ment made by the widow, with the natural father of the adopted son before the adoption, whereby she makes a reservation in regard to her life-interest. However imperative might be the terms of the authority by the husband to the widow to adopt, it is not obligatory on her to do so. One cannot compel a Hindu widow to adopt. Her interest in most cases would be not to adopt as thereby she would divest herself of the estate of her husband. At the same time, it may be her moral duty to carry out the wishes of her husband expressed in the authority to adopt. She may, therefore, contrive means by which she may be enabled to carry out the wishes of her husband, without depriving herself of all interest in her husband's property. On the other hand, adoptions under such conditions might also be beneficial to the son to be adopted. It seems therefore that an agreement which is fair and equitable in its terms and which takes into consideration the interest both of the adopted son and the adoptive widow might be enforced. But where the agreement is essentially repugnant to the status created by adoption, it ought not to bind the adopted son. For instance, if the agreement deprived the adopted son of all right to the property of the husband of the widow to

Ante-adoption agreement—how far binding on adopted son.

whom adoption is made, and so left him without any means of performing the necessary religious offices towards the manes of his adoptive father and his ancestors, it may well be that the Courts would regard the condition as essentially repugnant to Hindu law and would refuse to uphold it.

No text of Hindu law on the point.

There is, however, no text of Hindu law which either recognizes or prohibits such agreements being entered into and we must look for the law on the point to the judicial decisions—decisions which have not been quite uniform.

Judicial decisions thereon.

In the case of Chitko *vs.* Janaki (*a*) which is one of the earliest cases on the point, it was held by the Bombay High Court that an agreement on the part of the father, that his son's interest shall be postponed till the death of the widow, was valid and binding. In the case of Ramasami Aiyan *vs.* Venkataramaiyan (*b*) refering to the above decision of the Bombay High Court, the Privy Council observed :— "In this case their Lordships think it enough to decide that the agreement of the natural father which has been set out was not void, but was, at the least, capable of ratification when the son became of age:" In 1887 the

(*a*) 11 Bom. H. C. R., 199.

(*b*) I. L. R. 2 Madras., 91.

Bombay High Court again affirmed the validity of such agreement and held that it could be entered into by the adoptive father so as to bind him and the adoptive widow (*a*). In 1888 in a case before the Judicial Committee it appeared that a second deed of adoption was executed subsequent to the adoption by which the adopting widow purported to revoke the first deed of adoption on the allegation that it ought to have contained a provision postponing the interest of the adopted son until her death and their Lordships held that such an agreement did not affect the rights of the adopted son. Their Lordships said that even if it amounted to a condition, the analogy, such as it was, presented by the doctrines of the English courts of equity, relating to the execution of the powers of appointment, would rather suggest that the adoption would have been valid and the condition void (*b*). It is to be noticed that in this case the agreement was subsequent to the adoption and therefore the observations were *obiter* so far as the point under discussion is concerned. In 1892 the Madras High Court apparently relying on this dictum of their Lordships held that an agreement made before adoption

Conflict of authorities in Madras on the question.

(*a*) Ravji vs Laksmibai. I. L. R. 11 Bom., 381.

(*b*) Bhaiya Rabidat vs. Indar. I. L. R. 16 Cal., 556.

which had the effect of postponing the rights of the adopted son to the death of the widow was not valid (*a*), although the said decision was in conflict with the *ratio decidendi* in two earlier cases Lakshmi *vs.* Subramanya (*b*) and Narayanasami *vs.* Ramasami (*c*). These conflicting views prevailed in Madras till 1904 when a Full Bench of that Court (*d*) decided in favour of the agreement and overruled the case in 16 Madras series cited above. It is hardly necessary to add that the decision of the Madras Full Bench is just and equitable and accords with the spirit of Hindu law.

Ante-adoption agreement upheld by authority of the caste.

Such dispositions are also commonly made and are upheld by the authority of the caste and the consciousness of the people (*e*). In Allahabad, a condition in the deed of adoption to the effect that the widow was to be the owner and manager of the estate during her life has been held to bind the adopted son (*f*).

In cases of adoption after the death of the adoptive father by his widow under his

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(*a*) Jagannadha vs Papamma, I. L. R 16 Mad, 400.

(*b*) I. L. R. 12 Mad., 490.

(*c*) I. L. R. 14 Mad., 172.

(*d*) Visalakshi vs Sivaramien, I. L. R. 27 Mad., 577.

(*e*) See the decision of the Full Bench in 27 Mad. series cited above.

(*f*) Kali vs Bijai, I. L. R. 13 All., 391.

authority every lawful disposition of property made by him even by a will would be binding on the adopted son for the obvious reason that those dispositions become operative from the moment of the death of the testator, while the adoption must necessarily take place at some moment subsequent to death, and rights accruing by virtue of such adoption are only in that part of the estate which remains undisposed of at the moment of adoption. For the like reasons alienations by a widow of her life interest made before the adoption will also bind the adopted son (*a*); on like principles in Bengal, where the father is the absolute owner of property, ancestral or self-acquired, it has been held that where the power of adoption to a Hindu wife directed her to remain in possession of all properties of her husband during her life, the widow took a life interest in those properties with remainder to the adopted son (*b*). The preceding discussion suggests or rather assumes that where an adoption is made by the widow after her husband's death the rights of the adopted son accrue after such adoption. The decision of the Judicial Committee in the case of Bamandas Mookerjee *vs.* Mussamat

Alienations by widow before adoption of her life-interest binding on adopted son.

(*a*) Sreeramula vs. Kristamma. I. L. R. 26 Mad 143. (*b*) Bipin vs Brojo, I. L. R. 8 Cal., 357.

Tarinee (*a*) supports this view. It affirms that the rights arise from the date of the adoption and not before. Although by a legal fiction the adopted son is considered to be the posthumous son of the adoptive father still the date of the birth is not carried back by another fiction to the death of the adoptive father. The rights of an adopted son spring up on the date of adoption. The adopted son therefore can not question the mesne acts of the widow between the death of the last full owner and the adoption. But, of course, in the case of widows, the acts must be such as a limited owner could legally do so as to bind the next takers after the widow. For instance, the widow can, in the absence of legal necessity, make an alienation which will remain good during her life and not beyond. In a case where such an alienation was made before adoption the adopted son was held not entitled to recover possession during her life(*b*).

Effect of adoption on *Stridhan*.

Before we part with the subject we should state that adoption by a widow does not divest her of her *Stridhan*.

We have already had occasion to refer to the authority of a widow to give a son in

(*a*) 7 M. I. A., 188.

(*b*) Sree Ramulu vs Kristamma, I. L. R. 26 Mad., 143.

adoption *(a)*. As has been pointed out by the Judicial Committee in a recent case this authority differs in the different schools of Hindu law *(b)*. We have also stated before what are the views of the different schools on the question. We indicated before that in the Bombay school there is a difference of judicial opinion as to the nature of the basis of the right of the widow to give a child in adoption. We shall simply here confine ourselves to an examination of the original authorities on the question. Manu declares :—"He is called a Datrima son whom his father or mother affectionately gives as a son, being alike, and in a time of distress confirming the gift with water" *(c)*. Yajnavalkya *(d)* and Vishnu *(e)* Baudhayana *(f)* and Vasistha *(g)* each ordians that each parent has independently of the other the power of giving a son in adoption and that when the husband is alive the wife must obtain his assent. But these texts do not stand alone and there are two texts of Vasistha and Baudhayana which

Original authorities on widow's power to give in adoption.

(a) See Page 147. ante.

(b) Sri Balusu vs Sri Balusu, I. L. R. 22 Bom, 408

(c) IX, 168. *(d)* Yajnavalkya, II, 131.

(e) Vishnu, XV, 18-19.

(f) Baudhayana, III, 2. 3, 20.

(g) XVII, 29-29.

seem to impose further restrictions on the power of the widowed mother to give in adoption. Both Vasistha (*a*) and Bandhayana (*b*) after stating, that the son produced from the virile seed and uterine blood is an effect where of the father and mother are the cause, and that the mother and the father are consequently competent to give, sell or abandon him, adds :—"But a woman shall neither give nor accept a son, except with the assent of her husband." Referring to the above text of Manu, Nilkantha observes that "from the word *wa* (or) it means that if the mother be absent, the father alone may give him away, and if the father be dead, the mother may do the same, bnt if both be alive, then even both : so [says] Madana" (*c*). The Mitakshara (*d*) says that the mother may give in adoption without his father's assent after his decease. The Viramitrodaya contains the following remark : The mother and the father may give either separately or jointly.

Nanda Pandita considers, as we have seen already, that widows are incompetent to adopt. The same argument ought to apply

(*a*) Vas, XV 1-5 (*b*) Parisistha, VII, 5, 2-6.

(*c*) Vyavahara Mayukha, ch. IV. V. 50, (Mandlik's Edition.) (*d*) Mitakshara, I, 11, 9.

(*e*) Mr. G. C. Sarkar's translation. Page 115.

to a widow's power to give as both capacities are founded on the same text of Vasistha ; but he maintains that a widowed mother has a right to give as the assent of the husband must be presumed and he relies on a text of the *Veda* as justifying the legality of the gift *(a)*.

Capacity to give in adoption, how far a survival of patria potestas

On the texts of the sages and the writings of the commentators it is clear that the widowed mother has a right to give in adoption. According to the texts this right results from the maternal relation and is not derived by delegation from her husband. It is however necessary to notice another theory which the text of Vasistha might seem to suggest viz., that the capacity of a man to give his son in adoption is the survival of the *patria potestas* of ancient law, according to which a man could exercise absolute dominion over the persons placed under his power viz, his wife and children whom he could sell or give away : and the right of the widow to give a boy in adoption would, in this view, be regarded as a right of disposition, a portion of the *patria potestas*, which comes to the widow by reason of her connection with the deceased husband's estate *(b)*. But as against this

(*a*) Dattaka Mimansa, 4. 12.

(*b*) See Justice Ranade's view in Panchappa vs Sanganbaswa, I. L. R. 24 Bom. 94.

view it must be said that Vasistha wrote at a time when the earlier sages like Manu had already shown the sinfulness of selling a child and when there was no trace of the *patria potestas*. There is a very instructive discussion in the Vyavahara Mayukha which leads to the conclusion that there is no ownership over a wife as there is in a cow, and therefore there cannot be any property in the children begotten on her (*a*). The Vyavahara Mayukha denies that the wife and children can ever be the subject of ownership. According to this then Mr. Justice Ranade's view that the right of adoption is a right of disposition and a portion of the *patria potestas* does not seem to be justified. Besides it is extremely doubtful if at any time since the beginning of Indian history the power of the *pater familias* over the children ever extended to giving them away or selling them. Vachaspati Misra and Jimutvahana support Nilkantha in his view with regard to the absence of ownership of a man over his wife and children. The Mitakshara and the Viramitrodaya, while maintaining that the wife and children can be the subject of ownership, hold that the children could never be given

Vyavahara Mayukha denies ownership over wife and children.

(*a*) Chap IV. Sec 11 see Page 35 (Mandlik's translation.)

away or sold by reason of express prohibitions in the *Smritis* and the *Srutis*. Adoption is generally regarded as an advancement of the child and the mother can safely be entrusted to decide whether or not she would give away the child in adoption.

Right of a Hindu widow to maintenance.

I now propose to touch upon the right of a Hindu widow to maintenance. In the different schools of Hindu law, the widow inherits the property of her husband under varying conditions. It is only when she does not so inherit that she becomes entitled to maintenance. Her right to maintenance, however, unlike that of the wife, is dependent on the possession of her husband's property by her husband's heir whether by survivorship or by inheritance. Amongst the persons who, according to a text of Manu cited before, must be maintained even if the person whose duty it is to maintain does not possess any inherited or ancestral property, a widow is not mentioned. The Smriti Chandrika says that in order to maintain the widow, the elder brother or any of the others above mentioned must have taken the property of the deceased ; the duty of maintaining the widow being dependent on the possession of property. The Mitakshara by laying down that 'where there may be no property but what has been self acquired,

Smriti Chandrika.

Mitakshara.

the only persons whose maintenance out of such property is imperative are aged parents, wife and minor children" (*a*) suggests that the obligation to maintain the widow (who is not named there in) is dependent on the possession of the property of the deceased by those that are entitled to succeed to his property. The Viramitrodaya says on the point as follows :—"But of a sonless (deceased) person who was unseparated or reunited, even the chaste wife is entitled to mere subsitence by reason of the text of Narada and others such as "If any one amongst brothers die without issue" (*b*). The text of Narada which is not quoted in full in the Viramitrodaya may be translated as follows :—Among brothers if any one die without issue or enter a religious order let the rest of the children divide his wealth except the wifes separate property. Let them allow maintenance to his women provided these preserve unsullied the bed of their Lord but if they behave otherwise, the brethern may resume that allowance.

Viramitrodaya

Obligation to maintain widow not absolute.

According to all the schools of Hindu law the obligation to maintain the widow is not absolute but is conditioned on the fact

(*a*) Mitakshara in the Chapter on substraction of Gifts. (*b*) Page 153 G. Sarkars translation.

of the person against whom maintenance is claimed having inherited the property of her late husband, and that where that condition is not satisfied the widow's claim for maintenance cannot prevail.

Benares School.

In the Benares School of Hindu law the question of a widow's maintenance arise more frequently than in the Bengal School and the reason is obvious. Under the Mitakshara a widow can only inherit the property of the husband when he died without issue and was not a member of an undivided family but was separate from his coparceners at the time of his death. In Bengal she succeeds in default of son, grandson or great-grandson whether her husband was a member of joint family or not (*a*). Cases of maintenance of widows are therefore less frequent in Bengal than in Benares. A Full Bench of the Allahabad High Court (*b*), which lays down that where there is no joint property, the widow of a son has no legal claim for maintenance against her father-in-law, has settled the law for the Benares School. The subject of a Hindu widow's right to maintenance has been dealt with in a very careful and learned exposition of the law by Mr. Justice Mahmood who

(*a*) Hema vs Ajoodhya, 24, W. R., 474.

(*b*) Janki vs Nanda Ram. I. L. R. 11. A. 194 (F.B).

after examining the texts and authorities on the point held that there was no legal obligation on the father-in-law to provide for the son's widow out of his self-acquired property, but that there was only a moral obligation. The Full Bench laid down another proposition of very great importance viz : that when upon the death of the father-in-law who was merely under a moral obligation to maintain his widowed daughter-in-law, the property devolved on his sons they came under a legal obligation to carry out this moral obligation of their father and could be compelled to do so.

Moral obligation in the ancestor to maintain ripens into a legal obligation in the heir.

Bengal School.

This decision has been followed in Bengal in several cases (*a*). In the more recent case of Siddheswari Dasee *vs* Janardan Sarkar (*b*), Chief-Justice Sir Francis Maclean pointed out that in regard to a Hindu widow's right to maintenance there is no difference between the Dayabhaga and the Mitakshara schools. All these decisions rest on the principle that an heir does not take property for his own benefit but for the spiritual benefit of his predecessor, and both the schools are governed by the same principle of spiritual benefit.

(*a*) Kamini vs. Chandra Pode, I. L. R. 17 Cal., 373 ; Devi Pershad vs. Gunwanti, I. L. R. 22 Cal., 410.

(*b*) I. L. R. 29 Cal, 557.

Judicial decisions on the point.

In Bengal one of the earliest and leading cases on the subject is the case of Khetramani *vs* Kasinath (*a*). In that case the majority of the Judges held that the claim of a widowed daughter-in-law, who after her husband's death went to reside in her father's house, for maintenance against the father-in-law could not be supported as the son left no property of his own. This Full Bench has settled the law for Bengal.

In Bengal.

In Bombay.

In Bombay it was formerly held that a Hindu father-in-law was legally bound to maintain his deceased son's widow, notwithstanding that no property left by the son may have come into his hands (*b*). But this decision was overruled by a Full Bench (*c*) which laid down that in the Bombay Presidency a Hindu widow voluntarily living apart from her husband's relations is not entitled to a money allowance as maintenance from them if they were separated in estate from him at the time of his death nor is she entitled to such maintenance from them whether they were separated or unseparated from him at the time of his death if they have not any ancestral estate belonging to them in their hands.

(*a*) 10 W. R. (F B) 89. 2 B. L. R. A. C. (15)

(*b*) Udaram vs Sonkabai, 10. Bom. H. C. 483 (1873)

(*c*) Savitri vs Laksmi, I. L. R. 2 Bom., 573.

This has settled the law for Bombay (*a*). Where, however, after the death of the father-in-law his self-acquired property devolved either on his son or his widow, they were under a legal obligation to maintain his widowed daughter-in-law (*b*) on the principle stated before viz.,—that the moral obligation of the father-in-law became a legal obligation which his heirs inheriting his property were bound to discharge. The ripening of the moral obligation into a legal obligation on devolution by inheritance is due to the operation of principles peculiar to the doctrines of Hindu law which regards as *quasi* trustee for the family, and for the spiritual benefit of the deceased owner, a member into whose hands property comes by virtue of his status as a member of the family.

Devisee not bound to maintain if relieved by the testator.

But property acquired by valid testamentary disposition is not governed by the rules of the Hindu law of inheritance, and when the power is unrestricted it is difficult to conceive any consistent ground on which the devisee could be held bound by an obligation from which the testator had power to relieve him and by the bequest

(*a*) Kalu vs Kashibai, I. L. R. 7 Bom., 127.

(*b*) Adhibai vs Cursandas, 11 Bom., 199. Yamunabai vs Manu, 23 Bom., 608; Rashid vs Sherbanoo 29 Bom 85.

had actually relieved him. It has accordingly been held in Bombay that the widow of a predeceased unseparated son has no right to maintenance from a person to whom her father-in-law has bequeathed the whole of his self-acquired property (*a*).

In Madras. In Madras the text of Smriti Chandrika viz :—that the rule of maintaining the widow is dependent on the taking of the property—is strictly followed (*b*) and in the case of Ammakanu *vs.* Appu (*c*) it has been laid down that a Hindu is under no legal obligation to maintain his son's widow out of his self acquired property. In a recent case the Madras High Court has laid down that the moral obligation to support the daughter-in-law to which her father-in-law was subject would, on his death, have acquired the force of a legal obligation as against his assets in the hands of his heir (*d*). In the same case it has been held that a testamentary disposition of the self-acquired estate made in favour of volunteers by a person morally bound to provide maintenance cannot affect the position of a party whose moral claim

(*a*) Bai Parbati vs. Tarwadi. I, L. R. 25 Bom. 263.
(*b*) Smriti Chandrika, XI, 1. S. 34.
(*c*) I. L. R. 11 Mad., 91.
(*d*) (1898) Rangammal vs. Echammal. I. L. R 22 Mad., 305.

has become a legal right. This view is in-direct conflict with that taken by the Bombay High Court in the case previously cited (*a*). It is submitted that the better view is that of the Madras High Court. To a Hindu not penetrated with European notions and still retaining the spirit of ancient Hindu law as contained in the texts of the sages and commentators the exposition of law of the Bombay High Court, regarding the absence of the right of a Hindu widowed daughter-in-law to maintenance as against the devisee of her father-in-law who possessed only self acquired property, would seem to be harsh and unsympathetic. The position of a Hindu widow especially of the more respectable classes is one of utter helplessness. She is incapable of earning her livelihood. Her life is one of seclusion. Her experience of the outside world is extremely limited. If those then whose moral duty it is to maintain make a bequest of property, the presumption is that the bequest is made subject to her right to be maintained. This view accords with the feeling of the Hindu community.

Comment on the decisions.

Where property is obtained by a person by inheritance from his maternal grandfather, he is liable to maintain his widow or

(*a*) Bai Parbati vs. Tarwadi, I. L. R. 25 Bom.

his widowed daughter-in-law out of that property, since such property is regarded as ancestral property in his hands.

Residence in her husband's house not necessary to sustain a claim for maintenance.

This brings us to consider whether residence of a Hindu widow in the house of her husband is requisite to sustain a claim for a separate allowance, as it is in the case of a similar claim by the *wife*. In some of the early Bengal cases the view prevailed that residence in the husband's family was necessary in order to sustain a claim for maintenance (*a*). But it is now settled by a decision of the Judicial Committee that "all that is required of her is that she is not to leave her husband's house for improper or unchaste purposes, and she is entitled to retain her maintenance unless she is guilty of unchastity, or other disreputable practices, after she leaves that residence" (*b*). Their Lordships point out "that the case of a widow is very different from the case of a wife. A wife of course can not leave her husband's house when she chooses and require him to provide, maintenance for her elsewhere ; but the case of a widow is different." In Bombay the question as to whether maintenance is to

Wife's right in this respect contrasted.

(*a*) 24 W. R. 474.

(*b*) Pirthee singh vs. Rani Raj Kooer, 20 W. R. 21. (P. C).

be allowed to a widow who resides away from her husband's family, not for unchaste or improper purposes has been held in one case to be a matter entirely in the discretion of the courts (*a*). This decision is inconsistent with an earlier Full Bench decision of the Bombay High Court (*b*) where it seems to have been considered as settled by authority that, so long as a widow remains chaste she is entitled to maintenance (where there is family property) whether she continues to live in the husband's family or not (*c*).

No separate maintenance where property is small.

But a widow cannot claim separate maintenance where the family property is so small as not reasonably to admit of allotment to her of a separate maintenance (*d*).

It may be an exception to the general rule that when a widow is directed by her husband's will to reside in his family house, or in that of her father, she is not entitled to separate maintenance if she resides elsewhere (*e*).

Obligation to maintain extends to king.

The obligation to maintain a widow extends even to a king when he takes the

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(*a*) Ranga vs. Yamuna Bai I. L. R. 3 Bom. 44.

(*b*) Savitri vs. Lakmi, I. L. R. 2 Bom., 573.

(*c*) See Kastur Bai vs. Shivaji. I. L. R. 2 Bom. 372.

(*d*) Godavari vs. Sagun Bai, I. L. R. 22 Bom., 52. Gokhi bai vs Laksmi, I. L. R. 14 Bom., 390.

estate of her husband by escheat or by forfieture (*a*).

Principles on which amount of maintenance are fixed.

Let us now proceed to the consideration of the principles on which the amount of maintenance of a widow would be fixed. The Privy Council pointed out that the extent of property is not a criterion of the amount of maintenance to be fixed in the sense that no ratio exists between the one and the other (*b*). In a Bombay case the court proceeding on the analogy of the amount of maintenance allowed by the sages to a deserted wife fixed the amount of the widows maintenance to a third of her husband's share in the estate (*c*). In a recent Allahabad case it has been laid down that in estimating the amount of maintenance which should be allowed to a Hindu widow out of her husband's estate regard should be had to the value of the estate as gauged by the annual income derivable therefrom, to the position and status of the deceased, and to the position and status of the widow and the expenses involved by the religious and other duties which she has to discharge (*d*) Mr. Justice Mahmood, in giving

(*a*) Golab vs. Collector of Benares 4 M. I. A. 246.
(*b*) Nitto Kishore vs Jogendro. 5 I. A. 55.
(*c*) Adi bai vs Cursondass, I. L. R 11 Bom, 199.
(*d*) Baisnj vs. Rup sing 12 All., 558.

a separate judgment said : "The amount of maintenance should not be determined with reference to the principle that the life of a Hindu widow should be of a peculiarly ascetic character, and that she should have only "a starving allowance". The austerities enjoined on Hindu widows are matters not of legal obligation but only of moral injunction and cannot be enforced by courts of justice. The courts should bear in mind that Hindu widows are by ancient custom debarred from remarriage and should fix the maintenance at a sum sufficient to obviate the danger of the widow being driven to immorality (*a*). In calculating the amount of maintenance to be awarded to a widow her *stridhan* must be taken into account. But clothes and jewels which do not bring any income shall certainly not be taken into account but only such kind of *stridhan* as is of a reproductive character (*b*).

Suit for arrears of maintenance.

It used at one time to be questioned whether a suit for arrears of maintenance would lie. But these decisions are of no effect after the decision of the judicial committee in the case of Pirthee singh vs Ram

(*a*) See also Devi vs. Gunwanti, I. L. R. 22 Cal., 410 ; Mahesh vs. Dugpal 21 All, 232.

(*b*) See Mr. Justice West's decision in Savitri vs Laksmi, I. L. R. 2 Bom., 584.

Raj Koer cited above where an opposite view was taken (*a*) :

Maintenance —how far a charge on family property.

It now remains to consider the somewhat vexed question as to the extent to which the claim for maintenance is an actual charge on the family property which binds it in the hands of the purchasers and transferees of the said property. We have in a previous chapter (Page 179-80) quoted texts from Manu, Narada, Vrihaspati which enjoin on a Hindu the duty of being just before he is generous by forbidding him from alienating the family property to such an extent as to deprive the dependent members of his family of maintenance. But the commentators have regarded these texts which relate to gifts as merely preceptive (*b*).

Judicial decisions.

For the law on the point we must look to the judicial decisions. Mr. Justice Wilson, in giving judgment in the case of Sorola *vs* Bhuban (*c*) said, "The wife's right to maintenance after her husband's death is, in one sense, undoubtedly a charge on the estate, and she may sue to enforce it and have it secured. But it is not a charge in the fullest sense of the term, because it does not in every case necessarily bind any

(*a*) Venkapadhaya vs. Kaveri, 2 Mad H. C. 36. also I Bom H. C, 194. (*b*) Jagannatha Digest 2, 132. Dayabhaga ii sec 28. (*c*) I. L. R. 15 Cal., 292.

part of the property in the hands of a purchaser. Mr. Justice West, after a careful examination of the original text and the previous decisions, held that mere notice of a claim for maintenance cannot be sufficient to bind a purchaser, and that the claim even of a widow for maintenance is not such a lien on the estate as binds it in the hands of a bonafide purchaser for value without notice (*a*). The learned Judge held that in the absence of a specific charge on the family estate as to the future maintenance of a Hindu widow the sale of ancestral property of the heir in possession, for discharging the valid debts of her husband, his father or grand-father, is valid, and the bonafide purchaser for value is not affected although he may have had notice of her claim to maintenance (*b*). A similar view has been taken in Bengal (*c*). A Full Bench of the Allahabad High Court has held that until fixed and charged by decree of court or contract on particular property maintenance is not a charge on the estate to be enforced against a bonafide purchaser without notice (*d*) This principle has been

(*a*) Laksman vs Satya Bhama Bai I. L. R. 2 Bom 494. (*b*) Lakshman vs Satyabhama. 2 Bom 494.

(*c*) (1884) 11 Cal 102 (105)

(*d*) 4 All 296 (299)

extended to a Hindu widow's right to maintenance, and it has been held that if the property of her deceased husband is transferred to a bonafide purchaser for value even with the knowledge of the widow's claim the widow's right is liable to be defeated provided that the transfer was not made with the intention of defeating the widow's claim (*a*). The real question in all cases of this description will always be, as has been indicated by Mr. Justice West in the case Laksman *vs* Satyabhama, (*b*) whether the vendor of the deceased husband's estate was acting in fraud of her rights and further whether the purchaser had notice not merely of the widow's claim but also of the fraud which was being practised on her claim.

Sec. 39 of the Transfer of Property Act (IV of 1882.)

Section 39 of the Transfer of Property Act substantially embodies the principles contained in the judgment of Mr. Justice West. But this section, it has been held, does not protect a transferee for consideration where the property has already been declared by a

(*a*) Ram Kunwar vs. Ram Dai, I. L. R. 22 All., 326 (329), also The Bharatpur Estate vs. Gopal, I. L. R. 24 All 160 (163); see also Mani Lal vs. Bai, I. L. R. 17 Bom., 398 where mortgage by her deceased husband of the family house not in fraud of her rights was held to prevail against the claim for maintenance.

(*b*) Lakshman Rámchandra vs. Satyábhamábai, I. L. R. 2 Bom., 607.

decree of Court as subject to a charge for maintenance (*a*).

Widow can not be deprived of maintenance by will in Bengal.

Although a father in Bengal can make a testamentary disposition of all his property so as to deprive his son even of maintenance (*b*) he cannot by will deprive his widow of her right to maintenance. The reason for this difference is obvious. It is only the infant son that has a right to be maintained by the father in accordance with a text of Manu cited before. The adult son has no such right. But with regard to the widow different considerations arise. The right to maintenance of the widow arises by marriage. It is a legal obligation which attaches on the property of her husband. Jaimini in the aphorisms cited in a previous chapter affirms that there is a community of interest of the wife in her husband's wealth. After the death of the husband she is at least in a subordinate sense co-owner with her husband and there can be no doubt that in this view she would at least be entitled to be maintained by those who would take her husband's property.

In Bengal it has accordingly been held that a widow cannot be deprived of her

(*a*) (1899) Kuloda vs. Jogeshar, I. L. R. 27 Cal., 194.

(*b*) Tagore vs Tagore, 4 B. L. R. (O. C. J.) 132, 159.

right to maintenance by any provision in a will of her husband. In the case of Serola Dasi(*a*) Mr. Justice now Sir Arthur) Wilson remarked that the husband has full power of disposition of his property by will subject only to any question of the maintenance of his widow. In the more recent case of Promotha *vs* Nogendra (*b*) the question was raised but does not seem to have been finally decided, as will appear from the following passage in the judgment in that case :—"The most difficult question, however, is whether the widow can challenge the express provisions for her maintenance. It is unnecessary for the purposes of the present litigation, to consider whether she could challenge a will if no maintenance had been allowed to her" ; but the learned judges went on to add : "and it seems, on the authorities, that a widow cannot be deprived of her right to maintenance by any provision in a Dayabhaga will. But in our opinion these larger questions do not arise in the present case."

A husband cannot make a wholesale gift

(*a*) I. L. R. 15 Cal., 292 (300).

(*b*) 15 C. W. N. 808.

(*c*) See Joytara vs. Ramhari, I. L. R. 10 Cal., 638 ; Debendra, Brojendra I. L. R. vs. 17 Cal., 886 ; Bhubanmoyee vs. Ramkissore S. D. of 1860. I P 489.

A husband cannot make a gift of all his property without providing for maintenance for his widow after his death.

inter vivos of his estate without reserving maintenance to his widow and, in such a case, it has been laid down that the donee takes the property subject to her right to maintenance (*a*). Nor can the holder of ancestral property alienate it where there exists a widow entitled to maintenance out of such property—so as to defeat the rights of the widow (*b*). But it has been held that where a donee takes the gift in consideration of discharging certain debts due from the donor, the widow's right of maintenance cannot stand in the way of such a gift (*c*).

Madras decisions on the point.

In Madras it was laid down in one of the early cases that a Hindu widow had a right to reside in the family dwelling house and a judicial sale of the dwelling house was subject to such right (*d*). But where the sale is valid against the widow as having been made for the benefit of the family or with her consent or in circumstances which would sustain a plea of equitable estoppel against her, the purchaser is entitled to eject her (*e*). In Bombay the general rule of Hindu law

(*a*) Jamuna vs Machul, I. L. R. 2 All., 315.

(*b*) Becha vs. Mothna, I. L. R. 23 All., 86.

(*c*) Gurdayal vs Kaunsila, I. L. R 5 All., 367.

(*d*) Venkatammal vs. Andyappa, I. L. R. 6 Mad., 130.

(*e*) Ramanadan vs Rangammal. I. L. R. 12 Mad 260 (F. B).

Bombay decisions thereon.

that a coparcener's widow is entitled to reside in the family house seems well settled (*a*). In Bengal, however, Sir Barnes Peacock held in one of the early cases that an adopted son could not convey to a stranger such a right to the family dwelling house as to deprive the adoptive mother of her right of residence (*b*).

Effect of unchastity on the widow's right to maintenance.

It remains now to consider the effect of unchastity on the widow's right to maintenance. The following text of Narada cited by Jimutvahana in (*c*) his Dayabhaga : "let them allow a maintenance provided they keep unsullied the bed of their lord. But if they behave otherwise, the brother may resume that allowance" would go to show that the right of maintenance was liable to resumption or forfeiture at least in Bengal. The Judicial Committee of the Privy Council in the case of Moniram Koleta *vs.* Keri Koletani (*d*) has expressed an opinion to that effect. Following this obiter dictum of the Privy Council it has been laid down that it is a settled principle of Hindu law that a Hindu widow's right to claim maintenance is forfeited upon her un-

She forfeits her right to maintenance.

(*a*) Bai Devkore vs. Sanmukhram, I. L. R. 13. Bom., 101 ; Dalsukhram vs. Lallubhai, I. L. R. 7 Bom 282.

(*b*) Mongola vs. Dinonath, 4 B. L. R. O. C. 72.

(*c*) Ch. XI. Sec I. V. 48. (*d*) I. L. R. 5 Cal, 776.

chastity(*a*). In Allahabad and Bombay it has been held that a decree obtained by a Hindu widow declaring her right to maintenance is liable to be set aside or suspended in operation on proof of subsequent unchastity (*b*). The question next arises whether an unchaste widow is not entitled to what been styled as a *starving maintenance i. e.* bare food and raiment. The texts, which we have cited in this connection when dealing with the maintenance of the wife, would seem to suggest that she is so entitled. But, as has been pointed out in Romanath *vs* Rajonimoni (*c*), cited above, the question is yet unsettled (*d*). But it will accord with the spirit of the Hindu law texts if she be allowed her bare necessaries of life, though unchaste. In Bengal the leaning of the Courts has been to allow her food and raiment provided she does not persist in her incontinence at the time when she commences her sult for maintenance.

Widow marriage.

We now proceed to deal with another topic affecting the status of a Hindu widow viz., her right of remarriage.

(*a*) Romanath vs. Rajonimoni, I. L. R. 17 Cal. 674.

(*b*) Daultakuari vs Meghu, I. L. R. 15 All 382. Vishnu vs. Majamma, I L. R. 9 Bom., 108.

(*c*) I. L. R. 17 Cal., 674.

(*d*) The Allahabad High Court suggests she will not get even starving maintenance (15 All 382 cited ante.)

In the vedic period widow-marriage seems to have been allowed, as would appear from the following passage in the Rig Veda : "When a woman has had one husband before, and gets another, if they present the Aja Panchaudana offering they shall not be separated. A second husband dwells in the same world with his rewedded wife if he offers the *aja Panchaudana*" (*a*). Vedic text.

When we descend to the *smriti* period we find ordinances prohibiting remarriage of widows. "In the sacred texts," says Manu, "which refer to marriage the appointment of widows is nowhere mentioned, nor is the re-marriage of widows prescribed in the rules concerning marriage" (*b*). We have no evidence as to how this change of ideas came about. But in most of the *smritis* no indication of the marriage of widows is to be found. Some passages of Manu would, however, seem to permit the marriage of virgin widows according to the interpretation put upon it by some European scholars (*c*). But the Institutes Manu.

(*a*) Rig V. IX, 5, 27 & 28 (Muir's Sanskrit texts 306 & 458 vol 5.

(*b*) Manu IX, 65 ; See also Manu, V. 161-165, which texts imply an obligation on widows not to marry again.

(*c*) Manu IX, 69 ; See Sacred Books of East, Vol. XXV. 339 and Ind Ed.

Parasara.

of the sage Parasara contain a verse which in the most explicit terms permits a widow to remarry. That verse runs as follows :—

नष्टे मृते प्रव्रजिते क्लीवे च पतिते पतौ ।
पञ्चस्वापत्सु नारीनाम् पतिरन्यो विधीयते । (*a*)

Now according to a verse cited in a previous chapter (page 23. ante) the Institutes of Parasara were specially ordained to to be the law for the Kaliyuga (present age). If that is once conceded then widow remarriage seems to be meant exclusively for the present age The whole subject of the sanction by the *shastras* of the remarriage of Hindu widows formed the subject of a controversy which more than half a century ago convulsed Hindu society. That distinguished Sanskrit scholar Pundit Issur chandra Vidyasagar, whose name is a household word in Bengal, published his famous tracts on widow marriage in which he attempted to show that the remarriage of widows had its sanction in the Hindu *shastras*. Pandit Issur chandra based his argument on the famous text of Parasara cited above and he contended that a text occuring in the Institutes of Parasara must be held to be specially binding in the present age. These tracts are remarkable no less for their close and vigorous reasoning

Pundit Issur Chandra Vidyasagar's views on the question.

(*b*) Institutes of Parasara, Ch. IV, verse 27.

as for the deep erudition and research that they evinced. On the other side those Pandits who denied the legality of widow marriage also displayed considerable learning. They relied on the commentary of Madhaviya, the only commentator of Parasara who took the view that the much canvassed text of Parasara was not intended to apply to the Kaliyuga, and they added that the text did not refer to the marriage of widows but to the marriage of betrothed girls whose husband died before the actual marriage. It is difficult to say at this distance of time which side came off best in the fight. But the result of the controversy was that Vidyasagar had a large number of supporters who forwarded a memorial to Government praying for the removal of legal obstacles to widow marriage and Act XV of 1856 which was styled "An act to remove all legal obstacles to the marriage of Hindu widows" was passed. The act legalized Hindu widow remarriage and enacted that the issue of such marriage would be legitimate, any custom and any interpretation of Hindu law to the contrary notwithstanding (see sec I.) This is a short act consisting of a few sections. The second section, which is the most important in the whole of the act, deals with the effect of remarriage on the rights of

Madhaviya.

Widow Marriage act (XV of 1856.)

Effect of marriage on widow's rights of inheritance and maintenance.

inheritance and maintenance which the widow possesses in the property of her husband or his lineal successors at the time of her remarriage. It has been said that it is always dangerous to paraphrase an enactment. We will therefore give *in extense* the section itself which reads as follows :—

Sec. 2, Act XV of 1856.

"All rights and interests which any widow may have in her deceased husband's property by way of maintenance or by inheritance to her husband or to his lineal successors, or by virtue of any will or testamentary disposition conferring upon her, without express permission to remarry, only a limited interest in such property with no power of alienating the same, *shall upon her remarriage*, cease and determine as if she had then died ; and the next heirs of her deceased, husband, or other persons entitled to the property on her death, shall thereupon succeed to the same" (*a*).

Interpretation put on it by different High Courts.

This section deprives the widow of any right of interest which she *had at the time* of her remarriage either in the property of her husband or son so that where after the remarriage of a Hindu widow her son by a former marriage died leaving property she suceeeded to his estate on the ground that section 2 does not deprive her of any right or interest which she had not at the time of remarriage (*b*). In Bombay the same view

(*a*) See II of Act XV of 1856.

(*b*) Akora vs Boreani, 2 B. L. R. A. C. 199.

has been taken by a Full Bench of the of the Bombay High Court(*a*). Sir Lawrence Jenkins who presided over the Full Bench put his decision on the ground of *stare decisis*. His Lordship in giving judgment said: "whatever might have been my view had the matter been uncovered by authority, it would (in my opinion) be wrong to disregard a rule affecting rights of property established as far back as 1868 by a decision of a Full Bench of the Calcutta High Court in Akorah *vs* Boranee." In Madras the same view has been taken and it has been held that the right of a Hindu widow who remarries during the life time of her son, to succeed by inheritance to the ancestral property of such son on his death is not within any of the exceptions referred to in section 2 of Act XV of 1856 (*b*). There is thus a complete unanimity in all the High Courts of India in so far as they hold that where the son's death is subsequent to the remarriage of the widow she is entitled to succeed to her son.

Decisions on the point uniform.

A question was raised in a recent Calcutta case, viz., whether this section is not of general application to all Hindu widows remarrying, but is limited only to Hindu

(*a*) Basappa vs Rayava, I. L. R. 29 Bom. 91 (1904); see also Chamar vs Kashi, 26 Bom., 388 (1902).

(*b*) Lakshmana vs. Siva, I. L. R. 28 Mad., 425.

Scope of Sec. 2 of Act XV of 1856.

widows remarrying as Hindus under Hindu law as provided by the act. The Full Bench which had to decide this held that the section was of universal application and was not limited in the manner suggested in the question aforesaid. Where a Hindu widow inherited the property of her husband taking therein the estate of a Hindu widow, and afterwards married a second husband, not a Hindu, in the form provided by Act III of 1872, having first made a declaration as required by section 10 of the act that she was not a Hindu, it was held that by her subsequent marriage, she forfeited her estate in her husband's property in favour of the next heir (*a*).

Act III of 1872.

Conflict of decisions in the different High Court on the point, viz. whether Sec. 2 applies to cases where remarriage was allowed by caste custom prevailing before act XV of 1856 was enacted.

There is however no such complete uniformity on the question as to the effect of section 2 of act XV of 1856 in cases where previous to its enactment the remarriage of a widow in a Hindu caste was permitted, and according to the custom of her caste such marriage did not entail a forfeiture by the widow of her interest in the husband's estate. It has been held in Bengal that even though, according to custom prevalent in her caste, a remarriage is permissible still a Hindu widow on her remarriage forfeits her interest in her first husband's estate,

(*a*) Matungini vs Ramrulton, I. L. R. 19 Cal., 289.

obtained by inheritance (*a*). The Madras High Court, like the Calcutta High Court puts the wider interpretation on the words of section 2 and holds that the operation of the section cannot be restricted to that class of widows who laboured under a customary disability which this act was intended to remove (*b*) whereas the Allahabad High Court (*c*) and the Bombay High Court (*d*), in some of its earlier decisions, held that the intention of the legislature was to restrict the scope of the section to those castes only where remarriage was forbidden by custom. But in a recent Full Bench of the Bombay High Court a contrary view has been taken and it has been held that a Hindu widow belonging to a caste in which remarriage has been always allowed, who has inherited property from her son, forfeits by remarriage her interest in such property in favour of the next heir (*e*). The later

Madras and Calcutta High Courts in favour of a wider interpretation.

The Allahabad and earlier Bombay decisions restrict the scope of the Section.

(*a*) Rasul Jahan vs Ramsurum. I. L. R. 22 Cal 589 ; (1895) Nitya vs. Srinath, 8 C. L. J., 542 (545) (1907.)

(*b*) Murugayi vs Viramakail, I. L. R. 1 Mad., 224.

(*c*) Harsaran vs. Nandi, I. L. R. 11 All, 330 : Ranjit vs Radharani, 20 All, 476. Khuddo vs. Durga Prasad vs. 29 All, 122 ; Gajadhar vs. Kaunsila, 31 All, 161 (166).

(*d*) Parekh vs Bai Bhakat, I. L. R. 11 Bom., 119.

(*e*) Vithu vs Govinda, I. L. R. 22 Bom., 321.

Later Bombay decision agrees with the Calcutta view.

Bombay decisions are of course in conformity with the view of the Calcutta and the Madras Courts (*a*).

Effect of marriage of widow on her capacity to give in adoption.

This brings us to consider the effect of remarriage on the capacity of the widow in regard to adoption. It has been held in Bombay that a Hindu widow has no power to give in adoption her son by her first husband unless he has expressly authorised her to do so (*b*). Mr. Justice Ranade gave the following reason for this conclusion, *viz.*, "The right to give a boy in adoption is a right of disposition, a portion of *patria potestas*, which comes to the widow by reason of her connection with her deceased husband's estate, and being a part of the rights and interests she acquires as a widow, it is included within the provisions of section 2 and 3 of the act, and is not a reservation which the act concedes to the widow." It is, however, humbly submitted that it is extremely doubtful if the legislature intended to attach such a wide meaning to the words "rights and interests" so as to include the right to give a boy in adoption. The question is whether the maternal relation does not continue with the son even after

(*a*) Panchappa vs. Sangabaswa, I. L. R. 24 Bom., 89.

(*b*) Pachappa *vs.* Sanganbaswa, I. L. R. 24 Bom. 89 (94).

remarriage and the right to give in adoption should be regarded as an incident of the maternal relation.

Effect of remarriage on alienations by widow.

A Hindu widow can undoubtedly make an alienation of her husband's property which will not enure beyond her life. Where she does so alienate and then remarries the question arises if the reversionary heirs of her husband can sue to recover possession from the transferee immediately on such remarriage or must they wait till the death of the widow. Mr. Justice Mookerjee has, in a recent case, laid down that in the case of remarriage of a Hindu widow, the very fact of remarriage operates as her death in the eye of law so far as her husband's estate is concerned. This proposition is consistent with the principles of Hindu law and follows also from the provisions of the Hindu widows remarriage act (*a*).

Status of widow has passed through varying stages of development.

In conclusion we repeat, what we said in the beginning of this chapter, that the position of a Hindu widow is unique in jurisprudence. The ancient custom of *Sati*, the abrogation of the same by statute, the obsolete practice of *Niyoga* or raising of issue by appointment condemned by some sages and not disapproved of by others, the once prevalent practice of

(*a*) See 8. C. L. J. 542.

Levirate, of which we find a parallel in the Jewish law, the texts enjoining on the widow the life of an ascetic, the judicial interpretation that these texts are mere moral precepts, the legal effect of unchasity on her status, the reference in the vedas to the existence of the practice of remarriage, the prohibition of the same in the *Smritis*, the legislation during British rule validating such remarriage, her varying capacities in different schools to give and take in adoption are the salient ideas with which we associate the widow when we consider her legal position in the past and the present. We can find no system of jurisprudence, where the status of the widow has passed through such varying stages of legal development as in Hindu law.

CHAPTER V.

PROPRIETARY POSITION OF WOMEN.

(Inheritance.)

* The proprietary position of women in Hindu law must be determined by its rules concerning the dominion of women over things or the equivalent of things. There are several modes by which such dominion may be acquired. Manu mentions seven lawful means of the acquisition of property (*a*) ; and he places inheritance at the top of them of all. Accordingly we shall deal in this chapter with rights acquired by inheritance and shall reserve for the next chapter the discussion of proprietary rights acquired by women by other means.

Early legal conceptions relative to the inheritance of women in Hindu law.

In order to find out the early legal conceptions relative to the inheritance of women in Hindu law, we must turn to the evidence furnished by the Vedas ; for, they

* Portions between asterisk are based on original research.

(a) See Manu X, 115, where inheritance, finding or friendly donation, purchase conquest, lending at interest, the performance of work, and the acceptance of gifts from virtuous men are mentioned as the seven lawful modes of acquiring property.

represent the first phase in the evolution of Hindu Jurisprudence. It has been affirmed in two of the leading commentaries, Dayabhaga and Viramitrodaya, that there is a text of the vedas which is ample authority for the general exclusion of women from inheritance. The writers of these two treatises base their conclusion on a text of Baudhayana, the reputed founder of one of the schools of the Black Yajurveda, who says that females are generally incompetent to inherit and quotes in turn a passage of his Veda to support his opinion. That text is as follows : *Nirindriya hyadayadah strio nritam* (*a*). It may be translated thus :— devoid of prowess and incompetent to inherit, women are useless. The commentators have differed not a little as to the precise meaning of this text. Some of them contend that the text can have no possible application to the inheritance of women (*b*).

Vedic texts concerning inheritance.

Upon this Vedic text has been based the theory that, from the earliest times reached by written Brahmanic records, one

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(*a*) निरिन्द्रियाह्यदायादाः स्त्रियोऽसृतम्। Baudhayana, II, 2, 3, 46.

(*b*) The meaning of the vedic text according to some of these writers is "women are considered disqualified to drink the *somajuice* and receive no portion of it at the sacrifice."

Theory of the general exclusion of women from inheritance based on same.

of the fundamental principles of the Hindu law of inheritance has been the general exclusion of the female sex. This theory has been adopted by most of the modern writers on Hindu law ; and the true meaning and authenticity of the text upon which it is based will require serious discussion, before the theory can be set aside in favour of another. It is, therefore, necessary to examine how the text has been interpreted by the leading commentators. It will be further necessary to consider whether the passage quoted by Baudhayana does really occur in the *Vedas*. Jimutvahana refers to this Vedic text in order to support his conclusion that the text of Manu, "To the nearest kinsman (sapinda) the inheritance next belongs," excludes female sapindas. He says :—"Accordingly Baudhayana, after premising 'A woman is entitled,' proceeds 'not to the heritage'; for females, and persons deficient in an organ of sense or member, are deemed incompetent to inherit'. The construction of this passage is 'a woman is not entitled to heritage.' But the succession of the widow and certain others, viz., the daughter, the mother and the paternal grandmother, takes effect under express texts, without any contradiction to this maxim" (*a*).

Interpretation of Vedic text by leading commentators.

Jimutvahana.

(*a*) Dayabhaga, Chap XI., Sec. VI., para. 11.

According to the author of the Dayabhaga, then, the meaning of the Vedic text, we are discussing, is that women are generally incompetent to inherit. The disability of widow and other females is, in the opinion of Jimutvahana, removed by express texts.

Mitramisra, author of Vlramitrodaya

In the Viramitrodaya, the Vedic text quoted by Baudhayana is noticed in three places. Mitramisra concludes his discussion as to the right of inheritance of the widow thus :—"As for the text of *Sruti* viz., 'Therefore women are devoid of the senses (*nirindriya*) and incompetent to inherit' and for the text of Manu based upon it, namely, 'Indeed the rule is that women are always devoid of the senses and incompetent to inherit' ;—these are both to be interpreted to refer to those women whose right of inheritance has not been expressly declared. Haradatta also, has explained these texts in this very way in his commentary on the Institutes of Gautama, called Mitakshara. But some commentators say that the term 'incompetent to inherit', implies censure only by reason of its association with the term 'devoid of the senses'. This is not tenable ; because it cannot but be admitted that the portion, namely, 'incompetent to inherit' is prohibitory and not condemnatory, for it cannot be held to be an absolutely superfluous precept in as much

as the taking of heritage by women may take place under the desire for property. But the portion 'devoid of the senses' is to be some how explained as being a superfluous precept, and purporting the dependence of women on men ; for the negation, what is contrary to the nature, meaning as it does of things, is objectionable. Hence what has been said above forms the best interpretation. The venerable Vidyaranya, however, has in his commentary on the Institutes of Parasara, explained the above text of *Sruti* in a different way :—The term 'incompetent to inherit' indicates that the wife is not entitled to a share in case of her retirement to a forest ; the term *Anindriyas* (rendered above into 'devoid of the senses') embodies the reason for the same ; for it appears from the text, viz., 'The *somajuice* indeed is the *indriya*,' that the term signifies also the *soma*, hence that those are not entitled to it are *anindriyas i.e.*, not entitled to taste the soma juice : the text being laudatory of the retirement of the wife into a forest on the death of the husband"(*a*). Then again in another place where the author deals with the right of paternal grandmother to inherit, he comments as follows on the same Vedic text cited above :—"Agrecably, however, to the inter-

(*a*) Page 175. Mr. Golap chandra Sarkar's Translation.

pretation put upon the text of *Sruti*; 'Therefore women are devoid of the senses etc.' by the venerable Vidyaranya, which has previously been cited, this text does not at all prohibit women's right of succession : So there can neither be a doubt as to their competency to inherit nor an answer to such doubt. But it should be remarked that how can that interpretation be accepted when it is in conflict with the text of Baudhayana ? For although the term *indriya* may be taken in any of its acceptations, still there is nothing else in the text of *Sruti* to support women's incompetency to inherit, and it cannot be held that the text of *Sruti* has nothing in it to support the position that women are not entitled to inherit ; hence it cannot but be held that the text of *Sruti* does prohibit women's right of succession, in as much as otherwise the quotation by Baudhayana of that text as establishing the position would be unreasonable ; just as in this instance :— "*Therefore an unknown embryo being killed a man beeomes a murderer of Brahmana*" (*a*). Mr. Mandlik translates the last sentence in the above passage of the Viramitrodaya differently (*b*) and it is submitted that Mr.

(*a*) See Page 199, Mr. G. C. Sarkar's translation.

(*b*) "Therefore by the birth of a child without his knowledge, a man is degraded from Brahmanhood"

Mandlik's translation is not correct and that which we have given from Mr. Golap Chandra Sarkar's book is right. The last sentence is the translation of a passage quoted from the Vedas *The text of revelation is as follows* :—तस्माद्गर्भे नाविज्ञातेनऽतेन ब्रह्महेत्यवगेति ध्येयम् । It is interesting to compare this passage with the 7th aphorism of Jaimini (at page 64 ante), in which Jaimini embodies the argument of his opponents who hold that men only are entitled io perform sacrifices, and women are not so entitled. The Vedic text cited by Baudhayana is noticed again in another place in the Viramitrodaya where the author, after noticing that the daughter-in-law and other females are entitled to food and raiment only since the nearness as a sapinda is of no force when it is opposed by express texts, concludes the discussion thus :—"Therefore women are devoid of the senses and incompetent to inherit", and a text of Manu, founded upon it, says, "Indeed the rule is that, devoid of the senses and incompetent to inherit women are useless." The conclusion arrived at by the author of the Smriti Chandrika, Hara Datta and other Southern commentators as well as by all the oriental commentators

Views of Jaimini and Mitramisra compared.

is how Mr. Manlik translates the passage. (See page 363-4, Mandlik's Edition of the Institute's of Yajnavalkya.)

such as Jimutvahana, is, that those women only are entitled to inherit, whose right of succession has been expressly mentioned in texts such as,—"The wife and the daughters also &c.,"—but that others are certainly prohibited from taking heritage by the texts of the *sruti* and of Manu (*a*).

The five-fold importance of the discussion of the Vedic text in the Vlramitrodaya

We have been at pains to quote these long extracts from the Viramitrodaya because they are significant and aid us in the direction of obtaining a true theory regarding the inheritance of women. The discussion in the Viramitrodaya of the Vedic text is important in more ways than one. In the first place, it is important as showing that there have been other commentators of repute like Vidyaranya and others who have interpreted the Vedic text differently and who consider that it has nothing to do with inheritance ; in the second place, it shows that the author does not accept the text in its entirety but qualifies it by applying it to those females only who are not named as heirs. In the third place, the discussion illustrates the habit of Hindu commentators and logicians to endeavour to reconcile the Vedic text which excludes women from inheritance altogether with the text of the later sages which allows certain female relations like widow, mother

(*a*) See page 244. Mr. G. C. Sarkar's Translation.

and daughter to inherit. And fourthly, it betrays the reluctance of the author of the Viramitrodaya to assent to the theory that the Vedic text incapacitates women generally from inheritance. And lastly, it shows that Mitramisra would not have put that construction on the Vedic text which would make it refer to the incompetency of women to inherit if he had not supposed that he was supported by a text of Manu, which conveys the same idea as is contained in the Vedic text. But Mitramisra apparently misquotes Manu ; for the reading given by Kulluka differs entirely from the one given in the Viramitrodaya. None of the commentators of Manu (*a*) accept the reading given by Mitramisra, but they all proceed on the assumption of the correctness of the reading given in Kulluka's commentary (*b*).

Smriti Chandrika.

The Smriti Chandrika, the leading authority of the Southern school, also notices this text of the *sruti* in three places. The text

(*a*) See Mandlik's edition of Manu, p. 1125, note on IX, 18.

(*b*) (Verse IX. 18.) Reading given by Kulluka.

नास्ति स्त्रीणां क्रियामन्त्रैरिति धर्म्मो व्यवस्थितः ।
निरिन्द्रिया ह्यमन्त्राश्च स्त्रियो ऽनृतमिति स्थितिः ।

Reading by Mitramisra. The first line of the couplet is the same. The second line is अनिन्द्रिया ह्यदायादा स्त्रियो नित्यमितिस्थितिः । See Page 72 (Golap Ch. Sarkar's Ed,) of Viramitrodaya.

is introduced for the first time to support the position that females are not entitled to the heritage, that is, to wealth descending from the owner and admitting of partition. In this connection the Smriti Chandrika observes :—"By saying that persons deficient in an organ of sense or member and females are deemed incompetent to inherit, it is to be understood that the substance of the Veda called Taittiriyam to the effect that females and persons wanting in an organ of sense or member are incompetent to inherit has been recited." Here Devananda Bhatta is confronted with an objection, viz. :—If females are incompetent to inherit, how then did Yajnavalkya say—'of heirs dividing after the death of the father, let the mother also take an equal share.'—How did Vyasa say : 'even childless wives of the father are pronounced equal shares.' This objection he meets thus :—The reply is, they are fully correct. 'With regard to those that are incompetent to inherit, passages directing the allotment to them of heritage may be incorrect, but not those which simply direct portions to be given to them. *Amcam* signifies a portion and not a share in the heritage (Daya). We find it inserted in law books that a portion (*Amcam*) may be given out of property belonging in common

to several" *(a)*. Here the *Smriti Chandrika* says, that the widow does not get a share in the heritage but simply gets a portion by reason of the above text of the *Sruti*. Devanand Bhatta refers to this Vedic text again, while dealing with the widow's right of succession and says : "the *Sruti* in question is merely exaggeratory and refers consequently to females other than *Patni* and the like, whose competency to inherit has been expressly provided for. Thus all is unexceptionable"(*b*). The author here lands himself in an inconsistency. In the extract first given the widow's right to inherit is negatived, on the authority of the Vedic text, whereas in the extract last given, the text of the *Sruti* has been said not to apply to widows and other females expressly named in other texts. The third place where the Vedic text is noticed is in connection with the succession of the *Gotrajas* (gentiles or kinsmen) (*c*) ; on the authority of this text of the *Sruti*, female *Gotrajas* have been held disentitled to inherit.

These passages from the Smriti Chandrika make it abundantly clear that, in the opinion of the author, the Vedic text quoted

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(a) Smriti Chandrika, Ch. IV. Sec. 6. 7. 8.

(b) Smriti Chandrika, Chap XI, S. 1., 56.

(c) Smriti Chandrika, Chap. XI, Sec V.

by Baudhayana indisputably refers to inheritance.

Mitaksara does not notice the Vedic text, nor does Vyavahara Mayukha.

The Mitakshara does not notice the Vedic text mentioned above, nor does the Vyavahara mayukha make any reference to it. The Vivadachintamoni, the leading authority of the Mithila school, is silent on it. On the other hand, it is clear that Baudhayana's interpretation of the Vedic text relating to the exclusion of women from inheritance has not been adopted by Vijananeswara, for the discussion in chapter II, sec. 1, placita 24, 25, 26, of the Mitakshara recognises the general competency of women to inherit, and if it be contended that those *placita* relate only to the widow, whose rights are the subject of that section, the reply is, that his subsequent introduction in sec. V of the paternal grandmother and paternal great-grandmother amongst the *gotraja sapindas* as heirs shows that those placita are not to be confined to the widow. Nilkantha does not obviously accept the interpretation of the Vedic text by Baudhayana, for he puts the competency of women to inherit as *a sapinda* beyond doubt, by expressly naming the paternal grandmother as the first of the *Gotraja sapindas* for the purposes of inheritance. Thus we see that the three leading commentators of

Vivada chintamoni silent on it.

the three different schools respectively not only do not refer to the Vedic text relating to the exclusion of women from inheritance, but on the other hand hint at the opposite view which recognises their capacity for inheritance. Vidyaranya, an author of great reputation and learning while commenting on the Institutes of Parasara, says expressly that the word "Indriya" in the Vedic text means *somajuice. (a).* Messrs West and Buhler say that the Vedic text may be translated thus : "women are considered to drink the soma-juice and receive no portion of it at the sacrifice." The Virmitrodaya, as has been seen already, observes that there are commentators who say that the term incompetent to inherit implies censure only, and is not intended to be a rule excluding women from inheritance. Apararka takes the Vedic text as an explanatory text only (*Artha Vada*) and not as a rule (*Vidhi*). He says : "Therefore women are feeble and incompetent to inherit, has to be applied conformably to circumstances in corroboration of rules otherwise established. It must be referred therefore to the case where there are sons" (*b*). The foregoing considerations are sufficient to show that the

Apararka takes the Vedic text as explanatory text and not as a rule (*Vidhi*) and refers it to the case where there are sons.

(*a*) Viramitrodaya, Page 175 ; translation.

(*b*) Dr. Jolly's Tagore Lectures 1883 Page 218,

weight of authority is rather against the interpretation which Baudhayana has put upon the Vedic text. Baudhayana, Mitra-Misra, Jimutvahana, and Devananda Bhatta are unfavourable to women's capacity for inheritance, whereas the opposite view has the support of Vijnaneswara, Nilkantha, Vachaspati-Misra, Vidyaranya, Apararka and a few other commentators referred to, but not named, in the Viramitrodaya. If where the commentators differed, the voice of the majority were to decide, then the theory that the Vedas contained the rule of general exclusion of women from inheritance should be rejected.

Weight of authority is against the theory of general exclusion of women from inheritance.

But, as has been observed before, new light is thrown on this question by the aphorisms of the sage Jaimini. In the sixteenth aphorism (p 79 ante) Jaimini states that a certain Vedic texts shows that women have the capacity of owning and possessing wealth. No distinction is made between wealth acquired by inheritance and wealth obtained by other modes of acquisition. If the Vedic text cited by Baudhayana be interpreted so as to refer to the exclusion of women from inheritance there can be no doubt Jaimini would have alluded to it while he was dealing with the *Adhikarana* which relates to the equal rights

New light thrown on the question by the aphorisms of Jaimini.

of men and women to perform sacrifices. That this right (to perform sacrifices) depends on the capacity to own or *possess* wealth is manifest from the tenth aphorism (p 72 ante.) The method of interpretation of the Veda by Jaimini must prevail over any other, and when we find the want of any reference to this Vedic text in Jaimini's aphorisms it may be legitimately inferred that it has nothing to do with the inheritance of women—inheritance being undoubtedly one of the modes of acquiring property.

Difficulty of formulating a definite theory—a plausible theory suggested.

It is difficult to formulate a definite theory, but the following seems a plausible one. In the Vedic world sacrifices played a very important part. Wealth was produced for the sake of solemn sacrifices so said an ancient *Smriti*. So long therefore as women were allowed to join in sacrifices, the various modes of acquisition of wealth including that by inheritance would be open to them. But when the right to participate in the offering of sacrifice came to be denied to women, it would seem to follow that attempts would be made to divert the wealth of a person from passing by inheritance to female relations as they would no longer be able to use it. In the period of the *smritis* they were no longer competent to utter Vedic formulæ and consequently to join in sacrifices. With this

degradation in their status, women's right to inherit the property of another would be gone and we find accordingly Baudhayana laying down that women are incompetent to inherit (*a*). Besides it is somewhat difficult to suppose that the passage in the Yajurveda cited by Baudhayana can refer to the exclusion of women from succession when we find that the school of Vaja senayins followers of the white Yajur veda were specially favourable to them. Professor Maxmuller points out that the famous dialogue ascribed to Yajnavalkya with Maitreyi points to a division, by that sage, of his property between his two wives when he was himself retiring from the world. This dialogue goes to show that wives inherited property in the Vedic age ; for retirement was tantamount to civil death (*b*). If the preceeding argument is sound then it would appear that the Vedic

Baudhayana.

(*a*) This theory receives some support from a text of the *smriti* below quoted in the Mitakhsara, Chap II sec 1, 14. द्विजाति धनस्य यज्ञार्थत्वात् स्त्रीणां च यज्ञेऽनधिकारात् धनग्रहणमयुक्तम् तथाच कैनापि कृतम् ।

यज्ञार्थंद्रव्यमुत्पन्न तत्रानधिकृतास्तु ये
ऋत्विक्थ भाजस्ते सर्व्वे ग्रासाच्छादनभाजना: ॥
यज्ञार्थं विहितं वित्तं तस्मात्तद्विनियोजयेत्
स्त्रीणेषु धर्म्मदुष्टेषु न स्त्रीमूर्खविधर्म्मिषु

(*b*) Professor Maxmuller's History of Sanskrit Literature, p. 199, 349.

text has been misinterpreted so as to make it applicable to inheritance. We have hitherto proceeded on the assumption that Baudhayan a has cited this Vedic text for the purpose of supporting his position as to the incapacity of women to inherit. But the researches of oriental scholars show that the text of Baudhayana is in great confusion (*a*) Professor Maxmuller translates the text of of Baudhayana as follows :—The Veda declares 'therefore, women are considered destitute of strength and of a portion.' The translation shows that the text of the vedas has nothing to do with inheritannce. Dr. Jolly is also of opinion that the Vedic text refers to exclusion from participation in the drinking of soma juice at solemn soma sacrifices (*b*).

Text of Baudhayana is in great confusion.

It remains to answer certain possible objections to the theory we have propounded viz., that there is no authentic text in the Vedas which lays down any rule unfavourable to the succession of women generally. This theory is opposed to the view of most of the modern writers on the subject and we would not have ventured to put it forward if it had been wanting in plausibility or semblance of

Certain possible objections to our theory answered.

(*a*) Sacred Books of East, Vol. XIV., Baudhayana. See also Book I. Chap. II. Sec. 14. West & Buhler's Digest, Third Edition.

(*b*) Dr. Jolly's Tagore Lectures, 1883 Page 40.

authority. But we have seen that incontrovertible evidence is furnished by Jaimini's aphorisms in favour of this theory. Besides, there is a dissidence of opinion amongst the commentators themselves, as to the true meaning of this Vedic text. It is objected by those who hold the opposite view that the following comment of Yaska on the Vedic text(*a*) viz : "Some hold that daughters do not inherit. Therefore it is known that a male is the taker of wealth, and that a female is not the taker of wealth," furnishes evidence of the usage prevailing in the Vedic period ; for it is argued that Yaska was the author of Nirukta or the Vedic glossary and he must have made the above remark in accordance with early tradition which was opposed to female succession. It is a sufficient answer to this objection to say that the remark of Yaska about the general incompetency of women to take wealth is a mere inference which does not necessarily follow from the Vedic text commented on by him. The original text rather lays stress on the fact that all *sons without distinction* between them must succeed to the property of the father, but it does not say that daughters shall not be entitled to

An objection based on Yaska's comment on the Vedic text about exclusion of women.

(*a*) अविशेषेन पुत्राणां दायो भवति धर्मतः ।

Inheritance properly belongs to the sons without distinction. Roths Edition of Yaska 53.

inherit in default of sons because of their general incapacity for inheritance. It is important to remember in this connection the view propounded by Professor Roth, the founder of Vedic philology, that the aim of Vedic interpretation is not to ascertain the meaning which Sayana or even Yaska who lived eighteen centuries earlier (about 400 B. C.) attributed to the Vedic hymns, but the meaning which the ancient poets themselves intended, and that such an end could not be attained by simply following the lead of the commentators. Yaska's comment might have reflected the view of his own time, when women's status had been lowered. Professor Macdonell rightly points out that there is a distinct tendency in his writings towards misinterpreting the language as well as the religious, mythological and cosmical ideas of a vanished age by the scholastic notions prevalent in his own (*a*). Yaska's observation therefore does not assist the adherents of the theory opposed to our own.

Yaskas remarks criticised.

We are fortified in our conclusion by a verse in one of the hymns of the Rig Veda(*b*) which is as follows :—As a virtuous maiden growing old in the same dwelling

(*a*) Macdonell's Sanskrit Literature, P. 60.

(*b*) Asth. II. M. II. Ch 6. Anu. II., Sukta VI Verse 7, Mr Dutt's Ed., p. 519.

house with her parent claim from them her support, so come I to thee for support. Sayana commenting on this says that the daughter, in these circumstances, could claim a share of her father's estate (*a*). This verse at least indicates that, in the Vedic period, women were not, by reason of their sex, debarred from inheriting. It also renders the interpretation of the Vedic text *Nadayada etc.* by Vidyaranya more acceptable than that of Baudhayana. While seeking support for the theory of the general competency of women to inherit from the above hymn in the Rig Veda, we are uot unmindful of another verse (3 mandal 31 h, 2nd verse), which has been supposed by a distinguised Sanskrit scholar, (*b*) to lay down the principle of female exclusion in unmistakeable terms. We venture to submit, however, with the greatest deference to this eminent writer, who is also a lawyer, that the text is wholly indecisive of the present question. I will here reproduce the text as it has been translated by this learned writer himself :—"The son does not vacate the inherited wealth of the sister ; he makes her

A passage from the Rig Veda cited in support of our theory.

An objection based on Professor Krisnakamal Bhattacharyyas reading of another Vedic text.

(*a*) पतिं अलभमाना सती दुहिता सनात् आत्मन: पितोश्च साधारणात् सदस: गृहात्.....यथा भागं याचते । सायण: ।

(*b*) Krishna Kamal Bhattacharjya's Tagore Lectures, (1884-85) p. 122.

the repository of the issue of him who takes her ; although the parents procreate both the males and the females ;—the one is a worker of good deeds ; the other is graceful."

Prof. Bhattacharyya's remarks commented on.

It is submitted that there is no principle of female exclusion underlying this Vedic text. It suggests that the son inherits in preference to his married sister who passes into another family and bears sons to her husband. Professor Bhattacharjee is forced to admit that this "verse is almost riddle-like." There may be one or two sentences in Sayana's comment of this verse which imply that the daughter is a mere ornamental member of the family, fit for no useful purposes and that it is not therefore inequitable to postpone her to the son in the matter of inheritance ; but surely there is nothing in the comment which indicates a principle of female exclusion. Even if Sayana has hinted at such exclusion, his opinion can be dismissed with the remark that he has misinterpreted the Vedic text being influenced by the conceptions that prevailed in his own time (1400 A.D.)—conceptions which were certainly opposed to the succession of females in general. It may be added, in confirmation of this view, that Sayana flourished in Southern India and was a member of the Baudhayana school in the fourteenth

century (*a*). It is natural to expect that he should adhere to the doctrine of female exclusion as laid down by the founder of his school. Besides Mr. Bhattacharjya is careful to add that some portion of Sayana's explanation of the above Vedic verse might probably be taken exception to by European scholars, who justly deny infallibility to Sayana in the matter of Vedic interpretation (*b*).

A third objection based on the analogy drawn from other patriarchal societies.

Another objection to our theory will have to be met—an objection based on the analogy drawn from other patriarchal societies which recognize the general unfitness of women for heritage. It is said that in India where the society in its early stage was patriarchal, the same rule of female exclusion must have prevailed. The reason for which nations descended from patriarchal groups followed the principle of female exclusion, consisted in this that the weaker sex was incapable of performing useful work, the most important part of work to be done at the patriarchal stage being the fighting business. But the argument derived from analogy can be of no use ; for the reason stated by later *smriti* writers for the exclusion of

(*a*) See Prof. Macdonell's History of Sanskrit Literature, p. 259.

(*b*) Tagore Lectures, 1884-85. p. 121.

women was their incompetency to join in sacrifices. Vijnaneswara notices a text of the *smriti* to the following effect : 'wealth was produced for the sake of solemn sacrifices ; and they who are incompetent to the celebration of these rights, donot participate in the property, but are all entitled to food and raiment' (*a*)—a text which embodies the reason why women could not inherit. When there is a fundamental difference between the reasons on which the principle of exclusion of females is based in India and the ground on which it rests in other patriarchal societies, the argument derived from analogy can hardly be accepted. It will appear from the text of the smritis just cited that the view of Dr. Mayr as to the mode in which the widows right of succession grew up historically out of her right to an allotment for maintenance is open to serious doubt (*b*).

Argument derived ; from analogy of no use in this case.

Dr. Mayr's view criticised.

Even in Jaimini's time, women had the right to perform sacrifices and consequently the right to inherit ; but it would seem the movement had just then begun the object of which was to declare their incapacity to perform sacrifices and their consequent in-

Superior position of women in Jaimenis time.

(*a*) Mitakshara. Ch II, Sec, I, 14. pe.

(*b*) Mayr P 179, cited in Mr. Mayne's book at p 689 (6th. Ed.)

competency to inherit and in the time of Baudhay ana, it is probable, the movement had achieved its final triumph. In the *Dharma shastra* of Gautama (though entitled a *Dharma shastra* it is in style and character a regular *Dharma Sutra)* we find an indication of the beginnings of this movement. Gautama says :—"of one without the issue, the wealth is given to those who are connected with him by *sapinda* relationship by *Gotra* or *Pravara* as well to the wife" (*a*) It thus appears that at the period when Gautama lived, the widow of the deceased was not permitted to inherit indepently of the male relations. She was allotted a share along with the male *sapinda.* This was the thin end of the wedge which in Baudhayana's time led to the extinction of her right to heritage altogether. That the *Dharma shastra* of Gautama is older than that of Baudhayana, there can be no doubt ; for the latter has been shown to contain passages based on or borrowed from Gautama's work *(b)*. The position of women was reduced to the level of Sudras they were forbidden to utter Vedic Mantras and to join in sacrifices ; simultaneously

Degradation of their status during the period Baudhayana flounshed.

(*a*) Gaut XXVIII, 24.

(*b*) Prof. Macdonell History of Sanskrit Literature p 260).

with this diminution of their status their right to inherit was extinguished on the principle stated in the *smriti* quoted in the Mitakshara. It is difficult at this distance of time to discover the reason which led to the degradation of the status of women in in the *sutra* period. We have however suggested a likely reason in a preceding chapter. The foregoing argument that the position of women was at its worst in Baudhayana's time, assumes that Jaimini flourished earlier than Baudhayana. That Jaimini is a sage of very great antiquity would appear from a verse in the Srimad Bhagbat Purana where Jaimini is described as the revealer of the Sam Veda (*a*). Besides modern research shows that Jaimini's *sutras* were composed at a time when no *smriti* works in any elaborate shape existed, and that his aphorisms must date before the existing metrical works of Manu and the rest *(b)*. There is also internal evidence in the writings of the sage which renders it probable that he preceded Baudhayana, for instance, the name of many sages like Badari Labukayana, Badarayana, and Aitisayana are mentioned in Jaimini's *sutras* but not that of

Relative age of Jaimini and Baudhayana.

(*a*) सामगो जैमिनि: कवि.—Sk. I Ch. IV (V. 21.)

(*b*) See Kishore Lal Sarkar's Tagore Lectures, 511.

Baudhayana. It would also be a singular thing for Jaimini not to notice the view of Baudhayana about women's incapacity to inherit, when he was dealing with the proprietary capacity of women in the aphorisms cited in the second chapter, if Baudhayana had really lived before his time. The foregoing reasons make it probable that the theory of female exclusion from inheritance originated with Baudhayana. Apastamba, whose *sutras* are more recent than those of Baudhayana, adheres to the principle enunciated by the latter. Apastamba says "that on failure of sons, the nearest *sapinda* takes the inheritance (II. 6, 14, 2) The word *sapinda* is used in the masculine and precludes the idea of a female being included in the word." It is true that he mentions the daughter as capable of inheriting in default of other heirs (II. 6, 14, 4) but he assigns to her the last place in the line so as to save an escheat to the crown.

Apastamba.

Position of women during the age of the metrical *Smritis*.

When we pass from the *sutra* period to the age of the metrical *smritis* we find a considerable change of popular feeling regarding the proprietary position of women at the time and certain near female relations are admitted to the order of succession by Manu, Yajnavalkya, Vrihaspati, Narada and other *smriti* writers. Manu expressly re-

Manu.

cognises the right of the mother (*a*) and the daughter (*b*) to inherit ; and if the interpretation of the text of Manu : *anantara sapindatja tasya tasya dhanam bhabeta* (*c*) by Kulluka be right then Manu would seem to admit female sapindas in general to the order of succession.

Yajnavalkya expressly admits the widow, the daughter, the mother and the *Gotrajahs*, to the order of succession. If the word *Gotrajah* (gentile) be held to include both male and female, then Yajnavalkya's view would seem to be extremely favourable to the succession of women in general (*d*). Yajnavalkya.

Vrihaspati says, "The wife is declared to succeed to her husband's property, and in her default, the daughter" (*e*). "When a man dies", says the same sage, "without leaving either wife or male issue, the mother has to be considered as her son's heiress, or a brother may succeed if she consents to it" (*f*). Narada, in his chapter on Inheritance does not mention any female as Vrihaspati. Narada.

(*a*) Manu, IX, 217.

(*b*) Ibid, 130. But all the commentators say that this text refers to the succession of appointed daughter.

(*c*) Manu IX, 187.

(*d*) Yajnavalkya II. 135, 136.

(*e*) Vrihaspati, XXV, 55.

(*f*) Ibid,.....XXV, 63.

entitled to inherit save the daugher (*a*). It is the appointed daughter only, from amongst the numerous female relations of a deceased person who finds a place in Vasistha's enumeration of his heirs. Vasistha apparently must be taken as opposed to the succession of females.

Vasistha.

Commentaries on the theory of position of women in the field of inheritance.

From the list of female heirs as given in the *smritis* we now turn to the commentaries which complete the development of the theory of the position of women in the field of the law of inheritance. It is in them that we shall find the modern law of female succession for the different schools respectively. Some of these commentaries are stronger advocates of women's rights than the others. They have attempted to base their conclusions on the texts of the *smritis*, which in some cases cannot be easily reconciled with one another. It will be convenient to begin with the widow, for she is mentioned by Yajnavalkya as the first in the li ne of heirs of a sonless man. The author of the Mitakshara maintains that when a man, who is separated from his coheirs and not reunited with them, dies leaving no male issue, his widow, if chaste, takes the estate in the first instance. He bases this right of the widow to inherit on

Widow.

Mitakshara on the widow's right to inherit.

(*a*) Narada,.....XIII, 50.

the following well known text of Yajnavalkya:—"The wife and the daughters also, both parents, brothers likewise, and their sons, gentiles, cognates, a pupil, and a fellow-student: on failure of the first amongst these, the next in order is indeed heir to the estate of one, who has departed for heaven, without leaving male issue" (*a*).

Chaste widow entitled to succeed.

He also cites texts from Bridha Manu, Brihad Bishnu (*b*), Katyayana and Vrihaspati in support of his view that a chaste widow is entitled to succeed to the property of her deceased husband.

Three objections to this view considered.

He notices three objections to his view and refutes them. The first of these objections is to the effect that the texts of Yajnavalkya and others were intended to ordain the succession of the widow of a separated brother provided she had authority from her husband to raise issue by appointment (*Niyoga*). In support of this the objectors rely on certain texts of Narada, Manu, Sankhya and Katyayana which according to them are adverse to the widow's claim to inherit; as also on the text of Vasistha, which enjoins a widow not to raise issue by appointment from a covetous motive. The main ground the objectors urge is that the widow's succession to the

(*a*) Mitaksara, Ch. II. S. 1, 2.

(*b*) XVII, 4-7;

estate is in right of such an appointment. He meets this objection by saying that the raising up of an issue by the widow is not a condition precedent to inheritance but is an alternative which the widow might adopt, and in doing so observes : "besides it is fit, that a chaste woman should succeed to the estate rather than one appointed to raise up issue, reprobated as this practice is, in law as well as in popular opinion. The succession of a chaste widow is expressly declared and an authority to raise up issue is expressly condemned by Manu". In meeting the principal reason of the objectors, viz :—that the widow's succession to the estate is in right of appointment to raise issue—Vijnaneswara propounds the theory of female ownership. He remarks:—"But, it is said, women have a title to property, either through the husband, or through the son, and not otherwise." That is wrong, for it is inconsistent with the following text and other similar passages. "What was given before the nuptial fire, what was presented in the bridal procession, what has been given in token of affection, what has been received by a woman from her brother, her mother, or her father, are denominated the sixfold property of woman". These remarks show that Vijananeswara

Theory of female ownership as propounded by Vijnaneswara.

refutes the notion entertained by some that there are only two modes by which women can acquire property, viz., either through the husband or through a son.

Second objection.

The second objection is that "since the wealth of a regenerate man is designed for religious uses, the succession of women to such property is unfit, because they are not competent to the performance of religious rites,"

Vijnaneswara answers this by saying that the premise that wealth was designed for religious uses is wrong and he supports his opinion by texts of Yajnavalkya, Gautama and Manu. He also cites a text from the Vedas which gives indirect support to his view. He then lays down a proposition of far-reaching importance, a proposition which is not assented to by many of his numerous followers when he says that the text of Narada, which declares the dependence of women, is not incompatible with the acceptance of property. The conclusion of the author is that the text that wealth was produced for the sake of solemn sacrifices must be explained thus :—wealth which was obtained in charity for the express purpose of defraying sacrifices, must be appropriated exclusively to that use by sons and others.

Third objection.

The third objection is that of Sricara viz., that the widow's succession is restricted to cases where the estate of her deceased husband is small. But to this it is replied that there are express texts which declare that "of heirs dividing after the death of the father, let the mother also take an equal share." Vijnaneswara states emphatically that it is a mere error to say that the wife takes nothing but subsistence from the wealth of her husband, who died leaving no male issue,

The theory of the Mitaksara that succession is confined to the widow of a separated brother commented on.

The view of the Mitakshara, that the widow of a separated brother shall succeed and not that of a joint or reunited brother, does not find any support from the numerous texts of the sages he has cited in connection with a widow's right to inherit. The only reason he gives for such a conclusion is that "partition has been discussed previously and reunion will be subsequently considered." The reason is obviously insufficient. Later writers have supported Vijnaneswara's opinion by the text of Vrihaspati and Katyayana (*a*) but these seem not to have been known to him.

No texts of sages cited by him in support of his theory.

(*a*) Katyayana cited in Smriti Chandrika, Ch XI. S 1, 35. K. Iyer's Ed. p. 158. "But if her husband have departed for heaven, the widow obtains food and raiment, or she receives a share of the undivided wealth so long as she lives."

This theory is assented to by all except Jimutvahana.

This theory of the Mitakshara is, as we shall see presently, universally accepted except by Jimutvahana.

Viramitrodaya supports it.

The Viramitrodaya says that "there are also many other passages of law, establishing the preferable right of the wife to succeed to the estate of her sonless husband *who was separated but not reunited* and cites in support the well-known text of Vrihaspati :— 'In the Vedas and in the *smritis* as well as in popular practice, a wife is declared by the wise to be half of the body of her husband equally sharing the fruit of pure and impure acts etc' ; but the text of Vrihaspati does not impose the limitation suggested by the latter part of the proposition which is given in italics (*a*). In another place Mitra misra gives the same reason for the limitation as the Mitakshara does. He says : "The text, namely,—'The wife and the daughters also' is relative to the estate of one who was separated and not reunited, for partition of a joint family has previously been treated, and partition after reunion, has by way of an exception to all other cases, been subsequently dealt with by Yajnavalkya, consequently this is the only case which remains to be discussed" (*b*). It is there pointed out that this

(*a*) Translation by Mr. G. C. Sarkar, P. 143.

(*b*) Translation by Mr. Sarkar, P. 154.

is also the opinion of many other writers besides Vijnaneswara e. g. Laksmidhara Viswarupa, Medatithi, the author of the Madanratna. The Mayukha also agrees with the Mitakshara and confines the application of the text of Yajnavalkya, we are dealing with, to the case of the widow of a person who died separated and not reunited and left no male issue (*a*).

Mayukha also agrees with it.

Smriti Chandrika supports it by two texts of Vrihaspati and Katyayana.

It is only when we come to the Smriti Chandrika that two texts are cited, one of Vrihaspati (*b*) and the other of Katyayana, which lend support to the view taken by the Mitakshara and agreed to by the Mayukha and Viramitrodaya. The text of Vrihaspati is as follows :—"Whatever property a man possesses of every kind after division, whether mortgaged or other, the wife (*Jaya*) shall take after the husband with the exception of fixed property". Upon this text the Smriti Chandrika observes :—"The purport of this text is, whatever is the property of the deceased husband, whether consisting of moveables or immoveables whether pledged or otherwise, the widow alone takes, where the husband was a divided member of the

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(*a*) Vyavahar Mayukha, Ch. IV., Sec. VIII (1-4) 76-78 Mandlik's Ed.

(*b*) Smriti Chandrika, Ch. XI., S. I P. 23. Page 154 (K. Iyer's Ed.)

family", It is somewhat difficult to understand how the text of Vrihaspati can bear this interpretation. The text would rather seem to preclude the widow of a divided brother from inheriting her husband's immoveable property. Madhava construes this text differently from the Smriti Chandrika and considers that it relates to the prohibition of sale or other transfer of real property by widow, without concurrence of the heirs *(a)*.

Madhava interprets the texts of Vrihaspati differently from the Smriti Chandrika.

To us the genuineness of the texts of Vrihaspati and Katyayana seems open to question; for it is hard to believe that Vijnaneswara would not have mentioned these texts in support of his opinion that the succession of a widow of divided and not reunited brother is what is ordained by the famous text of Yajnavalkya.

Vachaspati Misra lays down the same law for the Mithila school. After stating that there are certain texts of Vrihaspati, and Vriddha Manu on the widow's succession, he says that "what has been said above is applicable in the case of a husband who has taken his share from the co-heirs." And again he tells us: "When the husband dies without par-

Vachaspati Misra takes the same view as the Mitakshara.

(a) Vyavahara Mayukha, chap. IV., S 8; P 3, Page 77 (Mandalik's edition.)