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

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

Position of Mahomedan women compared.

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

Women as surety.

Suretyship is a kind of contract, and there is nothing in Hindu law to prohibit women from entering into this particular form of contract.

Roman and Hindu Law compared.

It is however otherwise in early Roman law ; one of the salient features of the Roman law of suretyship is the practical incapacity of women to bind themselves by contracts of this kind. "A woman who was sued in respect of an *intercessio* of any kind, whether suretyship or any other, could plead the *exceptio senatus consulti Vellejani*" (*b*).

(*a*) (1880) Pusi v. Mahadeo Prasad I.L.R. 3 All. p. 122.
(*b*) Sohm's Institutes of Roman Law (Ledlie) pp. 292 and 405.

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

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

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

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

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

Origin of *Parda*.

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

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

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

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

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

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

(*b*) See above.

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

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

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

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

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

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

Limits of the rule of the Judicial Committee.

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

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

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

Women not generally qualified as witnesses.

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

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

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

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

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

Manu.

Vasistha.

Yajnavalka

(a) Yajnavalka, II. 69.

(b) Vasistha, XVI. 29.

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

Section 118, Indian Evidence Act.

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

Right of women to maintenance.

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

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

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

No systematic treatment of maintenance of females in original texts.

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

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

Maintenance of mother, wife and infant daugter, not dependent on possession of property.

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

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

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

Manu.

Dayabhaga.

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

Narada.

Brihaspati.

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

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

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

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

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

Right to maintenance of Mother.

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

Step-mother not entitled to maintenance.

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

Unchastity no bar to mother's maintenance.

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

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

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

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

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

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

Daughters' right to maintenance.

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

Father's obligation to maintain daughter till marriage.

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

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

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

Judicial decisions also establish the same propositions (*a*). The obligation to maintain the daughter does not end with the change of religion by the father, so that where the father became a Mahomedan convert, the daughter's claim to separate maintenance was allowed and such maintenance was made a charge on the father's property (*b*).

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

In Bengal it has been held that a sonless widowed daughter cannot get separate maintenance from her father's estate until she can establish that she can not be maintained by her husband's family, to whom, under the law she must in the first instance look for her maintenance (*c*).

View in Bombay.

In the case of Bai Mangal *versus* Bai Rukhimni, Mr. Justice Ranade pointed out that the support of unmarried daughte stands on a different footing from the support of married or widowed daughters, and that married daughters must seek for maintenance from their husbands' family. If this provision fails, and the widowed daughter returns to live with her father or brother, there is a moral and not a legal

(*a*) Ramabai *v.* Trimbak 9 Bom. H. C. Rep. 283.
Mansha *v.* Jiwan I. L. R. 6 All. 617.
Jamna V. Machul, I. L. R. 2 All 315.
(*b*) Mansha *v.* Jiwan I. L. R. 6 All 617.
(*c*) Mokhada *v.* Nando Lal I. L. R. 28 Cal. 278.

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

Right of Daughters to maintenance ceases upon marriage.

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

Texts about right of Sisters to maintenance.

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

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

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

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

ancient sages on which this right is based, are as follows : "Uninitiated sisters," says Yajnavalka, "should have their ceremonies performed by those brothers who have already been initiated giving them a quarter of their own share" (*a*). Manu also says : "To the maiden sisters let their brothers give out portions out of their own allotments respectively ; to each, the fourth part of the approximate share, and they who refuse it should be degraded." Vyasa says : "And for the unmarried sisters, their initiation shall be completed by their elder brother as the law requires." According to Manu the initiation of females, as we have seen already, consists in their marriage. Vachaspati Misra in his Vivada Chintamoni maintains that the word "quarter" in Yajnavalka's text cited above is not used in its ordinary sense but is only intended to enjoin the allowance of as much as will be sufficient for the marriage of sisters. Sulapani and the author of Smriti Chandrika and the Dayabhaga (*b*) agree with Vachaspati Misra in this view. In the Viramitrodoya (*c*)

Yajnavalka.

Manu.

Vyasa.

Vachaspati Misra.

Sulapani Smriti Chandrika Dayabhaga.

(*a*) Yajnavalka II, 124.

भगिन्यश्च निजादंशाद्दत्वा शेषन्तु तुरीयकम ।

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

(*c*) Golap Chandra Sarkar's translation of Viramitrodaya, Pages 81-86.

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

Mitakshara.

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

Grand-mother's right to maintenance.

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

Obligation to maintain under the Criminal Procedure Code.

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

Defamation of women.

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

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

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

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

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

(*c*) शतं स्त्री दूषणे दद्याद्वै तु मिथ्याभिशंसने

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

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

Distinction between tort and crime.

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

(*b*) Manu VIII 287, 288.

Defamation considered as an offence against State in Hindu law.

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

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

Assault regarded both as a tort and a crime.

Texts showing above.

(*a*) Manu VIII 287.

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

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

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

Retrospect.

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

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

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

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

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

Agencies by which woman's position was lowered.

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

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

(*a*) Compare Yajnavalkya Ch 1, verse 87.

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

CHAPTER III.

Status of wife and the Law of Marriage.

Status of wifehood created by Marriage.

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

Raghunandan's definition of Marriage.

Marriage, a sacrament with the Hindus.

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

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(*a*) Raghunandan, opening lines of Udbahatatta.

(*b*) जायमानो ह वै ब्राह्मणस्-त्रिभि ऋणैर्ऋणवान् जायते। ब्रह्मचर्येण ऋषिभ्यो, यज्ञेन देवेभ्यः, प्रजया पितृभ्यः॥

श्रुतिः।

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

"In him a father pays a debt
And reaches immortality" (*a*).

Marrriage, an established institution in the Vedic period.

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

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

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

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

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

(*b*) Rigveda. X 25, 26.

गृहान् गच्छ गृहपत्नी यथाऽसो ।
वशिनी त्वं विदथमावदासि ॥

(*c*) वीर सूदेवकामास्योनाशं नो भव
Rigveda X. 85-44.

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

Marriage of women, not compulsory in the Vedic ages

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

Mantra portion of the Vedas deals with marriage rituals.

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

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

"May thy joy increase here through progeny.
Be thou ever awake here in this house for thy duty as house-holder.
With this thy husband do thou unite thy body
And as thou advancest in age thou shall teach the sacrificial law" (*a*).

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

It is natural to expect that these words could only be addressed to a bride who is able to enter into the responsibility of married life, and this could only be expected of a girl quite mature in mind and body.

Similar rule in the Sutra Period.

Coming to the period of the *Sutras*, we find unmistakeable evidence that marriage after puberty was the rule.

Jaimini's Grihya Sutras.

In Jaimini's *Grihya Sutras*, we find the bridegroom addressing the bride at the time of *Saptapadi* (walking of seven steps) as follows :—"Come now, let us beget, let us place the seed together that we may attain a male child" (*b*). Now according to this at the time of the ceremony of pacing of seven steps, which is one of the essential parts of marriage, the bridegroom and bride are of an age when they are fit to become parents of children.

Marriage of infant girls strictly enjoined in the Smritis.

As we shall see later, this rule was done away with in the period of the Smritis, and marriages of infant girls were enjoined in the most unconditional terms. In the

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(*a*) Rigveda X. 85, 27.
(*b*) Grihyasutras (Jaimini 21, 8).

Condition of Society in the Vedic period, not primitive.

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

Hymns of Rigveda betray advanced state of civilization.

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

Legend of Svetaketu.

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

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

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

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

Gradual adoption of Aryan customs by non-Aryaus.

(*a*) Mahabharata, Adiparva, Ch. II.

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

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

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

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

Contrary view of Darwin.

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

Andrew Lang agrees with Darwin.

main with the conclusion of Darwin, and he accordingly rejects the theory of a promiscuous horde as having been the earliest state of human life (*a*). There is, however, no complete unanimity between all writers on the subject. But in opposition to the views of Bachofen, McLennan and other sociologists,

Westernmarck considers marriage existed at the commencement of the human race.

Westernmarck considers that marriage had existed in all probability from the commencement of the human race. "The only result," says he in his book on the History of Human marriage "to which a crucial investigation of facts can lead us is, that in all probability, there has been no stage of human development when marriage has not existed and that the father, as a rule, has been the protector of the family. Human marriage appears then to be an inheritance from some apelike progenitor."

Nothing in the Vedas suggests state of promiscuity.

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

(*a*) *Secret of Totem.*

Legend of Svetakatu may represent condition of non-Aryans.

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

Or may be fiction.

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

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

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

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

Other hymns shewing Aswins to be friends of the bridegroom.

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

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

Mayne holds polyandry had become rare in the earliest times.

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

(*c*) Mr. Mayne's Hindu Law.

Prohibition in the Aitareya Brahmana.

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

Story of Draupadi.

Comment of Kumarila on the story of Draupadi.

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

(*a*) नैकस्येबहवः सहपतयः Aitareya Brahmana III. 2. 23.

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

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

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

(*a*) या चोक्ता पाण्डुपुत्राणान् एकपत्नीविरूद्धता
सापि द्वैपायनेनैव व्युत्पाद्य प्रतिपादिता ।
Tantra Vartika p. 135. Benares Edition.

(*b*) सद्वानुभावा किल सा सुमध्यमा
बभूव कन्येव गते गतेऽहनीति ।

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

No trace of Polyandry in the Smritis.

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

Polygamy prevailed in the Vedic period.

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

Girls could choose husbands in the Vedic Age.

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

Marriage ceremony in the Vedas.

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* This is the result of original research.

(*a*) तस्मादेकस्य बहवो जाया भवन्ति
नैकस्यै बहवः सहपतयः ॥
Aitareya Brahmana III, 2, 23.

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

(*c*) Rigveda x. 85, 36

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

Marriage ritual more complex in the Sutra period.

The horror of incest is universal amongst

(*a*) Rig Veda x. 85. 38, 39
(*b*) Rig Veda x. 85. 43, 45
„ „ x. 185. 47

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

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

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

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

Law of Marriage in the Smritis.

(*a*) 14 A 31.

(*b*) 1-8-3-2.

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

Eight forms of Marriage in the Smritis.

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

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

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

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

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

Brahma form of marriage allowable for all classes.

Origin of different forms of Marriage.

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

Brahma form of Marriage.

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

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

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

Daiva form of Marriage.

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

Arsha form of Marriage.

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

Arsha Marriage, not a sale.

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

(*a*) Manu III 27. (*b*) Manu III 28.
(*c*) Manu III 29.

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

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

Prajapatya form of Marriage.

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

Asura form of Marriage.

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

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

* Portion within asterisks is believed to be original.

(*b*) Manu III. 30.

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

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

Gandharba form of marriage.

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

Gandharba form allowed to Kshatriyas alone.

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

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

(*b*) Manu III. 32.

(*c*) Manu III. 26.

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

(*e*) Ibid.

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

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

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

Judicial Decisions hold otherwise.

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

The *Rakshasa* form of Marriage.

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

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

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

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

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

The *Paisacha* form of Marriage.

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

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(*a*) Manu III 33.

(*b*) Manu III 26.

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

(*d*) Manu, III 34.

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

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

Paisacha, the basest form of marriage.

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

Customary forms of marriage.

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

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

Capacity of persons to marry.

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

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

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

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

(*a*) कन्यापुत्रविवाहे तु पित्रर्थम् श्राद्धमाचरेत् ।
See Raghunandan's, Udbahatattwa.

(*b*) Manu III. 7.

(*c*) Manu III. 8, 9.

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

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

Kulluka Bhatta and Raghunandan agree in this view.

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

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

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

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

(*a*) Manu III. 10.

(*b*) Udbahatattwa.

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

Indian Legislature has allowed remarriage of widows.

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

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

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

Sapinda and Sagotra.

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

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(*a*) Manu V. 161.

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

(*c*) Act XV. of 1856.

(*d*) Manu, III, 5.

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

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

This text of Manu is the basis of the rule of prohibited degrees in marriage in Hindu Law, and commentators have displayed much learning, in ascertaining the precise import and extent of this rule. It is not intended, however, to explore the exuberant learning, that has gathered round the table of prohibited alliances. We shall only give the conclusions, to which the sages and commentators have arrived, on the rule of prohibited degrees, as well as what has been established by the judicial decisions in regard to some of these rules. It may be generally stated, that in Bengal the exposition of Raghunandan on the subject has been accepted, while in the other schools, the rule accepted has been that of Kamalakara, in the *Nirnaya Sindhu*. But before we lay before the reader the exposition of Raghunandan, it is necessary to give the comment of Kulluka on this verse of Manu :—

Raghunandan's view accepted in Bengal.

Kamalakara's view accepted in other schools.

Significance of the word *cha* in this text.

"*Asapinda* is she, who is not the *Sapinda* of the mother (of the bridegroom). *Sapindaship extends to the seventh person.* Therefore by this is meant, she who does not belong to the family of the maternal grandfather (of the bridegroom). The word "*cha*" indicates, that the girl in order to be eligible for marriage,

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

Vyasa.

Medhatithi.

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

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

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

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

Raghunandan's view :— Bridegroom is to avoid eight sapindas reckoning from himself.

Sulapain's view.

The word मातुः refers to the maternal grand-father.

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

i.e. father by marriage (*a*). Raghunandan points out, that for the purposes of marriage only, the *sapinda* relationship ceases on the father's side with the seventh degree (from the father), and on the mother's side with the fifth degree from the maternal grandfather, and cites a text of Narada in support of this position (*b*).

Raghunandan's comment on Paithinasi's text.

Raghunandan next comments on Paithinasi's view on the question. Paithinasi says, that a girl who belongs to the same *gotra* and *pravara* as the bridegroom, and who is a *sapinda i.e.* either within five degrees from maternal grandfather and seven degrees from the father, or within three degrees from the maternal grandfather and five degrees from the father, is not fit to be taken in marriage.

Sulapani's comment of Paithinasi's text.

Sulapani says, that the last clause of Paithinasi's text applies to all other kinds of marriage except *Bramha*, *Daiva* and *Arsha*.

Ratnakara's view on the question.

Ratnakara thinks that the alternative clause applies to marriages between different castes, and not within the same caste. Raghunandan's view is, that Paithinasi in the last clause indicates,

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(*a*) प्रत्तानां भर्तृसापिण्ड्यम् प्राह देव पितामहः। Institutes of Raghunandan P. 571 (Udbahatatta).

(*b*) पञ्चमात् सप्तमादूर्द्धं मातृतः पितृतः क्रमात्।
सपिण्डता निवर्त्तेत सर्व्ववर्णे स्वयं विधिः॥
Narada cited in Institutes of Raghunandan p. 571 (Ed. 1880).

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

Maxim of Hindu Law regarding interpretaton of texts.

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

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

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

(*a*) सम्भवत्येकवाक्ये तु वाक्यभेदो न युज्यते ।

Narada's text on the subject.

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

Who are bandhus of father and mother.

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

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(*a*) आसप्तमात् पञ्चमाच्च बन्धुभ्यः पितृमातृतः ।
अविवाह्या सगोत्रा च समानप्रवरा तथा ॥

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

(*b*) पितुः पितुः स्वसुः पुत्राः पितुर्भ्रातुः स्वसुः सुताः ।
पितुर्मातुलपुत्राश्च विज्ञेया पितृबान्धवा ॥
मातुर्भ्रातुः स्वसुः पुत्राः मातुः पितुः स्वसुः सुताः ।
मातुर्भ्रातुल पुत्राश्च विज्ञेया मातृबान्धवाः ॥

Raghunandan's Udbahatattwa, p. 574.

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

Gotra and Prabara explained

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

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

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

Girls removed by three gotras may be married.

Text in support of the position.

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

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(*a*) सन्निकर्षेपि कर्त्तव्यं त्रिगोत्रात् परतो यदि ।

(*b* असम्बन्धा भवेत् यातु पित्रृसैवोदकेन वा
सा विवाह्या द्विजातीनां त्रिगोत्रान्तरिता च या ।
Raghunundan's Udbahatattwa p. 574.

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

Yajnavalkya's text on prohibited degrees.

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

Comment of Mitakshara on the above.

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

"पञ्चमात् सप्तमात् ऊर्ध्वं मातृतः पितृतस्तथा" ।

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

term *non-sapinda*, "the *sapinda* relationship is stated to be, directly or mediately, through connection with one body ; but that relationship of all persons may, in one way or other, be traced with all other persons in this world of eternal transmigrations of the Soul with its minute body, and so it would include persons that are not intended to be included ; hence it is ordained '*and is beyond the fifth and seventh from the mother and from the father respectively.*' The purport is, that *sapinda* relationship ceases beyond the fifth from the mother *i.e.* in the mother's line, and beyond the seventh from the father *i.e.*, in the father's line. "Hence although the word *sapinda* by its etymological import applies to all relations, yet it is restricted in its signification. * * * * * Accordingly, it is to be understood, that the fifth from the mother is she, who is (the fifth) in the line of descent from (any ancestor of the mother up to) the fifth ancestor, and (counting her and such ancestor, each as one degree)—in the computation—beginning with the mother (and counting her as one degree),—of the mother's father, paternal grand-father, and the like ; similarly, the seventh from the father is she who is (the seventh) in the line of descent from (any ancestor up to) the seventh ancestor (and

counting her and such ancestor, each as one degree),—in the computation—beginning with the father and counting him as one degree),—of the father's father, and the like : * * * As for what is said by Vasistha (*a*) namely : 'May marry the fifth and seventh from the mother and father respectively,'—and by Paithinasi namely "beyond the third from the mother and fifth from the father," these should be taken to intend the prohibition of the nearer degrees ; indicated therein and not to allow of the espousal of the nearer degrees expressed therein, thus is the conflict between all *Smritis* avoided" (*b*).

Diversity of opinion among sages on the question of prohibited degrees.

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

Method of counting prohibited degrees in Mitakshara.

There is one peculiarity in the method of reckoning prohibited degrees, in the Mitakshara. All the other commentators are

(*a*) Vasistha quoted in the Mitakshara, Achara Adhyaya.

पञ्चमीं सप्तमीञ्चैव मातृतः पितृतस्तथा ।

(*b*) Translation by Babu Golap Chandra Sarkar of Mitakshara ; See Sarkar's Hindu Law, 4th Edition. P, 54.

agreed, that the degrees have to be counted, by leaving the propositus out, on the father's side, and by leaving the mother out, on the mother's side. In computing degrees on the father's side the Mitakshara observes the same rule, but on the mother's side, it counts the mother as one degree. Raghunandana, as has been noticed already, says that as the mother's *Gotra* is merged in the father's by marriage, and therefore in the bride-groom's, the degrees have to be counted from the maternal grandfather and that the word मातृ: means "maternal grandfather." The method of calculating prohibited degrees is that of the canonist, and not of the civilian. This fact, however, is sometimes overlooked, and Judges have sometimes fallen into the error of reckoning prohibited degrees in marriage, according to the method of the civilians (*a*).

The rule of the canonist followed in counting prohibited degrees.

Another fact to be noticed in this connection is, that while in counting in the ascending line, male ancestors alone, of the father and mother, have to be considered, in counting downwards, both male and female descendants have to be taken into account.

Counting upwards, only male ancestors are reckoned; counting downwards, both male and female descendants are taken into account.

It may not be out of place to refer to the reason of the rule of prohibited degrees in

Reason for the rule of prohibited degrees.

(*a*) (1883) Venkata vs. Subhadra, I. L. R. 7 Mad. 548.

Hindu law. Montesquieu gives the following reason for the rule prohibiting marriage between cousins-german, in the early ages (*a*). "In the early ages", says the author of the Spirit of Laws, "that is, in the times of innocence ; in the ages when luxury was unknown, it was customary for children upon their marriage not to remove from their parents, but settle in the same house ; as a small habitation was at that time sufficient for a large family ; the children of two brothers, or cousins-german were considered both by themselves and others, as brothers. The estrangement then between the brothers and sisters, as to marriage, subsisted also between the cousins-german. These principles are so strong and so natural, that they have had their influence, almost over all the earth, independently of any communication." These remarks are of universal application, and furnish the clue, to the true reason of the rule in Hindu law. Jointness was the normal condition of a Hindu family, even from the most ancient times, and the descendants of the same father, grandfather etc. would live for generations together. The son of one brother, would look upon the daughter of another as a sister. The grandson of one brother would look upon the grand-

Montesquieu ascribes the rules of prohibited degrees to the practice of cousins living under the same roof, where they were regarded as brothers and sisters.

The same reasons apply to the rule of prohibited degrees in Hindu Law,

(*a*) Montesquieu's Spirit of Laws p. 70.

daughter of another, as sister, and so on. The preservation of the sanctity of the home necessitated the prohibition of marriage between them.

Legal effect of marriage within the prohibited degrees.

The violation of the rule of prohibited degrees, affects the legality of the union. Kulluka, in commenting on verse 11, Chapter III of Manu's Code observes thus :— "In this topic, in connection with marriage with *sagotras*, desertion has been ordained 'He who inadvertently marries a girl sprung from the same original stock (*sagotra*) and so forth, must support her, as a mother' (*a*) ; and penance has been ordained by the text 'If a man marries etc.' (*b*) ; consequently, together with her, girls related as mother's *sapindas*, do not become wives."

Mr. Mandlik says, that a woman married within the prohibited degrees, though she cannot be the wife of the bride-groom, for any conjugal and religious purpose, cannot be married by another, and must be maintained by the bride-groom whom she has married (*c*). Raghunandana apparently takes the same view of the effect of marriage within prohibited degrees and quotes a text

(*a*) Kulluka here quotes from Baudhayana, II. 1, i, 37.

(*b*) Kulluka here quotes from Vasistha.

(*c*) Mandlik's Edition of Institutes of Vyabahara Mayukha 508.

of Sumantu "that a person should, after deserting father's sister's daughter, maternal uncle's daughter, a girl of the same gotra as the father and mother and also a girl with the same pravara as himself, whom he may have married, perform penance and maintain the girl." Raghunandana in this connection cited another text from Apastamba to similar effect (*a*).

Certain marriages, in which the relationship is close, do not seem to have been forbidden. For instance, marriage with wife's sister, step-mother's sister, wife's sister's daughter, paternal uncle's wife's sister and paternal uncle's wife's sister's daughter is not forbidden. In fact, in the Southern Presidency, marriages between a man and his wife's sister's daughter, are common amongst various sections of the Brahman community and are regarded as perfectly valid (*b*). Both under the Roman law (*c*) and, until recently, under the English law (*d*) marriage with a deceased wife's sister was declared invalid.

(*a*) See Raghunandan's Udbahatattwa, p. 572.

(*b*) See (1897) Raghavendra vs. Jayaram, I. L. R. 20 Madras, p. 283.

But the Nirnaya Sindhu cities passages from Baudhayana which regard these marriages as invalid on the ground of incongruous relationship.

(*c*) Marriage with a deceased wife's sister was forbidden by Constantine's sons in the East and by Valentinian, Theodosius, and Arcadius in the West. (*d*) Deceased Wife's Sister Marriage Act, 1907.

There are other rules, which are in the nature of moral injunctions e.g., a man is enjoined not to marry a girl who bears the same name as his mother (*a*) or a girl who is older in age than himself (*b*).

Intermarriage between different castes.

We proceed, in the next place, to deal with the eligibility of a girl, belonging to a different caste, to be taken in marriage by a man of inferior or superior caste. We have in the introductory chapter, referred to the four divisions of the castes, and to the principal division by the *Smritis*, of men into two classes, the Sudras on the one hand, and the twice-born or regenerate classes on the other. Raghunandana cities a text, from the Aditya Purana, to show that marriage between different castes is prohibited in the *Kalijuga* or present age. Manu's Code contains verses, from which it would seem that inter-marriage between different castes was allowable in his time, although such marriage was condemned by the sage himself (*c*). The Hindu sages and the principal commentators have spent no inconsiderable learning over this topic. While intermarriage between a woman of the inferior class and a man of the superior class would be allowed, marriage

Manu.

(*a*) Udvahatattwa.

(*b*) Yajnavalkya, I. 52.

(*c*) Manu, III, 12, 13.

between a woman of the superior class and a man of the inferior class was not permitted, and there are passages in the *Smritis*, providing for punishment by the King, if a man of the inferior class married a woman of the superior class. These passages suggest that the intermarriages of the latter kind were prohibited.

Mitakshara and Dayabhaga on the point.

The Mitakshara and the Dayabhaga, which have influenced the developement of Hindu law, recognise intermarriage between a woman of the inferior and a man of the superior tribe, as also the legitimacy of the issue of such intermarriage. Chap. IX of the Dayabhaga commences as follows :—1. "Partition among sons of the same father by different women, some equal to himself by class, others married in the direct order of the tribes, is described. 2. Marriage is allowed with women, in order of the tribes as well as, with those of equal class" :..... The whole chapter deals with the rights of sons by marriage on partition. The Mitakshara in the Achara Adhyaya, comments on the texts of Yajnavalkya, and says, that a Brahman may have three wives in the order of the tribes, the Kshatriya may have two wives and the Vaisya one, but the Sudra can have only one of his own class ; and in sec. VIII. chap. I, (the chapter on inheri-

tance), the author of Mitakshara deals with the shares, which a son born of a wife of different caste to the father, obtains by inheritance. Although, from the somewhat detailed investigations into the shares of the sons by marriage with a woman of a lower caste, it would seem, that intermarriage was in vogue at the time, when these two commentaries were written, one cannot, however, be certain with regard to it, seeing that they deal with obsolete and current usages, side by side ; and our view is, that intermarriage had become obsolete, when Vijnaneswara or Jimutabahana flourished. We are confirmed in this view by the fact, that both Raghunandana and Kamalakara say that intermarriage is prohibited in the present age, and it is more likely than not, that intermarriages had become obsolete, at the time of the Mitakshara and the Dayabhaga.

Judicial decisions on the point.

In the absence of local usage, these intermarriages are not regarded as valid, and it has been held in the case of *Melaram vs. Thannooram* (9. W. R. 552.), that inter-marriage between a Dome Brahmin and a girl of the Haree caste, is not valid. But in the present stage of Hindu Society, in which there are signs of reform in this direction, a

question may frequently arise, whether marriages between different sub-divisions of the same caste, may not be regarded as valid.

In the case of Inderun *vs.* Ramaswamy (*a*), which was carried in appeal to the Judicial Committee from Madras, the Privy Council laid down, that intermarriage between different subdivisions of the Sudra caste was valid. In an early Bengal case (*b*), certain observations were made by Justice Romesh Chandra Mitter, against the validity of marriages, between different subdivisions of the Sudra caste. But these observations were regarded as *obiter dictum* in the recent case of Upoma *vs.* Bholaram (*c*), when the Calcutta High Court came to an opposite conclusion, and declared intermarriages between different subdivisions of the Sudra caste valid. In the Punjab, intermarriages amongst Sudras, and Jats, the leading Sudra su b-caste in the Punjab, are not forbidden by Hindu law (*d*). In Bombay, marriages between members of different sects of Lingayets, are not illegal (*e*). And quite recently, it has been held there, that the marrriage between a man of one caste and

(*a*) 13. M. I. A. 141.
(*b* (1878) Narain Dhara's case I. L. R. 1. Cal. p. 1.
(*c*) I. L. R. 15 Cal. 708. (*d*) 64 P L. R. (1908).
(*e*) I. L R. (1896) 22 Bom. 277.

woman of another caste is valid, where the two castes are subdivisions of the Sudra tribe (*a*). In Tipperah, marriage between a Vaidya and and Kayasth woman, (both being Sudras, but of different subdivisions) was held valid according to local custom prevailing there (*b*).

New light thrown by Hemadri.

*There is nothing in the Smritis or commentaries to prohibit such marriages. On the other hand, we find in the *Hemadri* a commentary which is of authority in the Bombay Presidency, a distinct statement to the effect, that the rule, that the gift of a daughter should not be made except to a man of the same subdivision of a caste (among the three regenerate classes) does not hold good (*c*).*

A question of no small importance arose in a recent case in the courts in England regarding the effect of the marriage of a twice born Hindu with an Englishwoman in England. The facts of the case are these : Mr. Venu Gopal Chetti is a member of the Indian Civil Service and is a District Judge in Madras. He married, while he was studying

a) Mahanta *vs.* Gangara 11. Bom. L. R. 822.

(*b*) 1903—7 C. W. N. 619.

(*c*) अतो न कन्यादाने नचापि इविदाने स्वशाखीयद्विजनियम इति सिद्धं ।

Hemadri Parisesh khanda. Vol. III. Part I. A. p. 381.

* The portion within asterisks is based on original research.

Marriage of a Hindu with a Christian woman not invalid.

for the Indian Civil Service, an English woman in England, and had a child born of her. He did not bring her to India and practically deserted her. The wife petitioned for a judicial separation alleging desertion. The defence of Mr. Chetti was that, as Hindus belonging to the twice-born classes cannot lawfully marry out of their own caste, his marriage with the petitioner was invalid, and the question of his capacity to marry must be determined by his personal law which was Hindu law, and wherever he went he carried with him that law. The Court of Divorce (*a*) negatived the defence holding that the respondent cannot be allowed to assert that he carried about with him, while in England, the burden of an incapacity, imposed by Hindu law, to do that which he has voluntarily done and in due form according to the laws of England.

The fallacy in the argument for the defence consisted in ignoring the rule of Hindu law that a Hindu cannot marry a girl professing a different religion and that as soon he does so he ceases to be a Hindu. A Hindu cannot marry outside his own caste (and necessarily with one belonging to a different religion) according

(*a*) (1909) L. R., P and D, p. 67.

to Hindu marriage rituals, for both parties must have the capacity of partaking in the religious ceremonies of marriage. A person after such marriage ceases to be a Hindu, and he cannot be permitted to say that the marriage is invalid because, prior to the marriage, he was a Hindu. If the marriage was valid, according to the law of the country where it was celebrated, no rule of Hindu law can make it void. In point of fact, Hindu law does not concern itself with the validity or otherwise of the marriage of one who is no longer within the pale of Hindu society.

Marriageable age for girls.

According to the Hindu sages or Smriti-writers, eight years was the suitable age for a girl to marry. We have already, in the commencement of this chapter, attempted to indicate that, in the Vedic age, marriage of girls after attainment of puberty was the rule. During the period of the *Smritis*, this rule seems to have undergone a change, and the age of eight years was considered the earliest age of marriage. There are passages in the various *Smritis*, to show that, in any case, marriages of girls must take place before puberty. In other words, there was an obligation on the part of the guardians to marry the girl before puberty. Up till quite recently, all Hindu girls would