamti*, I. L. R. 31 Mad. 366. (F. B.); also 32 Mad., 206 cited *supra*.

(b) *Bepin vs Durga*, I. L. R. 35 Cal., 1086.

ters, for the alienee cannot have a larger estate than that possessed by the alienors, and the coalition of the estate of the widow with that of the daughters not having the effect of amplifying the *quantum* of the resultant estate." This view receives indirect support from the cases cited below (a).

Alienation by widow without consent of reversioner and without justifying necessity is not void but voidable.

The alienation by a widow without the consent of the reversioner and without any justifying necessity is not void but is voidable ; for she is not a tenant for life, but is owner of her husband's property subject to certain restrictions on alienation and subject to its devolving on her husband's heirs upon her death. But she may alienate it subject to certain conditions being complied with. Her alienation is not, therefore, absolutely void but it is *prima facie* voidable at the election of the reversionary heir. He may think fit to affirm, or he may at his pleasure treat it as a nullity without the intervention of a Court (b).

(a) Kooer Goolab Singh vs Rao Kurun Singh, 14 M. I. A., 176 ; Varjiban Rangji vs Ghelji Gokaldas, I. L. R., 5 Bom. 563 ; Vinayak Vithal Bhange vs. Gobind Venkatesh Kulkarni, I. L. R., 25 Bom. 129 ; Abinash Chander Mazumdar vs Hari Nath Shaha, I. L. R., 32 Cal. 62.

(b) Bejoy vs Krisna, I. L. R. 34 Cal. 329 (P. C) ; Modhoosudan vs Rooke, I. L. R. 25 Cal., 1 (P. C) ; Sadai vs Serai, I. L. R. 28 Cal. 532 ; Bijoy Gopal

In the case of *Hurry Doss vs Uppoor-nah* (a), a question was raised whether by the Hindu law current in Bengal the interest of the daughter in the estate of her deceased father is of the same nature as the interest of a widow in her husband's estate. But it is now settled that the daughter and other female heirs like the mother and daughter etc. are subject to the same restrictions and limitations as to alienations in respect of the estate inherited by them, as is the widow in respect of her deceased husband's estate (b). In Bombay it would be different with sisters and daughters both of whom take an absolute estate.

Daughters take the same estate as widows.

Not so in Bombay.

The same principles which govern private sales by a Hindu widow, will also govern sales held in execution of decrees against a qualified female owner. Although for certain purposes the estate of her husband vests in the widow absolutely, yet it would not be sold for the personal debts of the widow or in execution of a personal decree against

Private sales and sales in execution of decrees governed by same principles.

Estate would not pass by a personal decree against widow.

v. *Nil Ratan*, I. L. R. 30 Cal. 990 ; *Hayes vs Harendra*, I. L. R. 31 Cal. 698 ; *Deputy Commissioner of Kheri vs Khanjan*, I. L. R. 29 All., 331 (P. C).

(a) 6 M. I. A., 433.

(b) See as to daughter, *Chotay lall vs Chunno lall*, I. L. R. 4 Cal. 744 ; *Ray Radhakissen vs Nauratan*, 6 C. L. J. 513 (1907.)

her. All that would pass under it would be her own limited interest in the property left by her husband (a). Similarly, where a decree for arrears of rent was obtained against a daughter in possession of a life estate inherited from her father, it has been held that the debt was a personal debt for which the father's estate was not liable. But where the heiress is sued as representing the estate and a decree obtained against her as such representative, then the estate is liable to be sold in execution of the decree. No difficulty can arise in cases where the decree is passed in the life-time of the male owner and the female is brought on the record as his legal representative. The sale will pass the estate. But where the decree has not been so obtained then the suit will have to be revived against her as the representative of the last male holder. Where that is done and a decree obtained against the widow as such, then the sale in execution of the decree will pass, not the widow's personal interest in the property but the absolute estate. The principle to be followed in such cases is stated by Sir Barnes Peacock in the case of *Ishanchander Mitter vs.*

Estate would pass, where the decree is obtained against the heiress as representing the estate.

Ishan Chandra Mitter vs. Buksh Ali.

(a) *Baijun vs. Bij Bhookua*, I. L. R. 1 Cal., 133.
Nagendra vs. Kaminee, 11 M. I. A., 241.

(b) *Kristo vs. Hem chunder*, I. L. R. 16 Cal., 511.

Buksh ali (a) in these words : "Supposing in an ordinary case a suit is brought against an executor, and judgment is given against him as an executor, the purchaser under an execution buys not the personal estate of the defendant, but the property of the defendant in his representative character for a debt which was due from him in that capacity." The principle expressed here has been approved by the Judicial Committee in subsequent cases (b). The effect of these decisions of the Judicial Committee has been summarized by Mr. Justice Mookerjee in the recent case of Roy Radhakissen *vs.* Nauratan in these words :—"It is well settled that the test to be applied in order to determine the exact interest which passes at a sale in execution of a decree against a Hindu widow or a qualified proprietor similarly situated, is whether the suit in which the sale was directed was one brought against the widow upon a cause of action personal to herself or one which affects the whole inheritance of the property in the suit" (c). If the suit is simply for a personal

Law on the subject summarised by Mr. Justice Mookerjee in Roy Radhakissen *vs.* Nauratan.

(a) Marshall's Reports, 614.

(b) General Manager, Durbhunga *vs.* Ramapat, 14 M. I. A., (605) ; Jugal kishore *vs.* Jotendra mohan, I. L. R. 10 Cal., 985 ; Partab *vs.* Triloki, I. L. R. 11 Cal., 186 ; Abdul Azir *vs.* Appuyasami, L. R. 31 I. A. 1.

(c) 6 C. L. J., 490 (519.)

Where the suit is for a personal claim against widow, only her limited interest passes.

Where the suit is upon a cause of action affecting the inheritance, the whole estate passes.

Katama Natchiar vs. Raja of Shivagunga, 9 M. I. A. 543.

claim against the widow, then merely the widow's qualified interest is sold, and the reversionary interest is not bound by it. If, on the other hand, the suit is against the widow in respect of the estate, or for a cause which is not a mere personal cause of action against the widow, then the whole estate passes. In many of the cases although the right, title and interest of the widow had been sold the whole interest in the estate was held to have passed and the reversionary heirs bound by it. Closely connected with this is the question as to how far a decree obtained against a Hindu widow either in a suit brought by or against her is binding on the reversionary heirs of her husband. In the case of *Katama Natchiar vs Raja of Shivagunga (a)*, the Judicial Committee held that where there has been a decree in a suit brought by a Hindu widow for possession of a zemindary as heir to her husband, it would have bound those claiming the zemindary in succession to her if there had been a fair trial of the right in that suit that is effectual and operative against the reversioner unless the decree can be successfully impeached on some special ground. Their Lordships in giving judgment said :—
“The same principles which has prevailed

(a) 9 M. I. A. 543.

in the Courts of this country as to tenants-in-tail representing the inheritance would seem to apply to a Hindu widow ; and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow." Their Lordships reaffirmed this principle in the case of *Partapnarain vs Triloki nath* (a). The principle of these decisions have been held to be applicable to the case of other female heirs like the daughter and the mother (b).

So long as the widow holds possession of her deceased husband's estate as an heiress entitled to a life-estate, her possession is never adverse to the reversionary heir, but where she holds under a title independently of her husband, her possession becomes adverse to the reversioners and limitation as against the latter begins to run from the date of such possession. Suppose the widow, whose husband was a member of a joint Mitakshara family at the time of his death, and who is therefore only entitled to maintenance takes possession of her deceased husband's estate after his death, a suit by the coparceners of her husband will be barred by limitation if brought after twelve

Widow's possession as heiress not adverse to reversionary heir but where she holds independently of her husband it is otherwise.

(a) I. L. R. 11 Cal, 186.

(b) 9 M. I. A. 604.

years from the date of such possession her possession being regarded as adverse to the reversioner. So where the mother takes possession of the estate of her deceased son to the exclusion of the son's widow and continued in possession for more than 12 years, a suit by the son's widow and the reversionary heirs of the son was held barred by limitation (*a*), for the possession of the mother was not that of a Hindu widow as such, but as a trespasser. But where the widow takes possession as heir to her husband, she could not, by any act or declaration of her own, while retaining possession of her husband's estate, give her possession or estate a character different from that attaching to the possession or estate of a Hindu widow (*b*).

Extinction of widow's right do not extinguish that of reversioner.

The reversioner does not derive his right from or through the widow, consequently the extinguishment of the widow's right under section 28 of the Limitation Act does not extinguish the right of the reversioner (*c*).

(*a*) *Harinath vs Mothura mohun*, I. L. R. 21 Cal, 8 (P. C.); *Lilabati vs Bishnu*, 6 C. L. J. 621; *Roy Radhakissen vs Nowruthun*, 6 C. L. J. 490; *Madan vs Akbarayar*, I. L. R. 28 All, 241; *Kedar vs. Jatindra*, 9 C. L. J. 236.

(*b*) *Lachan kunwar vs Manorath*, I. L. R. 22 Cal, 445; *Mahabir vs Adhikari*, I. L. R. 23 Cal, 942.

(*c*) *Ranchordas vs Parbati*, I. L. R. 23 Bom, 725 (1899) (P. C.); *Amrit vs. Bindessari*, I. L. R. 23 All 448; *Kedar vs. Jatindra*, 9 C. L. J. 236.

Article 141 of the Limitation Act (Act IX of 1908) enacts that in a suit (for possession of immoveable property) by a Hindu entitled to the possession of immoveable property on the death of a Hindu female the period of limitation is twelve years from the death of the female. It has been held by the Judicial Committee that where a Hindu widow granted a lease of immoveable property of her husband for a term extending beyond her own life, a suit by a reversioner to recover the same is governed by the 12 years' period of limitation provided by article 141 of Act XV of 1877 and not by the three years' period prescribed by section 91 of the second schedule (a).

Art. 141
of Limitation
Act (Act IX
of 1908.)

If a Hindu widow abuses her estate or commits acts of waste with regard to it the reversioner or the rightful heir of her husband is not without remedy. He might bring a suit in the nature of those *bills quia timet* of the Chancery Courts in England. These bills to restrain the widow from wasting the estate, are, in the words of Mr. Justice Story, "in the nature of writs of prevention, to accomplish the ends of precautionary justice. They are ordinarily applied to prevent wrongs or anticipated

wastes by
widow, how
restrained.

(a) Bijoy vs. Krishna Mahisi, I. L. R. 34 Cal, 329 (1907) (p. c.) ;

mischiefs, and not merely to redress them when done. The party seeks the aid of the Court of equity, because he fears (*quia timet*) some probable injury to his rights or interests and not because an injury has already occurred which requires any compensation or other relief"(a). Sir Lawrence Peel, Chief Justice, in the case of Hurry Doss *vs* Rungunmoney Dasee, recognised the power of the Courts in India to grant relief on suits answering the description of bills in equity, *quia timet*. "The Hindu female," said the Chief Justice, "is rather in the position of an heir taking by descent until a contingency happens, than an heir or devisee upon a trust by implication. Therefore a bill filed by the presumptive heir in succession against the immediate heir who has succeeded by inheritance must show a case approaching to spoliation" (b). In the case of Hurry Doss Dutt *vs* Srimutty Uppoornah, the Judicial Committee held that the bill *quia timet* by a reversioner against the daughter of an intestate Hindu in possession of personalty was rightly dismissed as it was not shown that there was danger to the property from

By suits in the nature of bills *quia timet*. of Courts of Chancery.

(a) See Story's Equity Jurisprudence, Chap. XX, S. 826, 2nd Eng. Edition.

(b) Hurry Doss *vs* Rungunmoney, Sev. 661; Brindaban v. Sureswar, 10 C. L. J., 263.

the mode in which the party in possession was dealing with it. But a bill *quia timet* is not the only remedy. The Court may give relief by the appointment of a receiver (a). It has been held recently in Bengal that in a suit for partition amongst coparceners, one of whom is a widow, if a case is made out that there is reasonable apprehension of waste by the widow, provisions can be made in the final decree in the suit for prevention of future waste by the widow of such cash or other moveable property as falls to her share, separate suit for injunction based on her conduct in the use of property in her possession subsequent to partition is not necessary (b).

or by the appointment of a receiver.

The reversionary heirs have a like remedy against the transferee of the widow or other limited heir for prevention of waste or destruction of property (c). In the case of acquisition of land in which a widow or daughter has a life estate by Government under Act I of 1894 ample protection is made for prevention of waste of the compensation money. Such money shall not under section 32 of the Act be made over to the widow

Reversionary heir has a like remedy against transferee of widow or other limited heir.

Land Acquisition act. (Act I of 1894).

(a) See Story's Equity Jurisprudence, Chap XX., S. 826 2nd. Eng. Edition. See also Sec 54, ill. (m) Specific Relief act. (b) I. L. R., 2 Cal., 262 ; 9 Cal., 580.

(c) Durga vs Chinta, I. L. R. 31 Cal 214.

or daughter but shall be invested in the purchase of other lands to be held under like title and conditions of ownership as the land in respect of which such money shall have been deposited or held or if such purchase can be effected forthwith, then in such government or other approved securities as the Court shall think fit. Payment of the rent or other proceeds of such investment will be made to the female holder as the person for the time being entitled to the possession of such land (a).

Even where a widow had sold the property to a third person without legal necessity before the acquisition and such third person had withdrawn the compensation money he was held bound to refund the same, in order that the Court might invest the same in the manner provided for by section 32 of the act for the ultimate benefit of the reversionary heirs (b). If the money be invested in the purchase of other lands, the transferee would be entitled to hold possession of it as limited owner during the lifetime of the widow, and upon her death,

(a) Sheorattan vs. Mohri, 1. L. R. 21 All, 354 ; Sheoprasad vs Jaliha, I. L. R., 24 All., 189.

(b) Gobind vs Shamlall, W. R. Sp. No., 165 (167). Mrinalini vs Abinash, 11 C. L. J., 533 (1910) ; Kamini vs Promotho, 13 C. L. J. 597.

the property would pass into the hands of the original owner.

Hitherto we have been discussing the principles which govern the inheritance by females from males. The same principles are also applicable to estate inherited by females from females. The nature of the estate taken by a woman from males is the same as that inherited from females. In the recent case of *Sheopratab Singh vs. The Allahabad Bank (a)* the Judicial Committee observe that inheritance from males and that from females could not be differently treated and that what a woman has inherited from a woman, she does not hold as her absolute and alienable estate, but for a qualified estate, with reverter after her death to the heirs of her predecessor in title. With regard to the doctrine of reverter their Lordships point out that the question may be different in those parts of Bombay which are governed by the Mayukha.

Closely connected with this is the question of the descent of property inherited by a female from a female upon which there has not been until recently a conclusive ruling of the Judicial Committee. In the case of *Sheosanker Lall vs. Debi Sahai (b)*,

The same principles which apply to inheritance from males govern inheritance from females.

Rules as to descent of property inherited from a female.

(a) I. L. R. 25 All., 476 (F. C.)

(b) I. L. R. 25 All., 468.

their Lordships point out that in this respect "there has been, however, a remarkable concurrence of opinion in India among judges, text writers, and pure scholars, to the effect that no distinction can be drawn consistently with the Mitakshara from what has been inherited from a male and from what has been inherited from a female." In Bengal it is well settled that what has once descended as *stridhan* does not so descend again (a). This is another way of expressing the well-settled rule which obtains in Bengal that property inherited from a woman by a woman does not on the death of the latter pass as her *stridhan*. With regard to Bombay, wherever the Mayukha is accepted, it is held that its rules govern the descent of property. Those rules differ widely from the texts of the Mitakshara and exclude the idea that what has passed by inheritance from woman to woman goes on the death of the latter to the special line of heirs with a preference for females who would succeed to it, if it were *stridhan* proper (b).

(a) *Hari doyal v Giris Chandra* 17 Cal. 911.

(b) *Vijaragam v Lakshman* 8. Bom. H. C. R. Oc. 244 (260.) *Bai Narmada v Bhagwanta Rai* 12. Bom. 535. *Monilal v Rai bewa* 17. Bom. 758. *Sheosankar v Debi Sahai* 25. All 474. P. C.

CHAPTER VI.

PROPRIETARY RIGHTS OF WOMEN—STRIDHANA.

It has been shown in the preceding pages that in the early Vedic period it is possible to discern some indication of a theory of perfect equality of men and women with regard to their capacity for holding property. There are passages in the Vedas to show that in early times married women pursued independent occupations and acquired gain by them (a). There are no texts in the Vedas to the effect that these earnings were absolutely at the disposal of the man to whom they belonged. Manu and Katyayana no doubt assert this, but we cannot interpret the position of women in the Vedic age by what is said by these later sages many centuries after. Jaimini, whose interpretation of the Vedic teaching must prevail above all others, discards the idea that legal incapacity for property ascribed to women in some of the texts of Manu and Katyayana could have prevailed in the Vedic period. On the other hand he refers to a Vedic text which shows that women had proprietary capacity in those early times (b). But

Women had full proprietary capacity in Vedic period.

(a) Dr. Mayr, 162.

(b) 16th aphorism Page 79 *ante*.

They lost
this position
anterior to
Manu's time.

women apparently lost this position of equality in the overgrowth of another stage in the national existence, to which must be attributed the text of Baudhayana, that women are incompetent to *inherit*; by the time the Code of Manu was compiled women had fallen to a distinctly lower position. Manu was only recording the indications of such a state of society in so far as it concerned the position of women in the well-known text: "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" (a). The verse probably meant that these persons were unable to dispose of their property independently (b). In other words, the wife had a passive proprietary capacity.

But this is certain, that it was only in the course of its development during the Smṛiti period that Hindu law broke through, one by one, the rigorous limitations of the law laid down in the text just cited—a text ascribed to the period anterior to Manu's compilation—and gradually established the principle of the active proprietary capacity of women. The term *Stridhana* (generally woman's property), which according to Manu

(a) Manu, VIII, 416.

(b) See comment of Mitakshara on verse 49 (Debts).

and others denoted women's *peculium*, afterwards came to include all kinds of property acquired by a woman including that by inheritance (*a*). Having regard to the uncertainty in Hindu chronology, it is impossible to trace precisely the steps by which Hindu women from the condition of being *Nirdhana* (incapable of holding property)—a condition to which they descended during the period of the Smritis—rose again to the high position assigned to them by Vijñaneswara. But it is possible to trace in the Smritis something like a gradual development of the recognized capacity of women for property which may have corresponded in a measure to the successive generations in which the texts were framed.

Smritis shew
a development
of the capacity
of women.

Baudhayana provides for the succession, in case of woman's property, of daughters to their mother's ornaments consistently with his rule that women are generally incompetent to inherit (*b*). Apastamba says that in a partition the share of a wife comprises only her ornaments and the wealth given to her by her relations (*c*).

Baudhayana.

(*a*) See Vijñaneswara's definition of *Stridhan* in the Mitakshara.

(*b*) Baudhayana, Prasna II. Achya 2. Kan. 3, 43 (Sacred Books of the East, Vol. XIV, P. 230.)

(*c*) Prasna II. Pat 6, Kan 14. V. 9.

Manu.

Manu enumerates six kinds of *Stridhana* or woman's property. "What was given before the nuptial fire, what was given on a 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" (a). To these six kinds of woman's property mentioned by Manu, Vishnu adds *gifts by sons, the present on supersession, (Sulka) the wife's fee and the gift subsequent* (b). Manu and Vishnu, both declare that the ornaments which may have been worn during her husband's life time, his heirs shall not divide, those who divide them become outcasts (c). The texts of Manu and Vishnu in the original are identical. The English rendering of this verse in Vishnu is based on Kulluka's interpretation of the identical passage of Manu ; and this interpretation is

Vishnu.

(a) Manu IX, 194.

(b) Katyayana defines a gift subsequent अनुषेय thus :—what has been received by a woman from the family of her husband at a time posterior to her marriage, is called a gift subsequent ; and so is that which is similarly received from the family of the kindred.

(c) पतौ जीवति यः स्त्रीभिरलङ्कारोष्ठतो भवेत् ।

न तं भजेरन्दायदीभजमानापतन्ति ॥

Manu, IX, 200 ; Vishnu, XVII, 22 (Sacred Books of the East series).

accepted by Vijnaneswara, (a) Madhava, (b) Varadaraja, (c) and others. Nanda Pandita interprets the text differently as follows : "Those ornaments, which the wives usually wear should not be divided by the heirs whilst the husbands are alive." Upon this interpretation of Vishnu by Nanda Pandita, Mr. Mayne bases the theory that the right of married women to ornaments ended in early times with the life of the husband. That is to say, as soon as he died, the dominion over her passed to others, and with it the power of appropriating her property (d). Messrs. West and Buhler, adopting Nanda Pandita's interpretation, infer that the ornaments of widows may be divided. Although, as Sir Gooro Das Banerjee points out, the original text of Vishnu would bear either interpretation, yet there are good reasons to suppose that the former interpretation (*i.e.* that of Kulluka) is likely the right one and is best supported by facts. Apastamba, as we have already seen, recognises the right of the wife to ornaments on a partition and it is not natural to expect that Vishnu coming after him, would alter the position of women for the worse. Dr. Jolly remarks that Nanda

Interpretation
of Vishnu's
text by Nanda
Pandita.

-
- (a) Mitakshara I. 4, 19. (b) Burnell's Dayabibhaga, 51. (c) Burnell's Vyavahara Nirnaya, 49.
(d) Mayne's Hindu Law and Usage, 881 (7th. Edition).

Narada.

Pandita's interpretation is hardly reconcilable with the laws of Sanskrit syntax and composition and is opposed to all ancient authority (a). Narada, who presents some indications of modern influences, practically reiterates the rule of Manu regarding the six-fold property of women with this slight difference that he mentions "husband's donation" in the place of "what was given in token of love" in the text of Manu cited above. Narada limits "*Stridhana*" to gifts from the husband alone, and not from strangers.

Katyayana.

Katyayana mentions the same six kinds of *Stridhana* as Manu (b). But he imposes a limitation, which is not to be found in Manu as appears from the text : "Whatever wealth she may gain by arts, as by painting or spinning, or may receive on account of her friendship from any but her kindred, her lord has dominion over it. But the rest is declared to be women's property." Devala certainly is more liberal when he says :— "Her subsistence, her ornaments, her perquisites and her gains are the separate property of a woman. She herself exclusively enjoys it ; and her husband has no right to use it unless in distress" (c).

Devala.

(a) Tagore Lectures (1883). Page 232.

(b) Cited in the Dayabhaga, Chap. IV., Sec. I.

(c) *Ibid*, Chap. IV., Sec. I, 19.

We next come to the liberal rule of Yajnavalkya, as construed by the Mitakshara. That rule is contained in the text :—\ What was given to a woman by the father ; the mother, the husband, or a brother, or received by her at the nuptial fire, or presented to her on her husband's marriage to another wife, or also any other separate acquisition is denominated "woman's property". The word "Adya" ("or the rest" or any other separate acquisition) has been held by Vijnaneswara to include property which a woman may have acquired by inheritance, purchase, partition, seizure or finding (a). This text has been the subject of much contention amongst the commentators. Jimutvahana and Jagannatha do not accept the reading of the Mitakshara (a). From this difference of reading flow very different effects. The passage, as quoted in the Dayabhaga, omits the words "आद्यं" (*Adyam*) upon which the author of the Mitakshara builds his theory that the word "*Stridhana*" includes property acquired by a woman by any of the recognized modes of acquisition including inheritance, and that the term *Stridhana* conforms in its

Mitakshara's
gloss on the
same.

(a) षष्ठमाहर्षति भ्रातृदत्तमध्यमुपागतम् ।

अधिवेदनिकाद्यच्च स्त्रीधनं परिकीर्तितम् ॥

Instead of "अधिवेदनिकाद्यं च" the Dayabhaga reads it as "अधिवेदनिकश्चैव"

import with its etymology and is not technical.

Comment on
the definition
of Stridhana
by the sages.

None of the sages whom we have quoted tell us in the abstract what *Stridhana* means. Its contents have to be gathered from several texts cited and others of a similar character. There is another difficulty ; none of them give an exhaustive enumeration of it. Some sages mention six kinds of *Stridhana*, others a larger number. Whether Vijñāneswara has not given to the text of Yajñavalkya a comprehension going much beyond the intention of the writer may reasonably be doubted (a). Indeed Viśvarūpa, the earliest commentator on Yajñavalkya, does not give the extended meaning to the text of Yajñavalkya as the Mitakshara does (b).

It remains now to examine how these Smṛiti texts regarding *stridhana* have been construed by the commentators and what is the tendency exhibited in the writing of each of them regarding "*Stridhana*." Of all the commentators the author of Mitakshara has been the most favourable towards women's proprietary rights. The prevailing tendency in his writings is to show that a woman may acquire

Mitakshara.

(a) See Messrs. West and Buhler's Digest of Hindu Law. 2nd. Ed. p. 425 where he gives reasons for this view.

(b) See Translation by Sitaram Sastri. 9, Madras. L. J. 423.

property in precisely the same way as a man and all property obtained by her in any mode of acquisition is without distinction "*stridhana*." Inheritance is not even excluded. There can be no doubt that Vijñaneswara wanted to extend the original sphere of *stridhana* property, and has in fact given an indefinite expansion to their proprietary capacity. He supports his theory by the text of Yajñavalkya, to which he gives the widest signification. Commenting on this text he says (a) : "That, which was given by the father, by the mother, by the husband, or by a brother ; and that, which was presented (to the bride) by the maternal uncles and the rest at the time of the wedding, before the nuptial fire ; and a gift on second marriage, or gratuity on account of supersession, as will be subsequently explained, ("To a woman whose husband marries a second wife let him give an equal sum as compensation for the supersession") ; *likewise as indicated by the word Adyam (etc.), property which she may have acquired by inheritance, purchase, partition, acceptance or finding ; all*

Vijñaneswara gives a wide signification to Yajñavalkya's text.

His comment on the said text.

(a) पिता माता पत्या भ्राता च यद्वत्तं यन्न विवाहकालेऽप्रावधिकृत्य-
मातुलादिभिर्दत्तं आधिपदेनिकं अधिवेदनमिसितं अधिविन्नस्त्रियै दद्यादिति
वक्ष्यमाण आद्यशब्देन रिक्तशक्यसंविभागपरिग्रहाधिगमप्राप्तमितत् तु स्त्रीधनं
मत्वादिभिर्दत्तम् । स्त्रीधनशब्दश्च योगिको न पारिभाषिकः योगसंभवे
परिभाषाया अयुक्तात् ।

these descriptions of property are denominated woman's property ; (by whom ?) by Manu and the other ancient sages (a). The term (woman's property) conforms, in its import, with its etymology, and is not technical : for, if the literal sense be admissible, a technical acceptation is improper." The words in italics render it absolutely clear that "*Stridhan*", according to Vijnaneswara, means *property of any description belonging to a woman*. In this view Vijnaneswara is supported by a large number of commentators. Dr. Jolly cites the opinions of Kamalakara, Ballambhatta, Nanda Pandita, Rudra Deva and Apararka, all of which tend to confirm the theory of the Mitakshara (b). Vachaspati Misra, author of the Viramitrodaya, also follows Vijnaneswara in discarding the notion that the term "*Stridhan*" has been used in the text of Manu, Yajnavalkya and Vishnu in a technical sense, and not in the sense conformable to its derivation.

Vijnaneswara supported in his view by commentators.

Vachaspati Misra follows Vijnaneswara.

The Vyavahara Mayukha, after quoting the text of Manu regarding the "six fold

(a) The translation of the portion in italics by Mr. Colebrooke is not correct and has misled the Bombay High Court and Mr. Mayne. See on this point Dr. Jolly's Tagore Lectures, (1883), p. 244-247.

(b) Dr. Jolly's Tagore Lectures, (1883) Page 248-250.

peculiar property of a woman," remarks that the word 'six' is here used as exceptive of a less number. This interpretation harmonizes with the use of the word "Adya" in a text of Yajnavalkya" (a). From this it is not clear whether property acquired by inheritance, partition etc. is *stridhana*. But later on in the same chapter property taken by inheritance is ranked by Nilkantha as *stridhana*, but he draws a distinction between such *stridhana* and the *stridhana* of the less important kinds to which the special texts apply. After quoting the text of Katyayana : "But on failure of daughters the inheritance belongs to the sons," he says, "This right of inheritance of daughters and the rest in the mother's property exists only in respect of *adhyagni*, *adhyavahanika*, and other aforesaid kinds of technical *stridhan* ; for if it related to all wealth in which their mother had property, the technical term " "*stridhan*" would be nugatory" (b). The author of the Smṛiti Chandrika, though he cites the text of Yajnavalkya, does not give it the wide signification which the Mitakshara gives. On the other hand there occurs a passage

Vyavahara Mayukha on the text of Yajnavalkya.

Nilkantha recognizes property inherited by woman as *stridhana*,

but draws a distinction between such *stridhana* and technical *stridhana*.

Smṛiti Chandrika gives a restricted meaning to the text of Yajnavalkya.

(a) Nilkantha quotes the identical text of Yajnavalkya which has already been cited. Chap IV, Sec. 10. 1. *Stridhan*.

(b) Vyavahara Mayukha, Ch. IV. Sec. 10., 26.

in that treatise which suggests by implication that inherited property is not "*stridhana*." That passage is as follows :—"Whatever the mother takes, she takes for herself, *like* the *stridhana* called *Adhyagni* and the like, and not for the benefit of both herself and her husband" (*a*).

Vivada Chintamoni.

The Vivada Chintamoni does not refer to this much canvassed text of Yajnavalkya at all. It enumerates eleven kinds of the peculiar property of women (*stridhana*). They consist of the six kinds mentioned by Manu, the gift to a superseded wife noticed by Yajnavalkya, the *sulka* or woman's perquisite and the gift subsequent referred to by Katyayana, the ornaments including those which a woman was allowed to wear while her husband was alive although he might not have made a gift of it to her, and lastly the "food and vesture" spoken of by Devala.

Definition of *stridhana* given by Jimutavahana.

In the last place, we have to consider the definition of *stridhana* given by Jimutavahana, the founder of the Bengal School. After examining the various enumerations of the different kinds of *Stridhana* according to the different sages, he says, "since various sorts of the separate property of a woman have been thus propounded without any res-

(*a*) Smṛiti Chandrika, Ch. XI. Sec. 3, para 8 ; see also Sengamalathammal's case, 3 M. H. C. R. 312.

triction of number, the number six (as specified by Manu and others) is not definitely meant. But the text of the sages merely intend an explanation of woman's separate property. *That alone is her peculiar property which she has power to give sell or use independently of her husband.*" But this definition of *stridhan* has one great demerit. As no general rule is anywhere laid down as to what property a woman can dispose of independently of her husband's control, the foregoing definition is open to the objection that it defines one unknown thing in terms of another (a). Srikrishna, the commentator of Dayabhaga, perceived this defect, and tries to improve a little upon it thus :—"That property is *Stridhana* in which the wife has independently of her husband, full power of disposal according to the sacred texts ; the text is that of Katyayana. The wealth, which is earned by mechanical arts, or which is received through affection from any other, but the kindred, is always subject to her husband's dominion. The rest is pronounced to be woman's property" (b). Jimutavahana quotes the text of Yajnavalkya but omits the word

Defect of
Jimutavahana's
definition.

Srikrishna's
definition.

(a) Tagore Lectures, 1878, Page 285-6 (2nd. Ed.)

(b) Srikrishna's Dayakramasangraha, P. 12.
(Chandi Charan Smritibhushan's Ed.)

Comment of
Jimutavahana
on Katyaya-
na's text.

"*Adyam*" on which the author of the *Mitakshara* builds his theory of female ownership. He gives a technical meaning to the word "*stridhana*" and refutes the notion that it includes the property acquired by inheritance (a). Speaking of the widow's succession, he quotes the text of *Katyayana*, "Let the childless widow, keeping unsullied the bed of her lord" etc., and then in commenting on it says :—"Abiding with her venerable protector, that is, with her father-in-law or others of her husband's family, let her enjoy her husband's estate during her life ; and not as with her separate property (*stridhana*) make a gift, mortgage or sale of it at her pleasure" (b). A clear distinction is drawn in this passage between inherited property and *stridhan* by the *Dayabhaga*. On the contrary, it is equally clear that the author of the *Mitakshara* includes inherited property within the definition of *stridhan*. In these two leading treatises which embody the more modern development of Hindu law we find two contrary theories on the subject of woman's property. According to the rule laid down by the Judicial Committee in the case of

(a) *Dayabhaga*, Ch. IV, Sec. I, 11 & 12 ; Chapter. XI, Sec. I, 58 ; *Ibid*, Sec. II. 30. 31.

(b) Ch. XI, Sec. I, 56-57.

Collector of Madura *vs* Mootoo Ramlinga Sathupathy, one would expect that inherited property would be regarded by the Courts as *stridhana* in tracts governed by the Mitakshara, while, in provinces where the influence of Jimutavahana prevails, the Courts would exclude it from the category of *stridhana*. Our expectations have been realized in the latter case but not in the former. So far as the Bengal school is concerned the judicial decisions establish the principle that property inherited by a woman either from a male or a female (*a*) does not become her *stridhana* and this is quite in accordance with the rule laid down in the Dayabhaga and Dayakrama Sangraha of Srikrishna.

Judicial decisions adopt the law laid down by Jimutavahana and Srikrishna.

On the other hand the course of decisions has been to hold, contrary to the doctrine of Vijnaneswara, that according to the law of the Benares school property inherited by a female is not her *stridhana*. In the leading cases of Thakoor Deyhee *vs* Baluk Ram (*b*) and Bhugawandeen *vs* Myna (*c*) the Judicial Committee have held that property inherited by a widow from her husband

Course of decisions is contrary to the doctrine of Vijnaneswara.

Judicial decisions.

(*a*) Sreenath *vs* Surbomongala, 10 W. R. 488 ; Prankissen *vs* Nayanmani, I. L. R. 5 Cal, 222 ; Huri Doyal *vs* Grish Chandra, I. L. R. 17 Cal, 911.

(*b*) 11 M. I. A. 139.

(*c*) 11 M. I. A. 487.

Judicial deci-
sions.

is not her *stridhana* according to the law of the Benares school. In the case of Chotaylall *vs* Chunnoolall (*a*) property inherited by a daughter from her father has been held not to rank as *stridhana*. In Muttu Vaduganadha *vs* Dora Singha (*b*) the same principle was applied to cases in Madras governed by the Mitakshara law. Quite recently the Judicial Committee reaffirmed the principle of these decisions in these words :—
“The law of inheritance in the case of women is left in great obscurity by the Mitakshara. The subject is dealt with in Chapter II, section 11 and has more than once been considered by this Board. The nature of a widow's estate was settled in two cases (Thakoor Deyhee *vs*. Baluk Ram and Bhugawandeen *vs* Myna); and the nature of a daughter's estate was considered in Chotaylall *vs* Chunnolal. It was there decided that under the law of the Mitakshara a daughter's estate is a limited and restricted estate and not *Stridhan*” (*c*). These were cases of inheritance from males. But the same principle has been recently extended to the case of inheritance from females

(*a*) I. L. R. 4. Cal. 744.

(*b*) I. L. R. 3 Mad., 290.

(*c*) Venkayamma Garu *vs* Venkataramanayamma, Garu, I. L. R. 25 Mad. 678. (P. C.)

in two recent appeals to the Privy Council from Allahabad (a). In the first of these cases (*Sheosankar vs Debi Sahai*) the Lords of the Privy Council in giving judgment said :—"Under the Benares law their Lordships are not aware of any direct judicial decision on the precise question now to be disposed of. But they do not feel any hesitation as to the answer which ought to be given to it. On the one hand stands the text of the *Mitakshara*, which, taken literally, seems to make all property inherited by a woman a part of her *stridhana*, inheritable from her according to the rules applicable to her *stridhana* in the strictest sense of the term. On the other hand, it has already been decided that the rule seemingly laid down in the *Mitakshara* as to the descent of property taken by inheritance is not the Benares law so far as concerns property inherited from males. The decisions to that effect were based upon no narrow grounds. Their Lordships examined the primitive texts upon which the *Mitakshara* purports to be based ; they considered the fundamental principles of the Hindu law ; they reviewed the judicial decisions bearing on the questions before them ; they gave such weight as

Property inherited by woman both from males and females governed by the same principle.

Sheosankar v. Debi Sahai, I. L.R. 25 All, 468.

(a) *Sheosankar vs Debi Sahai*, I. L. R. 25 All. 468 ; *Sheopratap vs Allahabad Bank*. Ibid, 476.

could properly be given to the very conflicting opinion of numerous pandits and they arrived at their conclusions without hesitation. And it is difficult to see how any other rule can be applied to what has been inherited from females." In the second of these appeals (*Sheopartab vs. Allahabad Bank*) their Lordships referring to the above remarks said : "The reasons given by their Lordships in the judgment just delivered for declining to draw a distinction between property inherited from a male and that inherited from a female seem to them to apply to the present case."

Sheopartab
vs Allahabad
Bank, I. L. R.
25 All, 476.

The law on
the point in
Madras.

In Madras, where the *Mitakshara* is approved as also other treatises (especially the *Smriti Chandrika*, which differs much from the text of the *Mitakshara* with regard to woman's property), the view has been accepted that what a woman has inherited from a woman is not *stridhana* for the purposes of inheritance (a).

In Western
India, property
inherited by
a woman, whether
from male or
female is
stridhana.

The law of Western India differs considerably from that prevalent elsewhere as to the rights of female heirs. The general rule there is that property inherited by a woman, whether from a male or female, is

(a) Venkatarama Krishna vs. Bhujanga, I. L. R. 19 Mad., 107 ; Virasangappa vs. Rudrappa, I. L. R. 19 Mad., 110.

stridhana. The only exception is the case of property inherited by widows. The decisions restricting female rights, so far as they have gone, all relate to inheritance by widows from male heirs. In regard to female *stridhana* succession the decisions have all been in favour of complete dominion. There are numerous rulings which assert the full dominion and absolute power of the daughter where she succeeds as heir to her father (a). Sisters and nieces have also been held entitled to take absolutely in the Bombay Presidency (b). These analogies regulate the general rule when it has to be applied to a female succeeding as heir to another female. In a recent Full Bench of the Bombay High Court the paternal grandmother inheriting from her maiden granddaughter has been held entitled to take an

Property inherited by widows is exception to the rule.

Judicial decisions.

(a) *Pranjivandas vs. Devkuvarbai*, 1 Bom. H. C. R., 130 ; *Navalram vs. Nandkishore*, 1 Bom., H. C. R., 209 ; *Bhaskar vs. Mahadev*, 6 Bom. H. C. R., 1 ; *Kotarbasapa vs. Chanverova*, 10 Bom. H. C. R., 408 ; *Hari bhat vs. Damodarbhat*, 3 Bom., 171 ; *Bulakhidas vs. Keshavlal*, I. L. R. 6 Bom., 85 ; *Jankibai vs. Sundra*, I. L. R. 14 Bom., 612 ; *Babaji vs. Balaji*, I. L. R. 5 Bom., 660.

(b) *Vinayek vs. Luxumeebaee*, 9 M. I. A. 516 ; *Rindabai vs. Anacharya*, I. L. R. 15 Bom., 206 ; *Tuljaram vs. Mathuradas*, I. L. R. 5 Bom., 662.

absolute interest in such property, and on her death the property has been held to go to her heir and not to the heir of the granddaughter (a).

Divergence
amongst sages
and commen-
tators regard-
ing nature of
Sulka.

Vyasa.

Mitakshara.

Ballambhatta.

Viramitrodaya

Dayabhaga.

Of the several kinds of *stridhana* specifically mentioned there is considerable divergence amongst the sages and commentators as to the exact nature of *sulka* (wife's fee). Vyasa describes it as a fee which is given to the bride to induce her to go to the house of her husband (b). The author of the Mitakshara regards it as a gratuity for the receipt of which a girl is given in marriage. Ballambhatta says this relates to a marriage in the form termed *Asura* or the like. But Viramitrodaya, who does not so limit it, says that the father or the like takes it on the understanding that it is to belong to the bride, because, otherwise, in the absence of her right thereto, the application of the denomination of woman's property to it, would be unreasonable (c). The Dayabhaga, like the Viramitrodaya, says that "*sulka*" occurs indiscriminately in any form of marriage, whether that termed *Brahma* or another (d).

(a) Gandhi vs. Bai Jadab, I. L. R. 24 Bom., 192.

(b) Vyasa cited in the Dayabhaga, Ch. IV, Sec. III, 21.

(c) Mr. G. C. Sarkar's translation. Page 223.

(d) Ch. IV, Sec. III, 21, 22.

According to Katyayana whatever is obtained by a woman as the equivalent of household utensils, of beasts of burden, of milch cattle, or ornaments is declared to be *sulka*. Nilkantha, in the Vyavahara Mayukha, after citing this text of Katyayana explains it thus :—"The meaning is when the household utensils and the rest are not available, what is given to the bride at the time of her being given in marriage as the price of them is *sulka*" (a). The Madanaratna says that the price of household furniture, which is taken from the bridegroom or the like for giving the bride in marriage in the shape of the bride's ornaments, is the fee or *sulka* (b). The Vivada Chintamani describes *sulka* "as wealth given to a damsel on demanding her in marriage" (c). The Dayabhaga, after noticing a text of Katyayana, says that one of the meanings of *sulka* is what is given to woman by artists constructing a house or executing other work, as a bribe to send her husband or other person of his family to labour on such particular work (d). The Smriti Chandrika cites the text of Katyayana : "Whatever is received as the price of

Katyayana.

Vyavahara
Mayukha.M a d a n a
r a t n a.Vivada Chin-
tamani.Smriti Chan-
drika.

(a) Vyavahara Mayukha, Chap. IV., Sec. X, 3.

(b) See the quotation in the Viramitrodaya, p. 223.

(c) See P. K. Tagore's translation, p. 263.

(d) Chap. IV, Sec. III, 20.

house-hold utensils, etc.....or for works is called *sulka*" and says that it refers to price received from the bride-groom or the like as the bride's wealth and in trust for the bride.

Is the share obtained by woman on partition her stridhana?

Another question, which is not altogether free from difficulty, is whether the share which a woman obtains on partition becomes her *Stridhana*. According to the plain reading of the text of Mitakshara, an affirmative answer must be given to this question. But there is another passage in the Mitakshara which has a material bearing on the subject we are discussing and which also shows clearly that the share which a woman gets on partition is her *stridhana*. In chapter I, section VI, 1. & 2 Vijñaneswara discusses the subject of the mode of allotment of a share to a son born subsequently to a partition of the estate. Such a son, he says, obtains after death of his parents both their portions. Then follow these important words :—"He obtains his mother's portion, however, *only if there be no daughter* ; for it is declared daughters share the residue of their mother's property after payment of her debts." Here we have the author of the Mitakshara applying the special rules governing the descent of *stridhana* to the share which a woman gets on partition du-

Vijñaneswara applies the special rules of descent to property obtained by woman on partition.

ring her husband's life-time ; this conclusion is only possible on the supposition that Vijnaneswara considered a share so acquired by a wife to be her *stridhana* (a). There is no suggestion in any part of the Mitakshara that the share which a woman obtains on partition is in lieu of maintenance, yet this seems to have been assumed in Bengal, not only by judges but also by some of the writers on Hindu law. Mr. Justice D. N. Mitter in an early case remarked (b) : "There is no doubt that the share which is given to a Hindu mother at the time of partition is given to her for no other purpose than as a provision for her maintenance". The parties were governed by the Mitakshara. Similar remarks have been made in other Calcutta cases under the Benares law (c). The logical conclusion which follows from this view is that a share obtained by a wife or mother on partition is not her *stridhana*. But this is not the law as laid down by the Mitakshara. It seems to us that in deciding

Is share allotted to woman on partition in lieu of maintenance ?

Early decisions of the Calcutta High Court hold that it is so,

but the view is opposed to the Mitakshara.

(a) Apararka includes the share received by a wife or mother on partition under the head of *Stridhanam*. Dr. Jolly's Tagore Lectures, 250.

(b) (1868) Sheodyal vs Juddonath, 9 W. R., 61.

(c) Mohabeer vs Ramyad, 20 W. R., 192 ; Lalljeet vs Raj coomar, 20 W. R. 336 ; (1895) Beni Prasad vs Puran chand, I. L. R. 23 Cal., 262.

these cases the learned judges have qualified the Mitakshara by the special provisions of the Dayabhaga.

The Allahabad High Court has in a recent case followed strictly the doctrine laid down by Vijnaneswara. It has decided that the share which a mother in a joint Hindu family obtains on partition, after the death of the father, of the joint family property between the mother and the sons, becomes the mother's *stridhana* which devolves on her death upon her own heirs and not upon the heirs of her husband (*a*). This view has been followed in other cases before the Allahabad High Court (*b*). The Judicial Committee treat it as an open question under the Benares law (*c*). Mr. Mayne, however, is afraid that these Allahabad rulings will not probably stand the test of an appeal to the Privy Council (*d*). Since this was written, the Judicial Committee had to pronounce on the question and Mr. Mayne's apprehensions have been justified. In

(*a*) Chhidu vs. Naubat, I. L. R. 24 All 67.

(*b*) Dabi Mangal vs. Mahadeo Prasad, I. L. R. 32 All, 253.

Sripal Rai vs. Surajbali, I. L. R. 24 All. p. 82.

Gambhir Sing vs. Makradhuj 4, A. L. J. 673.

(*c*) 11 M. I. A., 509.

(*d*) Mayne's Hindu law, 7th Ed. Page 838.

appeal from the case of *Debi Mongal vs Mahadeo Prasad*, just cited, the Judicial Committee have held that the share obtained by a Hindu mother upon partition of ancestral property amongst her sons, under the Mitakshara law, does not become her *stridhana* property descendible to her *stridhana* heirs. Such share stands on the same footing as property obtained by a woman by inheritance (a). It may be noticed, however, that these Allahabad decisions (now of no effect after the decision of the Judicial Committee just referred to) do not rest on the general Mitakshara definition of *stridhana* (which the Judicial Committee have not accepted) but upon a specific text occurring in an earlier part of the work (Chap. I, Sec. VI para 2.).

The share of mother on partition is not her *stridhana*,

under the Mitakshara,

Jagannatha says that the share given to a wife, mother, *etc.* is her separate estate (b) and the Pandits of the Supreme Court declared that what a widow took in a partition was her *stridhana* (c). In recent times, no doubt the share taken by a mother in a partition has, in Bengal, been pronounced not to be *stridhana* (d). The

and also under the Bengal school.

(a) (1912) 16 C. W. N. 409. (P. C.)

(b) West and Buhler's Digest, 304, 307.

(c) Ibid, 304.

(d) *Jugomohun vs. Sarodamoyee*, I. L. R., 3 Cal. 149.

reason of these later decisions would seem to be that the share obtained by a woman on a partition among her sons is given to her simply in lieu of maintenance and not because she is a coparcener in the estate or that she has any pre-existing rights, and the share which is thus given to her reverts upon her death to those heirs of her husband out of whose portion the share is taken.

Hemangini vs Kedarnath, the leading case on the subject in the Bengal school.

It follows from this that such a share is not her *stridhana* (a). In the case of Hemangini Dasi vs. Kedarnath Kundu Chowdhury which is the leading case on the subject under the Bengal school, the Judicial Committee lay down that where the Hindu law provides that a share shall be allotted to a woman on a partition, she takes it in lieu of, or by way of provision for, the maintenance for which the partitioned estate is already bound (b).

In Southern India a widow cannot claim a share on partition if her sons divide the patrimony amongst themselves (c).

(a) Sorolah vs Bhoobun, I. L. R. 15 Cal., 292 ; see also Cossinath vs. Harrosundary affirmed by the P. C., cited in Shama Charan Sircar's Vyavastha Darpana. p.97.

(b) I. L. R. 16 Cal., 758.

(c) Subramanian vs. Arunachelam, I. L. R. 28 Mad., 1 (8) ; Sorolah vs Bhoobun, I. L. R. 15 Cal., 292 (304).

In Bombay the share taken by a wife, mother and daughter on partition would be regarded as *stridhana* (a). The Vyavahara Mayukha lays no particular restriction on the estate taken by a wife, a mother, or a sister in the shares assigned to them respectively on partition. As to the succession after their death, it directs that their respective sons and other heirs in order are to take it (b).

But it is regarded as *stridhana* in Bombay.

Property acquired by a Hindu wife or widow by adverse possession would be her *stridhana* even under the Bengal school, for such title would give to the holder of it an absolute control over the property independently of the husband (c). In the case of Brij Indar Bahadur Singh vs. Rani Janki Koer, the Judicial Committee (d) held that the estate of a deceased Hindu which had been forfeited to government and by it granted after his death to his widow with full power of alienation became her *stridhana*.

Property acquired by adverse possessions by the widow is her *stridhana*.

Property coming from a father to a daughter before her marriage, under a testamentary devise, is *stridhana* (e). A lease-

Property derived by a daughter under her father's will her *stridhana*.

(a) Bhagirthibai vs. Kahnujirav, I. L. R. 11 Bom., 285, (302-303), where the whole question is discussed.

(b) Vyavahara Mayukha. Chap IV. Sec X pa. 26.

(c) Mohim vs Kashi Kanta, 2 C. W. N., 161; Subramaniam vs. Arunachalam, I. L. R. 28 Mad., 1.

(d) L. R. 5 I. A., 1.

(e) Judoonath vs. Bussunt coomar, 19 W. R., 264.

Mourashi mokarrari lease granted by a father to his daughter after her marriage is her *Ayautuka stridhana* according to Dayabhaga.

hold property, such as a *mourashi mokarrari* lease reserving a nominal annual rent, granted by a father to his daughter after her marriage, has been regarded as property possessing the characteristics of *stridhana* according to Dayabhaya. The interest in the property so transferred to the daughter, constitutes her *Ayautuka stridhana* and falls within the class known as *Anwadheya* (a). In this case an objection was raised that leasehold property being unknown in the time, when the authoritative text books on Hindu law were written could not be regarded as *Stridhana* and in overruling this objection, Justice Sir Ashutosh Mookerjee made the following significant remarks: "We are not prepared to hold that rules of Hindu law are so inelastic as to be capable of application only to such descriptions of interests in property as formed the subject matter of transactions at the time when the rules were first formulated. Indeed if the rules of Hindu law were so narrowly construed and applied it would be impossible to administer them because in every case, the Courts would be called on to hold a preliminary enquiry as to when a particular rule was first laid down and also as to what kinds of interest in property were recognized at that time."

(a) Ram Gopal vs Narain Chandra, 3 C. L. J. 15.

Jimutavahana, as we have seen already, employed the term *stridhana* in the technical sense ; the test he adopted for determining whether or not a particular acquisition came under that category was the extent of the power of disposition possessed by the female over it. If the acquisition was at her absolute disposal, the property, according to the author of the Dayabhaga, was her *stridhana*. But the right of absolute disposal did not enter into Vijnaneswara's conception of the essentials of ownership ; and accordingly he and his numerous followers use the term *stridhana* to indicate property belonging to a woman whatever the extent of her power of disposition over it.

Jimutavahana uses *stridhana* in the technical sense.

Vijnaneswara uses the word in its widest sense.

The next step in the enquiry therefore is as to what is the extent of the rights of a woman over her *stridhana* using it in the widest sense of the Mitakshara, which of course includes property which technically comes within the definition of woman's property (*stridhana*). The Mitakshara does not lay down any rule as to the extent of the woman's own power over *stridhana*. Mr. Justice West suggests that the natural conclusion would seem to be that he, the author of Mitakshara, considered this already sufficiently provided for in regard to his immediate subject, inheritance, by

Extent of the rights of a woman over her *Stridhana*.

The Viramirodaya on the same.

Three classes of *stridhana*.

other lawyers and by the analogy to be drawn from his rules as to the estate of a male proprietor (a). Although the Mitakshara is silent on the point, the Viramirodaya, which supplements the Mitakshara in cases left doubtful by the latter, contains a somewhat systematic exposition of the law on the subject. From the discussions of the commentators it appears that *stridhana* or woman's property can conveniently be grouped under three heads if the principle of classification adopted be the extent of her right of disposition over such property. Property over which a woman has absolute dominion, falls under the first head ; under the second are comprised such kinds of *stridhana* in respect of which her right of disposition is subject to the control of her husband, and under the third is included the estate of a woman in which she has a qualified right of ownership and which she cannot sell or mortgage *etc.* except for legal necessity or with the consent of the next heir.

(a) Mr. Justice West here refers to the provisions in the Mitakshara, Ch. I, Sec. pp. 27, 28., where it is laid down that a man is subject to the control of his son and the rest (of those interest) in regard to immoveable estate, whether acquired by himself or inherited though he may make a gift or sale of it for the relief of family necessities or for pious purposes.

And let us now proceed to deal with the first head. Katyayana describes *a kind gift* or *Saudayika* as follows :—“That which is received by a married woman or by a maiden, in the house of her husband or of her father, from her brother or from her parents is termed a kind gift” (a). The same sage next declares :—“The independence of women who have received a kind gift, is admitted (in respect of it) for it was given by them out of kindness for their maintenance ; with respect to a kind gift, the independence, at all times, of women is proclaimed in making sale or gift according to pleasure, even when it consists of immoveable property” (b). From this text and from the comments on it by the commentators of the different schools it appears clear that over *Saudayika stridhana* (gifts of affectionate kindred) Katyayana declares the absolute dominion of women. If “*Saudayika*” includes donations from the husband accord-

Firstly, that over which a woman has absolute dominion.

Saudayika.

(a) The reading of the text as adopted by Jimutavahana, Kalpataru and other works is “from her husband” instead of *from her brother*, Dayabhaga, Ch. IV., Sec. I. 21.

(b) Viramitrodaya, Ch. V. P. I., 5, p. 225. ; Smṛiti Chandrika, Ch. IX, S. II, 3, 5 ; Vyavahara Mayukha, Ch. IV, Sec. X, 8, Page. 93, Mandlik's edition ; Vivada Chintamani, p. 260, P. C. Tagore's translation.

ing to the reading of Katyayana's text, the rule of absolute dominion will apply to the gift of immoveables by the husband.

Lands purchased with *Saudayika* *stridhana* are *stridhana*.

Lands purchased by a woman with her *Saudayika stridhana* become her *stridhana* and are subject to the same disposition which the law gives her power to make of her *Saudayika*. This would be the case even if the funds out of which lands were purchased were given to the wife by the husband. In the case of Venkata *vs.* Venkata (a), their Lordships of the Judicial Committee made the following observations : "It is suggested that where the funds are shown to have come wholly or in part from the husband, and to have been afterwards invested in land by his widow, the same law which governs in the devolution of immoveable estate derived from the husband is to govern that acquisition ; but their Lordships cannot find any trace of authority to support such a distinction. It is clearly the law that from the time the funds were given to the widow by the husband they became her *stridhanam*, and that she had full power of disposition over them. Years after the death of the husband she chooses to invest them in land. Can it be contended with any plausibility that that was land which was derived from the husband ?

(a) I. L. R. 2 Mad., 333 (P.C.).

Their Lordships can see no ground for establishing this subtle distinction, or for thus arbitrarily interfering with the power of investment and application and disposition which the general law gives to a Hindu female over her *stridhanam*."

We have seen already that a woman who succeeds to *stridhana* takes only a qualified estate. This is now the rule in all the Presidencies except in Bombay where the general rule is that all property inherited by a woman must be classed as *stridhana* with the exception (based on special texts) of property inherited by a widow either from her husband or as a *gotraja sapinda*. Sir Lawrence Jenkins, C. J., presiding over a recent Full Bench of the Bombay High Court stated the rule prevalent in that Presidency in these words :—"The principle of dependence, which perhaps governs the extent of power, may regulate the exceptions where widowed females inherit the males, but in all other cases the rule of absolute dominion must be allowed to prevail" (a). Devala mentions some other kinds of *stridhana* over which a woman has absolute control. He says :—"Her subsistence, her ornaments, her fee or *sulka*, and her gains are the separate property of a woman.

Extent of woman's right over *Stridhana*.

Devala describes other kinds of *Stridhana* over which women have absolute control.

(a) Gandhi vs Bai Jadab, I. L. R. 24 Bom, 192. (214).

She herself exclusively has the right to enjoy it, her husband has no right to use it, except in distress. In case of consumption or disbursement without cause, he must refund it to the wife with interest." Subsistence or *Vridhhi*, means, according to the Smriti Chandrika, what is given by the father or the like relation towards her advancement. In the Madanaratna, however, this is read as *Vritti*, and is explained to mean what is given by the father or the like for subsistence. "Gains", according to the Viramitrodaya, means what is received from any person, who makes the present for the purpose of pleasing Gauri or some other goddess" (a). It is elsewhere explained as wealth received by a woman from a kinsman (b). These gains, of course, cannot include earnings by mechanical arts for there is a text of Katyayana which shows that such earnings are subject to the control of the husband.

Second head
of Stridhana
considered.

This brings us to the consideration of that class of woman's property which falls under the second head described above.

The text of Katyayana just referred to runs as follows :—"But whatever is acquired by mechanical arts, also what is received

(a) Viramitrodaya, Sarkar's translation, p. 226.

(b) Colebrooke's Digest, Bk. 5, Ch. 9, 477.

through affection from any other, therein the husband's ownership arises at the time ; the rest is declared *Stridhana* (woman's property in the technical sense)"(a). The Viramirodaya says :—"That the text of Manu namely, 'A wife, a son, also a slave ; these are incapable of holding property ; whatever they acquire belongs to him whose they are' is to be taken to refer, in the case of the wife only to what is acquired by mechanical arts &c. by reason of the simplicity of the supposition that both the precepts are founded on the same radical revelation" (b). Commenting on the text of Katyayana, the author of the Dayabhaga says : "Over that which has been received by her from any other but the family of her father, mother, or husband, or has been earned by her in the practice of a mechanical art, (as spinning or weaving), her husband has dominion and full control. He has a right to take it even though no distress exists. Hence, though the goods be hers, they do not constitute woman's property ; because she has not independent power over them" (c). The concluding portion of this comment is quite

Viramirodaya

(a) Katyayana cited in the Dayabhaga Ch. IV, sec. I, 19.

(b) Viramirodaya, Sarkar's Translation, 222.

(c) Dayabhaga, Ch. IV, Sec. I, 20.

consistent with the notion of Jimutvahana that the power of alienation is the necessary concomitant of ownership.

Gift of moveables by husband subject to his control.

The gifts of moveable property made by the husband is subject to his control and the wife cannot use them as she pleases until her husband's death. This rule is deducible from two texts, one of Katyayana and other of Narada. "Let the woman," says Katyayana, "place her husband's donation as she pleases, when he is deceased ; but, while he lives, she should carefully preserve it, or else if unable to do so commit it to the family" (a). Narada tells us :—"What has been given by an affectionate husband to his wife, she may consume as she pleases, *when he is dead*, or may give it away excepting immoveable property" (b).

Gifts by husband to wife of immoveables.

These two texts also show that with regard to immoveable property given by the husband to the wife she has only a restricted power of alienation ; she cannot sell or mortgage or make a gift of it whether the husband be alive or dead. Immoveables given by the husband really fall under the last of the three heads of *stridhana* indicated before. It has been decided by the Judicial Committee in the Tanjore case that bequests

(a) Dayabhaga, Ch. IV, Sec. I. 8.

(b) See Dayabhaga, Ch. IV, Sec. I, 23.

stand on the same footing as gifts. So that bequests of immoveables made by the husband in favour of the wife are subject to the same limitations as gifts are. But where the bequest or gift of immoveable property is in terms absolute, it confers on the widow or wife as full dominion and power of alienation over that property as if the bequest had been made to a stranger. In an early Bengal case where a Hindu died, leaving a widow, two infant sons a daughter, and having made a will in English of which the material portion is, "I, give, devise and bequeath unto my wife L. D. and her heirs and assigns for ever all my real and personal estates and effects, and do appoint my wife sole executrix of this my will," it was held that she took an absolute estate with full power of alienation (a). It is not necessary that the power of alienation should be conferred in express terms. It is enough if words are used which of themselves imply absolute ownership, *e. g. malik*. The cases on the point are, however, not uniform. In the case of *Koonjbehari vs Premchand* (b), the Calcutta High Court held that whether, in respect of a gift or a will, it is neces-

Bequests in
favour of wife
by husband.

(a) *Prosunno vs Tarrucknath*, 10 B. L. R., 267. ;
Seth Mulchand vs Bai Mancha, I. L. R. 7 Bom., 491.

(b) (1880) I. L. R. 5 Cal., 684.

sary for the husband to give the wife in express terms a heritable right or a power of alienation in order to entitle her to get an absolute estate. And recently in Allahabad it has been held that under the Hindu law, in the case of immoveable property given or devised by a husband to his wife, the wife has no power to alienate unless such power is conferred in express terms (*a*). The words used in this case were "that the widows will remain in possession". But a Bench of the Allahabad High Court, differently constituted, refused to follow this case and expressed the opinion that the words in question passed an absolute estate (*b*). But the former case, in which the words were used, was carried in appeal to the Privy Council with the result that the decision was reversed (*c*). Their Lordships, after quoting with approval certain observations of Mr. Justice R. C. Mitter in the case of *Kollany Kooer vs. Luchmee Pershad* (*d*) said :—"The question as to the effect of the word 'malik' came before this Board in 1897 in the case of *Lolit Mohun vs. Chukkun*

The effect of the use of the word "Malik" in wills or bequests in favour of women.

(*a*) *Surajmani vs Rabinath*, I. L. R. 25 All., 351.

(*b*) *Padam vs Tek*, I. L. R. 29 All., 217, See also *Rajnarain vs Ashutosh*, I. L. R. 27 Cal., 649.

(*c*) *Surajmani vs Rabinath*, I. L. R. 30 All., 84.

(*d*) 24 W. R. 395.

Lall (a). The donee in that case was a man, but the principles of interpretation laid down were of general application." Those principles are contained in the following passage in the judgment of Lord Davey : "The words 'become owner (*malik*) of all my estates and properties' would, unless the context indicated a different meaning, be sufficient for that purpose (that is, to give an absolute interest) even without the words 'enjoy with son, grandson, and so on in succession' which latter words are frequently used in Hindu wills and have acquired the force of technical words conveying an heritable and alienable estate." The Bombay High Court has however recently held that the word "malik" though by itself it would be sufficient to give the widow an absolute estate has, when used in a will, to be construed with reference to the knowledge of the testator as to the incidents of a widow's estate and the ordinary notions and customs of Hindus (b).

Whatever the nature of the *stridhana* and however absolute the power of the woman over certain descriptions of it may be, the husband has in certain circumstances power to appropriate it. Those circumstances are

Husband can take *Stridhana* in distress.

(a) I. L.R. 24 Cal., 834.

(b) Moti Lall vs. Advocate general, 35 Bom., 279.

Right personal to husband.

described in the following text of Yajñavalkya : "A husband is not liable to make good the property of his wife, taken by him in a famine, or for the performance of a duty, or during illness, or while under restraint" (a). The distress referred to must be of such a character as it is impossible to get rid of except with the use of *stridhana* (b). But the husband is not liable to make good only where he has no means to repay the amount as in the case of poverty. This privilege of using the wife's *stridhana* in times of distress belongs exclusively to the husband.

It has accordingly been held in Bombay that ornaments on the person of a Hindu wife, if forming part of her *stridhana* cannot be taken in execution against her husband. On certain occasions, however, the husband may take them, but the right is personal to him (c).

Katyayana.

Katyayana denies the right of the husband to take the *stridhana* of his wife where the circumstances of distress mentioned in the preceding paragraph do not exist. He

(a) Dayabhaga, Chap. IV. S. I. 24 ; Viramitrodaya, 227 ; Smṛiti Chandrika, Ch. IX, S. II. 21.

(b) Smṛiti Chandrika, Ch. IX., S. II., 18.

(c) Tukaram vs. Gunaji, 8 Bom. H. C. R. 12. (A. C. J.) See also Strange's Hindu Law, Vol. I., 26 ; Vol. II., 19 ; Grady's Hindu Law. p. 174.

says :—"Neither the husband, nor the son, nor the father, nor the brothers, can assume the power over a woman's property, to take it or to 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 also incur a fine. If such person, having obtained her consent, use the property amicably he shall be required to pay the principal, when he becomes rich. But, if the husband have a second wife and do not show honour to his first wife, he shall be compelled by force to restore her property, though amicably lent to him. If food, raiment and dwelling be withheld from the woman, she may exact her due supply, and take a share of the estate with the co-heirs" (a).

It is not intended to deal in this thesis with the somewhat complicated subject of the succession to *stridhana*, as it really does not fall within its scope. But a few general observations may be made. The different schools of Hindu law differ vastly from one another on the subject of the mode of devolution of *stridhana* (b). A general pre-

Succession to
stridhana not
within the
scope of the
thesis.

(a) Cited in the Dayabhaga, Ch. IV., Sec. 1., 24.

(b) See Tagore Lectures, 1878. Dr. Banerji devotes three chapters, Ch. IX., X. XI, to the discussion of the subject of succession to *Stridhana*.

ference is however given to females over males in regard to succession to *stridhana* property, and the reason for this is to be found in the text of the Mitakshara : "The woman's property goes to her daughters, because portions of her abound in her female children ; and the father's estate goes to his sons, because portions of him abound in his male children" (a). This is indeed a fanciful reason, but the real reason is to be found in the equitable distribution of property—the property of males passing in the first instance to males, that of females in the first resort to females.

Unchastity no bar to inheriting *stridhana* from female relations.

Unchastity does not seem to disqualify a woman from inheriting the *stridhan* of her female relations. It has been held by a Full Bench of the Allahabad High Court that under the Mitakshara law the granddaughter is not debarred from inheriting the *stridhan* of her grandmother (b). The Madras High Court has recently decided that the degradation of a daughter on account of incontinence does not put an end to her right to inherit the *stridhan* property of her mother (c). In Bombay the leading case on

(a) Mitakshara, Ch. I, Sec. III., 10.

(b) (Ganga vs. Ghasita, I. L. R. 1 All., 46).

(c) Angammal vs Venkata I. L. R. 26 Mad., 509.

the subject is *Advya vs. Rudrava (a)*. It has been held in that case that a daughter is not by reason of her incontinence debarred from succession to the estate of her father. It follows *a fortiori* that unchastity would not disqualify her from inheriting *stridhan*. Even in the Bengal School the right of succession to *stridhan* does not rest exclusively on the theory of spiritual benefit and it would seem that the same rule will apply as has been laid down in the other High Courts (*b*).

Before we bring this chapter to a close the views of Sir Henry Sumner Maine on the origin and history of *stridhana* should be noted. "The settled property of a married woman" says the author of the *Early History of Institutions*, "incapable of alienation by her husband, is well known to the Hindus under the name of *Stridhan*. It is certainly a remarkable thing that the institution seems to have developed among the Hindus at a period relatively much earlier than among Romans. But, instead of being matured and improved, as it was in Western society, there is reason to think that in the East under various influences which may be partly traced, it has been gradually reduced to

Views of Sir
Henry Sum-
ner Maine
considered.

(a) I. L. R. 4. Bom., 104.

(b) Toolsee vs Luckymoney, 4 C. W. N., 743.

dimensions and importance far inferior to those which at one time belonged to it" (a). The learned jurist after quoting the definition of Stridhan given in the Mitakshara tries to account for the "amplitude which the Mitakshara assigns to Stridhan" from an examination of other bodies of Aryan custom. The result of such an examination led this brilliant writer to hold that the Stridhan had a pre-historic origin in the bride-price. After tracing the origin of Stridhan, Sir Henry Maine observed as follows :—

"If then the Stridhan had a pre-historic origin in the Bride-Price, its growth and decay become more intelligible. First of all it was property conferred on the wife by the husband 'at the nuptial fire,' as the sacerdotal Hindoo lawyers express it. Next it came to include what the Romans called the *dos*, property assigned to the wife at her marriage by her own family. The next stage may very well have been reached only in certain parts of India, and the rules relating to it may only have found their way into the doctrine of certain schools ; but still there is nothing

(a) Maine's Early Institutions 321.

contrary to the analogies of legal history in the extension of the Stridhan until it included all the property of a married woman. The really interesting question is how came the law to retreat after apparently advancing farther than the Middle Roman Law in the proprietary enfranchisement of women, and what are the causes of the strong hostility of the great majority of Hindoo Lawyers to the text of the Mitakshara, of which the authority could not be wholly denied ?" (a)

Sir Henry Maine shows a characteristic insight into the views of the majority of Hindu lawyers when he says that, putting the author of the Mitakshara aside, all the commentators who succeeded one another in the Hindu juridical schools show a visibly increasing desire to connect all property with the discharge of sacrificial duties, and with this desire the reluctance to place property in the hands of women is somehow connected. It would be interesting to compare this view with what we said in the previous pages as to the reason why the position of women deteriorated in the Smṛiti period. Commenting on the definition of Stridhan in

(a) Early Institutions 324.

Maine's comment on the definition of stridhana in the Mitakshara.

the Mitakshara, Maine says:—"All the property which a woman may have acquired by inheritance, purchase, partition, scizure, or finding," is a comprehensive description of all the forms of property as defined by the modes of acquisition and, if all this be Stridhan, it follows that the ancient Hindoo Law secured to married women, in theory at all events, an even greater degree of proprietary independence than that given to them by the modern English Married Women's Property Act." (a)

Mitakshara is the strongest advocate of proprietary rights of women.

Sir Henry Maine rightly perceived that the rule of the Mitakshara with regard to *Stridhana* is the most liberal one. A careful study of the various texts of the Mitakshara, to which reference has been made in the previous pages, can leave no doubt whatever that of all the Hindu sages and commentators the author of the Mitakshara may be regarded as the strongest advocate of the proprietary rights of women (b).

(a) Early Institutions p. 322.

(b) In a recent article of great originality, however, Mr. Justice Sarada Charan Mitra of the Calcutta High Court maintains that the Mahanirvana Tantra assigned a higher position to women than the Mitakshara; and that the former is more favourable to women's rights than the latter (See Law Quarterly Review Vol. XXI, 380.) This view, however, has in its turn been criticised by Mr. Setlur in an able article in the same review (Vol. XXIII) p. 202.

It may be interesting to compare the development of the law regarding the separate property of married women in England with the more modern development of the branch of Hindu law concerning *Stridhana*. It has been seen already that if we take *Manu* as the starting point we find that whatever property a married woman earned belonged to her husband and that he had full dominion over it. Gradually property which she acquired by mechanical arts was released from the operation of this general rule, and afterwards there were other kinds of property which were denominated "Stridhan" or peculium of the wife over which the husband had no control.

Development of the law regarding the separate property of women in England compared with the Modern Hindu Law concerning Stridhana.

In 1800, and indeed upto 1870, the property rights of a married woman in England were mainly determined by rules contained in two bodies of judge-made law, viz, the common law and equity. Under the common law a husband on marriage became for most purposes the almost absolute master of his wife's property. The whole of her income from whatever source it came (even if it were the earnings of her own work or professional skill) belonged to her husband. In equity, in 1800 the Court of Chancery had been engaged for a series of years in the endeavour to make it possible for a married

Property rights of married women in England governed by Common Law and Equity till 1870.

woman to hold property independently of her husband and exert over this property the rights which could be exercised by a man or unmarried woman. A long course of judicial legislation had at last given to a woman, over property settled for her separate use, nearly all the rights, and a good deal more than the protection possessed in respect of any property, by a man or *feme sole*. The final result of the judicial legislation, carried through by the Court of Chancery was this. A married woman could possess separate property over which her husband had no control whatever. She could, if it was not subject to a restraint on anticipation, dispose of it with perfect freedom (*a*). As regards a married woman's property the two systems of common law and of equity coexisted side by side unconfused and unmingled till the reform introduced by the Married Woman's Property Acts. Under the Married Woman's Property Act of 1893, which superseded the earlier act of 1882, all the property of a married woman is her separate property ; she may, except in so far as her power is limited by restraint on anticipation deal with it as she pleases. She has (subject always to this possible

(a) Dicey's Law and opinion in England, page 375-

restraint) full contractual and full testamentary capacity (a). It is true that the change introduced in England by the Married Women's Property Acts (1870-1893) was no sudden revolution ; it was the tardy recognition of the justice of arrangements, which as regards the gentry of England, had existed for generations. The Hindu law concerning the proprietary rights of women was capable of indefinite expansion, if the indigenous growth of that law had not been arrested after the establishment of British rule, and had not judicial decisions run counter to the famous text of the Mitakshara which defined "*Stridhan*." In a well-known text-book by a very distinguished Judge there occur the following significant remarks : — "The system of Hindu Law as it has reached us is not and does not profess to be exhaustive. It is a system which contains within itself elements of expansion, a system in which new customs and new propositions, not repugnant to the old law, may be engrafted upon it from time to time as change of circumstances and progress of society imperatively demands" (b). These observa-

Cessation of
development
of woman's
proprietary
rights.

(a) For a fuller exposition of the law regarding the property rights of married women in England, See Prof. Dicey's *Law and Public opinion*, Pages 369-393.

(b) Sir Ashutosh Mukherjee on *Perpetuities*, Page 59. (Tagore Lectures, 1889.)

tions so eminently true can no longer apply to the Hindu law regarding the property of women. For we believe, there can be no further expansion of the "property rights" of women however much public opinion in India may desire it. The Judicial Committee have, in a series of decisions, restricted those rights. Their Lordships have not accepted the definition of "*Stridhan*" as given in the Mitakshara. And although the general tendency of Hindu thought at the present day may be towards seeing women attain the same position in law, as has been assigned to them by Vijnaneswara, there is no hope of any change of legislative opinion in this respect for two reasons: first, because the Indian Legislature, in its wisdom, does rarely interfere with Hindu Law based as it is on Hindu religion; secondly, because legislative opinion is, in India as in other countries, constantly moulded or affected by the course of judicial decisions.*

Suggested
reason for the
same.

The last paragraph of this chapter is based on original research.

CHAPTER VII.

STATUS OF COURTESANS AND DANCING GIRLS.

Hindu law abounds in ordinances which inculcate chastity on women. It punishes incontinence in a wife by disinheriting her of her husband's estate after his death. It makes continuance of maintenance of the widow dependent on her faithfulness to her husband's bed. But at the same time, unlike other systems of law (*e. g.* English and Mahomedan) it does not ignore the class of degraded women known either as concubines or courtesans or dancing girls but gives them a status in law. It adopts a more charitable attitude towards these social and legal outcasts. Concubines are allowed maintenance after the death of their paramours under an express ordinance. Narada says, "Let them allow a maintenance to his *women* for life" (*a*).

Concubines
tolerated by
Hindu law.

•But even in the case of concubines it is laid down that they should preserve unsullied the bed of their lord, otherwise the brethren

(a) The word used is *Yoshi* concubine, and not *Stri* which is equivalent to lawfully wedded wife. (Narada 13, 26).

Position of
Concubines in
Roman law
compared.

may resume the allowance. It may be interesting to state that with the ancient Romans as with the Hindus, concubinage (*concupinatus*) was a relation tolerated by law. "A concubine," says Gibbon, "in the strict sense of the civilians, was a woman of servile or plebian extraction, the sole and faithful companion of a Roman citizen, who continued in a state of celibacy. Her modest station below the honours of a wife, above the infamy of a prostitute was acknowledged and approved by the laws: from the age of Augustus to the tenth century the use of this secondary marriage prevailed both in the East and the West" (a). The Romans say of it (*concupinatus*) "*per leges nomen assumpsit*" i.e., it has received by statute a legal significance (b). But under the Roman Law a man could have one concubine at a time and *concupinatus* was incompatible with marriage. There were no such limitations in Hindu Law. A married man could have as many concubines at a time as he pleased, for Narada cited above says, "Let them allow a maintenance to his *women* for life."

It is true that prostitution has always

(a) Decline and Fall of the Roman Empire, Vol. II, 240.

(b) Moyle's Justinian; "Imperatoris Justiniani Institutiones" Notes to Bk. I, Tit. 10. p. 135.

been distinguished in law and custom from concubinage which may be regarded as an inferior kind of marriage. Manu contemplates the case of men who make money by their wives' prostitution in the following text:—"This rule does not apply to the wives of actors and singers nor of those who live on the intrigues of their own wives for such men send their wives to others, or concealing themselves allow them to hold criminal intercourse" (a). Narada recognises the class of courtesans when he lays down:—"If a prostitute do not attend after having received her fee, she shall be fined twice she may have taken, but if her paramour refuse to receive her he shall only lose the money he has advanced" (b). In another place the same sage tells us:—"An unchaste married woman who is not of the Brahman class or a *professional prostitute*, a female slave who has left the family protection may be carnally known by a man of the same or higher class but not by a man of the lower class, but if such women be the kept mistresses of some persons the offence

Prostitution distinguished from Concubinage in Hindu law.

(a) Manu, VIII., 362.

(b) Narada, Chap. VI. Page 68 Dr. Jolly's translation. Similar provisions are to be found in the laws of other countries. Lord Mansfield in *Robinson vs. Bland* 2 Burr 1084 says: In many countries, a contract may be maintained by a courtesan for the price of her prostitution see story on conflict of Laws p. 341. 8th Ed.

of approaching them would be that of approaching another man's wife" thus indicating that harlotry although it deprived a well-born woman of her caste was an occupation of which Hindu law took cognizance (a). Yajnavalkya (Chap. II, 290) lays down that if a man has intercourse with another's mistress, he shall be fined 50 *panas*. In commenting on this text of Yajnavalkya, the author of the Mitakshara notices that in the Skanda Purana prostitutes are regarded as the fifth caste outside the then recognised four castes.

Coming to more modern times we find some of the commentaries laying down special rules for the protection of this unfortunate class of women. In Chapter xxii, V. 7 Nilkantha cites a text from Narada as authority for the proposition that the ornaments of professional prostitutes shall not be confiscated in any case. The founder of the Mithila School, while recognising the class of prostitutes, condemns irregular intercourse and imposes a penalty on those who visit these abandoned women. In doing so Vachaspati Misra exhibits a modern tendency. These texts however, do not necessarily point to a lax state of morals. The whole spirit of Hindu religion on which Hindu

Prostitutes
regarded as
the fifth caste.

Mitakshara.

Nilkantha.

Vachaspati
Misra.

(a) Narada quoted in Vyav. Mayukha Ch. XIX. (10-13) page 152 (Mandlik's Edition.)

law is based, favours a life of self-denial and it would be inconsistent with that spirit to say that Hindu Law looks with approval on practices which are prompted by desire for self-indulgence. The fact is that Hindu Law, while condemning immorality, does not deny to persons who by pursuit of immoral practices put themselves out of the pale of Hindu society the civil right of owning property and transmitting the same to their progeny.*

In the south of India, the ancient connection of dancing girls with temple worship survives till the present day and has been noted by many observers. Abbe Dubois, for instance, tells us :—"The courtesans or dancing girls attached to each temple take place in the second rank ; they are called *Devadasis* (servants or slaves of the Gods), but the public call them by the more vulgar name of prostitutes. And these lewd women, who make a public traffic of their charms, are consecrated in a special manner to the worship of the divinities of India ; every temple of any importance has in it a band of eight, twelve or more" (a). But this should not be considered peculiar to

Dancing girls attached to temples in the South of India.

* * Portion within asterisks based on original research.

(a) Abbe Dubois' Hindu Customs, manners and Geremonies, 3rd. edition (1906), 585.

India. Among the ancient Jews, harlotry appears to have been connected with religious worship and to have been not merely tolerated but encouraged. In Egypt, Phoenicia, Assyria, Chaldea, Cannan, Persia, the worship of Isis, Moloch, Baael, Astarte, Myletta and other deities consist of the most extravagant social orgies and temples were merely centres of vice. It is needless, however, to speculate about the genesis of the custom in India. It has been said that the custom has its origin in the deplorable tendency of the human mind to combine religious and sexual emotions in the worship of deities. Female artists were possibly introduced in temples more for the performance of certain specified duties, than for the purpose of pandering to the libidinous tastes of those who frequent such places of worship. In the system of education of these women, manners stand higher than morals. The dancing girl is not necessarily bad, but there is in her life much temptation to do evil and little stimulus to do right, and where one may live a blameless life, many others go wrong and drop below the margin of respectability. Thus in time, harlotry has come to be regarded as inseparably connected with the vocation of dancing girls and as an

Probable
origin of the
institution of
dancing girls.

essential feature of temple worship. Customary rules governing devolution of property and other incidents gradually sprung up among this class of persons, who constituted a community by themselves, and although Hindu law has not cared to lay down express rules providing for succession to the property of fallen women, it has not forbidden the recognition of customary rules obtaining among them. These customary rules have on several occasions come under the consideration of Courts.

Customary rules govern succession amongst dancing girls.

In the case of *Anandrav Ganpat vs. Bapu (a)*, Sir M. Sausse, C. J., of Bombay expressed a grave doubt "whether any recognition ought to be extended to an essentially immoral class like these Naikins." These Naikins belong to a class who, as dancers, singers and courtesans, perform in Bombay functions which recommend them highly to portions of the native community. In the year 1864 in the case of *Nanee Tara Naikin vs. Allarakhia (b)*, where the question turned upon the will of Tara Naikin and the dispute was between one adopted daughter and the sons of another adopted daughter of the said naikin, Sir Richard Couch, C. J. observed :—"Although I fully concur with

Judicial decisions.

(a) Referred to in Tara Naikin's case, I. L. R. 4 Bom., 573. (b) I. L. R. 4 Bom., 573.

the Court in its opinion against any extension of the principle, and its regret that the Court should ever have given a legal *status* to the immoral profession of prostitution by having recognized a separate code of law for dancing girls and courtesans, I cannot but think that adoption is recognized by the law, and the right of the adopted daughter to inherit must follow from it as in other cases." In the same year, the High Court of Madras seemed to hold in the case of *Chalakonda vs. Chalakonda* (a) that the Hindu law legalized and recognized prostitution and that the Courts cannot decline to adjudicate upon cases relating to the property of prostitutes on account of the immoral source from which such property has been acquired : Recognition of certain rules of succession to property amongst a certain class of persons seems to be a very different thing from legalizing the occupation of such class. A different view was taken by the Madras High Court in a later case. In a suit by the dancing girls of a temple claiming to have by custom the right to veto the introduction of new dancing girls, the High Court refused to give effect to the rights set up, although such rights were borne out by the custom of the temple,

(a) 2 Madras H. C. R., 56.

on the ground that it "would be recognizing an immoral custom, a custom, that is, for an association of women to enjoy a monopoly of the gains of prostitution, a right which no court would countenance" (a). But it would seem that this decision practically recognized the right of the manager of the temple to introduce fresh recruits to the association of harlots connected with the temple, a right which is equally disapproved by the moral sense of the community. In the case of Mathura Naikin *vs* Esu Naikin (b), which was a suit by the adopted daughter of a naikin to recover a share of property in the hands of her adoptive mother which was alleged to be the family property, Mr. Justice West of the Bombay High Court decided that the claim could not be supported. In a very elaborate judgment he held that Judges no doubt must decide cases relating to particular institutions "on an appreciation of the legal consciousness of the community, but when that consciousness is unsettled and fluctuating, its nobler may properly be chosen in preference to its baser elements as those which are to predominate." The charter of the Bombay Supreme Court which was still in force, directed the Court "as to cases of

Mathura Naikin v s. Esu Naikin, leading case in Bombay.

(a) Chinna *vs* Tegarai, I. L. R. 1 Mad. 168 (1876)

(b) I. L. R. 4 Bom., p. 545.

Mr. Justice
West's view.

inheritance and succession among Gentus to be governed by the laws and usages of the Gentus". But usage, says Mr. Justice West, must be "usage received as binding and although companies of temple women may at one time have been thought not so repugnant to the essential principles of the Vedic Code, it could not be maintained in the present day that the legal convictions of the people give final efficacy to special rules of any class of harlots in.....this presidency.Its constitution answering to no essential permanent need of society, it lost its place as a class soon after the general disposition to admit its pretensions died out." In other words, Mr. Justice West maintains that as soon as a custom is disapproved by the moral sense of the modern community, the custom loses its binding force. He gives expression to this view in the following luminous passage: "As the mind becomes enlightened, its legal convictions will change, and this will constitute a change in its common law as that law must from time to time be recognised and recorded in the Courts. The usage of individuals or of a class cannot, in opposition to the general conviction, on which rests its own validity, rank higher than a practice without binding force." This

learned Judge is of opinion that the custom or usage which gives a legal status to prostitutes, though once recognized, is now abhorred by the moral sense of the community, "and the Courts are accordingly bound to facilitate the truth and reception of a new and perfect offspring of the general conviction." This view has also been taken by writers of acknowledged authority. Professor Sorley maintains that in civilized and developed communities, where men have learned the lessons of reflection, custom has to justify itself at the bar of reason, and conduct seems to be guided by a definite conception of its end, instead of by a vague belief that it is usual (*a*).

The judgment of Mr. Justice West has however, been subjected to a severe criticism by Mr. Justice Muttusami Ayyar of the Madras High Court. In delivering a judgment remarkable for its vigour and originality, the learned Madras Judge observed as follows (*b*) :—

Justice West's view criticised by Mr. Justice Ayyar of Madras.

"Apart from the professional prostitution referred to as tainting the custom of the caste, there are several special grounds on which the decision can be supported. Among those, it is stated, first, that, ac-

(*a*) Essay in Philosophical criticism, pages, 109, 110.

(*b*) I. L. R. 11 Madras, 393.

According to the very custom set up, a daughter cannot call for a partition during her adoptive mother's life. It is observed further that there were natural born daughters and that they excluded the adopted daughter. The remarks then made in regard to the usage, though very instructive, were not necessary for the decision of that case. It is there observed that usage is law because it is followed from a conviction that it is law. Though reference is made to Austin's opinion that the tacit sanction of the sovereign is necessary to the binding force of custom, yet the cases decided in this Presidency wherein adoption by a dancing woman was recognised as the source of a civil right are also mentioned. In advertence to the practice of an abandoned class of women like dancing girls, it is admitted that it was recognised by Hindu law. It is also admitted that it is only according to the standards of Hindu law that a usage has coercive force among Hindus. But it is remarked that the usage which the Courts are bound to follow according to the Charter is not to be understood in the sense that it shuts out all amelioration. The learned Judge then observes that the practices of an abandoned class are no doubt a usage in the sense of a tolerably uniform series of

acts, but they do not therefore spring from a consciousness of compulsion but rather from habit, imitation, and ignorance, and that such usage is not a law, for, over it presides the higher usage of the community at large from whose approval it must have derived any conceivable original validity and in opposition to which it cannot subsist ; and as the community comes to recognise certain principles as essential to the common welfare, it will no longer lend its sanction to sectional practices at variance with the principles thus recognised. This seems to be the jural theory suggested in regard to sectional usage, and from it a power is deduced by the learned Judge for Courts of Justice to decline to recognise adoption by a dancing girl when the popular sentiment would no longer give validity to such adoption. In *Abraham vs. Abraham (a)*, the Privy Council say that customs and usages as to dealing with property unless their continuance is enjoined by law, as they are adopted voluntarily, may be changed or lost by desuetude. Would not they, the class of dancing women, cease to exist as a distinct class when there is such a complete change in the sentiment of the general mass of the Hindu community as

(a) 9 M. I. A. 199.

to render the adoption of the jural theory feasible and just for the amelioration or abrogation of what was once recognised as a valid special custom? Is not therefore the cessation of the usage indicated by the Privy Council the sound basis for judiciary action especially when there is a standing Legislative Council and when only very imperfect material is available to a Judge who is bound to decide according to evidence for ascertaining whether to any and what extent there has been a substantial change in the sentiments of the large mass of the Hindu community in regard to a particular usage of a section of the Hindus? How would this theory work as the basis of judiciary action if a Judge in Malabar or South Canara were to hold that according to a very considerable body of Hindus the non-recognition of marriage as a legal institution is pernicious and that therefore he would decree tarwad or Aliyasantanam property to the sons and daughters of those who now follow the special law of the nephews? Is it not also a sound rule of legislative policy that judiciary legislation of the earlier period should gradually retire within the narrow limits of judicial interpretation in proportion to the increased activity of direct legislation through organised bodies? I may observe

that whatever may be the change in the sentiments of the general mass of Hindus in regard to dancing women in Bombay and Poona I am unable to say that there is a considerable change in this Presidency in the opinion of the general mass of the Hindu community as contradistinguished from a comparatively small section that has come under the influence of Western culture. With all deference to the learned Judge who decided the Bombay case, I do not see my way to follow his decision or adopt the jural theory as propounded by him as the basis of judiciary action" (a).

This criticism is undoubtedly just. Change of opinion on any question may be a good reason for legislative reform but can be no reason for Judges to vary their interpretation of law. We may add that the opinion of Mr. Justice West is also open to the criticism that it is absolutely impossible to fix with precision the date at which a body of opinion begins to exert a perceptible influence on the community or even to become predominant. Mr. Justice Muttusami Ayyar accordingly does not approve of the jural theory which Mr. Justice West proposes to adopt as the basis of judiciary action. He seems to hold that in determining the validity of a

Further comments on Mr. Justice West's view.

(a) I. L. R. 11 Madras, 401.

particular usage of a section of the community, it is not the function of the Judge to ascertain whether to any and what extent there has been a substantial change in the sentiments of a large mass of the Hindu community. Mr. Justice Subramania Ayyar in a later case said practically the same thing when he observed : "And I consider that we, sitting as judges, are not at liberty to upset any decisions admitting the rights of the members of the dancing-girl caste to remedy for violation of their civil rights on the alleged ground that a change has taken place in the sentiments of the large mass of the Hindu community in regard to the propriety of recognising the usages of the said caste"(a). It is difficult to see why if a daughter born of the womb of the courtesan cannot be denied the right to succeed to her mother's property, a daughter received into the family by adoption which is a process of filiation, should be refused a status. The view forcibly expressed by Mr. Justice Muttusami Ayyar seizes the distinction between allowing dancing girls certain civil rights and giving sanction to the vocation pursued by them. To some extent the Bombay Court in later decisions have adopted the view of the learned Madras

(a) *Kamalakshi vs. Ramasami*, I. L. R. 19 Mad 127(131).

Judge. In the case of *Tara Naikin vs. Nana Lakshman (a)*, Sir Charles Sargent C. J., although he does not express any opinion on the validity of adoption by naikins, says that "the existence of dancing girls in connexion with temples is according to the ancient established usage of the country, and the court would be taking far too much upon itself to say that it is so opposed to the "legal consciousness" of the community at the present day as to justify the court in refusing to recognize existing endowments in connexion with such an institution". The view of Mr. Justice West of testing the binding force of a custom or usage in the light of the "legal consciousness" of the community does not seem to have been accepted in its entirety.

In the case of *Mathura vs. Esu*, Mr. Justice West further maintains that since the passing of the Indian Penal Code, adoptions by temple dancers, who notoriously carry on the trade of prostitution, would offend against the public law of the land. But, as Mr. Justice Muttusami Ayyar points out, what section 372 of the Indian Penal Code prohibits is not adoption by dancing girls but the disposition of a minor for the purposes of prostitution. The learned Judge goes on to

How far
S. 372 of the
Indian Penal
Code affects
adoption by
dancing wo-
men.

point out that "adoption is recognized in Hindu Law partly for continuing the family and partly for securing a person competent according to the custom of the community to perform the funeral obsequies of the adoptive parents and to take their property. It should not therefore in the case of dancing girls be confounded with prostitution, which is neither its essential condition nor necessary consequence but an incident due to social influences.....The policy of the Penal Code is not to obliterate altogether the line of distinction between the province of ethics and that of law."

When adoption by a dancing girl would be illegal.

Adoption by a dancing woman would however be illegal if the adoptive mother intends to employ the adopted girl for a life of prostitution during her minority. The Madras High Court has held that, the intention to use the minor adopted girl as a prostitute must be proved by evidence. "Though the adoptive parent may be a prostitute", says Mr. Justice Muttusami Ayyar "yet she may have civil rights. In criminal cases the presumption of innocence must be displaced by positive evidence" (a). Similar view was expressed by the Madras High Court in the case of *Kamalakshi vs.*

(a) *Queen Empress vs. Ramana*, I. L. R. 12 Mad, 273.

Ramasami Chetti (*a*). Mr. Justice Subramania Ayyar, extended the application of the rule laid down in the case of *Younghusband vs. Birmingham T. S. Co.* (*b*), viz "the general rule is that no rights can spring from or be rested upon an act in the performance of which a criminal penalty is incurred", to transactions touching personal status, and held that "if a woman who makes an adoption under circumstances which render the adoption an offence under section 373, sues to enforce rights alleged to have been created in her favour by that adoption, it would be impossible, consistently with established legal principles to allow such a suit to be maintained." Mr. Justice Best, also adopted the same view and held that "there was authority for the following positions :—(i) that the institution of dancing women cannot be ignored by the Courts and (ii) that adoption by such women is not necessarily illegal and further (iii) that if the adoption was made with the intention of training the child to a life of prostitution, the act would be criminal, and that Courts cannot recognize rights claimed as arising from a criminal act."

The status of dancing girls who may

(*a*) I. L. R. 19 Mad, p. 127.

(*b*) 36 American State Reports 248.

Rules govern-
ing status of
dancing girls.

ordinarily follow immoral lives being thus to all intents and purposes recognized in Hindu Law, the question next arises what are the rules by which such status is governed. The ordinary Hindu Law does not contain any such rules. The difficulty has sometimes been obviated by laying down rules from analogy with the rules of Hindu Law. For example, so far back as 1864, the Madras High Court held in the case of *Chalakonda Alsani vs. Chalakonda Ratnachalam (a)*, that a mother and her daughter living together and carrying on the trade of prostitution were governed by the rules of Hindu law relating to ordinary gains of science. If the science was learnt at the expense of the joint family, the gains of such science would be divisible amongst all the members of the joint family. Similarly, if the *nucleus* of the stock-in-trade of a prostitute's profession is furnished from the joint funds of the so-called undivided family, the gains of the profession would be joint property. In another case reported in the same volume (*b*), which is a case of concubinage rather than of prostitution, the relation subsisting between the offspring of a woman born of such adulterous connection came under

(a) 2 M. H. C. R., 56.

(b) *Mayna Bai vs. Uttaram* Ibid, p. 196.

consideration. The case had previously been carried to the Privy Council and the Judicial Committee decided that the illegitimate children of an Englishman by two Hindu women who had deserted their husband and lived in adultery with him were Hindus and were to be governed by Hindu Law and that although they lived in copartnership, it was not the copartnership of a joint Hindu family and therefore on the death of each son, his lineal heirs representing their parent would be entitled to enter into the partnership. The case was remitted by the Privy Council for determining whether the title of the plaintiff to succeed to his uterine illegitimate brother could be supported by any course of decisions or any custom. The learned Judges of the Madras High Court observe that "if from any anomalous circumstance, they (the illegitimate sons) cannot be referred to any class, it seems to us that we are bound to reason analogically and apply to them the rules observable by classes to whom they bear the greatest likeness." In *Kamakhshi vs. Nagarathnam* (a), daughters of dancing women were held to take the place of sons and in the absence of any positive rule, daughters were to be regarded as sons and to take estates of inheritance from

Custom if any would seem to determine such rules.

(a) 5 Mad. H. C. R. 161.

their mother similarly to sons under the general law of inheritance.

Mr. Justice Muttusami Ayyar in a later case (a) laid down that "as a matter of private law, the class of dancing women being recognized by Hindu Law as a separate class having a legal status, the usage of that class in the absence of positive legislation to the contrary regulates rights of status and of inheritance, adoption and survivorship." It would seem that the customs or usages of any class which do not require the immoral practices of the class to be proved in order to establish a claim founded thereon, afford surer materials for determining the rights of status than analogies from Hindu Law, which may not be always precise.

Custom or usage of any class regulates status of that class.

It is to be noticed, however, that the Judicial Committee of the Privy Council (b) in discussing the claims of an adopted daughter of a woman of the *kanchan* class, who carry on the business of brothel-keeping, as against her natural brothers and sisters, inclined to the view of Mr. Justice West in *Mathura vs. Esu* (c). The ratio of their Lordship's judgment seems to be that the Mahomedan Law which was the common law of the

(a) *Muttukannu vs. Paramasami*, I. L. R. 12 Mad, 214.

(b) *Ghasiti vs. Umrao*, I. L. R., 21 Cal. 156.

(c) I. L. R., 4 Bom. 545.

parties to the litigation prohibit connection with harlots and practices tending towards the encouragement of harlotry could not be supported according to that law. Their Lordships, however, were inclined to think that there are stronger grounds for maintaining that practices of prostitution are related to worship in temples and meet with countenance from the Hindu law. Members of no community, however, ought to be denied civil rights which the law recognizes, merely because owing to social influences and environments they lapse into immoral lives. The fact is, singing and dancing or prostitution or the three together form the occupation of the greater number of the Naikins of Bombay or the dancing girls of Madras. Prostitution is not however the necessary incident of the lives of these dancing girls, although it may be true as a fact that most of those women that dance and sing lead a loose life. This view has been so far adopted in Bombay that where the father of a Naikin borrowed certain money by pledging family property for the purpose of training the daughter to sing, the transaction of mortgage was enforced and the objection that it was void on the ground of its being immoral was disallowed (a).

Prostitution
not necessary
incident of the
lives of dan-
cing girls.

(a) *Khubchand vs. Beram*, I. I. R. 13 Bom. 150.

Consequence
of prostitution
on the relation
between pros-
titute and
members of
her original
family.

What is the consequence of prostitution on the relation between the prostitute and the members of her original family? The answer, it would seem, would in a large measure depend on what is understood by the term "prostitute." Every unchaste woman is not a prostitute and the legal consequences of prostitution as regards status would not follow mere unchastity. Some ancient texts seem to point to different grades of unchastity. Parasara, for example, holds that an adulterous woman is purified by the flow of menses, and if a woman having committed adultery is not willing to repeat her offence, she may be purified by the Prajapatya rite and the flow of catamenia, but a woman who has conceived by adulterous intercourse is far more severely dealt with (a). Yajnavalkya also ordains the same rule (b). Thus the ancient sages have provided for condoning incontinence under certain circumstances (c). There are, how-

(a) Parasara, VII. 4. X. 26. X. 20.

(b) Yajnavalkya, I. 70-72.

(c) The following observations of the learned Judges of the Allahabad High Court in a recent case however, have come as a surprise on the profession in Bengal. "There is thus no authority for the contention", says Sir George Knox, "that a widow who after her husband's death lives with another man commits an act of unchastity or vice." *Dal vs. Dini*, I. L. R. 32 All 155.

ever other texts which enumerate acts which when performed, render a woman liable to excommunication. Yajnavalkya lays down that "sexual intercourse with a low caste man causing abortion of a child in her womb and killing her husband, these are certainly additional causes of woman's degradation." (a). Vasistha also adopts the same rule. It appears, therefore, that women who descend to adulterous union with men of low caste are regarded as degraded and abandoned. Prostitutes who submit themselves to the embraces of any person who is willing to pay, must necessarily come under the ban of this rule.

*But the question remains whether the texts cited above point to a cessation of ties of kinship and consequently loss of all rights arising out of such kinship. As we have said in a previous chapter, the desertion of an incontinent wife by a husband does not amount to a divorce. The deserted wife could not validly marry another, as she would do if she were only divorced (b). But at the same time, there is authority for saying that abandonment of a wife for causes which would authorize desertion would entail loss of heritable right in her. Mr. Golap Chandra Sarkar quotes a text of

Cessation of ties of kinship whether necessary result of lapsing into prostitution.

(a) Yajnavalkya, III. 298.

(b) See *ante* p. 372.

Manu (a), in support of the view that a person who becomes outcast by commission of sinful acts most heinous in character becomes also civilly dead.

The text although not dealing with civil rights, ordains certain rites, expressly stating that the rites were to be performed, as if the outcast were a dead person. Mr. Golap Chandra Sarkar therefore is of opinion that "when a woman becomes an outcaste by reason of unchastity, and is deemed dead, the tie of kindred with her undegraded relations becomes severed." The learned author, however, observes :—"That the tie of kindred can be deemed severed or not, according as the unchaste woman is outcaste or civilly dead or not, having regard to the nature and character of her unchastity", and further notices that the conflict of decision on this point has arisen in consequence of this principle of distinction not having been kept in view. Judicial decisions on this side of India have from a long time adopted the view that a woman by lapsing into prostitution becomes severed from her natural family. This view seems to have been adopted by the judges of the Sudder Dewany Adalat in a very early case. So far back as 1846, in the case

Cessation of ties of kinship with original family would depend on the nature and character of unchastity.

(a) See Manu, XI. 183-4, quoted by Mr. Golap Chandra Sarkar at p. 370 in his Hindu Law, 4th Edition.

of Taramoni Dassi *vs.* Muttee Banéanee (a) two prostitute daughters of a prostitute were preferred to the grandsons of an undegraded daughter, the *ratio decidendi* being that the legal relation between a married and respectable daughter and her prostitute mother ceased as soon as the mother became an outcast. Judicial decisions.

The High Court again expressed the same view in a much later case (b). In the goods of Kaminy money Bewah, the husband's sister's son of a deceased prostitute was held to have no interest in the estate, so as to entitle him to maintain an application for revocation. Mr. Justice Sale held that the general rule is the rule of severance of the tie of kindred between degraded and undegraded members of a Hindu family.

In the case of Sarnamoyee *vs.* The Secretary of State for India (c), the High Court held that a woman who has lapsed into prostitution may become an outcast, but does not cease to be a Hindu and succession to her estate, in the absence of a local custom, is governed by the Hindu Law.

The decision in Kamineymoney Bewa's

(a) 7 Sel. Rep.

(b) I. L. R. 21 Cal. 697.

(c) I. L. R. 25 Cal. 254

case, however, was approved of in this case, but in this case a sister, who is no heir under the Bengal School claimed the estate of her deceased prostitute sister on the ground that ordinary Hindu Law did not apply to the case of succession to prostitute's property and that the case should be governed by those principles of natural justice, not inconsistent with Hindu law according to which a sister, a near consanguineal relation should be held in the line of heirs and secondly, the deceased prostitute should be considered as a person who is not a Hindu within the meaning of section 331 of the Indian Succession Act. Both these contentions were negatived by the High Court. Of course, it is very difficult to formulate any rule which is to be the guiding principle in the devolution of property in such cases which may be regarded as abnormal. But it is obvious that it works a great hardship upon such relations of the fallen woman who may have adopted the same vocation as herself and had possibly been with her for the best portion of their lives. It would seem to be more in consonance with natural justice that the property of a degraded woman should be left to such persons.

It is thus clear that from 1846 to 1897 the course of decision has been uniform in

holding that the effect of a woman lapsing into prostitution has been that by her degradation, the tie between her and the undegraded relations is broken. In 1906, Woodroffe J., while unwilling to upset what he found to be the settled law of the Court, was *dubitante* as to the correctness of the view adopted by the Court in the earlier cases, cited above. But this doubt did not prevail, for the learned Judge laid down the same law as was enunciated in those earlier cases (a). In a subsequent case (b), however, Mr. Justice Fletcher for the first time struck a note of dissent. His Lordship found it impossible to agree with the decision in the case of Kaminey Bewah (c) and held that there was a conflict between that case and the case of Sarnamoyee (d) which he approved of. The result was that his Lordship refused letters of administration to the sister's daughter of the deceased prostitute who was also a prostitute, on the ground that she is not an heir under the Hindu Law which was the personal law of the prostitute. But the learned Judge did

(a) Bhutnath Mandal vs. The Secretary of State.
10 C. W. N. 1085.

(b) Sundari vs. Nemyi Charan Daw, 6 C. L. J. 372.

(c) I. L. R. 21 Cal. 697.

(d) I. L. R. 25 Cal. 254.

not proceed to decide, as it was not necessary to decide, that the caveator who was a member of the deceased's husband's family could claim to be an heir. This conflict of cases in the Calcutta High Court as indicated above led to a reference to a Full Bench, of the following question :—"Whether a person who would have been entitled to inherit the property of a Hindu woman if she had not been degraded is disentitled to do so by reason of her degradation ; or, in other words, whether such property escheats to the Crown in the absence of the degraded heirs" (a) ; but the reference became infructuous and the point was not decided by the Full Bench as the facts upon which the reference purported to have been made had not been finally determined. The question again came up for decision in the case of Tripura Charan Banerji *vs.* Harimuty Dassi (b) and Mr. Justice Stephen who decided the case, upon an elaborate review of all the authorities on the point took the view of the earlier cases. Mr. Justice Stephen failed to discern any conflict between the case of Kaminey Bewah (c) and that of Sarnamoyee (d) and held that al-

(a) Chattoo *vs.* Rajaram, 11. C. L. J. 124.

(b) 15 C. W. N. 807.

(c) I. L. R., 21 Cal. 697.

(d) I. L. R. 25 Cal. 254.

though a Hindu woman does not by degradation cease to be a Hindu, her degradation causes a severance with her family. But Mr. Justice Stephen refused to extend this rule of severance beyond limits for which there was authority and held that sons and chaste daughters born *after* degradation can inherit to their mother.

Is the rule of severance laid down by the Judicial decisions an inflexible rule? Where members of a prostitute's family, although they may keep themselves free from the stain of degradation are yet, as a matter of fact, freely mixing with her, can it be said that the severance in law is sufficient to bar their succession to the estate of the prostitute? The question as to whether the severance is complete or not may, as stated before, depend upon the character of unchastity of which the woman is guilty—but it may also depend upon the light in which the relatives take the offence. It seems to us that in such cases there is considerable room for the application of principles of equity and natural justice, not inconsistent with Hindu Law which would meet the requirement of each particular case.

Is the rule of severance an inflexible rule?

The Madras High Court was formerly inclined to the view that prostitution of a woman severed the legal relation between her

Views of the
Madras and
Allahabad
High Courts.

and her natural family and *a fortiori*, between her and the family of her husband (a). These decisions lay down that where there is competition between a degraded and an undegraded heir of a degraded woman, the former has preference. In the later case of Subbaraya Pillai *vs.* Ramsami Pillai (b) the Madras High Court did not evidently assent to this view. It held there that loss of caste did not dissolve the matrimonial tie and that the broad proposition that degradation of a woman in consequence of her unchastity entails in the eye of law cessation of the tie of kindred between her and members of her natural family and also between her and members of her husband's family was unsustainable. Later Madras cases affirm this view (c). The Allahabad High Court is in complete agreement with the Madras Court (d). In a recent case, the former court decided that by her degradation a woman does not cease to be a Hindu unless she became a convert to some other religion. In such a case as this, the rule of succession to property would be the ordinary rule of

(a) Sivasangu *vs.* Minal I. L. R. 12 Mad. 277.

Narasanna *vs.* Ganguly 13 Mad. 133.

(b) I. L. R. 23 Mad. 171.

(c) Angammal *vs.* Venkata, I. L. R. 26 Mad. 509.

(d) Narain *vs.* Tilok, I. L. R. 29 All. 4.

Hindu Law. The decision of the Madras Court has elaborately dealt with the question as to how far Act XXI of 1850 has affected the Hindu Law. A question was raised as to whether the act applied only to cases of where there was loss of caste on account of renunciation of religion or it also applied to cases where loss of caste was due to other causes. It is true that Mr. Justice Dwarka Nath Mitter in an early case took the more limited view (a). But the preponderance of authority is in favour of the conclusion that the act relieves the forfeiture of the rights of those who are deprived of caste on other grounds as well (b).

Act XXI of 1850.

The act, however, is inapplicable to cases where instead of a prostitute's right being in question, we have to ascertain who is entitled to her property.

Although the status of prostitutes is for some purposes recognised by Hindu law or usage the rights and liabilities of courtesans on a contract would be regulated by the

Contracts by and with prostitutes.

(a) 19 W. R. 367 (*Keri vs. Moniram*). (b) As to Calcutta, see *Matangini vs. Joykali*, 5 B. L. R. 466, (493); *Saudamoney vs. Nimy Charan*, 2 T & B, 300. As to N. W. P., see *Bhujgun vs. Gya*, 2 N. W. P. H. C. R. 446; *Taj vs. Kousilla*, 1 Agra H. C. R. 90. As to Bombay, see *Parvati vs. Bhiku*, 4 Bom. H. C. R. A. C. 25; *Honamma vs. Timanabhat*, 1 L. R. 1 Bom. 559.

Indian Contract Act. Even before the passing of the Indian Contract Act in the case of *Satov Kasbin vs. Hurreeram* (Bellasis Rep 1), the Sadar Court of Bombay dealt with the question of essential immorality of the *kasbins'* calling as affecting their civil rights. There a courtesan mother sued for the wages of the daughter as a concubine. The Shastri, when consulted, said that the sum stipulated was recoverable, but the court said that "the subject of the contract being of so direct an immoral tendency, and being bad in itself, the court considers, notwithstanding the provisions of Hindu law to the contrary, that an action on such a contract cannot and is not to be maintained in the Civil Court."

In the case of *Goureenath vs. Modhoo-monee* (a), it has been laid down that a landlord cannot recover rent of lodgings knowingly let to a prostitute who carries on her vocation there. In this case Sir Richard Couch, Chief Justice, refused to follow the rules of Hindu law on the subject and applied the principles of English law (b) to the case. Then in the year 1872 was enacted the Indian Contract Act which is

(a) 18 W. R. 445.

(b) See the case of *Pearce vs. Brookes*. L. R., I Ex 213 (1866).

justly regarded as a code of English law. Contracts of the description mentioned in *Goureenath's* case cited above would now fall within the mischief of section 23 of the Act which embodies the principles of English law on the subject (a). And it is no wonder that it should be so for the Indian Contract Act is, like any other piece of legislation in British India, the work of a body of English specialists who follow to a great extent the current of English opinion.

(a) (1908) *Chogalal vs. Pyari*, I. L. R. 31 All, 58.



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