be married before twelve, which is considered generally to be the age when a girl attains puberty. But the reforming tendencies of Hindu youths of the present day, and the difficulty of getting a suitable bridegroom have imperceptibly raised, in practice, the marriageable age of girls in Hindu families, and we often find girls married after they attain puberty. The direction to marry a girl, while she is still an infant, seems to be in the nature of a moral injunction, and the disobedience of this precept does not render the marriage either void or voidable.

Infant marriage not peculiar to India.

It has often been said that early marriage is an institution which is peculiar to India. But this is indeed far from the truth. Such marriages were known in England even in Tudor times. Professors Pollock and Maitland point out that the Canonists fixed the age of consent at seven years and that any marriage after that age, without the consent of parent or guardian or even in opposition to it, was held legal and that it was voidable so long as either of the parties to it was below the age at which it could be consummated. They further say, "so far as we can see this doctrine was accepted by our temporal Courts" (*a*).

(*a*) Maitland's History of English law, II, p. 388.

Manu on the point.

Manu says :—"To a distinguished, handsome suitor of the same class, should a father give his daughter, in accordance with the prescribed rule, though she may have not attained the proper age" (*a*). In commenting on this text, Kulluka, Narayana, and Raghunandana say that 'proper age' means the age of eight years. Medhatithi, however, interprets 'proper age' to mean 'before she is bodily fit for marriage'. Other sages insist on marriage before puberty (*b*).

We have seen that in the Vedic age, marriage of girls was not compulsory. But this can not be said of the period of the Smritis, when it was obligatory on the guardians, to celebrate marriages of the girls under their care.

The following text of Manu, "But the maiden, though marriageable, should rather stop at her father's house until death, than that she should ever be given to a man, destitute of good qualities" (*c*), might be interpreted to mean that marriages of girls were

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(*a*) Manu IX, 88.

(*b*) Gautama, XVIII 20 23, Vasistha, XVII, 69-71. Baudhayana IV, 1, 11-14, Brihaspati, XXIV, 4. Yajnavalkya, 1, 64. Kulluka in his comments on verse 4, chapter IX, Manu fixes the proper age to be before puberty.

(*c*) Manu IX, 89.

not regarded as compulsory, even in Manu's time. But Raghunandana points out that the true meaning of this verse is that a bad match is prohibited, and that it does not contain a rule, sanctioning the life-long maidenhood of girls, as in the Vedic age. In the next verse, Manu says, that a girl may wait for three years, after puberty and if the father or guardian does not during that period, find out a bridegroom for her, she must select one for herself (*a*). In practice however, the selection of bridegroom is generally made by the guardian of the girl, and the opportunity for the exercise of this right by her is extremely rare.

Guardians for the purposes of marriage.

This is the proper place to consider the question of guardianship for the purposes of marriage. Infant marriages having been enjoined by the Smritis, the law regarding the guardianship in marriage is of great practical importance. But the sages are not all agreed as to the preferental right of certain relations, to act as guardians of a girl in marriage. Raghunandana, whose authority is followed in Bengal, deduces the following rule from the texts of sages in connection with the order of guardianship:—

"The father, paternal grandfather, the brother, sakulya, the maternal grandfather,

(*a*) Manu, IX, 90.

the maternal uncle, and the mother, if of sound mind, are entitled in succession, to give a girl in marriage." This order is the same as that of the sage Vishnu (*a*), except that the maternal uncle is interposed between the maternal grandfather and the mother. Yajnavalkya says, "The father, the paternal grandfather, brother, *sakulya*, and mother are the persons, who have a right to give away a damsel, provided they are of sound mind." The order given by Yajnavalkya is adopted by the Mitakshara and is followed, in determining the right to guardianship, in all the Schools, except that of Bengal.

Absence of guardian's consent does not invalidate marriage.

These texts, relating to the eligibility of persons who can claim the right of giving a girl in marriage, are however directory and not mandatory (*b*). The father has the most preferential right to dispose of his girl in marriage, both according to Raghunandan and the author of Mitakshara, but in certain exceptional circumstances, other relations are preferred to the father. So where a father had, for about eight years, voluntarily given up residence with his wife and daughters, and had neglected to marry the daughter

(*a*) पिता पितामही भ्राता सकुल्यो मातामही माताचेति ।
कन्याप्रदः पूर्व्वाभावे प्रकृतिस्थ परः परः ॥ Vishnu.

(*b*) (1897) Mulchand vs. Bhudhia, I. L. R., 22 Bom., 812.

of eleven years age, although requested by the mother to do so, it was held that marriage with the consent of the mother was valid (*a*). In this case, the learned Judges observed, that the consent of parents or guardian was not a condition precedent to the validity of the marriage. Absence of father's consent would not invalidate a marriage, where the marriage was performed with due ceremonies, in the absence of force or fraud. The Judges of Bombay High Court reaffirmed this view in the case in I. L. R. 22 Bombay cited above (*b*) resting their decision on the directory nature of the above texts, and on the doctrine of *factum valet.*

Judicial decisions

In a recent Allahabad case, the learned Judges observed that a uniform course of rulings, dating back to 1843, has laid down that the want of the guardian's consent would not invalidate a marriage actually and properly celebrated. Where a Hindu widow who was appointed guardian of the person of her minor daughter, eight or nine years old, married the minor, in disobedience of the order of the Civil Court directing the minor to be made over to the paternal uncle,

(*a*) (1886) Khusalchand vs. Baimani, I. L. R, 11 Bom, 247.

(*b*) (1897.) Mulchand vs. Bhudhia, I.L.R., 22 Bom., 812 ; Bai Duvali vs. Moti (1890) I. L. R. 22 Bom. 509.

for the purpose of getting her married, it was held, that the principle of *factum valet* applied, and the courts said that neither the disobedience of the court's order, nor the disregard of the preferable claims of the male relations could invalidate the marriage (*a*). In a Madras case, the learned Judges, after reviewing the authorities, held that where a Vaishnava Brahman girl was given to the plaintiff in marriage by her mother, without the consent of her father, who subsequently repudiated the marriage, the plaintiff was entitled to a declaration that the marriage was valid, and to an injunction restraining the parents from marrying the girl to any one else (*b*). The learned Judges came to this conclusion, although it appeared that the mother falsely informed the Brahman, who solemnised the marrige that the father had consented to it.

In Bengal, it was laid down, in an old case, that a *kulin* father was not such a natural guardian of his child as the mother, and that the absence of his consent would not invalidate a marriage duly solemnised by the mother (*c*). In 1885, the same view was adopted by the Bengal High Court, in

(*a*) (1897). Ghazi vs. Shukru., I. L. R., 19 All., 515.
(*b*) (1890). Venkata vs. Ranga., I.L.R., 14 Mad., 316.
(*c*) Modhoosodun vs Jadub chundra, 3 W. R., 194.

a case, where the question was raised, whether the marriage was valid, the girl having been given away by the mother, without the consent of the uncle, who under the texts above cited, had a right to give away in preference to the mother (*a*). In 1869, the Madras High Court held, that a divided brother had no exclusive right, as against the widow of a Hindu, to betrothe the infant daughters of the deceased, without the interference of the widow, It was pointed out in that case that the independent position of the mother, as the guardian of her daughters, and possessor of her husband's property, is inconsistent with the disposal of her daughters in marriage, by her husband's brother or other relation, without reference to her (*b*). It seems to us, that the texts cited above, do not confer a right on the particular relations of the girl, to give away, but they impose a duty on them ; and viewed in this light, the texts do not appear to be mandatory, but merely directory. But in the Bombay High Court, it was held in one case, that the father was entitled to an injunction, restraining the mother, from giving their

(*a*) (1885) Brindaban vs. Chundra., I. L. R., 12, Cal., 140.

(*a*) S. Nama Sevayem Pillai vs. Annamai, 4 M. H. C. R., 339 ; (1900) Vaikuntham vs. Kallapiran, I. L. R., 23 Mad., 512.

daughter in marriage to a person with whom the mother has arranged marriage (*a*).

Preceptor's daughter not eligible for marriage.

A preceptor's daughter is not fit to be taken in marriage. In the ancient constitution of Hindu society, a youth had to spend several years either 12, 24 or 36 years of his life, as the case may be, in the house of his preceptor. The pupil would be treated, as if, he were a member of the preceptor's family, and it is natural that a sacred tie would be formed between the preceptor and the pupil, which would be necessarily of the nature of a family tie, and would carry with it the same associations and the same order of feeling. The preceptor would be regarded as a father, and the preceptor's daughter as a sister. A sort of spiritual, akin to family, relationship would grow up. The same ideas which underlie the rule prohibiting marriage between a brother and sister, would bar union between a pupil and the preceptor's daughter. The Roman law, likewise, forbade marriage between god-parent and godchild, on the ground of *cognatio spiritualis*—a sort of spiritual kinship (*b*). The canon law also forbade the marriage of a sponsor with the baptized (*c*).

(*a*) Nana Bhai *vs.* Janardan, I. L. R., 12 Bom., 110.

(*b*) Justinian's Code, 5, 4, 26.

(*c*) Maine's Early History of Institutions, p. 240.

Incompetency of males to marry.

We have hitherto been considering the disqualifications which render a girl ineligible for marriage. It will now be convenient to deal with the rules regarding the incompetency of a male to marry. The minority of a boy is no bar to his marriage. We have already seen that, under the Hindu law, minority ceases at the end or at the beginning of the sixteenth year; and for the purposes of marriage, the Hindu law remains unaffected, by the Indian Majority Act (IX of 1875). Manu lays it down, that a man can marry as soon as he finishes his period of studentship, which period is extremely elastic, ranging from thirty six years to nine years (*a*). But this text is not mandatory. In 1865, two learned Judges of the High Court of Bengal, were of opinion, that the marriage of a Hindu minor is a legitimate cause of expense, in regard to which his guardian has power to bind him (*b*). In this respect, the Hindu law presents a striking contrast to other systems of Jurisprudence, where the contract of marriage is, generally, only permissible between persons who have attained a certain age. In practice the natural guardian of the minor male arranges for his marriage.

Minority no bar.

(*a*) Manu III. 1. *Ibid.* IX. 94.

(*b*) Juggessar vs Nilamber, 3 W. R., 217.

Impotent persons and eunuchs.

* Are eunuchs and impotent persons eligible for marriage? The fact that marriage was and is the only *samskara* for women and that the sages (*a*) enjoin the gift of girls to suitable bridegrooms suggest a negative answer. In verse 55 of the Achara Adhyaya of the *smriti* of Yajnavalka, we find the qualities which a bridegroom should possess. They are youth, talent, learning and manhood (*b*). The sage is very emphatic as to the possession of manhood, for he uses the expression यत्नात् परीक्षितः। Potency is to be definitely determined and must not be presumed to exist. Vijnaneswar in commenting on the verse says that there are three purposes of marriage, viz., the gratification of the senses, the procreation of children and the performance of religious acts. So far as the first two purposes are concerned, marriage of an impotent male or a eunuch is useless. "The man must," says Narada, "undergo an examination with regard to his virile and he shall obtain the maiden only when the fact of his virility has been placed beyond doubt" (*c*). After describing the different varieties of impotent persons and

(*a*) Manu, IX, 89.

(*b*) एतैरेव गुणैर्युक्तः सवर्णः श्रोत्रियो वरः।
यत्नात् परीक्षितः पुंस्त्वे युवा धीमाञ्जनप्रियः॥

(*c*) XII, 8.

the method of determining potency, he lays down, "women have been created for the sake of propagation, the wife being the field and the husband the giver of the seed. The field must be given to him who has seed. He who has no seed is not worthy to possess the field" (*a*). So, it is evident that, according to Narada, an impotent male is ineligible for marriage. Manu says, "If the eunuch and the rest should somehow or other desire to (take) wives, the offspring of such among them as have children is worthy of a share" (*b*). The expression "somehow or other" is significant and implies, as Kulluka interprets, that a eunuch and the rest are not fit to marry. Medatithi, in his commentary, observes that the rule may refer to cases where the disqualification arose after marriage. Narayana remarks that there cannot be a legal marriage with a eunuch. Kulluka and Narayana explain 'children' in the above verse to mean *kshetraja* sons. The *mantras* that are recited at the marriage also show that the bridegroom must always be a person capable of begetting children (*c*).

(*a*) XII, 19. (*b*) IX, 204.

(*c*) रेतोऽहं रेतो मय्यं.....मव पुंसे पुत्रायवेत्तुवे श्रियैपुत्रायवेत्तवव हि सुनुते। I am the living seed, thou art the bearer thereof —come thou unto me for bringing forth sons, wealth and progeny.

An opposite conclusion may, however, be said to follow from the text of Manu quoted last and similar texts (*a*) of other *Smriti* writers giving the issue of an impotent person the right of inheritance. The possibility of impotent persons having any issue was dependent on *niyoga* and when these sages condemn the custom in very strong terms, it may safely be asserted that they could not have meant to sanction the marriage of impotent persons. It is true that the commentators beginning with Vijnanesvara agree in treating the issue of eunuchs as legitimate. But they base their legitimacy on *niyoga*; and in the present age, this custom is distinctly prohibited (*b*). So it is extremely doubtful if their issue may now be treated as legitimate. It is, therefore, clear that eunuchs and impotent persons cannot any longer be said to possess the capacity to marry.*

Insane persons.

The question whether a marriage contracted by a really insane person is or is not invalid was raised in a very early case (Daby *vs.* Radha 2 Morl 99) and it was held that such a marriage was valid. In a recent

(*a*) Yajnavalkya, II, 141.

(*b*) Brihaspati, XXIV, 12, 13.

* The portion within asterisk is based on original research.

Bengal case, which was carried in appeal to the Judicial Committee, the question was raised but was not decided (*a*). The commentators are agreed that the dumb and those born deaf or blind are eligible for marriage and the issue of such marriage is legitimate (*b*). This rule will also apply to the case of lunatics. But the rational view seems to be that the marriage with a lunatic ought to be declared a nullity for lunacy negatives a true consent, and there cannot be any acceptance of the gift of the girl by the lunatic husband. And accordingly we find under the early Roman law lunatics and idiots were absolutely incapable of contracting marriage.

Having a living wife, no incompetency in Hindu Law.

In European countries a man who has one wife living cannot marry ; there is no such incompetence on the part of a married man under the Hindu Law, as polygamy was allowed even in Vedic times. Manu, while sanctioning polygamy, reserves it for exceptional cases, for instance, it is said that where a wife drinks spirituous liquor, is of bad conduct, is rebellious etc,,

(*a*) 1911 Mouji Lall *vs.* Chandrabati, 14, C. L. J. 72.

(*b*) Mitaksara, Ch. II. Sec. X. 9 11. Dayabhaga, Ch. V. 18. Vivadachintamoni, p. 244, P. C. Tagore's translation. Smriti Chandrika, (K. Iyer's Edition) Ch. V, 32 Vyavahar Mayukha Ch. IV. sec. XI, 11.

she may be superseded by another wife (*a*). The reason why polygamy is abhorred in European countries is, as pointed out by Bentham, that it is not consistent with peace (*b*). Similar reason has made polygamy very rare amongst the present day Hindus. In some castes polygamy is prohibited. Mr. Mandlik points out that in Vadananagar caste, a man cannot marry a second wife, if his first wife be living (*c*). A question recently arose in the Madras High Court how far the remarriage of a Hindu, having a Christian wife alive, was valid. The facts were that a Hindu convert to Christianity married a Christian woman, according to the rules of Roman Catholic religion. Subsequently, and during the life-time of the Christian wife, he reverted to Hinduism and married a Hindu woman in accordance with the rites of the class to which the parties belonged.

(*a*) Manu, IX., 80-81.

(*b*) Compare Daksha's case who had two contentious wives. Bentham says in the East polygamy is consistent with peace. If Daksha's instance had been known to Bentham he would not have made the remark; but it is humbly submitted that in the East, as well as in the West, polygamy is not consistent with peace.

(*c*) Mandlik's Institutes of Yajnavalkya, p. 406. Bentham, p. 254.

It was held that the marriage was valid, and the offence of bigamy was not committed (*a*).

Formalities attending marriage.

Having discussed the nature of the marriage relation in Hindu law, and the different forms of marriage therein, we have next to consider the modes of contracting marriage. The formalities and ceremonies attending marriages fall within this head of discussion. In early Roman law marriage was contracted by consent ; and the betrothal accordingly consisted in consent. The transition from betrothal to marriage was effected by matrimonial cohabitation. Under the Hindu law, the marriage ceremony is preceded by betrothal, *viz* a promise by the guardian of a girl to give her in marriage (*b*). Narada says that previous to the union of man and wife, the betrothal takes place and the betrothal and marriage ceremony together constitute lawful wedlock (*c*).

Betrothal.

Betrothal is revocable.

A question has sometimes been raised as to whether the betrothment, or the mutual contract between two parties for a future

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(*a*) (1911) Emperor *vs.* Antony, I. L. R. 33 Mad, 371. 3 M. H. C. R. App. VII. See, however Emperor, *vs.* Lazar, I. L. R., 30 Mad., 550.

(*b*) Compare the *Asirbad* ceremony in Bengal and *tilak* ceremony in Behar and Upper India which are ceremonies evidencing betrothal, before marriage

(*c*) XII, 2.

marriage between the persons betrothed, is a revocable contract, or, is one that cannot be rescinded. Sir Gooroo Das Banerjee points out that there is some authority in the Hindu texts for holding the view, that such a contract can not be revoked (*a*). But there are numerous texts which support the contrary view. For example, Manu says that the bridal contract is known by the learned to be complete on the seventh step of the married pair, hand in hand, after the nuptial texts had been pronounced (*b*). Other sages might also be cited in support of this view (*c*). Raghunandana cites a text from Vasistha to show that, if the intended husband of the girl die after betrothal, the girl is to be regarded as unmarried (*d*). A text of Yama is also cited by him to strengthen his own opinion, that *Vagdana* or betrothal is something distinct from marriage, and that the dominion of the husband over wife does not arise from betrothal, but from the actual gift of the

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(*a*) Tagore Lectures, 1878, p. 84. Second Edition.

(*b*) Manu, VIII, 227.

(*c*) Yajnavalkya, I, 65. Vasistha cited in Colebrooke's Digest.

(*d*) अद्भिर्वाचा प्रदत्तायां म्रियेतोढे वरो यदि।
न च मन्त्रोपनीता स्यात् कुमारी पितुरेव सा॥
Udbahatattwa, p. 579.

bride at the time of marriage. Narada also ordains that the betrothal loses its binding force when blemishes are subsequently discovered (*a*). The courts have accepted the more sensible view of Raghunandana and other commentators, that a betrothment can be rescinded and is not irrevocable like marriage. In actual practice, such a revocation, if without any good cause, would be censured socially, but it would seem, that no action would lie for specific performance of a contract of betrothal. In the case of Umedkika *vs.* Nagandas Narotam, it was decided, after a very full discussion of the texts and the authorities, that the court would not order specific performance or compel the father to carry out a marriage with the person to whom the daughter had been betrothed (*b*). The same view was taken in Calcutta in an early case, and it was held that the ceremony of betrothal does not, by Hindu law, amount to a binding irrevocable contract of which the court would grant specific performance (*c*). It was suggested by Glover J., that an action for damages for breach of the contract would be the proper remedy ; and the Bombay

No specific performance of betrothal.

Damages, the proper remedy.

(*a*) XII, 3.

(*b*) 7 Bom H. C. R., O. C., 122.

(*c*) In the matter of Gunput, I. L. R., 1 Cal, 74.

High Court, in a recent case, allowed damages for repudiation of a betrothal by the father of the betrothed girl (*a*).

Unwillingness of the girl to marry, no defence.

We have seen already that the marriage of Hindu children is a contract made by the parents, and the children exercise no volition. This is equally true of betrothal, and there is no implied condition that fulfilment of the contract depends on the willingness of the girl at the time of marriage. It is true that a girl should not be forced into a marriage that would be odious to her; (*b*) but it is the duty of the father to use to the utmost his persuasive powers and his position as parent, in order to induce his daughter to be married to the person with whom he has entered into the contract of betrothal.

Vedic marriage, a simple rite.

Having dealt with betrothal and its legal effect, we proceed to the actual marriage ceremony. The Vedic marriage ceremonial was extremely simple. Custom has introduced great changes upon the Vedic ritual. Even now the ceremonies differ according to the usages of castes and provinces. Mr. Mandlik notices twenty seven ceremonies including *vagdana* (betrothal) (*c*).

(*a*) Purshotam Das *vs.* Purshotam Das, I. L. R., 21 Bom, 23.

(*b*) Shirdhar *vs.* Hiralal, I. L. R., 12 Bom, 480.

(*c*) Mandlik's Institutes of Yajnavalkya, p. 401.

The three principal ceremonies in marriage.

The Sanskara Tattwa of Raghunandana gives a number of the principal ceremonies. It is necessary to notice only three of them, the *Sampradan* or the gift, the *Panigrahan* or the acceptance of the bride's hand and the kindling of the nuptial fire, and the *Saptapadi* or the walking of seven steps by the married pair hand in hand. *(a)*. The *Saptapadi* or the walking of seven steps is, according to some writers, the most material of nuptial rites, for they hold that marriage becomes irrevocable on the seventh step being taken, and not before.

Performance of what ceremonies constitutes marriage.

The question as to how far the performance of these ceremonies is necessary to constitute a valid marriage is of great importance from the legal point of view. The consideration of this question has engaged the attention of modern writers on Hindu Law. There is, however, no complete unanimity amongst them on this point. Mr. Mayne *(b)* maintains that in the actual marriage, there are numerous formalities and many recitals of holy texts ; but the operative part of the transaction consists

(a) For a full description of these ceremonies, reference may be made to Sanskar Tatwa of Raghunandan, pages 383-385.

(b) Mayne's Hindu Law and Usage (7th Edition), p., 117.

Diverse opinions on the subject.

in the seven steps taken by the bridal pair. On the completion of the seventh step, the actual marriage has taken place. Till then, it is imperfect and revocable. Sir Gooroodas Banerjee(*a*) considers that according to the original authorities, all the ceremonies are necessary to constitute a valid marriage and that the status of wifehood does not come into existence without the *Saptapadi* and the recital of the nuptial texts. Mr. Colebrooke regards the ceremony of the bride's stepping seven steps as the most material of all the nuptial rites; for the marriage is complete and irrevocable, so soon as she has taken the seventh step and not sooner (*b*). On the other hand, Sir Thomas Strange's view is that the essence of the marriage rite consists in the consent of the parties (*c*). The bridal contract is, however, according to him, perfected upon the completion of the seventh step (*d*). According to Mr. Golap Chandra Sarkar (*e*), the secular gift and acceptance of the bride would be sufficient to create the relation of husband and wife between

(*a*) Tagore Lectures, 1878, pp. 94-95.

(*b*). Colebrooke's Miscellaneous Essays, Vol I, p. 218.

(*c*). Elements of Hindu Law, p. 44.

(*d*). Ibid, p. 37.

(*e*). Sarkar's Hindu Law (4th Edition), p. 113.

the acceptor and the girl. In his opinion, the status of wife-hood is created immediately after the gift of the girl and the acceptance by the bridegroom ; the ceremonies following the gift including *Saptapadi* are not essential parts of the marriage ceremony.

*It becomes necessary, therefore, to examine the original authorities on Hindu Law to see which of these views is borne out by them. "The gift of the daughters amongst Brahmans," says Manu (*a*), "is most approved if it is preceded by a libation of water, but in the case of other castes it may be performed by the expression of mutual consent." This lays down the manner how gift is to be made. The Brahmans are directed to pour water on the hands of the bridegroom before making the actual gift. The commentators of Manu are not agreed as to the extent of the application of this rule. Medhatithi and Kulluka limit it only to Brahmans and remark that, in other castes, the gift can be verbal, without the libation of water. Ram Chandra, however, would extend it to all the three regenerate classes, holding that the second part of the verse applies to intermarriages between different castes. "The ceremony of joining hands is prescribed for marriages with

Texts of Manu.

(*a*) Manu, III, 35.

women of equal caste (*Varna*) ; know that the following rule applies to weddings with females of a different caste" (*a*). This declares how the gift is to be accepted. All the commentators are agreed that the rule applies to marriages with a girl of the same caste. From the verse that follows, it is manifest that the *samaskar* mentioned here is a physical act, or, as Narayan puts it, the taking of (the bride's) hand by (the bridegroom's) hand (*b*).

The next verse, bearing on the question, runs thus :—"For the the sake of procuring good fortune to (brides) the recitation of benedictory texts and the sacrifice to the Lord of creatures are used at weddings ; but the betrothal (by the father or guardian) is the cause of the husband's dominion over the wife" (*c*. The point of time, when the husband's dominion over the girl commences, is stated here. *Pradanam* is the cause of conjugal dominion. *Pradanam* may mean, either the oral gift *sampradan* immediately preceding the *homam* and the recitation of sacred texts, or the agreement to give, *bagdan* as it is commonly called. Medhatithi

(*a*). Manu, III, 43.

(*b*) करेण करस्य ग्रहणम् पाणिग्रहणम्।

Mandalik's Manu, p. 306.

(*c*) प्रयुज्यते विवाहेषु प्रदानं स्वाम्यकारणम्। Manu, V, 152.

does not give any explanation of the word *pradanam* but, from his comments on verse 15 it is clear that he understands it to mean what we have called *sampradan* (*a*). Kulluka comments that *bagdanam* is the essence of *pradanam* so the girl comes under the dominion of the bridegroom from the *bagdana*. He remarks further that such dominion does not clothe the girl with the rights of wifehood, without the performance of the *saptapadi*. One cannot, however, be certain as to the exact intent of the word *bagdana* used by Kulluka. Apparently, he also refers to the gift at the time of the celebration of the actual marriage ceremony and not to the previous agreement to give in marriage. Manu makes no mention of what Narada calls *varana*, the choice of the bride ; nor do we find any reference to the contract between the bride's father and the bridegroom previous to marriage.

In chapter IX, we have the verses : "If the maiden dies after she has been orally given, the husband's younger brother shall wed her according to the following rule. Having according to the rules espoused her (who must be) clad in white garments, and be intent on purity, he shall approach her once

(*a*) अतश्च न विवाहकाल एव दानं प्रागपि विवाहावरणकाले अस्ति-दानं किमर्थमन्यथा विवाहः। Mandliks' Manu, p. 687.

in each proper season until issue (be had)" (*a*). From them, we get that the person, to whom the gift by words is made, becomes the husband (पति:) of the girl; but in case of his death afterwards, she is to be married by the celebration of proper rites, to the younger brother of that person. Kulluka views such subsequent marriage as a form of *niyoga* and the issue thereof as the children of the deceased. From verses 71 and 72 (*b*), we find that, after a gift has been made to one person, any subsequent gift of the same girl is condemned; and that after the gift has been accepted, the girl may not be abandoned, except when she is labouring under certain specified disqualifications. In Kulluka's opinion, verse 71 solves a doubt that there could be a second gift, if the wifehood is not acquired by reason of the non-performance of the *saptapadi*, or, that a gift made, but not followed by other ceremonies of marriage, is a good one. As to verse 72, Kulluka says that the abandonment is not blameable, if it takes place before the *saptapadi*,

(*a*) Manu, IX., 69, 70.

(*b*) न दत्त्वा कस्यचित्कन्यां पुनर्दद्याद्विचक्षण:।
दत्त्वा पुन: प्रयच्छन् हि प्राप्नोति पुरुषाऽनृतम् ॥
विधिवत्प्रतिगृह्यापि त्यजेत्कन्यां विगर्हिताम्।
व्याधितां विप्रदुष्टां वा छद्मना चोपपादिताम् ॥

on the knowledge of the blemishes mentioned. By the use of past participle दत्वा, a distinction is made between the act of giving and a promise to give in future. From these texts it is clear that *pradanam* means *sampradan*; and the oral gift (preceded by a libation of water, in the case of Brahmans only) is sufficient to divest the giver of his dominion over the girl and to invest the bridegroom with the same. Marriage, so it would seem, is complete as soon as the gift is made.

"The nuptial texts," says Manu, "are applied solely to virgins, and nowhere among men to females who have lost their virginity, for such females are excluded from religious ceremonies." "The nuptial texts are a certain proof that a maiden has been made a lawful wife, but the learned should know that they and the marriage ceremony are complete with the seventh step of the bride" (*a*). These verses occur where Manu is dealing with rescission of completed transactions (*b*). They enjoin the recital of the nuptial texts in the marriage of virgins only, such recital ending with the taking of the seventh step (*a*). Kulluka says that they lay down, not that

(*a*) VIII, 226, 227.

(*b*) VIII, 228.

recitation of the *mantras* is prohibited in the marriages of girls who are not virgins, but that their marriages cannot be called religious ones, and so are reprehensible. He further remarks that the girl does not become a wife till after the *saptapadi*. In the time of Manu, marriage of non-virgins was also allowed ; and so, the limitation of the rule to virgins only shows that the recital of the *mantras* was not necessary for investing the girl with wifehood.

Yajnavalkya.

We next proceed to Yajnavalkya. In the Acharakanda, we find the following, "Once is a maiden given ; (he who) takes her after giving is liable to be punished as a thief ; if a bridegroom better than the previous one comes, even the given (maiden) may be taken away" (*a*). To the last portion of the verse, Vijnaneswara adds the comment that this can only refer to a gift which has not been followed by the walking of the seven steps. In other words, he suggests that the *saptapadi* is the most essential and material part of the marriage ceremony. Read in the light of Vijnaneswara's comment, the text undoubtedly supports the conclusion that marriage can be revoked,

(*a*) Sulapani is of opinion that this applies to Asura marriages only. See Jagannath (Colebrooke's Digest, Vol II, p. 604).

before the ceremony of the walking of seven steps has been completed. In the chapter on Vyavahara, we have the verse, "For detaining a damsel after affiancing (दत्वा) her, the offender should also make good the expenditure together with interest." Vijnaneswara explains 'affiancing' as a verbal gift. But Yajnavalkya regards such a girl as 'remarried' (*a*).

Narada. Narada, as we have already seen, makes a distinction between *varana* and *pani-grahana*. Like Manu, he enjoins the gift of a girl once for all (*b*), and provides for the punishment of one who, having promised to give her in marriage, does not do so (*c*) in the absence of blemishes in the bridegroom. "When a man, after having received a maiden, abandons her although she is faultless, shall be fined and shall marry the maiden, even against his will" (*d*). In this verse, Narada regards the acceptance following the gift as different from the actual marriage rites. Chronic disease, deformity and loss of virgnity are the faults in a maiden for which she may be abandoned (*e*). Further, he classes maidens who have been 'disgraced

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(*a*) I, 67. (*b*) XII 27, 28.

(*c*) XII, 32. (*d*) XII, 35.

(*e*) XII, 36.

by act of joining hands' as *punarbhu*, or re-married women(*a*). So, it seems that Narada holds the marriage to be complete, but revocable for certain grounds, as soon as the gift is made.

Raghunandan's opinion.

Raghunandana, in his Udbahatattwa defines marriage (विवाह) as acceptance whereby wifehood is created. He states that the status of wifehood is created by the gift followed by acceptance, and that marriage precedes *panigrahan* (ceremony of joining of hands). To support his position, he cites a text from Haribansa which runs thus :— "That evil-minded person who took away the *wife* of another after *marriage* thus thwarted the recitation of the nuptial texts" (*b*). From the text of Manu (*c*) ordaining that the *panigrahan* ceremony is not necessary in intermarriages between different castes, he concludes that marriage and *panigrahan* are distinct things. With regard to the text of Manu, already quoted, to the effect that the nuptial texts are a certain proof of wedlock (*d*), he says that it only indicates that a special ceremony must be gone through after

(*a*) XII, 46.

(*b*) पाणिग्रहणमन्त्राणां विघ्नं चक्रे स दुर्म्मतिः
येन भार्य्या हृता पुर्व्वं क्रतौवाहे परस्य वै ।
See Udhbatattwa, p. 570.

(*c*) Manu, III., 43, 44. (*d*) Manu, VIII, 227.

marriage. He then refers to a sentence from Ratnakar to the effect, that the recital of the nuptial texts is, one of the limbs of the ceremony, connected with marriage. A text of Laghuharita is also cited to show that *vivaha* is effected before the *panigrahan* ceremony. The girl given in marriage does not, however, change her *gotra* till after she takes the seventh step with her husband. So, it follows, that though, in Raghunandana's opinion, a valid marriage is constituted by gift and acceptance, yet the ceremonies following them are necessary for the complete acquisition of wifehood. The conclusion, then that we arrive at from the above discussion, is that the gift and acceptance create a valid marriage, and that the ceremonies following them are necessary, more as evidence of marriage rather than as essential ingredients for constituting it.*

The ceremonies, we have mentioned above, are requisite in all forms of marriage. In the Madana Parijata, (page 157, Bibliotheca Indica Series) it is said, "that it should not be doubted whether the relation of husband and wife is produced in the Asura and other forms of marriage by reason of the absence of *saptapadi* or seven steps ceremony therein. Even in those forms

Madana Parijata.

* This is based on original research.

of marriage the observance of that ceremony is prescribed by way of command after acceptance."

Performance of necessary ceremonies presumed.

Where a marriage in fact is established there is a presumption that these ceremonies had been performed (*a*). But where the validity and legality of the marriage are the most essential points in issue, as in a suit for restitution of conjugal rights (the validity of marriage itself being disputed), it must be proved affirmatively that the necessary rites and ceremonies were performed. It is not enough to find in such a case that the marriage in fact took place leaving it to be presumed that the necessary formalities must have been complied with (*b*). The presumption, it is said, might rightly arise in cases involving questions of inheritance, and legitimacy of the offspring of the marriage(*c*). In Bombay, it has been held that, if the evidence is sufficient to prove the performance of some ceremonies usually observed on such occasions, a presumption is always to be drawn that they were duly

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(*a*) (1869) Inderan vs. Ramaswamy, 13. M. I. A., 141.

(*b*) (1900) Surjyamoni vs. Kalikanta, I. L. R., 28 Cal., 37 (50).

(*c*) See also (1885). Brindaban vs. Chandra, I. L. R., 12 Cal., 140; (1886) Administrator-General vs. Ananda Chari., I. L. R., 9 Mad., 466.

completed until the contrary is shown (*a*). In Madras, Grihapravesh and Rathasunti have been held to be ceremonies necessary for marriage ; and the expenses for performing them must be borne by the persons responsible in law to meet the charges connected with the girl's disposal in marriage, who in this case was the husband's undivided brother (*b*). The non-performance of Vivahahoma and Saptapadi, amongst castes in which these ceremonies are not necessary, cannot render the marriage invalid. This circumstance may be relied on to show that there was no valid marriage where they form, with or without others, the criterion of intention to enter into the contract of marriage ; but it cannot be relied on to prove that marriage was in any particular form (*c*). It is well to state here that generally the doctrine of *factum valet* is brought into requisition by the courts, to render valid marriages in which even the necessary ceremonies were not performed.

Roman Law.

In early Roman law, the transition from betrothal to marriage was effected by matri-

(*a*) (1896) Bai vs Moti, I. L. R., 22 Bom, 509.

(*b*) (1902) Vaikuntham *vs.* Kallipiram, I. L. R., 26 Mad., 497.

(*c*) (1909) Authi vs. Ramanijam, I. L. R., 32 Mad., 512.

monial cohabitation (*a*). But in Hindu law consummation is not necessary to complete marriage; the law of England agrees in this respect with Hindu law (*b*).

Effect of marriage.

The effect of marriage, according to most systems of law, was to produce a unity between the husband and wife with respect to their proprietary rights. It is said that in Hindu law the effect of marriage is to produce a unity between husband and wife for religious, and not for any legal and secular, purposes; and a text of Manu (*c*) is cited in support of this view. Whatever may be the view of later *Smriti*-writers, it is clear, from some of the aphorisims of Jaimini (*d*), that one effect of marriage is to give each of the parties thereto control over the other's wealth. On the seven-

Co-ownership of husband and wife.

Jaimini's view

(*a*) Sohm's Institutes of Roman Law, pp. 470-71.

(*b*) Weldon vs Weldon, L. R., 9 P. D. 52. See Dadaji vs Rukmabai, I. L. R., 10 Bom., 301 (311).

(*c*) IX. 45-46. This text of Manu is translated by Buhler thus :—He only is a perfect man who consists of (three persons united), his wife, himself and, his offspring; thus (says the Veda), and learned Brahmans propound the maxim 'The husband is declared to be one with the wife.' The maxim is translated by Sir William Jones thus :—'The husband is even one person with the wife,' *for all domestic and religious, not for all civil purposes.*

(*d*) See chapter II, *ante.*

teenth aphorism (*a*), Sabar's comment is as follows :—"The wife is entitled to wealth earned by the husband and vice versa. Hence sacrifice must be performed by both jointly, because if one of them is unwilling to perform it, the gift cannot be valid. Therefore gift of money even earned by the husband is invalid if the wife's consent is not obtained." This quotation shows that both Jaimini and Sabar entertained as, if not more, liberal views with regard to the rights of the wife as did John Stuart Mill, one of the greatest of modern European thinkers. "Some people are," says Mill, "sentimentally shocked at the idea of a separate interest in money matters, as inconsistent with the ideal fusion of two lives into one. For my own part, I am one of strongest supporters, of the community of goods, when resulting from an entire unity of feeling in the owners, which makes all things common between them. But I have no relish for a community of goods resting on the doctrine that what is mine is yours but what is yours is not mine ; and I should prefer to decline entering into such a compact with any one though I were myself the person to profit by it" (*b*).

(*a*) See, p. 86, *ante*.

(*b*) Mill's Subjection of Women, p. 106-7.

Smrities and the deterioration of the wife's right.

But the wife's equal rights in this respect with the husband, as follow from Jaimini's aphorism, seem to have been impaired in the period anterior to those of the *Smrities*, where we read the text "whatever is acquired by the wife belongs to the husband"(*a*). The position of the wife, under the Hindu law at this period, agrees in many respects with that of a wife under the common law of England, before the Married Woman's Property Act was passed. The effect of marriage, under the common law, was to constitute a sort of partnership between husband and wife, in which the husband had very extensive powers over the partnership property, while the wife had not only no power of alienating it, but was also incapable of making a will, or of entering into a contract on her our account (*b*).

Subsequent improvement of her rights.

The position of a Hindu wife gradually improved. We find her possessed of separate property known as *Stridhan*, which she could dispose of by will or alienate, and which would be liable for her debts. We also find her endowed with the capacity of entering into a contract enforceable in courts of law. The contractual disabilities of women in England have been

(*a*) Manu, VIII. 416.

(*b*) Holland's Jurisprudence, p. 332 (9th Edition).

modified by recent legislation, especially by the Married Woman Property Act, 1882. But, even now, so far as the community of goods is concerned, the position of the wife under the Hindu law is not worse than that of the wife under the law of England The husband can, under the Hindu law, take the *Stridhan* or peculiar property of the wife only in times of distress or famine (*a*), and there is no obligation on him to repay the same. The idea underlying the text of Manu, 'whatever a wife earns belongs to her husband,' is the basis of the arguments of the *purba paksha* (exponents of the view opposed to that of Jaimini) as appears from the nineteenth aphorism which runs thus, "The husband has full control over the wife as she is purchased or bought." Sabara expands this aphorism thus :— "Therefore her (wife's) ownership of wealth is apparent and not real. Her ownership of wealth is on behalf of her husband. Just as our cowherd is the master of our oxen, in the same sense has the wife ownership over her husband's wealth." This position is distinctly refuted in the seventeenth and eighteenth aphorisms which embody Jaimini's view and convey the idea that the wife is entitled to wealth earned by the husband, or vice versa ; and that her

English Law compared.

ownership in her husband's wealth is real. The notion of the community of interest, approved of by Mill in the passage quoted above, finds forcible expression in these two aphorisms of Jaimini. Apastamba, expresses a similar view in the three following *sutras*. "No division takes place between husband and wife, for, from the time of marriage, they are united in religious ceremonies. Likewise also as regards the rewards for works by which spiritual merit is acquired and the acquisition of property. For they declare that it is not a theft, if the wife expends money on occasions of necessity during the absence of her husband" (*a*). These *sutras* has been often construed to mean that there cannot be a division between the husband and the wife in respect of property, whereas it is clear that they refer to the division of ceremonies (*b*).

Apastamba's view.

We have already had occasion to indicate before that, according to Jaimini, the wife is a co-owner with the husband; and that her right in the husband's wealth is real, and not a fictitious one. She is not a co-

According to Jaimini, the wife a co-owner not in a subordinate sense.

(*a*) Apastamba, Prasna II, Ka 14, Sc. 16, 17, 18, See West and Buhler's Digest, p. 531, 2nd Edition.

(*b*) (1904) Dular vs. Dwarka, I. L. R., 32 Cal., 234, (242).

owner in a subordinate sense, as some later commentators seems to have thought. The logical conclusion, that would follow from Jaimini's aphorisms, is that the wife's right in her husband's property would not be extinguished by his death. Jimutvahana comes to the same conclusion, when he says "nor is there any proof of the position that the wife's right in her husband's property, accruing to her from her marriage, ceases on his demise"; although he is careful to add that the cessation of the widow's right of property, if there be male issue, appears only from the law ordaining their succession (*a*). Later commentators have made the position of the wife in this respect considerably worse than it was in Jaimini's time. Mitramisra, the author of the Viramitrodaya, for instance, says :—"her (wife's) right is only fictional but not a real one; the wife's right to the husband's property which to all appearances seems to be the same (as the husband's right) like a mixture of milk and water, is suitable to performance of acts which are to be jointly performed. But it is not mutual like that of the brothers, hence it is said that there may be separation of brothers but not that of

Jimutavahana's view.

Mitramisra's view opposed to Jaimini's.

(*a*) Dayabhaga, Chap. XI, sce. I., 26.

husband and wife" (*a*). He apparently makes the wife a co-owner in a subordinate sense with her husband; and, on, his authority, judicial decisions have laid down that a Hindu wife has no property or co-ownership in her husband's estate, in the ordinary sense, which involves independent and co-equal powers of disposition and exclusive enjoyment (*b*). In Bengal, it has accordingly been held that a Hindu wife is not a co-owner with her husband, in the sense that she can maintain a suit against him to establish her right to a share in his property and for partition, in the absence of any allegation that he refuses to maintain her, or has ceased to do so (*c*). The view accordingly has prevailed that the share which a widow takes on the death of her husband, on partition amongst her sons, is not taken from her husband's estate by way of survivorship in continuation of any pre-existing interest (*d*),

Judicial decisions follow Mitramisra.

(*a*) Viramitrodaya Translation by G. C. Sarkar. p. 165.

(*b*) (1880) Narbada vs Mahadeo, I. L. R, 5 Bom, 99.
(1879) Jamuna vs Machal, I. L. R., 2 All, 315.
(1900) Becha vs. Mathina, I. L. R., 23 All, 86.
(1910) Srinath vs Probodh, 11 C. L. J., 580.

(*c*) (1903) Punna vs. Radhikissen, I. L. R., 31 Cal, 476.

(*d*) (1908) Sorola vs Bhuban, I. L. R., 15 Cal, 292.
Promotha vs Srimati Nagendra, 8 C. L. J., 489

but is taken in lieu of (or by way of provision for) her maintenance (*a*). This view is not warranted by the aphorisims of Jaimini already referred to, for the logical conclusion from them is that the wife gets the share, on partition, by virtue of the co-ownership which she acquires at the moment of her marriage.

Wife's share on partition between her husband and his sons, and its extent.

All the commentators are agreed that the wife is entitled to get a share, at the time of partition between her husband and her sons. But there is a great divergence of opinion amongst them, as to the manner of alloting such share. In the Bengal school, where a father makes an equal division amongst his sons, his sonless wives are each entitled to a share, either equal to that of a son, or half of such a share, as the case may be, according as they are provided with *stridhan* or not (*b*). In the Benares School, the text of Yajnavalkya quoted below (*c*) is relied on as determining the principle of allotment of the share of a wife on partition. In commenting on this text, the Mitakshara says that, if the father divides the property equally

In Bengal.

In Benares.

(*a*) (1889) Hemangini vs. Kedarnath, I. L. R., 16 Cal, 758 ; (1906) Hridoy vs Behari, 11 C. W. N., 239.

(*b*) See Dayabhaga Ch. III, sec. II, 31 and 32. This is according to Srikrishna's gloss.

(*c*) "यदि कुर्यात्समानंशान् पत्न्याः कार्य्याः समांशिका ।
न दत्तं स्त्रीधनं यासां भर्त्रा वा श्वशुरेण वा" ॥ II, 115.

amongst his sons, all the wives must have equal share with his sons, provided they have got no *stridhan* or separate property; and in case of their possessing *stridhan*, they will get half of the share of the sons. This half need not be an exact moiety, but so much of the property as together with *stridhan* would amount to the defined share (*a*). The Madana Parijat also takes this view. It says, "If stridhan had been given, then the mode of allotment should be understood to be that laid down in the chapter on *Adhivedanika*. The manner laid down there is this, *viz.*, if it had been given, a half is ordained. The word 'half' (in 'half is ordained') means a portion, not an exact moiety" (*b*). The Vyavahar-mayukha quotes the text of Yajnavalkya, and agrees with the Mitakshara in the view regarding the share which a wife is entitled to get on a partition between her husband and his sons, where the partition is equal (*c*). Nilkantha does not recognize unequal partition between the father and the sons, which

In Bombay.

(*a*) Jodoo vs. Brojo, 12 B. L. R., 385. Viramitrodaya—Ch. II, pt. I, S. 10. G. C. Sarkar's Translation.

(*b*) 9 M. L. J., 99.

(*c*) Vyavahara Mayukha, Ch. IV, sec. IV, 15, p. 43, Mandlik's Edition.

he regards as a relic of a past age (*a*); for he says, "The partition by deduction is not proper in the Kali age." The Smriti Chandrika takes a view peculiar to itself, as will appear from the following comment on the text of Yajnavalkya referred to above :— "The meaning of this text is, that where a father, even where he is old, chooses to render all, inclusive of himself, partakers of equal portions, then he ought to take on account of each of his wives, a share equal to that taken by himself" (*b*). The wives, according to this view, do not take a share but the husband takes it on their account. This, in fact, recognizes the complete identity between a wife and her lord, and removes the doubt as to whether the text of Yajnavalkya was not opposed to the passage of Harita, which declares, "Partition does not take place between a wife and her lord." In the case of equal partition by the sons, the Mithila school adopts the same rule as the Mitakshara.

In Madras.

In Mithila.

From the views of the different schools given above, as to the manner in which the allotment is made to a wife on partition, the

Difference between the Bengal and other schools.

(*a*) Ch. IV, Sec. IV, 11, p. 42, Mandlik's Edition (translation.)

(*a*) Smriti Chandrika (Kristnaswamy Iyer's Edition)., Ch. II, Sec. 1, 39.

difference between the Bengal school and the other schools in one point is manifest. The distinction is that under the Bengal school only the sonless wives are entitled to a share on partition and not all the wives, as in the other schools.

One of the legal effects of marriage, then, on these authorities, is that there is a kind of identity between the wife and her husband in proprietary rights, by virtue of which she gets a share equal to that of a son, when a partition takes place at the instance of male members. It follows that the wife has such an interest in her husband's property that, when partition takes place between her husband and his sons, or his coparceners, the share of the husband may be appropriately made over to her, to be held by her during his absence (*a*).

Wife's right to maintenance.

We have already had occasion to point out that the duty of maintaining the wife, the infant son and the aged parents is strictly enjoined by Manu and other sages as also by the commentators. Manu tells us "that the husband receives his wife from the gods ; (he does not wed her) according to his own will ; doing what is agreeable to the gods, he must always support her while she is faithful" (*b*). The right of a Hindu wife

(*a*) (1910) Srinath vs. Probodh, 11 C. L. J., 580.

(*b*) Manu, IX, 95.

to maintenance is not based on contract (*a*), but is connected with the right called co-ownership with her husband and rests on the same moral identity arising from the marriage relations ; but the two are rather co-ordinate rights than one the basis of the other (*b*). Mr. Justice Ashutosh Mookerjee has, however, in a recent decision, held that the wife's right to maintenance is to be attributed to a kind of identity with her husband in proprietary right, though of a subordinate character (*c*). Mr. Justice Sankarannair holds, that the right of a wife to maintenance is a matter of personal obligation, and that it rests on the identity arising from marriage relations and is not dependent on the possession of any property by the husband (*a*). It seems, to us, that in point of fact, the claim is based on the provisions of Hindu law which expressly govern rights and duties of the different members of the joint family. It may be stated here that the rights of a wife and a widow respectively to

Its basis.

Views of Justice Mukerjee.

(*a*) (1878) Sidlingapa vs. Sidava, I. L. R., 2 Bom., 624 ; (1900) Gopikabai vs. Dattatraya, I. L. R., 24 Bom., 386.

(*b*) (1880) Narbadabai vs. Mahadeo, I. L. R., 5 Bom, 99 (103).

(*c*) (1910) Srinath vs. Probodh, 11 C. L. J., 580.,

(*d*) (1908) Surampalli vs. Surampalli I. L. R., 31 Mad, 338.

maintenance rest entirely on different grounds.

No agreement evades the right.

As pointed out by Mr. Justice West of the Bombay High Court, the right of maintenance and possibly to a share on partition, though it may not amount to more than an equity to a settlement, and is not the subject of contract until ripened and defined by events, is not to be evaded by any arrangement purposely made in fraud of it (*a*).

The husband primarily liable and his relations in certain circumstances.

The wife can claim the right to maintenance against the husband alone. Other relations are not bound to support her, except where the husband has abandoned her, and his property is in the possession of the other relations (*b*). She is entitled in such cases to receive maintenance to an extent not exceeding one third of the amount of assets of the husband in the hands of such relations. Legal cruelty, which would bar a claim by a husband for restitution of conjugal rights, will also justify a wife in deserting her husband's home and in claiming separate maintenance. When we deal with the law relating to restituton of conjugal rights, we shall discuss the question as to what constitutes legal cruelty.

(*a*) (1880) Narbada vs. Mahadeo, I. L. R., 5 Bom., 99.

(*b*) Ramabai vs. Trimbak, 9 Bom. H. C. R., 283; Gopika vs Dattatraya, I. L. R., 24 Bom., 386.

Forfeiture of maintenance.

Let us in the next place proceed to consider the circumstances under which the wife's right to maintenance may be forfeited. From the moment of marriage, the Hindu husband is his wife's legal guardian, even though she be an infant; and he has an immediate right to require her to live with him in the same house. As soon as she has attained puberty, her home is necessarily her husband's house. The duty imposed on a Hindu wife to reside with her husband, wherever he may choose to reside, is a rule of Hindu law and not merely a moral duty (*a*). A wife accordingly can not claim maintenance, if she refuses to live with her husband without any adequate reason. Mere unkindness or neglect, short of cruelty, would not be sufficient ground for leaving the husband (*b*). The reason is that a wife, in living apart from her husband without a justifying cause, commits a breach of duty which disentitles her to maintenance (*c*). As we shall see later on, there is no such obligation on the part of the widow to live

Desertion of the husband.

(*a*) (1901) Tekait Monmohini vs Basanta Kumar, I. L. R., 28 Cal, 751.

(*b*) (1866) Kullyanesuree us Dwarkanath, 6 W. R., 115; (1875) Sitanath vs Srimati Haimabutty, 24 W. R., 377.

(*c*) (1908) Surampalli vs. Surampalli, I. L. R., 3 Mad, 338.

in her husband's house. A separate maintenance was allowed to the wife, although she left her husband's protection, on the ground that she was justified in so doing, when he habitually treated her with cruelty and such violence as to create the most serious apprehension for her personal safety (*a*).

Unchastity.

It is a settled principle of Hindu law that a Hindu widow's right to claim maintenance is forfeited upon her unchastity (*b*). But the question whether an unchaste wife can claim any maintenance has given rise to conflicting opinions; and in this connection one has to keep in view the distinction between maintenance as a *dives* and what has been styled as starving maintenance, that is, allowance of bare food and raiment. "An exceedingly corrupt wife," says Manu, "let her husband confine to one apartment, and compel her to perform penance which is prescribed for males in cases of adultery" (*c*). Kulluka explains the verse to enjoin physical restraint, perhaps, as Sulapani observes, for the purpose of preventing the recurrence of misconduct on the part of the

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(*a*) (1891) Matangini Dasi vs. Jogendra Chundra Mallick, I. L. R., 19 Cal, 84.

(*b*) Ramanath vs. Rajanimoni, I. L. R., 17 Cal, 674; Moniram Kalita vs. Kerry Koletani., I. L. R., 5 Cal.,, Kanlasami vs. Muru, I. L. R., 19 Mad, 6. (*c*) XI, 177.

Texts of the *Smritis*.

wife. Vishnu, Vasistha and Brihaspati lay down that an adulterous wife becomes pure after the performance of the prescribed penances. She is, according to the last two sages, to be forsaken only when she had carnal commerce with a low class male, or with certain other persons mentioned by them (*a*). Narada directs that she shall have to lie on a low couch, receive bad food and bad clothing and her occupation shall be the removal of rubbish (*b*). "Deprived of her position," says Yajnavalkya, "in the family, clad in dirty clothes, living upon morsels barely sufficient for life and humiliated, an unchaste wife shall be made to lie down upon bare earth". Vijnaneswara explains this text as laying down the conduct she should be made to follow not for expiating her misdeed but for destroying her evil tendencies (*c*). A doubt has been raised whether this text will be regarded as mandatory, and not merely preceptive (*d*). One reason for regarding the text of Yajnavalkya

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(*a*) Vishnu, LIII, 8; Vasistha, XXI, 8, 9 and 10; Brihaspati, XXIII, 14.

(*b*) XII, 91.

(*c*) हताधिकारां मलिनां पिण्डमात्रोपजीविनीम्।
परिभूताम् अधःशय्यां वासयेद्व्यभिचारिणीम् ॥ I, 71.

(*d*) Muttamal vs. Kamakshy, 2 M. H. C. R., 337; Valu vs. Ganga, I. L. R., 7 Bom, 84 (89).

The texts, mandatory or preceptive.

as imposing a moral duty is supposed to be that there are texts, which show that an unchaste wife can be forsaken or abandoned by the husband and may be turned out of doors without any maintenance (*a*). And from this, it is said to follow that the other injunction about maintaining an unchaste wife cannot be imperative or obligatory. But, as has been pointed out by Mr. Mayne, the passages, upon which this dictum rests, refer to the maintenance either of the wife of disqualified heirs or of the widows of deceased coparceners. Mr. Golap Chandra Sarkar however refers to a text of Manu cited in the Vivada Ratnakara (*b*) to show that if a woman is licentious her abandonment is ordained ; and in his opinion the provision made by Hindu law about stârving maintenance of an unchaste but penitent wife is only a moral injunction on the husband (*c*). But, it is submitted, the text cited by Mr. Sarkar does not justify the proposition that a Hindu wife can be absolutely abandoned by the husband for unchastity. The author of the Mitakshara in his comment of the text of Yajnavalkya—"a

(*a*) Yajnavalkya, II, 142.

(*b*) P. 426 ; Asiatic Society's Edition.

(*c*) Mayne's Hindu Law and Usage, p. 66. (7th Edition).

woman guilty of adultery is purified by catamenia ; but her abandonment (*tyaga*) is ordained in case of conception by adultery, and in case of causing abortion or killing the husband as well as in case of committing heinous sins *(a)*"—explains *tyaga*, not as abandonment in the sense of being expelled from the husband's house, but as deprivation of all conjugal rights and religious ceremonies *(b)*. The word *tyaga* or abandonment in the text cited by Mr. Sarkar should be interpreted similarly. In other words, the unchaste wife is to be kept apart in the house and is to be given such food and clothing as will keep body and soul together.

Views of the commentators.

Commentators have maintained the opinion that the unchaste wife would be entitled to a starving maintenance only. The Viramitrodaya is in favour of an allowance of food and raiment to the unchaste wife. This appears from the following passage *(c)*, "As for the allowance of food and raiment even to the unchaste wives, as is declared in the following text, namely,—'Also let one act in the same manner towards even the fallen wives ; food and raiment, however, should be allowed to them, if they reside in the

(*a*) Sarkar's Hindu law, p. 367.

(*b*) Yajnavalkya, I, 72.

(*c*) Viramitrodaya, Translation by G. C. Sarkar, p. 153.

vicinity of the dwelling house' :—that, however, is to be explained as referring to the husband, consistently with what is ordained by Yogisvara after having premised the husband, as in the text.—'Deprived of her position * * bare earth' (*a*)". Nilkantha in the Prayaschitta Mayuka takes the same view. Referring to a text of Chaturvinshati Smriti, which provides that there should be no abandonment of any woman except in case of such sins as the murder of a Brahman and the like, he explains that even in such cases a woman should do penance in the house (*b*). Madhavacharya in the Parasara Dharma Smriti explains the law to the same effect (*c*).

Unchaste wife entitled to bare maintenance.

From what has been stated above, it is clear that Hindu legislators were humane enough to allow bare maintenance even to an unrepentant and unchaste wife, to save her from utter destitution. In no case is she to be forsaken and to be cast adrift on the world ; on the other hand, an opportunity is to be given to her for reformation.

(*a*) Yajnavalkya, I, 71.

(*b*) स्त्रीणान् नास्ति परित्यागो ब्रह्महत्यादिभिर्विना ।
सत्वापि गृहमध्ये तु प्रायश्चित्तानि कारयेत् ॥ Prayaschitta Mayukha, Benares Edition, p. 91.

(*c*) Parashara Dharma Sanhita, Sanskrit Bombay Series Ed. p. 352, Vol. II. part I.

It is difficult, as we attempted to show before, to distinguish between legal and moral injunctions in Hindu law. It is better to construe the texts about maintenance liberally in favour of an unchaste wife and to regard them as legal injunctions. Mr. Mayne apparently takes this view and he supports it with the text of Vasistha which treats even adultery on the part of a wife as an expiable offence. We have also the remark of Apararka in his comments on verse 70 and 72 of Yajnavalkya to the effect :—"She who has performed expiatory rites, becomes fit for conjugal and social association" (*a*).

Judicial decisions in Bengal and Madras.

The judicial decisions in Bengal and Madras lay down the rule that a wife though unchaste shall be entitled to a starving maintenance, if she has abandoned a vicious course of life at the time of the litigation (*b*). But, in Bombay, the course of decisions has not been uniform. In the case of Homana vs. Timannabhat (*c*), Sir Michael Westropp, C. J., expressed the opinion that a Hindu widow entitled to a bare or starving maintenance under a decree, was not to be de-

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(*a*) कृतप्रायश्चित्तातु संव्यवहार्य्या भवति । Apararka, Anandashrama Series, Vol. I., p. 98.

(*b*) (1895) Kandasami vs. Muruga, I. L. R., 19 Mad, 6 ; Ramanath vs Rajanimoni, I. L. R, 17 Cal, 674.

(*c*) (1877) I. L. R., 1 Bom., 559.

In Bombay.

prived of the benefit of that decree by the fact that she has since been leading an incontinent life. In Valu vs. Ganga (*a*), Sir Charles Sargeant, C. J., dissented from the above case and held that an unchaste widow was not entitled even to a bare maintenance. The Chief Justice, speaking of the right of the unchaste wife to maintenance, observed :—"It will have to be determined how far the texts which provide for maintenance will be regarded as mandatory and not merely preceptive and if the former to what extent the Courts will express them". This view was affirmed in a subsequent case (*b*). But, after more than a quarter of a century, two learned Judges of the Bombay High Court (Chandravarkar and Knight, J. J.), after a full consideration of all the Hindu law texts, seem to adopt the view of Sir Michael Westropp *(c)*. The question of the maintenance of the unchaste wife was not directly in issue in all these cases. Should it ever come before the courts, it is submitted that the authorities we have referred to and those collected by Hemadri (*d*) will support the view that we have ventured to advance here.

(*a*) (1882) I. L. R., 7 Bom., 84.

(*b*) (1884) Vishnu vs. Manjamma, I. L. R., 9 Bom, 108.

(*c*) Parami vs Mahadevi, I. L. R., 34 Bom., 278.

(*d*) Chaturvarga Chintamani, Parishesh kanda, p. 846.

Amount of maintenance.

The Hindu sages lay down rules for regulating the amount of maintenance to the wife unjustly forsaken by the husband. Yajnavalkya says :—"He who deserts a wife that is obedient to his commands, diligent in her duties, mother of an excellent son and speaking kindly, shall be compelled to pay the third part of his wealth to her, if poor, to provide maintenance for her" *(a)*. The amount of maintenance in such cases is fixed at one third of the property possessed by the husband. For other cases, no rule is prescribed as to the amount of maintenance to be awarded. We will discuss the principles on which the assessment of maintenance is to be made in the next chapter dealing with the status of widows—for the same principles will also govern the case of a wife. It may be stated here generally, that the amount which a wife is entitled to get for her maintenance would depend on the position in life of the husband, the extent of his property, and the claims of other members of the husband's family.

The right of a wife to maintenance is not transferable (*b*). But the question may

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(a) Yajnavalkya, I, 76. See Mitakshara, comment on the same. See Vyavahara Mayukha, XX. I.

(b) (1880) Narbada vs. Mahadeo., I. L. R, 5 Bom, 99.

Decree for arrears of maintenance transferable.

arise whether, where a decree has been obtained for arrears of maintenance against the husband, she is entitled to transfer it. It is submitted she can. It has been pointed out, in a very recent case, that it is settled law that, when the claim for maintenance has been merged in an actual judgment, the right under it is assignable (*a*). Debts of her husband take precedence over the maintenance of the wife. But a husband cannot make a wholesale gift of his estate, so as to deprive his wife of her maintenance (*b*).

Effect of marriage.

In the next place, we proceed to the consideration of the behests of Hindu law as to the effect of marriage on the persons of the parties. Certain duties are reciprocal. "'Let mutual fidelity continue until death,' this may be considered as the summary of the highest law for husband and wife. Let man and woman, united in marriage, constantly exert themselves, that they may not be disunited and may not violate their mutual fidelity" (*c*). There is, thus, an obligation on the part of the wife to keep unsullied the bed of her lord and a like obligation on the part of the husband to be faithful to his wife. "It is a crime in them

Reciprocal duties.

(*a*) Asadali vs Hyder, I. L. R., 38 Cal., 13 (20).

(*b*) (1879) Jamna vs Machul, I. L. R., 2 All, 315.

(*c*) Manu, IX, 101, 102.

both," says Narada, "if they desert each other or if they persist in mutual altercation except in the case of adultery by a guarded wife" *(a)*. "If a man," says he in another place, "leaves a wife who is obedient, pleasant-spoken, skilful, virtuous and mother of male issue, the king shall make him mindful of his duty by inflicting severe punishment on him" *(b)*. "He who forsakes a wife," says Yajnavalkya *(c)*, "though obedient to his commands, diligent in household managements, mother of an excellent son and speaking kindly shall be compelled to pay the third of his wealth, or if poor to provide maintenance for that wife." "A man who deserts a faultless wife," says Vishnu, "shall suffer the same punishment as a thief" *(d)*. Manu also lays down that he who casts a wife off unless guilty of a crime shall be fined by the king six hundred panas *(e)*. The wife, likewise, cannot desert her husband; and the Hindu law is so strict in this respect that it lays down that, even where a wife has been legally superseded, she would be punished by the king, if she deserts her husband. "If a wife," says Manu, "legally superseded shall depart in wrath from the house, she must

(a) XII, 90.
(b) Narada XII, 95.
(c) I, 76.
(d) V, 163.
(e) VIII, 389.

either instantly be confined or abandoned in the presence of the whole family" (*a*). That, under the ancient Hindu law, the king's powers were very extensive in respect of the wrongful desertion of the husband by a wife appears from the following text of Manu :—"Should a wife proud of her family and the great qualities of her kinsmen, actually violate the duty which she owes to her lord, let the king condemn her to be devoured by dogs, in a place much frequented" (*b*).

Husband's right of chatisement.

Let us next consider the rights of the husband over the wife. Manu says that a wife * * who has committed fault may be beaten with a rope or a split bamboo, but on the back part of the body and never on the noble part. He who strikes them otherwise will incur the same guilt as a thief (*c*). But this rule of Hindu law is, now, of merely academic interest as the Indian Penal Code governs cases of assault of the wife by a husband, and makes such assault punishable. In England, a husband might, formerly, have chastised his wife for levity of conduct ; but his right to do so has recently been negatived by the Court of

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(*a*) Manu, IX, 83. (*b*) Manu, VIII, 371.

(*c*) Manu, VIII 299. 300.

Appeal (*a*). The husband, under the early Roman law, had full authority to chastise his wife and in some cases even to kill her. But under the Hindu law, his power of chastisement was subject to the limitation stated above.

Husband the legal guardian of the wife.

The husband is the legal guardian of his wife's person from the moment of marriage. According to the custom of the caste or community to which he belongs, he may, however, be precluded from such custody until the wife be fit for marital intercourse (*b*). The husband protects her in youth, says Manu. Youth is interpreted by Kulluka to mean coverture (*c*). Yajnavalkya also says that a father should protect the maiden daughter, the husband (should protect her) when she is married (*d*). The husband has the right to the companionship of his wife. If a third party deprives him of her society he has his remedy in the courts of law. The infringement of this right of the husband to the custody of his wife is made criminally punishable under the Indian Penal Code. So, where the father of a minor girl of fifteen takes her away from her hus-

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(*a*) (1891) R. vs. Jackson, 1 Q. B., 671.

(*b*) Santosh vs. Gera, 23 W. R., (C. R.), 22; Arumuga vs. Viraraghava, I. L. R., 24 Mad, 255.

(*c*) Manu, IX, 3. (*d*) I, 85.

band without the latter's consent, such taking away amounts to kidnapping from lawful guardianship, even though the father may have had no criminal intention in so doing. The reason is that the husband, and not the father, of a married Hindu girl is her lawful guardian (*a*).

Restraint of the wife's liberty.

A Hindu husband would be entitled to exercise a certain amount of restraint on the liberty of the wife. In many parts of India, where the custom of *parda* prevails, the husband might require her to remain within the zenana. Under the law of England, a husband was up till quite recently allowed to restrain the personal liberty of the wife (*b*). Nothing will justify a wife in leaving her home except such violence as renders it unsafe for her to continue there or such continued ill-usage as would be termed cruelty in the English matrimonial Court.

The effect of marriage is the union of the bride and the bridegroom. There is a text of the Vedas to the following effect, "Bones (identified) with bones, flesh with flesh, and skin with skin, the husband and

(*a*) In the matter of Dhuronidhar Ghose, I. L. R., 17 Cal, 298. Tekait Monmohini vs. Basanta, I. L. R., 28 Cal, 751.

(*b* But, see, Reg vs. Jackson, 1 Q. B., 671. (1891).

wife become as it were one person" (*a*). From the seventeenth and eighteenth aphorisms of Jaimini quoted in the previous chapter, it would appear that the husband and wife must perform sacrifices and all religious duties jointly. Vrihaspati also says, "In Scripture and in the Code of law, as well as in popular practice, the wife is declared to be half the body of her husband sharing the fruit of pure and impure acts; of him whose wife is not deceased, half his body survives." Manu also says that the husband is as it were even one person with his wife (*b*). These passages show that the marriage tie is indissoluble and the wife must associate with the husband, and the husband with the wife, throughout their joint lives. The duty imposed upon a Hindu wife to reside with her husband wherever he may choose to reside is not only a moral duty but a rule of Hindu law. It has, accordingly, been held that an agreement at the time of marriage by the husband not to remove his wife from her paternal abode, being contrary to the prnciples of Hindu law and public policy, is invalid (*c*). Under

Wife must reside with her husband.

(*a*) Dayabhaga, Ch. IV, Sec. II, 14.

(*b*) Manu, IX, 45.

(*c*) Tekait Monmohini vs. Basanta., 28 Cal., 751 (1901.) Dadaji vs. Rukmabai, I. L. R., 10 Bom, 301; Binda vs. Kaunsilia, I. L. R., 13 All, 138.

English law compared.

the English Law, an agreement providing for future separation is invalid, though an agreement for present separation is enforceable (*a*).

The rights of the husband capable of legal enforcement.

From what has been said in the previous pages of the chapter, it is manifest that the Hindu Law texts, so far they relate to conjugal cohabitation, and impose restrictions on the liberty of the wife, and place her under the control of the husband, are rules of law creating a legal right in the husband based upon the jural relation which exists between him and the wife. The reciprocal duties of the wife and the husband towards each other are not duties of imperfect obligation to be enforced by religious sanction. They are rules of law and were enforceable either by the sovereign or by the Brahman assessors appointed by him who, in ancient Hindu times, had to administer justice. Ample provision has been made for the punishment of a wife guilty of neglect of marital duties. In a text of Manu (*b*), it is ordained that a king could condemn a woman to be devoured by the dogs in a public place, if she actually violated the duty which she owed to her lord. Another text of

(*a*) (1879) Marshal vs. Marshal, L. R., 5. P. D. 19; (1854) 1 H. L. C 538. (*b*) VIII, 371.

the same sage also cited before (*a*) is to the effect that if a wife legally superseded shall depart in wrath from the house, she must either instantly be confined, or abandoned in presence of the whole family. The confinement may be by the husband at a time when redress was by self-help ; or it would be lawful confinement to be awarded by the king after some sort of judicial determination. Vishnu is, indeed, very harsh on a delinquent wife when he ordains that the king should put to death a woman who violated the duty which she owes to her lord, the latter being unable to restrain her (*b*). These texts of the Hindu sages lead to the conclusion that the king had extensive powers over a delinquent wife. He could punish her with capital sentence, if she violated her duties towards her husband ; and *a fortiori* he could order the wife to return to her husband on penalty. If in ancient times the Hindu king could condemn a deserting wife to be devoured by the dogs, it stands to reason that in modern times, our Courts must be held to have the much lesser power of imprisoning her if she, having illegally deserted her husband, refuses to obey a decree for res-

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a IX, 83.

(*b*) Vishnu, V, 18.

Restitution of conjugal rights by the courts.

titution of conjugal rights. It follows that, according to the spirit and letter of Hindu law, the enforcement of conjugal right by ordering restitution does not fall beyond the scope of the king's functions. A suit for restitution of conjugal rights, by a Hindu husband, is provided for by the Hindu law itself. Such a suit would be cognizable by a Hindu sovereign in ancient Hindu times and therefore would not be beyond the jurisdiction of civil courts in modern times. Mr. Justice Pinhey of the Bombay High Court was, therefore, it is submitted, in error in supposing that the practice of allowing suits for restitution of conjugul rights originating in England under peculiar circumstances was transplanted from England into India, and that under the Hindu law such a suit would not be cognizable by a civil court *(a)*. The Hindu law texts, as we have seen above, amply support the jurisdiction of the king in ancient times to entertain a plaint for restitution of conjugal rights, and show the principles upon which it ought to be exercised.

Cases on the point

The course of judicial decisions in this country on the question of the jurisdiction of the civil courts to entertain

(*a*) (1885) Dadaji vs. Rukhmabai, I. L. R., 9 Bom, 529.

In Calcutta.

a suit for the restitution of conjugal rights has not been uniform. In 1866, Jackson and Macpherson, J. J., of the High Court of Calcutta held that a suit would lie by the husband in the nature of restitution of conjugal rights, for a decree declaratory of those rights to be enforced in case of disobedience by the imprisonment of the wife, or the attachment of her property, or by both. Mr. Justice Seton-Karr, however, thought that a suit by a husband to recover possession of the person of his wife would be maintainable, a view in which the other two learned judges did not agree (*a*). A year later the same High Court followed the decision of the majority of judges in that case (*b*). In the same year, in a case between Mahomedans, the Judicial Committee of the Privy Council observed, that suits for restitution of conjugal rights would be entertained in the civil courts in India, and further remarked that disobedience to the order of the court would be enforceable only by imprisonment or attachment of property or both (*c*). Their Lordships referred to an earlier case in which it was laid down that a suit for resti-

(*a*) (1866) Chotun vs. Ameer, 6 W. R., 105.

(*b*) (1867) Koobur vs. Jan, 8 W. R., 467.

(*c*) (1867) Moonshee Buzloor vs. Shumsoonissa, 11 M. I. A., 551 ; 8 W. R., (P. C.) 3.

tution of conjugal rights between Hindus and Mahomedans did not lie in the ecclesiastical side of the Presidency Courts in India, and quoted with approval the following observations of Dr. Lushington, in that case :— "The civil courts in India can bend their administration of justice to the laws of the various suitors who seek their aid. They can administer Mahomedan law to Mahomedans, and Hindu law to Hindus ; but the ecclesiastical law has no such flexibility" (*a*). In 1875, Markby and R. C. Mitter, J. J., while admitting that a husband is entitled to a decree which declares him entitled to conjugal rights and orders his wife to return to his protection, held that such a decree was not enforceable by imprisonment or attachment *(b)*. In the opinion of Mr. Justice Markby, a decree which orders a wife to return to her husband's protection amounts to nothing more than a declaration that the relationship of husband and wife exists between the parties. In 1876, the Bombay High Court differed from this view and held that a suit for restitution of conjugal rights was within the jurisdiction of the civil courts and a decree ordering such

In Bombay.

(*a*) Ardaseer vs. Perozeboye, 6 M. I. A., 348, 390.

(*b*) (1875) Gatha Ram vs. Moohita, 23 W. R., (C. R). 179.

restitution is capable of being enforced under section 200 of the Civil Procedure Code (*a*. In a later case, Sir Richard Garth entertained no doubts about the jurisdiction of the civil courts to try suits for restitution of conjugal rights in this country (*b*). On the other hand, in the year 1885, Mr. Justice Pinhey of the Bombay High Court was clearly of opinion that under the Hindu law, which was the religious law of the parties, a suit for restitution of conjugal rights would not be cognizable by a civil court (*c*). This decision was carried in appeal to the original appellate side of the Bombay High Court; and Sir Charles Sargeant, C. J., and Bayley, J., while feeling no hesitation in reversing the decree of Pinhey, J., based their judgment on the state of the case-law rather than upon any consideration of the texts. This settled the law for Bombay where the same view has since been always entertained (*d*). In 1890, the

(*a*) (1876) Yamuna vs. Narayan, I. L. R., 1 Bom, 164.

(*b*) (1879) Jogendra vs. Hari dass, I. L. R., 5 Cal, 500.

(*c*) (1885) Dadaji vs. Rukhmabai, I. L. R., 9 Bom, 529; on appeal, I. L. R., 10 Bom, 301.

(*d*) (1892) Bai Sari vs. Sankla, I. L. R., 16 Bom, 714; (1898) Fakirguuda vs. Gangi, I. L. R., 23 Bom, 307.

In Allahabad.

question of jurisdiction in such cases came up for decision before the Allahabad High Court (*a*) and Mahmood, J, after a review of the Hindu law texts on the point, came to the conclusion that the civil courts of British India as occupying the position in respect of judicial functions formerly occupied in the system of Hindu law by the king, have undoubtedly jurisdiction in respect of the enforcement of such rights and duties. In 1900, in a case before the Calcutta High Court the jurisdiction of the Civil Courts to entertain suits for the restitution of conjugal rights by Hindus was questioned by counsel. It was suggested, that in the Calcutta High Court, the point has never been in contest, and that it has been assumed rather than directly held that such a suit would lie. In reply to this argument, the learned Judges remarked as follows, "In Bengal there does not appear to have ever been any doubt that under Hindu law a husband had a right to have brought under his protection a wife who had run away from his house. The only matters about which there appears to have been doubt were what form of suit the husband could bring for relief and by what courts such a suit would

(*a*) (1890) Binda vs. Kaunsilia, I. L. R., 13 All, 129.

be heard" (*a*). It may now, therefore, be taken to be settled law for all the Presidencies that such a suit would lie between Hindus in the civil courts of the country. In a suit by the husband for restitution of conjugal rights, the Court within whose jurisdiction the husband resided would have jurisdiction to entertain the claim. In a recent Bombay case, objection by the wife, who was not residing within the territorial limits of the court where the suit was instituted, to the jurisdiction of the Court to entertain such a suit was overruled on the ground that as the cause of action consists in the wife absenting herself from her husband's house without his consent, it must be deemed to arise at his house only (*b*).

Place of accrual of cause of action in such suits.

There are no texts of Hindu law which speak directly of the defences which the wife may raise in a suit for restitution of conjugal rights. But, it can not be disputed upon the authorities, that such defences are open to her as are possible under the principles of natural justice, read in the light of the Hindu law of marriage. In the case of Bazloor Rahim vs. Shumsoonissa, their Lordships of

Wife's defences in such suits

(*a*) (1900) Surjyamoni vs. Kalikanta, I. L. R, 28 Cal, 37.

(*b*) (1893) Lalitagar vs. Bai Suraj, I. L. R., 18 Bom, 316.

(1) Cruelty.

the Judicial Committee pointed out "that if cruelty rendering it unsafe for the wife to return to her husband's dominion were established, the Court might refuse to send her back. It may be, too, that the gross failure by the husband of the performance of the obligation which the marriage contract imposes on him for the benefit of his wife, might if properly proved, afford good grounds for refusing to him the assistance of the Court. And there may be cases in which the Court would qualify its interference by imposing terms on the husband" (*a*). As has been remarked by Mahmood, J., the general principles of humanity upon which our courts act in such matters, have led to a long course of decisions which recognise the rule that legal cruelty of the husband would be a sufficient cause for refusing restitution of conjugal rights. The question what constitutes legal cruelty is by no means free from difficulty. "The essential features of cruelty are," it was said in Milford *vs.* Milford, "familiar. There must be actual violence of such a character as to endanger personal health or safety, or there must be the reasonable apprehension of it. The Court, as Lord Stowell once said, has never been driven off

Features of Cruelty in English law.

(*a*) 11 M I. A., 551, 615.

this ground. Nor do the cases cited in the argument, whatever general expressions may have fallen from the Court, affect to decide that any thing short of this will be sufficient to found a decree upon cruelty. The ground of the Court's interference is the wife's safety, and the impossibility of her fulfilling the duties of matrimony in a state of dread." In the recent case of Russel *vs.* Russel (*a*), Lord Chancellor Herschell pointed out that it was not sufficient to prove cruelty in a popular or wide sense of the term, but that it was necessary to show that the conduct complained of was such as to have caused danger, or a reasonable apprehension of danger, to life, limb and health, which is far more comprehensive in scope than mere physical violence.

What constitutes cruelty in India.

Judges have differed on the question whether the same state of circumstances which would be an answer to a suit for restitution of conjugal rights in the case of an European would be equally so in the case of a Hindu. Mr. Justice Melvill thought in an early case that the Hindu law on the question of legal cruelty would not differ materially from the English law (*b*). Sir Richard Garth in a

(*a*) (1897) A. C., 395.

(*b*) 1876) Yamuna vs. Narayan, I. L. R., 1 Bom., 164.

later case took the contrary view (*a*). Mr. Justice Mahmood in Binda *vs.* Kaunsilia (*b*) agreed with Mr. Justice Melvill. The true rule, however, seems to have been stated by Mr. Justice Mookerjee, *viz*, that although, by reason of a well-marked difference between habits and customs of the Indian and European communities, the same rules may not always be applicable in such a matter as a suit for restitution of conjugal rights, yet there can be no doubt that the principles upon which relief ought to be granted or refused would be substantially identical in the two cases(*c*). The courts in this country have refused to help the husband by way of restitution when he kept a concubine and by such conduct compelled the wife to leave his house, and also when the wife would herself run the risk of being put out of caste if she were to associate with him, he having been outcasted.

Dular *vs.* Dwarka.

In the case of Dular *vs.* Dwarka (*d*), Mr. Justice Mookerjee in an elaborate judgment

(*a*) (1879) Jogendra vs. Harrydass, I. L. R., 5 Cal, 500.

(*b*) (1890) Binda vs. Kaunsilia, I. L. R., 13 All, 126, 160.

(*c*) (1905) Dular vs. Dwarka, I. L. R., 34 Cal, 971, 977.

(*d*) I. L. R., 34 Cal, 971.

reviewed all the earlier decisions (*a*) on the subject and came to the conclusion that where the husband, after he had transferred his favours to his concubine, habitually ill-treated the wife and grossly insulted her religious feelings by making his concubine live in his house as a member of his family, and subsequently drove the wife out of the family residence at the instance of the prostitute, his conduct amounted to a grave, weighty and serious matrimonial offence within the meaning of the law, which fully justified the wife in living apart from her husband. The decision of Sir Richard Garth in Jogendranandini *vs.* Harrydass does not conflict with the view of Mr. Justice Mookerjee. The husband, in that case, lived a profligate life and was in the habit of consorting openly with prostitutes, and, on several occasions, had insulted his wife by introducing one of them into her private apartment ; and the husband was given a decree for the restitution of conjugal rights, subject to the condition that the house to be provided for the wife must be, in every respect, fit for the reception of a virtuous and respectable lady. But it is clear from

(*a*) (1870) Lalla Gobinda, vs. Dowlutbuttee, 14 W. R, 451 ; (1885) Paigi vs. Sheonarain, I. L. R., 8 All, 78.

the judgment that the circumstance, which weighed with the court in granting a decree, was that the wife though she left her husband's roof had allowed her husband to visit her at her father's place and to cohabit with her as man and wife, and that this conduct on her part amounted to condonation and reconciliation.

In some cases, conduct short of cruelty is good defence.

It is to be noticed however that there may be cases where conduct, though short of legal cruelty, on the part of the husband may bar a suit for restitution. We need seek no better illustration of this than the case of Moola *vs.* Nundy *(a)*, where the Court refused to decree restitution to a husband who, after transferring his affections to a mistress, had ill-treated the wife and had refused her maintenance during the period of separation. This case was relied on as an authority for holding that the Court may, in exceptional cases, exercise judicial discretion by refusing restitution, although it was doubted whether the decision was in consonance with the spirit of Hindu law. In Dular *vs.* Dwarka Mr., Justice Mookerjee held that there may be cases in which something short of legal cruelty may bar a suit for restitution; and this view is in consonance with the

(*a*) (1872) 4 N. W. P. 109.

law in England as expounded by judicial decisions (*a*).

Text of the sages on the point.

* Mr. Justice Mahmood is probably right when he says that a decree refusing restitution of conjugal rights to the husband, in spite of the fact that the conduct of the husband fell short of legal cruelty, would be inconsistent with the tenor of Hindu law. Manu condemns a wife who shows disrespect to a husband who is addicted to an evil passion, is a drunkard or diseased (*b*) and in another place the same sage tells us that "though destitute of virtue or seeking pleasure elsewhere (*i, e.* in company with another woman) or devoid of good qualities yet the husband must be constantly worshipped as a god by a faithful wife" (*c*). Yajnavalkya also says that obedience to the husband is the supreme duty for the wife and that even where the husband is guilty of *mahapataka* (most grievous sin or crime) she must wait till he performs penance or expiation *(d)*. These texts lead to the inference that a wife can not at least abandon a husband when his conduct though reprehensible yet falls short of legal cruelty.

(*a*) See observations of Lopes, L. J., in Russel vs. Russel. (1895) A. C., 384.

(*b*) IX, 78. (*c*) Manu V, 154.

(*d*) Mitakshara, Ch. IV, 77.

The texts would rather support the broader proposition that, however wicked the husband may be, the wife cannot desert him In allowing the wife to resist a suit for restitution of conjugal rights, on the ground of conduct in the past amounting not only to, but even falling short of, cruelty courts have acted on the principles of humanity.

Principles of humanity recognized in Hindu law

Although under Hindu law, as the texts above cited would seem to suggest, the contravention of these principles of humanity would not justify a wife in deserting her husband, still it cannot be said that those principles are not recognized by Hindu law. There are several texts which enjoin, on the husband, the duty of honouring his wife. Yajnavalkya says (*a*) that women are to be honoured by their husbands and every member of their husband's family with ornament, food, raiment and flowers. Manu also says :—"The husband receives his wife from the Gods ; he does not wed her according to his own will : doing what is agreeable to the Gods, he must always support her while she is faithful (*b*)." These texts breathe a spirit of anxious tenderness and respect for the wife. Where these injunctions are violated, it would seem that the courts would

(*a*) I, 72. (*b*) IX, 95.

be justified in giving effect to the spirit of Hindu law by refusing restitution. *

Marriage with second wife no defence.

The texts cited above make it clear that the mere fact of marrying a second wife and the consequent unkindness to the first wife is not sufficient to disentitle a Hindu husband from claiming restitution of conjugal rights (*a*). It was pointed out by the Madras High Court that the husband's marrying a second wife does not justify desertion of the husband by the first wife. It follows, therefore, that the marriage with a second wife would not be any answer to a suit for restitution. Mere taking of a wife's jewel, or unkindness, or neglect short of cruelty on the part of the husband would similarly be no answer to such a suit (*b*). Unfounded imputations upon the wife's chastity would also seem to be no good defence to a suit for restitution (*c*).

Nor is imputation upon wife's chastity

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* Portion within asterisk is based on original research.

(*a*) (1863) Virasami vs. Apasami, 1 M. H. C. R., 375; (1872) Jeebodhon vs. Sundhoo, 17 W. R., 522.

(*b*) (1875) Sitanath vs. Haimabatty, 24 W. R. 377; Matangini vs. Jogendra, I. L. R., 19 Cal, 84, (1891); 4 C. W. N., 488 (489).

(*c*) Yamuna vs. Narain, I. L. R., 1 Bom, 164 (173).