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, Raghunandan 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 originially 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 मौञ्जीबन्धनमिष्यते ।
अध्यापणं च वेदानां सावित्री वदनं 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 Yajnavalka Smriti in the chapter on Achara 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 degradation in woman'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 cetury 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.

Possible objection to the new theory answered.

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

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 proceeded 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 preceeded 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 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 (*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-

Narada.

Asahaya.

(*a*) Narada XIII. 30.

(*b*) तथाहि शास्त्राध्ययनानधिकारित्वात् शास्त्रमात्रोपजीवि धर्माधर्म ज्ञानाभावात् स्वातन्त्र्या वर्त्तमानत्वेन पुरुषपारतन्त्र्या भावात् तेनोपदेशासंभवश्च। 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.

Caste another test of status in Hindu law.

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

(a) स्त्रीशूद्रद्विजबन्धूनाम् त्रयी न श्रुतिगोचरा।

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. Macdonneli'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 Jogis 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) Khsatryas (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 Brahimni 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 I—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 (*Sanskar*) 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 Sastras to reduce women to the level of Sudras.

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 o

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 "*Kartyavya*" (*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 incliatinons, 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 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.

Yajnavalka's view on the question.

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 thraldom be admit-

Mitakshara.

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

(*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 restaint 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 अनुक्तं तु न विधेयमुदीरयेत्।
प्राप्तस्य पुनः कथनं अनुवादः।

her husband's permission Nilkantha takes the same view of the text of Yajnavalka, 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. Katyayana 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 Yajnavalka is also laid down here (by Katyayana following Yajnavalka) and is not a new rule laid down without prior authority."

Narada.

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 Yajnavalka, reproduces almost exactly the text of Manu about dependence (Chap. IX. verse 2). Then again

(*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 Smriti (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 indepedence 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.

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

Vrihaspati.

(*a*) आयव्ययेऽन्नसंस्कारे गृहोपस्करकर्मणि।
शौचाग्नि कार्ये संयोज्या रक्षास्त्रीणामियं श्रुत ॥
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.

Conclusions from the sanskrit texts.

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

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 pro-

Viramitrodaya

prietary 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

Dayabhaga.

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 of the remaining ones. This was also the opinion of four of the Pundits who were

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*).

Maine's view criticised.

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 Romon 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*).

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 (*e.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 reasonable.

(*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 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 inpure, 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 ordanied as check on their individual free-

Texts inculcating respect for women.

(*a*) Manu III 55.

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.

Danger of basing conclusions on isolated texts.

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 pupilage 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 doctine 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 princples 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 Masulipatum vs. Cavaly Vencata criticised.

Mitakshara gives an absolute estate to widows inheriting their husbands' property.

(*a*) Collector of Masulipatam vs. Cavaly 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 he 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.

Theory of perpetual tutelage has affected personal status.

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

View taken by the Madras High Court.

Bombay.

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

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

Allahabad.

(*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).

Capacity of women in the matter of adoption.

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. L. R. 12 All. 362). The *Dattaka* and the *Kritima* 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 (*Kritima*) is confined to Mithila and many districts in northern India and some parts of the Deccan.

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 Aswins 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 accomplishers 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 अपुत्रेण (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*) अपुत्रेणैव कर्त्तव्य पुत्रप्रतिनिधि 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". Baudhayana *(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 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 Chintamoni pp. 74-75.

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

Nanda Pandita's view.

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.

Dattaka Chandrika.

The Dattaka Chandrika (*a*) artributes 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.

(*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.

Maiden's right to adopt.

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

(*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 imcompetent 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*).

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."

English Law does not recognize adoption.

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

Adoption of Daughters — Nanda Pandita's view.

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-

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(*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 Judhisthira 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 '*dattrima*' (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 *map* added), whether the word be masculine or feminine, the daughter given to the husband or another is signified by the term 'dattrima'."

Nilkantha's view about adoption of daughters criticised.

*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

(*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.

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 of daughters not allowed by modern Hindu 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

Adoption in Roman Law.

(*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*' (Sohm'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 adoption.

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.s.* 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 Maharasthra School, the husband's consent to an adoption by the widow, is, in the absence of

Authority of the widow to give differs in different schools.

(*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 life-time." 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.

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

No positive rules regarding guardianship of women in the texts.

(*a*) उत्पादनमपत्यस्य जातस्य परिपालनम्।
प्रत्यहं लोकयात्रायाः प्रत्यक्षं स्त्रीनिबन्धनम्। 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.

Mother preferred to father as guardian in Mithila School.

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 outcasted' (*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 aneed 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

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(*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*).

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

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 of testamentary disposition over her stridhana in Bengal.

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

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(*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

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(*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.

Benares School.

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 *interalia* contained the following clause :—"After my

(*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

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

Right of woman to enter into contract under Hindu Law.

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-

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.

tutes of Narada, Yajnavalka and Katyayana we find it expressly laid down that a woman shall pay the debts contracted by herself.

Narada. 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

Vishnu. 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 :—

Yajnavalka. "A debt acknowledged by her husband, or contracted by her jointly with her husband

(*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.

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

Indian Majority Act.

that where a Hindu woman above the age of sixteen but under the age of eighteen years and whose husband had his domicil 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 domicil, 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 acnaughten's view.

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*).

His view riticized.

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. 1. 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 अध्यधिनापि (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). Vijnaneswar explains the last class of improper or void contracts to be contracts between teacher and pupil, husband and wife, master and servant. But Vijnaneswar 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.

(*a*) I. L. R. 1 Bom. 121.

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 liability on contract.

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

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(*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

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

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