Degradation of husband from caste—how far a good defence.

Another defence to a suit for restitution by the husband, under the Hindu law, appears to be that the husband has been turned out of caste since the marriage. The following texts seem to support this :—But she who shows aversion towards a mad or outcast husband * * * shall neither be cast off nor deprived of her property (*a*). "A husband, who is not an outcast, should not be forsaken by women desirous of happiness in another world". In the case of Paigi *vs.* Sheonarain (*b*), the learned judges of the Allahabad High Court however granted a decree for restitution to a husband who, in consequence of his having left his wife and cohabited with a Mahomedan woman, had been turned out of caste, subject to the condition that he should first obtain restoration to caste. Mr. Justice Mahmood thought, in a later case, (*c*) that this decision was not in consonance with the precepts of Hindu law. Mr. Justice Blair, refusing to follow it held that it is no defence in a suit for restitution of conjugal rights to say that the husband is out of caste nor ought a decree

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(*a*) Manu, IX, 79. For the next text see colebrookes Digest Bk IV, verse LVIII. (*b*) I. L. R. 8 All, 78.

(*c*) Binda vs. Kaunsilia, I. L. R., 13 All, 126 (123).

to be made conditioned on his being restored to caste (*a*). The text of Devala—A husband may be forsaken by his wife if he be an abandoned sinner, or an heretical mendicant, or impotent, or degraded or afflicted with pthisis, or if he have long been absent in a foreign country (*b*)—would seem to support the decision in Paigi *vs.* Sheonarain. But notwithstanding all this, Manu's text about the marriage tie being indissoluble would rather tend to show that the later decision of Mr. Justice Mahmood is more in keeping with the spirit of Hindu law.

Right of wife to sue for restitution of conjugal rights under Hindu law.

In English law, a wife has the right to petition against her husband for restitution of conjugal rights (*c*). The Hindu law also contemplates a similar right in the wife. Yajnavalkya ordains that the deserter of a faultless wife should be compelled to pay her a third part of his wealth, if poor, to provide her with maintenance. Narada also says :—"A man who forsakes a wife who is obedient, pleasant-spoken, virtuous and the mother of male issue the king shall make him mindful of his duty by inflicting severe punishment

(*a*) (1904) Sahadur vs. Rajwanta, I. L. R., 27 All, 96.

(*b*) Colebrooke's Digest Bk. IV., CLI Cal. Ed.

(*c*) Orme vs. Orme, 2 Addams, 382.

on him" (*a*). These texts amply support the proposition that the help of the king, and so of courts of justice, is available to the wife, under the Hindu law. Judicial decisions also recognise such right in her (*b*).

Defences open to the husband.

We will now deal with the defences which are open to a husband in a suit for restitution by the wife. Unchastity on the part of a wife is surely an answer to such suit, for the Hindu law ordains that an adulterous wife can be forsaken (*c*). When the Hindu law provides that a husband would be justified in forsaking a cruel and unkind wife, cruelty on her part would seem also to be an answer. Baudhayana says, "Prudent men forsake instantly a wife who speaks unkindly" (*d*). There is another text to the same effect, "Let him banish from his house a wife, who constantly dissipates wealth and who speaks unkindly" (*e*). There has been no reported case yet on the point; and such a case can seldom arise in practice. The apostacy of one of the parties does not in the case of Hindus *perse* annul the marriage and a Hindu

(*a*) Narada, XII, 95.

(*b*) Binda vs. Kaunsilia. I. L. R. 13 All 125; See also, 28 Cal., 37. (*c*) Narada, cited in Digest Bk IV, LXIII.

(*d*) Colebrooke's Digest, Bk. IV, LXVI.

(*e*) Ibid B. K. IV. LXIV.

husband is entitled to demand the custody of his wife and does not lose his rights over her by the fact that she has renounced Hinduism. This position is supported by the following text of Manu :—"That neither by sale nor desertion can a wife be released from her husband,"—which, in other words, means that the marriage tie is under the Hindu law indissoluble. But, in an early case, Sir Adam Bittelson said that this text of Manu has reference to those who are within the pale of Hindu law (*a*). Act XXI of 1850 enacts that loss of caste or change of religion shall not inflict on any person forfeiture of *rights* and property ; and the question arises whether the word *rights* is not confined to proprietary rights and is intended to cover such personal rights as constitute the status of the individual. It seems to us that Act XXI of 1850 repeals and abrogates so much of the provisions of Hindu law as by reason of change of religion deprive any party either from continuing to hold property owned before conversion, or from succeeding to property as an heir after conversion. There seems to be no authority in the Hindu law itself for the proposition that an apostate is absolved from all civil

Renunciation of religion by wife no defence in suit by husband.

(*a*) Rahmed vs. Rokeya, 1 Norton's Leading Cases on Hindu Law, 12.

obligations, and so far as the matrimonial bond is concerned, such a view would be contrary to the spirit of Hindu law which regards that bond as indissoluble (Manu V, 156-158 IX, 46). The courts have accordingly dissented from the view taken by Sir Adam Bittelson (*a*). In Muchoo *vs.* Arzoon Sahoo (*b*), the plea of change of religion by the husband was held to be a good plea so as to bar a suit for restitution by him. If a wife, for instance, says that the husband has, by change of religion, placed himself in such a position that she cannot possibly associate with him without doing violence to her religious opinions and to her inherited social feelings and prejudices, it would be a good defence. Act XXI of 1866 has made some important provisions for dissolution of marriage when either spouse becomes a convert to Christianity. This will be noticed in its proper place.

No formal demand and refusal necessary before suing for restitution.

Unlike the law of England no formal demand and refusal is necessary before a suit for restitution by either spouse can be

(*a*) Government of Bombay vs. Ganga, I. L. R, 4 Bom, 330. Administrator-general vs. Ananda-chari, I. L. R., 9 Mad, 466 ; In the matter of Ramkumari, I. L. R., 18 Cal, 264. In Re-Millard, 10 Mad, 218.

(*b*) 5 W. R., 235.

commenced. In the case of Binda *vs.* Kaunsilia, the Allahabad High Court held that the personal law of the Hindus did not require an antecedent demand to sustain a suit for restitution of conjugal rights nor make restitution unenforceable against a minor. Mr. Justice Mahmood was of opinion in that case that the withholding of conjugal rights by either party is a continuing wrong and that article 120 read with section 23 of the Limitation Act provided the period of limitation ; in other words, he held that a claim for restitution is never barred by limitation. The Bombay High Court took the same view in the case of Bai Sari *vs.* Sankla (*a*). These cases laid down, therefore, that article 35 of the Limitation Act (XV of 1877), which provided that a suit for restitution of conjugal rights must be brought within two years from the period when restitution is demanded and is refused by the husband or the wife, being of full age and of sound mind, did not apply to the case of Hindus. The reason of the Allahabad decision seems to be that article 35 can only apply to suits where demand and refusal are necessary and as this is not a necessary condition of a suit by a Hindu husband or wife the article has no application to such

Limitation Act (XV of 1877).

(*a*) I. L. R., 16 Bom, 714.

Sir Lawrence Jenkin's view of the question.

a suit. Sir Lawrence Jenkins, C. J., then Chief Justice of Bombay, said "that there is a fallacy underlying this train of reasoning," and his Lordship held that the correct view of the law would be to modify the ruling of the Allahabad High Court so far as to make the article applicable to Hindus and Mahomedans in case of suits preceded by demand and refusal (*a*). The Calcutta and Madras High Courts have since concurred in the view of the learned Chief Justice (*b*). This article does not find a place in the Limitation Act (IX of 1908). It is a usual thing in Hindu families for a wife to go and stay with her parents and brothers and if owing to any domestic quarrel, the wife should in a fit of temper refuse to return, the husband would have been compelled, so long as article 35 was in the statute book, to take the matter into court within two years. This often prevented reconciliation for as soon as the matter was exposed in court, it became difficult for the parties to come to amicable terms. Time heals many things ; it heals the dissentions between the husband and the wife, and if the parties know that

Limitation Act (IX of 1908).

(*a*) Dhanjibhoy vs. Hirabai, I. L. R, 25 Bom, 644 (F. B.)

(*b*) Asirunnessa vs. Buzloo, I. L R., 34 Cal, 79 ; Saravanai vs. Poovayi, I. L. R., 28 Mad, 436.

there is no period of limitation fixed for bringing a suit they might trust to time to get the same relief, which a court of law would grant, without the exposure which a suit entails.

There has been much controversy as to the mode in which a decree for restitution is to be enforced. Mr. Justice Markby was of opinion that a decree for restitution was a decree for declaration of rights of the parties as husband and wife. The Judicial Committee (see the case of Buzloor Rahim *vs.* Shamsunissa cited before) and all the courts in India agree that it is to be enforced by imprisonment of the spouse or attachment of the property. The mode in which a decree for restitution of conjugal rights is to be enforced is now provided for by order 21, rule 32 and 33 of the Code of Civil Procedure. Act V of 1908, rule 32, ch. (1) provides that where the party, against whom a decree for restitution of conjugal rights has been passed, has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced by his detention in the civil prison or by attachment of his property or by both. Rule 33 is new, and may be fairly compared with like provisions of the English Matrimonial Causes Act, 1884 (47 & 48 Vict., C. 68). Rule 33 runs as follows :—

Mode of enforcement of decree for restitution of conjugal rights.

Civil Procedure Code (Act V of 1908)

(1) "Notwithstanding anything in rule 32, the Court, either at the time of passing a decree for the restitution of conjugal rights, or at any time afterwards, may order that the decree shall not be executed by detention in prison.

(2) Where the Court has made an order under sub-rule (1) and the decree-holder is the wife it may order that in the event of the decree not being obeyed within such period as may be fixed in this behalf, the judgment debtor shall make to the decree-holder such periodical payments as may be just, and if it thinks fit, require that the judgment-debtor shall, to its satisfaction secure to the decree-holder such periodical payments.

(3) The Court may from time to time vary or modify any order made under sub-rule (2) for the periodical payment of money, either by altering the times of payment or by increasing or diminishing the amount or may temporarily suspend the same as to the whole or any part of the money so ordered to be paid and again revive the the same, either wholly or in part as it may think just.

(4) Any money ordered to be paid under this rule may be recovered as though it were payable under a decree for money.

In the last chapter we discussed in some detail the question as to how far the right of the wife to enter into contracts with third

persons and her liability on it are not affected by coverture (*a*). We need not repeat the discussion here. But we may add that a text of Yajnavalkya (*b*) makes it clear that a wife could borrow on her own account and the husband would not be liable for such debt unless the same was contracted for the benefit of the family. Yajnavalkya like Narada says that this rule does not apply to the case where debts are contracted by the wives of washermen, hunter etc. (*c*). The text cited also shows that a woman could contract a debt for the benefit of the family. It would thus seem that under the Hindu law a wife, merely as such, has no authority to bind her husband's credit. Under the common law of England a wife was incapable of entering into a contract on her own account. (*d*).

Right of wife to enter into contract previously dealt with.

English law on the point compared

If the wife could contract debts quite independently of the husband, if she could look after her own affairs and manage her own properties, it would seem to follow that she could sue and be sued alone in her own name. This rule has been adopted by the courts here and is based on manifest good

(*a*) Chapter II, *ante* pp. 159-160.

(*b*) Yajnavalkya, II, 46.

(*c*) Ibid, II, 48, Mitakshara or the same.

(*d*) Holland's Jurisprudence, 332.

For purposes of contract wife and husband not one persons

sense (*a*). The Hindu law does not recognise the identity of husband with the wife for all purposes. The Civil law, unlike the common law of England treated the husband and wife as distinct persons ; and for the purpose of contracts at any rate Hindu law regards the wife as distinct from the husband.

Remarriage of woman while her first husband is alive —not permitted.

It is one of the incidents of wifehood under the Hindu law that the wife is under an obligation not to marry again during the life-time of her husband. Remarriage by a woman while her husband is alive is so repugnant to the spirit of Hindu law, that the courts refuse to recognise such marriage even where there is a prevailing custom on the ground that such custom is immoral as legalizing adultery (*b*). In Uji vs Hathi, the Bombay High Court decided that the caste could not sanction a woman's remarriage without a divorce or without a proceeding to which both husband and wife were parties. In Madras, on the other hand, it has been held that there is nothing immoral in a caste custom by which divorce and remarriage are permissible on mutual

(*a*) Bhrb vs Madhub, 1 Hyde, 281.

(*b*) Reg vs Sambhu, I. L. R., 1 Bom, 347. Uji vs Hathi, 7 Bom A. C. J 133. Reg vs Kassan (HC) 2 Bom, 124. Bai Ugri vs Patel, I. L. R., 17 Bom. 400 (406).

agreement, on one party paying to the other the expenses of the latter's marriage. (*a*)

Wife incompetent witness for or against husband under Hindu law.

Marriage under the Hindu law does incapacitate a husband or wife from being competent witnesses against each other in a court of law. The husband cannot be a surety for the wife, nor can the wife be a surety for the husband. The following text of Yajnavalkya supports these two propositions :—"Of brothers, also of husband and wife, as well as of father and son, suretyship, indebtedness or witnessing of one with respect to the other has not been allowed while they are undivided (*b*). But these rules of Hindu law are now of academic interest, as the Evidence Act and the Contract Act govern matters of this kind respectively.

Except in certain circumstances.

Manu has said that women under certain circumstances can give evidence in any cause (*c*).

Not so under Evidence Act.

The Indian Evidence Act enacts that in all civil proceedings, the parties to the suit and the husband and the wife of any party the suit shall be competent witnesses. It further enacts that in criminal proceedings against any person, the husband

(*a*) Chetti vs. Chetti, I. L. R., 17 Mad, 479.

(*b*) I, 52.

(*c*) Manu VIII, 70.

or the wife of such person, respectively shall be a competent witness (*a*). In section 122 it is enacted that no person, who is or has been married shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married ; nor shall he be permitted to disclose any such communication, unless the person who made it, or his representative-in-interest, consents, except in suits between married persons or proceedings in which one married person is prosecuted for any crime committed against the other.

Sec 122 Indian Evidence Act (I of 1872.)

It is well known that under the common law of England, husband and wife were treated for most purposes as one person ; that is to say, the very being or legal existence of the woman as a distinct person was suspended during the marriage or at least was incorporated and consolidated with that of her husband. Upon this principle, of an union of person in husband and wife, depended almost all the legal rights, duties and disabilities which either of them acquired by the marriage (*b*). For this

Husband could not make a gift to wife under the common law of England.

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(*a*) Sec. 120 of the Indian Evidence Act (I. of 1872 ; R. *vs.* Khyroollah, 6 W. R., Cr. R., 21 (1866. For a case under earlier law see R. vs. Gour Chunder, I. W. R., C. R., 17 (1864).

(*b*) Blackstone's Comm, Vol. I. 442.

reason a man could not make a gift of any property to his wife, for the gift would have supposed her to possess distinct and separate existence (*a*). On the same ground it is said that, if the wife be injured in her person or property during coverture, she could bring no action for redress without the concurrence of her husband, neither could she be sued without making her husband a party to the cause. All this is very different in Hindu law, where the husband and the wife are considered as two distinct persons for many purposes. It is true that Manu has said that a husband is even as one person with his wife, but the comment of Kulluka shows that this unity is for religious and not for civil purposes. Apastamba has ordained that there is no division between husband and wife.

Not so under Hindu law.

Apastamba.

*This rule of Apastamba is true only in respect of the acts of religion—acts enjoined by the Vedas and Smrities in connection with sacrifices, but does not hold good with regard to partition of things. The sacrifices must be performed jointly with the husband, and so must many acts connected with it. The view of the commentators also seem to

(*a*) Under the Roman law also, mutual gifts between husband and wife were void. (Sohm's Institutes of Roman Law. p. 483.)

support the proposition that the unity is for religious purposes (*a*). We have also noticed in the foregoing chapter the comment of Sabar on the 21st aphorism of Jaimini. Sabar in commenting thereon quotes the following Vedic text :—"Let the wife unite with the husband in sharing fruits of sacrifice. Let both the husband and the wife join in taking the burden of performing the sacrifice. Let them commence brilliant and imperishable life in Heaven." The last portion of the Vedic text has been quoted by the author of Mitakshara as showing that the unity intended was one for religious purposes only. However that may be, Katyayana ordains that a husband can make a gift to the wife which becomes her absolute property, except perhaps immoveables which, under a text of Narada, she cannot alienate (*b*). Then again, as a consequence of this want of legal identity between a husband and his wife for some purposes the wife can be sued alone without joining the husband. Manu says whatever wealth is earned by the wife belongs to the husband and it is suggested that this can only be explained on the ground of recogni-

Jaimini on unity of husband and wife.

(*a*) See the comment of Mitakshara on Bk. II, 52 of Yajnavalkya.

(*b*) See Colebroke's Digest Vol. V. 475.

tion by Manu of legal identity between the husband and the wife. But Jaimini, as we have seen already, strongly refutes the reasoning of this text and says that this text must be disregarded as it is opposed to *Sruti*, and that the *Sruti* must prevail over the Smriti. Even the later commentators confine the application of the text of Manu only to wealth acquired by the mechanical arts. But there can be no doubt that there is a sort of identity in proprietary relationship between a husband and his wife in the wealth of the husband and this would appear clear from the comment of Sabar on the 17th aphorism (*a*).*

Effect of marriage on the capacity of husband and wife to sue each other.

We now proceed to consider what is the effect of marriage on the capacity of each of the parties to sue and to be sued by the other. The author of the Mitakshara, in commenting on a text of Yajnavalkya (*b*), cites a text from a Smriti, the authorship of which is unknown, which is to the following effect :—

"But in the case of a strife between teacher and pupil, father and son, husband and wife or master and servant mutual litigation is not legal." Vijnaneswara points out

(*a*) See page 86, second para. ante. of Jaimini.

* Portion within asterisks believed to be original.

(*b*) Verse 32. ch. II.

that the text does not mean that litigation is forbidden in a controversy between the husband and his wife, but that such litigation is not laudable and should be discouraged. To illustrate this, Vijnaneswara cites the text of Katyayana, which permits the husband to appropriate the wealth of his wife in case of famine and distress, and ordains that should he appropriate the wealth of his wife in the absence of such circumstances of necessity, and refuse to pay it on demand, though he is in a position to do so, a suit between the married couple would be allowed. Jagannatha remarks that the real import of the text of the *Smriti* is that wives, pupils etc., should ordinarily and generally be discouraged by the king or the court, but in very important cases where the husband or the wife transgresses, suits by one spouse against the other may be entertained. But other writers hold that the *Smriti* text quoted above only prevents husbands from having recourse to the king or the court, for it is declared that wives committing faults may be corrected by their husbands. But if husbands transgress, there is no redress without an application to the king. But the view of the author of the Mitakshara that a suit would lie under the law at the instance of one spouse against

Katyayana.

Jagannatha.

the other, although the court should discourage such suits generally, seems to be the right one. In England under the common law, such a suit would not lie but a wife might, in a court of equity, sue her husband and be sued by him (*a*).

English law compared.

Having considered the effect of marriage on the status of the wife, we may say a few words on its effect on the status of the husband. It has been stated that marriage fixes a boy in his own family, so that he cannot thereafter be adopted. There is, however, no text of Hindu law to support this statement. Those who maintain this view argue that under Hindu law certain religious ceremonies are necessary for the affiliation of a boy and marriage is the last of these. After marriage no ceremonies can be performed in the adoptive family, and therefore marriage is a bar to adoption, both amongst *Brahmans* or *Sudras*. The Bombay High Court, however, has taken an opposite view and hold that adoption of a married man is valid (*b*). These decisions are based on a passage in the Vyavahara Mayukha where Nilkantha expresses the opinion that there is no bar to the adoption of a married

Effect of marriage on the status of husband.

Marriage, no bar to adoption.

(*a*) See Story's Equity Jurisprudence, S. 1368.

(*b*) Dharma *vs.* Ramkrishna, I. L. R., 10 Bom, 80; I. L. R., 25 Bom., 250.

man. "According to my venerable father," says Nilkantha, "even one married and the father of a male issue is fit for adoption. And this is proper since there is nothing opposed to it.' The Allahabad High Court agrees with the view taken by the Bombay High Court (*a*). In the Allahabad cases, the parties were Jains and according to a custom prevailing amongst them, adoption of a married man is regarded as valid.

Husband's right to marry during life time of the wife.

As polygamy is sanctioned by Hindu law, there is nothing to prevent a married man from marrying another woman during the lifetime of the wife. The wife's position in this respect may be contrasted with that of the husband ; she has no such corresponding right, as has been noted before. It is not necessary for marriage with a second woman, that the first wife shall be abandoned or forsaken. "Neither by sale", says Manu, "nor by repudiation is a wife released from her husband" (*b*). Although the Hindu law permits a man to marry again during the lifetime of the first wife, the sages look upon such second marriage with disfavour where there are no justifying causes for superseding the first wife. These causes are indicated by

(*a*) Manohar *vs.* Banarsi, I. L. R., 29 All, 495 ; Asharfi *vs.* Rupchand, I. L. R., 30 All, 197.

(*b*) Manu IX, 46.

Manu in the following text:—"She who drinks spirituous liquor, is of bad conduct, rebellious, diseased, mischievous or wasteful may at any time be superseded by another wife". "A barren wife, and a wife who gives birth to daughters only and a quarrelsome wife may also be superseded" (*a*). Baudhayana (*b*) and Yajnavalkya (*c*) also agree in the view taken by Manu. The sages ordain that a compensation (*Adhibedanika*) should be given to the superseded wife. This compensation is mentioned as one of the six kinds of *stridhan* enumerated by the sages. There is much diversity of opinion among the commentators as to the amount of compensation. The author of the Mitakshara says that the amount may be half of what is spent on the second marriage, provided separate property has not been given to her by the husband or the father-in-law; where such property has been given she should get half. Srikrishna, the author of the Dayakrama sangraha, says that the superseded wife should get as much as is given to the second wife (*d*). Jagannatha

Diversity of opinion as to the amount of compensation to a superseded wife.

(*a*) Manu IX, 80; 81. (*b*) Baudhayana, II, 4, 6.

(*c*) Yajnavalkya, I, 73.

(*d*) Dayakrama sangraha, Ch. VI., 31. See also, Mitakshara, Ch. II., sec, XI, 34, 35. Dayabhaga, Ch. IV. Sec I, 14. Smriti Chandrika, I., Ch. IX, Sec. 1 (3-4).

says that this question yet remains to be settled ; Colebrooke agrees with the view of the Mitakshara.

Wife's subordination to husband modified by the principle of partnership.

With the husband's right to the companionship of the wife, is connected his right to decide all questions incident to married life. It is he who determines where they shall reside, for the wife shares in law her husband's domicile ; it is he who decides on the disposal and education of the children. It is he who decides on the nature and extent of the household expenditure. The sages ordain that the husband should employ the wife in the regulation of domestic expenditure. A Hindu marriage involves the principle of the wife's subordination to the husband, but it is modified by the infusion of the principle of partnership. It is the husband who has the right of giving away his son in adoption without the assent of his wife (*c*), but a wife cannot give away the son without the assent of her husband, for Vasistha lays down, "Nor let a woman give or accept a son without the assent of her lord." It is true that the son is the joint property of the father and mother for the purposes of the gift in adoption.

Wife's right to give her son in adoption.

Vasistha.

(*b*) Yajnavalkya I. 52.

(*c*) Dattaka Mimanasa, I., 22. ; Rangama *vs.* Atchama, 4 M. I. A., 2 ;

But where there is a competition between the father and the mother, the former has a predominant interest or potential voice in the act of giving away the son ; so that the husband may give away the son even against the will of the wife (*a*). A text from Baudhayana is cited in support of this position. But the mother cannot give in adoption in the *dattaka* form without the assent of her lord (*b*). As the adoption however is generally for the benefit of the son and is intended as an advancement of the child, it is not only natural, but reasonable in the highest degree, to presume that a mother would exercise a wise discretion in deciding whether the son should not in the circumstances of each case be given in adoption. The presumption being founded in natural affection and moral obligation, there need be no apprehension, that the mother would not properly exercise the discretion. But the wife's capacity to take a son in adoption in the *dattaka* form is far more restricted than her power to give in adoption. According to the doctrine of the Mithila School, a husband's assent is absolutely necessary for an adoption by the wife, *at the time of adoption*. The hus-

Baudhayana.

Wife's right to take in adoption.

Mithila school.

(*a*) Dattaka Mimansa, S. IV., 13.

(*b*) Jogesh *vs.* Nrityakali, I. L. R., 30 Cal,. 965.

band must, therefore, join in the adoption by the wife. In the Vivada Chintamoni, we find it laid down that "a woman has no power to adopt a son even with the assent of her husband, for she cannot perform the rites of adoption." "The common saying, that a woman has no power to take or give a son but with the assent of her husband, shews that, as she can give a son with the assent of her husband, so she has power to adopt one with his assent. Consequently, it might be argued that she has power to perform the rites of adoption. This argument is reasonable. She has a right to do so in association with her husband, but not alone, since in such a case the rule, which empowers her to take a son with her husband but not to perform the rites of adoption will be infringed" (*a*).

Dattaka Mimansa.

The Dattaka Mimansa supports this view (*b*) and explains the principle upon which the doctrine propounded by the Mithila School rests. The principle is that a wife in adopting a child acts simply as her husband's agent.

Bengal School.

The Bengal School does not admit the doctrine of agency. It accepts the rule laid down in the Dattaka Chandrika,

(*a*) Vivada Chintamoni, P. C. Tagore's Translation, 75.

(*b*) Dattaka Mimansa 1, 16.

that women with the sanction of their husbands are competent to adopt ; in other words, a wife possesses the capacity to adopt in her own right, subject to the assent of the husband. The Benares School follows the Bengal School. Adoptions are generally made by widows and seldom by wives during the life time of their husbands. We will discuss, in the next chapter, the opinions in the different Schools, regarding the widow's right to adopt, and the theories on which they rest. We have dealt with the rights of husband and wife as against each other.

Benares School.

We next proceed to state what are the rights which a husband has against third parties for an infringement of the right of the wife. Where, for instance, a person imputed unchastity to the wife, both husband and wife were held competent to commence a suit for defamation (*a*). It was held that not only was the wife defamed but the husband also. The words imputing unchastity to the wife were held to be actionable without proof of special damage. But where a person described the wife of another as a witch in a letter to her husband it was held that the husband had no cause of action as the

Action for imputation of unchastity to wife.

(*a*) Sukan Teli *vs.* Bipal Teli, 4 C. L. J., 388.

imputation made was not defamatory of him, but that the wife was entitled to damages (*a*).

Divorce unknown to Hindu law.

It may be said that divorce is unknown to Hindu law generally (*b*). Divorce can not find a place in a system where the law says "neither by sale nor by repudiation is a wife released from her husband" (*c*). The marriage tie is indissoluble with the Hindus; so that although a wife can be forsaken for conjugal infidelity there is no divorce. The abandonment even of an incontinent wife is tantamount to cessation of all conjugal association with the husband; for as have been noticed before, according to Yajnavalkya, desertion (त्याग) would not even mean banishment from the house but cessation of conjugal rights and religious duties (*d*). The point of distinction between divorce and desertion is prominently brought out by the fact that a wife can marry again after divorce with her former husband, whereas, desertion under the Hindu law can lead to no such consequence. The reason why divorce

Distinction between divorce and desertion.

Reason why divorce is not allowed in Hindu law.

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(*a*) Shoobhagee *vs.* Bokhori, 4 C. L. J., 390

(*b*) But Komalakara recognizes divorce especially in case of Sudra (See Mandlik. 434).

(*c*) Manu IX, 46.

(*d*) I, 72.

is not allowed is to be traced to the nature of the marriage relation under Hindu law which regards marriage as incapable of of being dissolved during the joint lives of the husband and the wife. In commenting on the text of Manu cited above, Medhatithi points out that the meaning is that a wife, sold or repudiated by her husband, can never become the legitimate wife of another who may have bought or received her after she was repudiated. It is not, therefore right to say, as has been said in a well-known text book on Jurisprudence, that the fact that there was little or no divorce amongst Hindus was due partly to the expense of the wedding which was always celebrated with the utmost pomp, and partly to the possibility of polygamy (*a*). This statement ignores the fundamental conception of the marriage relation in Hindu law. Even where a husband repudiated a wife without just cause, its effect was not to terminate the marriage. Although the strict Hindu law recognized no divorce, custom has ingrafted it on certain sections of the community belonging to the lower castes in particular places where the right to bring about divorce

Professor Lee's view.

Divorce allowed amongst lower castes.

(*a*) Lee's Historical Jurisprudence, p. 129.

was dependent on mutual consent of the parties (*a*).

We have noticed already that neither apostacy nor excommunication from caste justify desertion by the husband or the wife. But it is different in the case of the conversion of either spouse to Christianity where a divorce would seem to be allowed by the provisions of Act XXI of 1866. Section 19 of the Act enacts that where a Hindu husband or wife is deserted or repudiated on the ground of his or her conversion to Christianity a decree for divorce can be made in favour of the person so deserted or repudiated and the parties can marry again, as if the marriage has been dissolved by death.

Conflict of authorities on the question whether Divorce Act applies to marriage celebrated before conversion.

The question, as to whether the Indian Divorce Act (IV. of 1869) applies to a marriage celebrated before the conversion of the parties to Christianity, has come before the Indian High Courts in several modern cases. While the High Court of Bengal would answer the question in the

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(*a*) Sankaralingam *vs.* Subban, I. L. R., 17 Mad, 479.

As to the castes and localities in which such customs prevail, see Risley's "Tribes and Castes of Bengal"; Steele's "Law and Custom of Hindu castes"; Brooke's "Tribes and Castes of N. W. P. and Oudh."

affirmative(*a*) the High Courts of Madras (*b*) and the United Provinces *c*) take an opposite view.

Effect of marriage on legitimacy.

A few words are necessary as to the effect of marriage on legitimacy. Hindu sages and commentators are all agreed that in order to constitute legitimacy there must be not only birth but also procreation in lawful wedlock (*d*). Their Lordships of the Judicial Committee thought it a very inconvenient doctrine and held that under the Hindu law procreation after marriage was not necessary to render a child legitimate. In the opinion of their Lordships the Hindu law was the same in this respect as English law (*e*). This must be accepted as the law on the subject, Hindu law texts to the contrary notwithstanding.

As intermarriage between different castes is prohibited in the present age, we shall

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(*a*) (1891) Goberdhan vs. Jasada, I. L. R., 18 Cal, 252.

(*b*) (1894) Thapita vs. Thapita, I. L. R, 17 Mad., 235 ; Perianayakam vs. Pottukanni, 14 Mad., 382.

(*c*) Zuburdust khan, 2 N. W. P., 370.

(*d* Manu, IX, 166 ; Apastamba, II, 18, 1 ; Vasistha, XVII, 13 ; Baudhayana, II, 3, 14 ; Vishnu, XV, 2 ; Yajnavalkya, II, 123. See (1) Mitakshara, Ch. I. sec. XI ; (2) Mayukha, Ch. IV, sec. IV, 41.

(*e*) Pedda Amani vs. Zemindar of Marungapuri, L. R., II. A., 293.

consider only cursorily how far the offspring of such intermarriage may be legitimate.

Legitimacy of the offspring of intermarriage.

We have seen already that under the Hindu law there are only four castes or classes, *viz.*, Brahmans, Kshatriyas, Vaisyas and Sudras, and that in former ages the marriage of a male of one caste with a female not only of his caste, but of any of the lower castes was valid and the children of a man by a female of a caste lower than his own were called *anulomajas*. Though a son by such union was regarded as perfectly legitimate, yet in competition with a son of the same father by a wife of the same caste as himself, the share of the former was less than that of the latter. Marriage of a male of one of the three lower classes with a woman of a caste higher than his own was however not recognized. The offspring of such union was illegitimate and were known as *pratilomajas*. The whole law on the subject, especially with reference to the caste of the issues of *anuloma* marriages, is elaborately discussed in the case of Brindavana *vs.* Radhamani (*a*). Marriages in the *anuloma* form are however now obsolete, and under the present law, marriage is valid only as between persons of one and the same four leading divisions of caste. There are

(*a*) I. L. R., 12 Mad., 72.

however numerous subdivisions in each of the four castes and the question sometimes arises as to whether in marriages between different subdivisions of the same caste, the offspring of such marriages might be regarded as legitimate. The law on the subject has been recently discussed in the Madras case of Ramasami *vs.* Sundara (*a*) where it is laid down, following an earlier decision of the Judicial Committee in Ramamani *vs.* Kulanthai (*b*), that a marriage between different subdivisions of the Sudra caste is valid by Hindu law and the issue of such marriage would therefore be regarded as legitimate. It is further laid down in that case that where a Sudra marries a woman of his caste but of an inferior class, as a *dagger* wife, in addition to his wife equal in caste to him, the rule of selection is in favour of his son by the latter by reason of the mother being of a higher class. The learned judges base their decision on this point on a text of Manu (*c*). There was an appeal to the Privy Council from this decision, but this point was left undecided (*d*). This view has

Legitimacy of offspring of marriages between different subdivision of the same caste.

(*a*) I. L. R., 17 Mad., 422.

(*b*) 14 M. I. A, 346.

(*c*) IX, 125.

(*d*) Sundara *vs.* Ramasami, I. L. R., 22 Mad, 515

not found favour with the profession in Madras (*a*).

Marriage brokage contracts under Hindu law.

It remains now to consider that class of contracts and agreements respecting marriage by which a party engages to give another a compensation if he will negotiate an advantageous marriage for him. These contracts are termed "marriage brokage contracts" under the English law. There is no reference to this class of contracts either in the texts of Hindu sages or in the commentaries. In England such contracts would not be enforced at law (*b*). Indeed, contracts of this sort have been not inaptly called a sort of kidnapping into a state of conjugal servitude; and no act of parties can make them valid in a court of equity (*c*). Following the English rule, it has been held in India that such contracts are immoral and are against public policy (*d*). "Marriage brokers," it has been said, "should not be given a legal status such as would enable them to enforce their contracts by law."

Mr. Justice Jardine, in a later case,

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(*a*) See a criticism of this decision in 9 M. L. J., 353.

(*b*) Hall & Kean *vs.* Potter, 3. P. W., 76.

(*c*) Story's Equity Jurisprudence, 262. (Second Eng. Ed.)

(*d*) (1884) Pitamber *vs.* Jagjivan, 13 Bom, 131 (note).

affirmed this view(*a*). In Madras, following the decision in Pitamber *vs.* Jagjivan, it has been held that an agreement to assist a Hindu in procuring a wife for reward is void as being contrary to public policy (*b*). The Calcutta High Court has in a very recent case taken the same view (*c*). It is true that in Bengal the marriage of boys and girls takes place through match-makers who receive reward for their services. But, having regard to the principles deducible from the decisions cited above, it is extremely doubtful if a match-maker will be able to recover the remuneration for his services in a court of law.

Roman law on the point compared.

The Civil law does not seem to have held contracts of this sort in such severe rebuke ; for it allowed *proxenete*, or match-makers, to receive a reward for their services, to a limited extent. The Roman law, while it admitted the validity of contracts in a qualified form, had motives for such an indulgence, founded upon its own system of conjugal rights, duties and obligations very different from what in our age would be

(*a*) (1888) Dulari *vs.* Vallabdas, I L. R., 23 Bom, 126.

(*b*) (1893) Vaithayanatham *vs.* Gangarazu, I. L R., 17 Mad, 9.

(*c*) (1905) Baksi *vs.* Nadu, 1 C. L. J., 261.

deemed either safe, or just, or even worthy of toleration (*a*). Of a kindred nature and governed by the same rules as the marriage brokage contracts are secret contracts made with parents or guardians, or other persons standing in a peculiar relation to the party, whereby upon a treaty of marriage, they are to receive a compensation or security or benefit for promoting the marriage or giving their consent to it.

Secret contracts by parents or guardians for giving girls in marriage for consideration.

Under the English law these contracts are also regarded as void. They are in effect equivalent to contracts of bargain and sale of children and other relatives, and of the same public mischievous tendency as marriage brokage contracts (*b*). It is not easy to determine how far such contracts by parents or guardians of the bride and the bridegroom are enforceable where the parties to the suit have been Hindus,—a community in which consent of the marrying parties has rarely, if ever, anything to do with the marriage contract, which is generally arranged by the parents and friends of the parties before they are themselves of an age to give a free and intelligent consent. The validity and legality of contracts of this description have come

English law on the point.

(*a*) Story's Equity Jurisprudence, S. 262.

(*b*) Keat *vs.* Allen, 2 Vern. 588.

before the different High Courts in several cases for decision, but not with uniform result. Let us now see how the matter stands on the original authorities on Hindu law. The texts of Manu and other sages cited below lead to the inference that an agreement by the father to give his daughter in marriage to a person in consideration of a sum of money to be paid by the latter to the father is opposed to the spirit of Hindu law. If such a contract is condemned by the Hindu sages and commentators, it follows that it would be contrary to morality and public policy ; for any thing contrary to the ordinances of the sages would furnish the criterion for determining what is contrary to public policy.

Manu on such contracts.

"No father who knows the law," says Manu, "must take even the smallest gratuity for his daughter, for a man who, through avarice, takes a gratuity, is a seller of his offspring" (*a*). Apastamba (*b*), Vasistha (*c*) and Baudhayana (*d*) agree with Manu. "When the relatives", says Manu, "do not appropriate for their own use the gratuity given, it is not a sale ; in that case the gift is only a token of respect and of kindness towards the

(*a* III, 51. (*b*) II, 13, 11.
(*c*) I, 37-38.
(*d* I, 21, 23.

maidens" (*a*). The same sage tells us again when speaking of the duties of husband and wife that "nor, indeed have we heard, in even in former creations of such a thing as the covert sale of a daughter for a fixed price called a nuptial fee". Baudhayana (*b*) is very emphatic and says, "Those wicked men who, seduced by greed, give away a daughter for a fee, who thus sell themselves and commit a great crime, fall after death into a dreadful place of punishment and destroy their family up to the seventh generation". The same sage tells us that it is declared that a female who has been purchased for money is not a wife. She cannot assist at sacrifices offered to the gods or the manes. Kasyapa has stated that she is a slave. We have seen already, in the foregoing chapter, how Jaimini in his fifteenth aphorism points out that the gift of one hundred chariots, which is constant in all cases, is not paid as bride-price but paid in pursuance of a religious custom. Jaimini negatives the notion that the marriage contract involves any obligation on the part of the father of the bride-groom to pay money to the bride's father as the bride-price. It is not within the scope of the thesis to enter into a detailed examination of the judicial decisions on the point

Jaimini.

(*a*) III, 54. (*b*) I, 21, 3.

as the validity, or otherwise, of marriage brocage contracts does not affect, except incidentally, the position of women in Hindu law. All the judicial pronouncements of all the different High Courts on the point prior to 1905 were examined, in an elaborate judgment by Mr. Justice Asutosh Mookerjee in the case of Bakshi *vs.* Nadu (*a*) and, the following rules were deduced from a review of the authorities :—

Judicial decisions on the point.

(1) An agreement to pay money to the parents or guardian of a bride or bridegroom, in consideration of their consenting to the betrothal, is not necessarily immoral or opposed to public policy. Where the parents of the bride are not seeking her welfare, but give her to a husband otherwise ineligible, in consideration of a benefit secured to themselves, the agreement by which such benefit is secured is opposed to public policy and ought not to be enforced (*b*).

(2) Where an agreement to pay money to the parents or guardian of a bride or bridegroom, in consideration of their consenting to a betrothal, is under the circumstances of the case neither immoral nor

(*a*) 1 C. L. J., 261.

(*b*) Visvanathan *vs.* Saminathan, I. L. R. 13 Mad, 83 ; Baldeo Sahai *vs.* Jumna Kunwar, I. L. R , 23 All, 495 ; Dholidas *vs.* Fulchand, I. L. R., 22 Bom, 658.

opposed to public policy, it will be enforced and damages will also be awarded in breach of it (*a*).

(3) A suit will lie to recover value of ornaments or presents given to an intended bride or bridegroom in the event of the marriage contract being broken (*b*).

Conflict of authorities.

Since this decision of Mr. Justice Mookerjee, there have been two other decisions on the point, one of the Madras and the other of the Calcutta High Court. The Madras High Court expressly dissented from the earlier decision of the same court in the case of Visvanathan *vs.* Saminathan on which reliance was placed in the Calcutta Law Journal case. It was held that such contracts were immoral and opposed to public policy and that questions of this sort should be decided on general principles and not with reference to the special form of a particular contract. The learned judges observed that an enquiry in each case as to whether, having regard to the terms of a particular contract, the contract is or is

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(*a*) Umedkika *vs.* Nagen Das, 7 B. H. C. R., O. C., 122; Mulji *vs.* Gomti, I. L. R., 11 Bom, 412; Lallun *vs.* Nobin, 25 W. R., 32.

(*b*) Umed Kika *vs.* Nagen Das cited above; Rambhat *vs.* Timmayya, I. L. R., 16 Bom., 673; Visvanathan *vs.* Saminathan, I. L. R., 13 Mad, 83.

not contrary to public policy would be very objectionable (*a*). In the Calcutta High Court, this point was raised before Sir Richard Harington, in a case (*b*) where a Hindu mother sought to recover a sum of money which the defendant had agreed to pay to her in consideration of her consenting to give her daughter in marriage to his son and his Lordship held that such a contract being for the purpose of the personal pecuniary gain of the mother was not enforceable in a court of law. The Full Bench of the Madras High Court was followed and the case of Bakshi *vs.* Nadu was distinguished on the ground that the observations were *obiter*.

Sir Richard Harington's view of the question.

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(*a*) (1908) Kalavagunta *vs.* Kalavagunta, I. L. R., 32 Mad, 185.

(*b*) (1911) Baldeo Das *vs.* Mohamaya, 15 C. W. N., 447.

# CHAPTER IV.

## STATUS OF WIDOWS.

Professors Pollock and Maitland in their famous book on the History of English law defined the position of widows in that law by one brief phrase : 'Private law with few exceptions put women on a par with men' (*a*). It is not possible to define the legal status of Hindu widows by any such general statement, so unique indeed is their position in Jurisprudence. I shall begin with an institution peculiar to Hindu widows—an institution which made it her duty to devote herself to a frightful death by burning herself with her husband's corpse. In the opinion of Sir Henry Maine (*b*) this institution had its origin in the Brahmanical dislike to the enjoyment of property by women and was intended to combat the ancient rule of Civil law which made her tenant for life in respect of her husband's property.

*Institution of Sati.*

Sir Henry Maine's opinion.

The practice of the burning of the widow either on the funeral pyre of her husband, or (in case she was away from the place where her husband died) separately as soon

(*a*) Vol. I., page 482.

(*b*) Early Institution, p. 335.

as she received news of the death of her husband obtained in India until quite recent times. This practice, which is popularly known as the custom of "*Sati*," was abolished during the government of Lord William Bentinck by Regulation XVII. of 1829 which declared the observance of it penal within British India. This practice is supposed to have a Vedic origin. But there has been no little controversy on the point, and it has been occasioned by the difference between the readings of a Vedic text. The passage in the Rig Veda, which has given rise to this controversy, has been quoted by Raghunandana in the first chapter of his *Sudhitattwa*(*a*) as follows :

Raghunandana attributes to the custom a Vedic origin.

" ओम् इमा नारी रविधवाः सपत्नीरञ्जनेन सर्पिषा संविशन्तु ।
अनश्रवोऽनमीवा सुरत्ना आरोहन्तु जन योनिमग्ने ॥"

Colebrooke accepted this reading as correct and has translated it thus :—"Om : Let these women not to be widowed, good wives adorned with collyrium, holding clarified butter consign themselves to fire. Immortal, not childless, not husbandless, excellent ; let them pass into the fire whose original element is water" (*b*). Both Raghunandana

So does Colebrooke.

(*a*) Rig Veda, 7 As, M, 10, Su 18, verse 7 and 8.

(*b*) Colebrooke's Miscellaneous Essays, Vol I, p. 116.

and Colebrooke support the view that the practice of *Sati* had its origin in Vedic times.

Prof. Wilson differs from both.

Professor Wilson's reading of the text of the Rig Veda is as follows :—

इमा नारी रविधवाः सुपत्नीराञ्जनेन सर्पिषा संविशन्तु ।
अनश्रवोऽनमीवाः सुरत्ना आरोहन्तु जनयो योनिमग्रे ।

and he translates it thus :—"May these women, who are not widows, who have good husbands, who are mothers, enter with unguents and clarified butter without tears, without sorrow, *let them first go up into the dwelling.*"

Professor Wilson holds that *Sati* was unknown in Vedic times, and it is only by a misreading of this Vedic text that people have been led to ascribe to it a Vedic origin. Professor Maxmuller agrees with Professor Wilson, and thinks that the Vedic passage has been mangled and mistranslated and misapplied for the purpose of serving the interests of an unscrupulous priesthood (*a*).

Raghunandana in his *Sudhitattwa* cites numerous texts from the *Smritis* (*b*) and from the *Puranas* and the *Mahabharata* to show that there is an obligation on the part of

(*a*) Journal of the Royal Asiatic Society, Vol. XVI, Essays on "On the supposed Vaidic authority for the burning of Hindu widows."

(*b*) Maxmuller's Selected Essays (1881) I, p 335. Vishnu, XX, 39 ; XXV, 14.

widows either to ascend the pile of the husband and to be burnt along with him, or to ascend the pile after him as soon as she learned of the death of her husband. But there are exceptions in favour of women who are either pregnant, or mothers of infant children, who have not attained puberty or who are in their courses at the time. A widow of the Brahman caste may not commit herself to the flames when her husband died abroad.

Exceptions to the rule of *Sati*.

The question is now of academic interest as the custom has been abrogated by legislation. But there can be no doubt that the custom is of very great antiquity. During Mahomedan rule, the permission of the Governor used to be taken before a widow could burn herself as *Sati*. Tavernier, the French traveller, who came to India in the time of Aurangzeb, notices that "there is no woman that can burn herself along with her husband's body till she has the leave of the Governor of the place where she inhabits, who being a Mahomedan, and abhorring that execrable crime of self-murder, is very shy to permit them" (*a*).

There is another obsolete practice in connection with widows, on which a few words are necessary. In ancient times, a widow

(*a*) Tavernier's Travels in India, Book III, p 407.

*Niyoga.*

might by appointment (*niyoga*) raise issues by her husband's brother and the issue was regarded as the issue of the husband. Some hold that the offspring of the wife, by her husband's brother belongs to the husband according to the principle that "those who having no property in a field, but possesing seed corn, sow it in another's soil, do indeed not receive the grain of the crop which may spring up" (*a*). Others maintain that the issue of the seed sown in another's soil by the owner's permission is considered as belonging to both the owner of the seed and the owner of the soil (*b*). Manu notices this practice but condemns it severely (*c*). Other sages also condemn it (*d*). Yajnavalkya alone does not seem to refer to it in terms of disapproval (*e*).

Medhatithi in his commentary on verse 66, chapter IX. (Manu) says that the *Niyoga* is mentioned in Rig Veda. X. 40. 2. But this

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(*a*) See Mitakshara comment on verse 127, Ch. II.

न देवरस्य भार्यैत्वमापादयति। अतस्तदुत्पन्नमपत्यं चेत् स्वामिन एव भवति। न देवरस्य

(*b*) Narada quoted in Viramitrodaya, p. 109. (Translation) where the views of different sages are discussed.

(*c*) Manu, IX, 64—68.

(*d*) Apas, II, 27, 2-6; Baudhayana, II, 3, 34.

(*e*) Yajnavalkya, I, 68.

practice is forbidden in the *Kali Yuga*. Vrihaspati says, "The *Niyoga* has been declared by Manu, and again prohibited by the same; on account of the successive deterioration of the four ages of the world, it must not be practised by mortals in the present age according to law" (*a*).

Levirate in Hindu law.

In ancient Hindu law, there was a practice resembling the Levirate of the Jewish law. Manu says:—"If the future husband of a maiden dies after troth verbally plighted, her brother-in-law shall wed her according to the following rule." But this is now regarded as an obsloete rule.

Texts of sages on the duties of widows.

The Hindu law imposed certain duties on widows who did not ascend the funeral pile after her husband, but chose to survive him. All the sages enjoin a life of severe discipline on the widow. "Until her death," says Manu, "let her be patient of hardships, self-controlled, and chaste, and strive to fulfil that most excellent duty which is prescribed for wives who have one husband only" (*b*). Then again it is said:—"At her pleasure let her emaciate her body by living on pure flowers, roots and fruit; but she must never mention the name of another man after her husband has died" (*c*). "A

(*a*) XXIV, 12. (*b*) V, 158.
(*c*) Manu, V, 157.

virtuous wife," Manu says again, "who after the death of her husband constantly remains chaste, reaches Heaven, though she have no son, just like those chaste men." Vishnu says the same thing *(a)*. The precepts of Hindu law which enjoin a Hindu widow to lead a continent life are not mere moral precepts. Unchastity of the widow affects not only her status but also her proprietary position. But the injunction to emaciate her body and to live on frugal and abstemious diet seems to be in the nature of a religious or moral injunction. In a suit which was brought by a Hindu widow for maintenance against her step-son the defendant pleaded that the amount claimed for maintenance was excessive and should be reduced considerably as by the *Shastras* she was bound to lead a very strict and austere life for which a far smaller allowance was sufficient. The court refused to accept the plea of the defendant and observed as follows : "As to the life of semi-starvation and wretchedness, which it is argued that according to the Hindu *Shastras* a Hindu widow ought to live, that is a matter of religious or ceremonial observance rather than one of law. A Hindu widow is in these days at all events entitled to decent food and clothing if the

They are mere moral precepts.

*(a)* XXXVI, 17.

head of the family is in a position to supply them" *(a)*.

Power of a widow to adopt.

The question as to the power of a widow to adopt a son or give away a son in adoption should next claim our attention. In the first place, with regard to the power of a widow to adopt and its limitations there is divergence of opinion in the different schools of Hindu law. It is true that all the schools agree in basing their conclusions on the same text of Vasistha, *viz.*, "Nor let a woman give or accept a son unless with the assent of her lord," but the different schools interpret the text differently and this accounts for want of unanimity between them on the point. We cannot do better than quote the following observations of the Judicial Committee with respect to the widow's right to adopt in the different schools : "All the schools," say their Lordships, "accept as authoritative the text of Vasistha which says :—'Nor let a woman give or accept a son unless with the assent of her Lord.' But the Mithila school apparently takes this to mean that the assent of the husband must be given at the time of adoption, and therefore, a widow cannot receive a son in adoption, according to the Dattaka form, at

Divergence of opinion in different schools.

Mithila.

*(a)* Horry Mohan Ray vs. Nayantara, 25 W. R. 474 ; See Baisini vs. Rup Singh, I. L. R. 12 All, 558.

Bengal School.

all. The Bengal School interprets the text as requiring an express permission given by the husband in his lifetime, but capable of taking effect after his death; whilst the Mayukha and Koustoobha, treatises which govern the Mahratta School, explain the text away by saying, that it applies to an adoption made in the husband's lifetime, and is not to be taken to restrict the widow's power to do that which the general law prescribes as beneficial to her husband's soul. Thus on a careful review of all those writers, it appears, that the difference relates rather to what shall be taken to constitute, in cases of necessity, evidence of authority from the husband, than the authority to adopt being independent of the husband" (*a*).

Mahratta School.

Benares School.

In the Benares School the widow's capacity to take a son in adoption is circumscribed by the same limitation as that of a widow under the Bengal School (*b*).

Dravida School.

In the Dravida School the widow has a right to adopt with the assent of the sapindas. The difference in the capacity or otherwise of the widow to adopt in the different schools has been very briefly and lucidly summarized by Mr. Mayne thus :—"The result is that in the

(*a*) The Collector of Madura vs. Mutta Ramalinga Sathupathy, 12 M. I. A., 435.

(*b*) Tulsi vs Behari, I. L. R. 12 All., 438.

case of an adoption by a widow, in Mithila, no consent is sufficient ; in Western India no consent is required ; in Bengal and Benares the husband's assent is required ; in Southern India the consent either of the husband or of the sapindas is sufficient" (*a*). When Mr. Mayne says that in Western India no consent is required he evidently refers to the case of a widow (*b*) who is heir to her husband's estate and not to that of a widow who has not the estate vested in her by reason of her husband being member of a joint family at the time of her death, in which case the permission either of the father-in-law or of the husband's coparceners is deemed necessary.

These different views are based on different theories as to the capacity of a widow to adopt. The theory of the Mithila School is peculiar to itself. "A woman," says Vachaspati Misra, "has no power to adopt a son, even with the assent of her husband, for she cannot perform the rites of adoption," and further it is said by the same author, "She has a right to do so with her

These different views based on different theories. Basic theory of the Mithila School.

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(*a*) Mayne's Hindu Law and Usage, p. 143 (7th Edition).

(*b*) (1879) Ramji vs. Ghaman, I. L. R. 6 Bom. 498 (F. B).

husband, but not alone, since in such a case, the rule which empowers her to take a son with her husband but not to perform rites of adoption, will be infringed" (*a*). The theory of a widow's incapacity is based on her incompetency to perform religious ceremonies (*homa*), except jointly with her husband. Mr. Golap Chandra Sarkar points out that the view of the Mithila School as to the incapacity of widow to adopt accords with that of Nanda Pandita in the Dattaka Mimansa. But it is submitted, the basic theories are different (*b*).

of Bengal School.

The Bengal School does not base the right of widows to adopt on the doctrine of agency. Women would appear, according to this school, to possess the capacity to adopt in their own right, but the husband's assent is absolutely necessary by reason of the text of Vasistha which requires such assent.

of Benares School.

The Benares School accepts the

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(*a*) Vivada Chintamoni, pp. 74 and 75, P. C. Tagore's Translation.

(*b*) Tagore Lectures on Adoption, p 228. According to Dattaka Mimansa, a woman in adopting a child acts simply as her husband's agent in the legal sense. As an agent's authority is revoked by the death of the principal, so is the husband's authority to his wife to adopt determined on his death. A widow cannot therefore adopt. See also Datt. Mim. I., 16 & 23.

same view of the widow's capacity to adopt *(a)*.

of the Mahratta School.

* Let us in the next place examine what is the basic theory for the view of the Bombay school that the widow of a separated coparcener, who inherits her husband's estate, can adopt without the assent of her husband in the absence of an express or implied prohibition by him. We must turn to the Vyavahara Mayukha and other commentaries which obtain in the Bombay School in search for such a theory. After establishing the right of adoption of the Sudras, Nilkantha says "Even a woman has, like the Sudra, authority to adopt, because of the text 'women and Sudras are governed by the same rules'" *(b)*. Then again he proceeds to say :—"The husband's permission is intended only for a woman whose husband is alive for evident worldly reasons. But a widow may adopt even

*(a)* In the *Viramitrodaya* which is received as an authority in the Benares School, it is stated, however, that a widow can adopt without assent of her husband in a case where her husband's authority is wanting. But the authority of the Viramitrodaya is disregarded on the ground that preference is to be given to Dattaka Mimansa and Dattaka Chandrika in matters of adoption. Viram. p. 116.

*(b)* Vyav. Mayukha, Ch. IV, S. 14-18, See page 57. Mandlik's edition.

without it by the assent of her father, or in his absence by that of her *jnati* or clansmen." Then he cites the text of Yajnavalkya about the want of independence in women (*a*). The author then says, "In his absence, or owing to his infirmity on account of old age or otherwise, her dependence rests even on her sons, etc" ; Katyayana also (who says), 'Whatever spiritual acts (or acts relating to the future state) a woman performs without the permission of the father, the husband, or the son, to obtain a benefit after death, it shall become fruitless' :—declares the permission of the husband applicable to particular states. Therefore that permission of the husband indicated for a particular state (by Yajnavalkya) is also laid down here (by Katyana following Yajnavalkya) and is not a new rule, laid down without prior authority. Hence it follows that a widow has authority to adopt even *without the permission of the husband.*" There are two ideas which seem to underlie the whole of this discussion. One of these ideas is that the adoption by the widow is in her own inherent right and not in the right of the husband which she has obtained by delegation from him. According to this view, the permission given by

(*a*) I, 85.

the husband is not in the nature of a *power* given to the widow to adopt but is necessitated by the theory of dependence of women on the husband, son and clansmen in the different circumstances or situations respectively. The permission of the kindred is not unlike the *auctoritas tutoris* of the guardian under the early Roman law which was necessary to give the act of a woman a full legal character. The second idea which the passage suggests is that adoption is more a secular than a religious act, and therefore although religious acts might become fruitless unless done with the consent of the husband there is no such futility with regard to secular acts like adoption. In this connection a question has been raised, *viz*, when a widow adopts to whom does she adopt, to herself or to her husband ? But a little reflection will show that the question in that form cannot arise so long as the identity of the husband and wife not only for religious purposes but also in proprietary rights (to a certain extent) is acknowledged. It follows from this moral or legal identity between husband and wife (a doctrine which finds recognition in some of the aphorisms of Jaimini cited in the previous chapter), that when the husband adopts, he adopts to her and when the wife or

Roman law compared.

widow adopts she adopts for him and herself also. But then it may be said that the direction that she should obtain the permission of the husband in his life time negatives the theory that the capacity of a widow to adopt is one which she possesses in her right of wife-hood. But that is not so ; for she may have the power to adopt in her own right as wife or widow and at the same time be obliged to perform the paramount duty of implicitly obeying the commands and wishes of her husband. It is one thing to say that the right to adopt is not the widow's, but is exercised by her on behalf of her husband. It is another thing to say that the right to adopt is the widow's, subject of course to her duty to act according to the wishes of her husband. It thus appears that in the Bombay Presidency a widow's right to adopt to her separated husband is inherent and not merely delegated. Mr. Mandlik (*a*) quoted passages from the Viramitrodaya, the Sanskara Kousthubha of Ananta Deva, and the Nirnaya-sindhu of Kamalakara from which the widow's right to adopt in her own right and not by virtue of delegation from her husband can be legitimately inferred. Ananta Deva in fact goes further than the Mayukha and says, "In no

(*a*) See Mandlik's Institutes of Yajnavalkya, pages 464-65.

country is a female dependence on kinsmen even allowed by any learned men to restrain her in the observance of *Nitya* and *Kamya Vratas*; whereas according to proposed interpretation, widows having no kinsmen would have no authority to observe *Vratas* and the like without the previous permission of the king in accordance with the text cited by the Mitakshara, *viz*, on failure of both sides (that is, kinsmen on the father's and husband's sides), the king is the supporter and lord of females." "There is no distinction between *Vratas* and the like and the adoption of a son; but (in spite of this) much learning has been displayed on the subject by people devoid of any knowledge of the Dharma shastra."

The commentaries that are followed in the Bombay Presidency recognize, as we have shown above, a distinction between the theory which rests the widow's power to adopt on delegation from her deceased husband, and that which bases it on her own inherent right to adopt. As has been pointed out by Sir Lawrence Jenkins, Chief Justice, in Bombay (*a*) this distinction has more than an academic value. In that case the Chief Justice, while saying that the inclination of his opi-

Sir Lawrence Jenkins' view.

(*a*) (1899) Laksmi vs. Sarasvati, I. L. R 23 Bom. 789.

nion was that in the Bombay Presidency the widow's right is inherent and is not merely delegated, reserved to himself the right to reconsider the matter hereafter. But it is submitted, with great respect, that the authorities to which reference has been made, fully justify his Lordship's opinion.*

Reasons for the Bombay view.

It is now necessary to examine the reasons for the view which obtains in Bombay with regard to the powers of the widow of a deceased coparcener, who was member of a joint undivided family, to adopt. The leading case on the subject is Vithoba *vs* Bapu (*a*) where Mr. Justice Candy traced the development in the Bombay Presidency of the law regarding the right of a widow not having permission of her husband to adopt a son. The learned judges in Bombay laid down that the decision of the Judicial Committee in the Ramnaad case (*b*) which applied to the Dravida country would govern cases of adoption by widow of a deceased united coparcener. They quoted the following observations from the judgment in the Ramnad case :—"Where the husband's family is in the normal condition of a Hindu family *i. e.* undivided that question is of compara-

(*a*) (1890). I. L. R. 15 Bom, 110.

(*b*) Collector of Madura vs. Mootoo Ramalinga Sathupathy, 12 M.I.A., 397.

tively easy solution. In such a case the widow, under the law of all the schools, which admit this disputed power of adoption, takes no interest in her husband's share of the joint estate, except a right to maintenance. And though the father of the husband, if alive, might as the head of the family and the natural guardian of the widow, be competent by his sole assent to authorize an adoption by her, yet if there be no father, the consent of all the brothers, who, in default of adoption, would take the husband's share would probably be required, since it would be unjust to allow the widow to defeat their interest by introducing a new coparcener against their will." The passage from the Vyavahara Mayukha to which we have referred to above shows that the widow can adopt either with the permission of the father or her husband's kinsman. The author of the Viramitrodaya insists upon the necessity, if the husband were dead, of the assent of those upon whom the widow is dependent and they, in the case of an undivided family, would clearly be the coparceners from whom she obtains her maintenance. The necessity for the sanction of the husband's kindred, as existing in the Mahratta School, is mentioned by Sir Thomas Strange, *a*) and

Vyavahara Mayukha.

(*a*) Strange's Hindu Law, Vol. I., 77, 80.

by Mr. Colebrooke (*a*). It is now established in the Bombay Presidency that the widow of a deceased coparcener, who was member of an united family at the time of his death can adopt either with the assent of her husband or the consent of her father-in-law, or her husband's undivided coparceners (*b*).

Madras or Dravida School.

In Madras it has been established ever since the Ramnaad case was decided, that a widow can adopt with the assent of the Sapindas, when the consent of the husband is wanting. In the case where the husband's family is in the normal condition of a Hindu family the consent of the father of the husband, if alive, or if there be no father at all the brothers who in default of adoption, would take her husband's share, would probably be required. Where tne widow has taken by inheritance the separate-estate of her husband there is greater difficulty in laying down the rule. The assent of the kinsmen seems to be required by reason of the presumed incapacity of women for independence. Where the father-in-law is alive, the consent of the father-in-law to whom the law points as the natural guardian protector of the widow would be sufficient.

Ramnaad case.

(*a*) Strange's Hindu Law, Vol. II, 92.

(*b*) Ramji vs. Ghaman, I. L. R. 6 Bom, 498 (F.B.) Dinkar vs. Ganesh. I. L. R. 6. Bomy, 505 F. B.

"It is not easy," said their Lordships of the Judicial Committee, "to lay down an inflexible rule for the case in which no father-in-law is in existence. Every such case must depend on the circumstances of the family. All that can be said is that there should be such evidence of the assent of kinsmen as suffices to show that the act is done by the widow in the proper and bonafide performance of a religious duty, and neither capriciously, nor from a corrupt motive" *(a)*. The next case from Madras which was carried in appeal to the Judicial Committee was the Berhampore case *(b)*. In that case the adoption by the widow which was made with the consent of the divided sapinda was challenged on the ground that the consent of the undivided coparcener had not been obtained, the Judicial Committee on appeal, observed that there were very strong reasons for the conclusion that a widow cannot travel out of the undivided family and obtain the authorization required from a separated and remote kinsman of her husband. Those reasons are stated by their Lordships to be these :—"An undivided Hindu family is ordinarily joint, not only in estate but in food and worship ; therefore, not only all the concerns

Berhampore case.

*(a)* Ramnaad case, 12 M. I. A., 397.

*(b)* Raghunatha vs. Brojo Kishore, 3 I. A., 154.

of the joint property, but whatever relates to their commensality and their religious duties and observances, must be regulated by its members, or by the manager to whom they have expressly or by implication, delegated the task of regulation. The Hindu wife upon her marriage passes into, and becomes a member of, that family. It is upon that family that, as a widow, she has claim for maintenance. It is in that family that, in strict contemplation of law, she ought to reside. It is in the members of that family that she must presumably find such counsellors or protectors as the law makes requisite for her".

Motives of the widow for adoption—its effect on the validlty thereof.

The question whether the motives of the widow for the adoption can affect the validity of the adoption was not settled until quite recently. The passage in the judgment of the Privy Council in the Ramnad case to the effect that "there should be such evidence of the assent of kinsmen as suffices to show that the act is done by the widow in the proper and bonafide performance of a religious duty and neither capriciously nor from a corrupt motive", had for some time been misunderstood in India and this notwithstanding the fact that in the Guntur case (*a*) their

Guntur case.

(*a*) Vellanki vs Venkata Rama, 4 I. A, 113 ; S. C., 1 Mad., 174.

Lordships said that it would be dangerous to introduce into the consideration of these cases of adoption, nice questions as to the particular motives operating on the mind of the widow." Chief Justice Farran of the Bombay High Court thought that the question as to the relevancy of the adopting widow's motives was left open in the Guntur case *(a)*.

Evidence as to motive of widow in making the adoption is not relevant.

In Bombay, where the widow is left free and unfettered to exercise her own choice in the matter of adoption, a series of authorities laid down that evidence would be admissible to show whether the widow acted from a corrupt or sinful motive in making the adoption *(b)*. But a recent Full Bench of the Bombay High Court have removed all doubts which these decisions might have created by laying down that in the Bombay Presidency, a widow having the power to adopt, and a religious benefit being caused to her deceased husband by the adoption, any discussion of her motives in making the adoption is irrelevant *(c)*.

*(a)* Ram chandra vs. Mulji, I. L. R. 22 Bom., 558 (564).

*(b)* Vithoba vs Bapu, I. L. R. 15 Bom, 110 (134); Patel vs. Monilal, I. L. R. 15 Bom, 565; Mahableshvar vs. Durgabai, 22 Bom, 199; Bhimawa vs. Sangawa, I. L. R. 22 Bom, 106.

*(c)* (1896) Ram chandra vs Mulji, I. L. R. 22 Bom., 559.

And it seems, in the latest decision of the Privy Council (*a*) in an appeal from Madras, their Lordships appear to suggest that unless there is some express prohibition by the husband, the wife's power, at least with the concurrence of sapindas in cases where that is required, is co-extensive with that of the husband quite irrespective of the motives of the widow in making the adoption. The adoption in this case before the Privy Council was of an only son and therefore sinful and irreligious and yet their Lordships held that this circumstance did not affect the validity of the adoption. And this decision of the Judicial Committee, which does not consider the question of motive as relevant, is, it is humbly submitted, in accord with the spirit of Hindu law as contained in the texts of the sages and the writings of the commentators as there is nothing in them to suggest that an enquiry into motive is essential.

Assent of sapindas necessary, in what cases.

But if the consent of the sapinda is obtained by a false representation that the widow has authority from the husband, the assent is not sufficient to support an adoption (*b*) ; so will it be if the consent of the sapinda is purchased for a consideration.

(*a*) Sribalasu, I. L. R. 22 Mad. 398.

(*b*) Karunabdhi *vs.* Gopala, L. R, 7 I. A, 173

The reason underlying the former of these propositions is that the consent is given by the kinsmen, not in the exercise of an independent judgment on the expediency of the proposed adoption, but rather as the ratification of the non-existent authority of the deceased husband. In Madras, where the assent of the sapindas is necessary to support the adoption by the widow of a separated coparcener, a question arises whether the assent of all the sapindas are necessary. In the Ramnad case the consent of the majority of sapindas was considered sufficient. But where one sapinda out of several arbitrarily refused to assent to the adoption the opinion of such a sapinda was altogether disregarded as prompted by capricious considerations (*a*). It is not necessary that the consent of all presumptive reversionary heirs should be given, it is sufficient if the assent of those presumptive heirs of the husband, who are the nearest of kin to him be obtained provided the same be given bonafide and not from any corrupt motive and recently the Judicial Committee held in appeal from the last case that where a widow, without obtaining the consent of the

Assent of nearest presumptive heirs of husband necessary.

*a* Venkata vs. Annapurnamma I. L. R. 23 Mad, 486 (490); Subrahmaniam *vs.* Venkamma I. L. R. 26 Mad, 627 (635).

nearest kinsman of her deceased husband, made an adoption with the consent of a remote reversioner to whom she had falsely represented that she had obtained her husband's authority, the adoption made by her was invalid (*a*).

Power to adopt may be given either verbally or in writing or by will.

A power to adopt may under the Hindu law be given either orally or by writing (*b*). It may be given also by will (*c*); where the authority is given in writing, it must now be engrossed on a stamp paper of rupees ten and be registered. The authority must be given to the widow alone, it must not be given to the widow and other persons jointly; where this was done, the power or authority was held to be invalid (*d*). But the husband may direct that the widow may consult another in the matter of selection of the boy to be adopted. The authority is void if it directs adoption by the widow under circumstances in which the husband if alive, would have been incompetent to adopt (*e*). But it has been held in several cases that a man who is himself incompetent to adopt a son by

(*a*) Venkama vs. Subramaniam, I. L. R. 30 Mad, 50.

(*b*) Ramireddi vs. Rangamma, 11 M. L. J, 20; Mutsaddi vs. Kundan, 33 I. A, 55; S. C. 28 All., 377.

(*c*) Saroda vs. Tincowry, I Hyde, 223.

(*d*) Amrito vs. Surno, I. L. R. 27 Cal., 996.

(*e*) Gopec vs. Chandrabole, 19 W. R. (P. C.) 12.

reason of the existence of his son, can give authority to his widow to adopt a son in the event of the death of that son, or to adopt several sons in succession, provided one was not to be adopted till the death of the other (*a*).

Authority must be strictly followed.

The authority given by the husband must be strictly followed. The power will be exercised subject to the restrictions and limitations that the husband may have laid down. If the widow is authorized to adopt *one* son, she cannot adopt a second on the death of the first adopted son. But where it appears that the authority given by the husband evinces a general intention to be represented by a son, there the authority should be liberally construed and a second adoption made by the widow on the death of the first adopted son should be regarded as valid (*b*). To take a contrary view would be to lay down that by the first adoption all spiritual benefit to be derived from the act was

(*a*) Bhoobun vs Ram Kishore, 10 M. I. A., 279 ; Jumoona *vs.* Bama, 3 I. A, 72 ; S. C. I. L R. 1 Cal., 289 ; Vellanki *vs.* Venkata, I. L. R 1 Mad, 174 (P.C.)

(*b*) Kannepali *vs.* Pucha, 33 I. A, 145 ; Laksmi *vs.* Raja, I, L. R. 22 Bom, 996 ; Surjyanarayana vs. Venkata, I. L. R, 26 Mad, 681. Surendra *vs.* Sailaja I. L R. 18 Cal, 385 ; Ramsundar vs. Surbanee, 22 W. R, 121. See, however, Gournath *vs.* Annapoorna to the contrary, S. D. A. 1851-52, p. 332.

secured to the deceased and that the adoption of the second boy was therefore supererogatory—a view for which there was some authority in one of the early Bengal cases, but which has recently been disapproved by the Judicial Committee in the case last cited.

Limits of the widow's power to adopt.

I will now proceed to deal with the limits within which a power of adoption may be exercised by a Hindu widow. The answer to the question as to what are the limits to be assigned to a widow's power of adoption is deducible from a series of decisions of the Judicial Committee of the Privy Council. The first case in which the question arose was that of Bhoobunmoyee *vs.* Ramkishore. One Gour kishore died leaving a son Bhabani and a widow Chandrabalee, to whom he gave express authority to adopt in the event of his son's death. Bhabani married, attained his majority and died leaving a widow, but no issue. Chandrabalee then adopted a son Ramkishore who sued Bhabani's widow Bhoobunmoyee to recover the estate. The Judicial Committee held that her estate could not be divested by the subsequent adoption. Although the deed of permission to adopt did not assign any limits yet their Lordships held that some limits must be assigned, The principal reason on which the judgment of the Judicial

Bhoobunmoyee vs. Ramkishore, 10 M. I. A. 279.

Committee is based appear to be that, when the son died leaving a widow, the power of adoption vested in the mother came to an end. It is true their Lordships gave another additional reason, viz, that the adopted son having lived to an age which enabled him to perform all the religious services which a son could perform for his father, the spiritual benefit was exhausted. In the case of Puddo Kumare Debi *vs.* Court of Wards which arose out of the same adoption their Lordships made it clear that in the previous case they intended to lay down that upon the vesting of an estate in the widow of Bhabani the power of adoption was at an end and incapable of execution. They further added that the vesting of the estate in the widow of Bhabani was a proper limit to the exercise of the power. In the case of Thayammal *vs.* Venkatrama (*a*), their Lordships expressed their entire concurrence in the view of the law laid down in Puddo Kumari *vs.* Court of Wards. This view was reaffirmed by the Judicial Committee again in the case of Tara Charan Chatterjee *vs.* Suresh Chander Mookerji (*b*). The effect of the decision of the Judicial Committee in

Puddo Kumare vs. Court of Wards, I.L.R. 8 Cal 302 (P. C)

Thayammal vs. Venkatrama.

Tara Charan vs. Suresh Chander.

(*a*) (1887) I. L. R. 10. Mad, 205

(*b*) (1889) I. L. R. 17 Cal, 122.

Bhubun Moyee's case was considered by a recent Full Bench of Bombay High Court and it was held that the language of the judgment in Bhubun Moyee's case is so explicit that it is impossible to construe it otherwise than as meaning that there is a limit to the period within which a widow can exercise her power of adoption and that once the limit is reached the power is at an end (*a*).

In 1906 in a Bengal case (*b*) a Hindu lawyer of note raised the contention that their Lordships of the Judicial Committee in Bhuban Moyee's case intended merely to decide that the power of adoption vested in the mother did not come to an end but remained suspended during the life time of the widow left by the son, so that after the widow's death when the estate of the father would revert to the mother as heiress of her son, the power would revive. It was contended that the death of the widow of the original owner was the limit of time with which the power could be exercised subject to two

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(*a*) (1902) Ramkrishna *vs.* Shamrao, I. L. R. 26 Bom., 526 (F. B.) ; Krishnarav *vs* Shankarrav, I. L. R. 17 Bom., 164 ; also per Ranade, J, in Venkappa *vs.* Jivaji, I. L. R. 25 Bom., 306 (310).

(*b*) Manikyamala *vs.* Nanda Kumar, I. L. R. 33 Cal, 1306.

conditions, viz, faliure of male issue in the male line and vesting of the estate in the widow, no matter whether the estate vests in the adopting widow just after the death of the son or after the death of the widow of the son. This case was heard before Sir Francis Maclean, former Chief Justice, Mr. Justice Mookerjee and Mr. Justice Holmwood. In giving judgment, Mr. Justice Mookerjee after an elaborate review of the authorities (*a*) remarked as follows: "In view of these decisions of the Judicial Committee it is impossible for us to uphold the contention of the appellants that the power of of adoption vested in the mother did not come to an end but remained suspended during the life time of the widow left by the son" (*b*). The question raised in this case

(*a*) Vellanki vs. Venkata, Mad. 1 174; Jamna Bai vs. Ray chand, 7 Bom, 225; Ravji vs. Lakshmi Bai, 11 Bom, 383; Gavdappa vs Girimallapa, 19 Bom, 331; Payappa vs Appana, 23 Bom, 327 (331).

(*b*) Mr. Golap Chandra Sarkar has given certain reasons for the view contended for but not accepted in this case, see his Hindu Law, 136-139, (Ed. 1910). Mr. Sarkar thinks that when the foundation of the decision or obiter dicta in Bhubanmayee's case, viz, exhaustion of religious services by a son attaining a particular age fails then the whole superstructure of the obiter dicta must fail, Mr. Justice Mookerjee shows that is not the only reason, far less the principal reason, for the decision.

is of some nicety and is not altogether free from difficulty.

Original authorities on Hindu law silent on the point.

In conclusion we should state that the original authorities on Hindu law do not either directly or indirectly touch the point as to the limit to the exercise of the power by the widow and the law on this point has to be gathered from the judicial decisions to which reference has been made above.

It is hardly necessary to add that where after the death of a son who was succeeded by the widow as his mother she made an adoption, the adoption would be valid, as it divested no estate but her own.

Minority of widow no bar to her power to adopt.

We shall now deal with a few less debatable points. The minority of a widow is no bar to her exercising the power of adoption provided she is duly authorized by the husband to adopt (*a*). We have noticed already in a previous chapter that the Indian Majority Act (IX of 1875) does not purport to affect matters relating to adoption. Mr. Mayne notices that in the Bombay Presidency a widow under the age of majority cannot adopt (*a*). The reason for the difference between the Bengal and the Bombay view is, as pointed out by Mr. Mayne, that, in Bombay, the adoption is the act of

Not so in Bombay.

Reason for this difference between Bombay and Bengal.

(*a*) Mondakini vs Adinath, I. L. R. 18 Cal., 69.

(*b*) Mayne's Hindu Law and Usage, 148 (6th. Ed.)

the widow for which no authority or consent is required, whereas in Bengal the act is the husband's and she is merely the instrument. It is the authority which is the essence of adoption and the incapacity of the person entrusted to carry out the authority is of no consequence.

Unchastity of the widow is a bar to her exercising the right of adoption even with the express authority of the husband, and there is good reason for the rule. Unchastity renders a widow incapable of performing the necessary religious ceremonies. It is true that this incapacity may be removed by performance of penances, proper for expiation. But so long as the widow is pregnant she is incompetent to perform even penances. Therefore, an unchaste widow cannot, under any circumstance, adopt so long as pregnancy continues (*b*).

Unchastity of the widow is a bar to her exercising the right to adopt.

Amongst the twice-born classes where the performance of religious ceremonies by the widow would be necessary to support an adoption, the pollution of the widow at the time of the adoption would render the adoption invalid. In Madras, where a widow of the Vaisya caste adopted a son while her husband's corpse was still in the house, it

Pollution of widow of twice-born classes renders adoption invalid.

(*a*) Shyamalal vs. Saudamini, 5 B. L R, 362; see also Kerry vs Moniram, 13 B. L. R., 14,

was held that the adoption was bad as she could not perform the religious ceremonies, and the *datta homam* in particular during the period of pollution (*a*). In the case of Sudras, pollution is no bar to a widow's adopting as no religious ceremonies are necessary in an adoption by them.

Effect of adoption by a widow on her status and proprietary position.

We shall now deal with another question of great importance, viz—what is effect of the adoption by a widow on her status and proprietary position as well on the status of her co-widows. Let us first consider the case of a widow who is herself heir to the husband. The result of an adoption in such a case is that her limited estate as widow at once ceases. The adopted son at once becomes full heir to the property and the widow's rights are reduced to a mere claim for maintenance (*b*). This follows indeed from the legal fiction that the adopted son is the posthumous son of the husband. Where the adopted son is a minor, she will continue to hold possession of the property as trustee for him.

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(*a*) Ranganayakamma *vs.* Alwar, I. L. R. 13 Mad, 214 (222). Recently, in Bombay. it has been held that the performance of *dattahomam* is not necessary for adoption by twice-born classes.

(*b*) Dhurm das Pandey *vs.* Mt. Shama Soondri, 3 M. I. A., 229 ;

Effect of adoption by a widow on status of co-widows.

Where there are several widows, holding jointly, it has been held that a son adopted by an elder widow, without the consent of the younger, is entitled to take the whole estate of his adoptive father and to defeat the interest of the younger widow (*a*). This is the law in the Bombay Presidency where, in such a case, no permission or authority of the husband is necessary in order to validate an adoption by the widow. In Bengal, an adoption by a widow with the express permission of her husband has the same effect, viz : it divests both her own estate and that of the co-widows (*b*. In Madras, where the adoption by the widow can be made with the assent of sapindas, the same view has prevailed (*c*). The adoption by a widow would *a fortiori* devest all estates which follow that of a widow, such as the right of a daughter. But where the estate vests in the adopting widow by inheritance from her son, and she then adopts, the adoption will be valid and the widow will be divested of the estate according to the

Its effect where the estate vests in the adopting widow by inheritance.

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(*a*) Rukhmabai *vs.* Radhabai, 5 Bom, A. C, 181.

(*b*) Mondakini vs Adinath, I. L. R. 18 Cal., 43 ; see also the decision of Ameer Ali, J, in, C. W. N. 121.

(*c*) Sreeramulu *vs.* Kristamma, I. L. R. 26 Mad., 143 152).

Mitakshara School (*a*) of Hindu law. In Bengal, there seems to be some conflict although the weight of authority is in favour of the view stated above. In the case of Rai Jotindranath Chaudhuri *vs.* Amrita Lall Bagchi, (*b*) it has accordingly been held that a Hindu widow adopting a son under the authority of her deceased husbandupon the death of a son begotten or adopted whose estate she inherited as mother, divests herself of that estate by the act of adoption in favour of the son last adopted by her and such son takes the estate immediately on such adoption. Both Mr. Mayne and Mr. Golap Chandra Sarkar take an opposite view, although the latter considers the view now taken as equitable. But where one of the two co-widows adopts to her husband after the estate has vested in the other co-widow as heir to her own son, it has been held that such adoption does not divest the co-widow of the property which he has obtained by inheritance. The adoption by one of the widows has not in such a case the

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(*a*) Jamna Bai *vs.* Raychand, I. L. R. 7 Bom., 225 ; Ravji *vs.* Laksmibai, I. L. R. 11 Bom., 381 ; Lakhmi *vs.* Gatto, I. L. R. 8 All, 319 ; Manik Chand *vs.* Jagat Settani, I L R. 17 Cal., 518.

(*b*) 5 C. W. N. 20.

effect of divesting the interest of the other widow in the estate—interest which has vested in her as heir to her son (*a*).

Conflict of authorities in Bombay on the point.

But, in Bombay, a question was raised viz, whether the consent of the co-widow in whom the whole estate had vested by inheritance from her son, would divest the co-widow of her interest in the estate (*b*). Sir Lawrence Jenkins, Chief Justice, was of opinion that the consent would be of no avail for the power (of the adopting widow) to adopt was at an end, when the estate vested in her co-widow.

But there seems to be a conflict of authorites on the point in the Bombay High Court. In the case of Dharnidhar *vs.* Chinto (*c*)where Venubai, the widow of a predeceased son of Dharnidhar adopted a son to her husband after the estate had vested in Laksmibai, the widow of Dharnidhar after his death with the assent of Laksmibai, it was held that the assent of Laksmibai could not validate for the purposes of inheritance an adoption which, as the right to property, was *abinitio* invalid. But an opposite view was taken by Farran, C. J. in the case of

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(*a*) See Faizuddin *vs.* Tincowri, I. L. R. 22 Cal., 565.

(*b*) Anandi Bai vs Kashi Bai, I. L. R, 28 Bom., 461 (465).

(*c*) I. L. R. 20 Bom. 250.

Babu Anaji *vs.* Ratnoji (*a*). This conflict led to a reference to the Full Bench in the case of Vasudeo *vs.* Ramchandra (*b*) but the point remained unsettled and the effect of the assent was undecided as it became unnecessary to pronounce any decision on the effect of the assent as the assent was found to be invalid. In a later case Mr. Justice Ranade thought that an adoption made by a widow, with the assent of the person in whom the estate is vested, will divest him of that estate (*c*).

Subject to the limitations stated already a son adopted by the widow will divest not only the widow, or widows if there are more than one, though the adoption was made by only one of them, but also either in whole or in part an undivided coparcener of the father on whom the estate had devolved by survivorship (*d*).

Another question of importance, which is not altogether free from difficulty, is that which relates to the validity of an agree-

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(*a*) I. L. R. 21 Bom., 319.

(*b*) I. L. R. 22 Bom, 551.

(*c*) Payapa vs. Appanna, I. L. R, 23 Bom, 327.

(*d*) Surendra vs Sailaja, I. L. R. 18 Cal., 385. Vithoba vs Bapu, I. L. R. 15 Bom., 110. Sri Raghunatha vs Sri Brojo, L. R, 3 I. A, 154; Sri Virada vs Sri Brojo, I. L. R. 1 Mad., 69.