tition with his cosharers he has no share at all what then could his wife receive" (*a*).

Dissentient opinion of the founder of the Bengal School.

It remains to consider the dissentient opinion of the founder of the Bengal School. He combats the theory of the Mitakshara regarding the exclusion of the widow of deceased brother who was either joint or reunited with his other brothers. He maintains that such a theory, so far as it affects the right of the widow of a reunited coparcener, would be in conflict with a text of Vrihaspati which declares that the widow of a reunited coparcener succeeds in preference to his reunited brother. He holds that whether the deceased be divided or undivided, his next heir is the widow if he leaves no male issue. After noticing the contradictory texts regarding the widow's succession Jimutvahana cites the texts of Vrihaspati referred to above and says :— "Some reconcile the contradiction by saying, that the preferable right of the brother supposes him either to be not separated or to be reunited ; and the widow's right of succession is relative to the estate of one who was separated from his coheirs and not reunited with them." That is contrary to a passage of Vrihaspati, who says, "'Among brothers, who become reunited, through

(*a*) Vivada chintamoni, Pages 290. 291.

mutual affection after being separated, there is no right of seniority, if partition be again made. Should any one of them die, or in any manner depart, his portion is not lost but devolves on his uterine brother. His sister is also entitled to take a share of it. *The law concerns one who leaves no issue, nor wife, nor parent.* "Joint property," says Jimutvahana, "is referred severally to the unascertained portions of the aggregate. Both parceners have not a proprietary right to the whole for there is no proof of their ownership over the whole." Jimutvahana denies the fundamental principle of the Mitakshara that several undivided brothers are like joint tenants each having an unascertained interest in the whole of joint property, so that when on the death of one of the brothers the joint property belongs exclusively to the survivors, since the ownership of the other brothers is not divested. On the contrary he holds that several coparceners are like tenants in common, each having a right to an aliquot though unseparated portion, so that on the death of one, there is no right of survivorship to intercept his widow's right of succession under the text of Yajnavalkya (*a*). He gives an additional reason in support of

Jimutvahana denies the fundamental principle of the Mitaksara that several undivided brothers are like joint tenants.

(*a*) Dayabhaga Ch XI., Sec. I, 25-26).

his opinion when he says (*a*) :—"the assumption of any reference to the condition of the brethren as unseparated and reunited, not specified in the text—(of Yajnavalkya) is inadmissible being burdensome and unnecessary. Therefore the doctrine of Jitendriya, who affirms the right of the wife to inherit the whole property of her husband leaving no male issue, without attention to the circumstance of his being separated from his coheirs, or united with them, (for no such distinction is specified) should be respected."

His opinion marks the era when the patriarchal system lost its hold.

This opinion of Jimutvahana seems to mark the era when the patriarchal system which is the foundation of the Mitakshara, appears to have lost its hold.

Summary.

To sum up :—the conclusion arrived at by the author of the Mitaksara is, that the widow is entitled to inherit to her husband, if he dies separated and not reunited, and leaving no male Issue. All the commentators except Jimutvahana have adopted this doctrine. The Judicial decisions recognise that this rule governs the succession of the widow, in all provinces except where the authority of Jimutvahana prevails (*b*).

(*a*) Dayabhaga, Chap. XI ; Sec. I, 46.

(*b*) As to Madras ; Katama Nachiar vs Raja of Sheivagunga, 9 M I. A. 543 is the leading case. As to Benares school ; Moharanee Hiranath vs Baboo Burm

In the Dayabhaga school a widow is entitled to inherit to her husband in all cases whether he was joint or separate, in the event, of course, of his dying without male issue.

But it must be noticed that even under the Mitaksara the widow succeeds to the self-acquired property of her husband even where he died undivided. If he left both joint and self-acquired property the joint property would pass to the other members of the undivided family by survivorship, whereas the self-acquired property will be inherited by the widow. This proposition was settled in the Sivagunga case (9 M. I. A., 543.) and has been adopted in many subsequent decisions of the Judicial Committee (*a*).

Another question in connection with the succession of a widow under the Mitakshara school has not unfrequently arisen viz., whether an agreement to partition, even

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narayan 17 W. R., 316; Chowdhury Chintamon vs. Nowlukho 24 W. R. 255 (P. C.) Rup singh vs Baisni, II I. A ; 149. As to Mithila school see Pudmavati vs Baboo Boolar, 4 M. I. A, 259 ; Anundee vs Khedoo, 14 M. I. A, 416. As to Bombay, see Goolab vs Phool, I Bom ; 154, also Govinddas's case 241 ; Mankooneras vs Bhuggoo 2 Bom, I. L. R, 139.

(*a*) Sivagnana Tevar vs Periasami, 1, Mad., 312 (P. C.) Doorga Pershad vs Doorga Konwari 4 Cal. 190 (P. C.).

when it is not carried out by actual separation, entitles the widow of a deceased brother to succeed to his share in preference to the surviving cosharer ? An affirmative answer should be given to this question both on the texts and on the authorities. In Chapter II, section XII, paras 1, 2 of the Mitakshara, having explained the partition of heritage, the author next propounds the evidence by which it may be proved in case of doubt. "When partition is denied, the fact of it may be ascertained by the evidence of kinsmen, relatives and witnesses, and by written proof, or by separate possession of house or field." In this passage the author is discussing the modes of proof of a partition. It is to be proved by oral or written evidence, or by separate enjoyment of a house or field. It would follow from this passage of the Mitakshara that partition may be proved either by proving an oral or written agreement to divide by metes and bounds. In the case of Appovier *vs.* Rama subba Anjan (*a*) the Judicial Committee held, that although the agreement for partition had not been carried out by actual separtion, it was, nevertheless binding upon the contract ing parties, and operated as a division of the family property. The same principle

An agreement for partition operates as a division of the family property.

(*a*) 11. M. L. A., 75.

was reaffirmed by the Judicial Committee in Suraneni *vs* Suraneni (*a*) and Gajapathi *vs* Gajapathi (*b*). The proper test to apply in such cases is not whether the property is actually divided or not divided, but whether there had been a division of title so as to give each member a certain and definite share to receive and enjoy in severalty. The same principle underlies the class of cases of which Chidambaram Chettiar *vs.* Gauri Nachiar (*c*) is the type. In that case there was a partition decree which settled that a particular property was partible, and fixed the shares of the parties. A reference was made to the commissioner to effect the division. Before this division could take place the plaintiff died, and an objection was raised that the partition suit failed. The Privy Council, however, held that on the death of the plaintiff, his own heirs succeeded in preference to the defendants who were separated coparceners (*d*).

In the most recent case on the point the Judicial Committee held, affirming the principle in Appovier's case, that where the

(*a*) M. I. A., vol. XIII, 113.
(*b*) M. I. A., vol. XIII 497.
(*c*) I. L. R. 2 Mad. 83.
(*d*) 6 C. L. J. 735 ; 4 Cal., 434. 24 Bom., 182.

members of a joint Hindu family executed instruments in writing providing that part or whole of the joint family property should belong to, and be enjoyed by different members of the family in certain specified shares, the effect of it is that, as to property so dealt with there is a division of rights, the status of the family is changed, and the previously undivided family becomes by operation of law divided (*a*).

Chastity is a condition precedent to the right of succession of the widow.

According to all the commentaries it is the chaste widow alone who is entitled to succeed to the estate of a man who dies without leaving any male issue.

Mitakshara.

The Mitakshara cites the texts of Vriddha Manu and Katyayana in support of this view. "The widow of a childless man", says Vriddha Manu, "keeping unsullied her husband's bed, and persevering in religious observances, shall present his funeral oblation and obtain his (entire) share." Katyayana also says, "Let the widow succeed to her husband's wealth, provided she be chaste" (*b*).

Dayabhaga.

In the Dayabhaga, another text of the sage Katyayana is cited which is as follows :— "Let the childless widow, keeping unsullied

(*a*) Musst. Parbati *vs* Chaudhri Naunihal, 10 C.L.J., 121. P. C. see also Balkissen *vs* Ramnarain L. R. 30 I.-A. 139. (*b*) Mitakshara, Ch. II. sec. I., 6.

the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. After her death, let the heirs take it" (*a*). From these and other texts of like import it is now firmly established in all the schools that the chastity of the widow is a condition precedent to her taking her husband's property by inheritance. The Mitakshara expressly lays down :— "Therefore, it is a settled rule that a wedded wife, being chaste, takes the whole estate of a man, who, being separated from his coheirs, and not subsequently reunited with them, dies leaving no male issue" (*b*). Although unchastity is a cause of disinherison, a widow who has once succeeded to the estate of her deceased husband cannot be afterwards divested of it by reason of subsequent incontinence. This question, upon which there was formerly a conflict of authorities, was settled by a Full Bench of the Bengal High Court consisting of ten Judges (*c*) and was carried in appeal before the Judicial Committee of the Privy Council, who affirmed the view of the majority of the Full Bench. Mr. Justice Dwarkanath Mitter, who was in

Subsequent unchastity is not a cause of disinherision.

(*a*) Dayabhaga, Ch. XI., s. V, 56.

(*b*) Colebrook's Mitakshara, Ch. II., S. I. p. 39.

(*c*) (1873) Kerry Koletanee *vs* Moniram, 19 W. R, 367. F. B.

the minority, examined with great fulness and care all the original texts on the point, and came to the conclusion that under the Bengal school of Hindu law, a widow, who has once inherited the estate of her deceased husband is liable to forfeit that estate by reason of her unchastity. His judgment is a learned exposition of all that can possibly be said in support of his opinion which has now been set aside and is no longer law. The other view was exhaustively considered and discussed by Sir Richard Couch, Chief Justice of Bengal. It seems unnecessary to repeat at length the arguments used by them on both sides of the question and impossible to add thereto. It appears, however, that Mr. Justice Mitter was not quite accurate when he remarked :—"It has been said that under the Hindu law an estate once vested cannot afterwards be divested. Now there is no work on Hindu law that I am aware of in which it is laid down in so many terms that an estate once vested cannot be divested." For we find that the Viramitrodaya when dealing with the subject of exclusion from inheritance, observes as follows :—"The exclusion, again, of these, takes place, if their disqualification occur previously to partition (or succession ;) but not also if subsequently to partition or succes-

Criticism of Mr. Justice Mitter's view on the point.

sion ; *for there is no authority for the resumption of allotted shares*" (*a*). The portion in italics is significant ; it shows beyond doubt that the Hindu law does recognise the rule that an estate once vested cannot be divested. The view of the majority of the Full Bench has been affirmed by the Privy Council (*b*). The same view had been taken previously by the Bombay High Court (*c*). In Allahabad a Full Bench of the High Court, while dealing with the inheritance of a widow under the Benares school also adopted the rule laid down by the Calcutta Full Bench (*d*). So it may now be taken to be firmly established that under all the schools, a widow, who has once inherited the estate of her husband, is not liable to forfeit that estate by her subsequent unchastity.

Dr. Mayr's view.

Dr. Mayr thinks that the condition of chastity which the Brahmin lawyers engrafted upon a widow's right of succession is wholly unsupported by the early text of the Vedas (*e*).

Legal effect of remarriage by the widow on her deceased husband's estate.

I have already dealt with the question as to what is the legal effect of remarriage by a

(*a*) Viramitrodaya, p. 253 G. C. Sarkar's translation.
(*b*) Moniram vs Keri Koletani, I. L. R. 5 Cal., 776.
(*c*) Parbati vs Dhikhu, 4 Bom. H. C. R. A. C. 25.
(*d*) Nehalo vs Kishen lall, I. L. R. 2. All., 150.
(*e*) Mayr. 181.

Hindu widow upon the estate which she has inherited from her deceased husband in an earlier chapter and I need not here restate my views on the point.

Succession by several widows.

It has been shown that the widow is the heir to the deceased husband's estate in default of male issue. But where there are several widows each will inherit equally. The

Mitakshara.

Mitakshara says :—"The singular number "wife" in the text of Yajnavalkya, is used to designate a class," and adds "where there are several wives of the same or different castes they divide and take the property according to their shares" (*a*). The Viramitrodaya says likewise "but the wives of the same class with the husband shall take the estate dividing it amongst themselves" (*b*).

Dayabhaga.

In the Dayabhaga certain texts are cited which go to show that it is the eldest wife alone who is entitled to inherit. The inclination of the opinion of Jimutvahana is to lay down that that wife alone inherits who can be ranked as *Patni i.e.* wife who can associate with her husband in the performance of religious rites (*c*). But this view of Jimutvahana has not been accepted anywhere. It is settled under the Mitakshara school of Hindu

(*a*) एकवचनं च जात्याभिप्रायेण। Mitakshara. Sec II, 1, 5.

(*b*) Page 153. of Mr. G. C. Sarkar's translation.

(*c*) Dayabhaga Ch. XI, Sec. 1, 15 & 47.

law that the estate of several widows, who take their husband's property by inheritance is one estate, The right of survivorship is so strong that the survivors take the whole property. They are therefore, in the strictest sense, coparceners (*a*). The whole law as to the rights of co-widows in their husband's state in Madras was considered in the judgment of the Madras High Court in the Tanjore case (*b*) and it was laid down "that the sound rule of inheritance is that two or more lawfully married wives (*patnis*) take a joint estate for life in their husband's property, with rights of survivorship and equal beneficial enjoyment." The Judicial Committee of the Privy Council, in a later case, referred to this decision, and approved of the proposition of law stated above (*c*). The Smriti Chandrika (*d*) seems to support this view. In the Vyavahara Mayukha it is said that "if there be more than one, they will divide the wealth and take shares." Mr, Justice Melvill was not sure, if under this

Madras decision. Tanjore case.

(*a*) Bhagwandeen vs Myna Baee, 11 M. I. A. 487. (1866-67).

(*b*) Jijoyiamba Bayi vs Kamachi, 3 Mad. H. C. R., 424.

(*c*) Gajapathi Nilamani vs G. Radhamoni, I. L. R., 1 Mad., 290.

(*d*) Ch XI, Sec I, p 57.

text of Nilkantha (*a*) the widows would take a joint estate. But whether they took joint or several estates, the learned judge thought that as regards the devolution of the estate, the result would be the same. "If the widows take," said his lordship, "a joint estate, the surviving widow takes the undivided share of the other widow by survivorship. If they take several estates the surviving widow would take the divided share of the deceased widow by right of inheritance, as her husband's next heir" (*b*). The position of a senior widow would give her, as in the case of other coparceners, a preferable claim to the care and management of the joint property (*c*). But where the property is impartible, as in the case of a Raj, the senior widow will inherit and the other widows will only be entitled to maintenance.

Vyavahara Mayukha on the same.

In the text of Yajnavalkya the heir who comes next after the widow is the daughter. The Mitakshara cites texts of Vrihaspati and Katyayana to show that the daughter succeeds in default of the widow. Katyayana says, "Let the widow succeed to her husband's wealth, provided she be chaste; and

The daughter comes next after the widow.

(*a*) Vyvahara Mayukha, Ch. IV, Sec 4. p. 119.

(*b*) Bulakhidas vs Keshablal, I. L R., 6 Bom, 85.

(*c*) Tanjore case, 3 Mad. H. C. R., 424.

in default of her, let the daughter inherit, if unmarried. (*a*). Vrihaspati says : "The wife is pronounced successor to the wealth of her husband ; and in her default, the daughter. 'As a son, so does the daughter of a man proceed from his several limbs. *How then should any other person take her father's wealth* (*b*)" ? The author of the Mitakshara, by his above mentioned quotation from Vrihaspati—"as a son, so does the daughter of a man proceed from his several limbs"—appears to rest her heirship on consanguinity. From the latter part of the text of Katyayana, cited above, the Mitakshara deduces the rule that the unmarried daughter succeeds in preference to the married daughter. A text of Gautama :—"A woman's separate property goes to her daughters, unmarried or unprovided," is quoted in support of the proposition laid down by the Mitakshara, "that if the competition be between an unprovided and enriched daughter, the unprovided one inherits ; but, on failure of such, the enriched one succeeds." Vijnanes-

Mitakshara.

Unprovided daughter preferred to the wealthy one.

(*a*) "पत्नी भर्तुर्धनहरी या स्यादव्यभिचारिणी।
तदभावे तु दुहिता यद्यनूढा भवेत्तदा।"

(*b*) यस्मादङ्गात् सम्भवति पुत्रवद्दुहिता नृणाम्।
तस्मात् पित्र्यं धनं त्वन्यः कथं गृह्णीत मानवः॥

Mitakshara, Ch. II, Sec. 2, p. 2. (Colebrooke's Translation).

wara bases the right of the indigent married daughter to succeed to the inheritance of her deceased father in preference to the married daughter who is wealthy, on the analogy drawn from the text of Gautama which obviously applies to the succession of daughter to her mother's *Stridhan* only This rule of the Mitakshara has been accepted by the Judicial Committee of the Privy Council (*a*). But no preference is given to a daughter who has or is likely to have male issue, over a daughter who is barren or childless widow—a rule wherein the Benares School differs from the law of the Bengal School on the point (*b*). And this difference would follow from the divergence between the two schools as to the basis of the right of a daughter to inherit to her deceased father. As we shall see later, Jimutvahana would rest the daughter's right to inherit on her capacity to offer oblations. A daughter could offer no religious oblations herself, but she produced sons who could present such oblations; where therefore the daughter had either no sons or was incapable of having sons at the time the succession opened, she was

No preference to a daughter likely to have issue over barren or childless daughter.

Divergence between the two schools—Bengal and Benares—on the point.

(*a*) Wooma Dayee vs. Gokoolanund, I. L. R. 3 Cal., 587. (P. C.)

(*b*) *Ibid.*

held not competent to inherit. But Vijnaneswara intended to ground the daughter's right of succession on consanguinity and such intention would not be in conflict with his general doctrine that *Sapindaship* is based on the community of particles rather than on the capacity to offer funeral oblations.

Incontinence of the daughter is no bar to her succeeding under Mitakshara.

We have seen already that the widow is by her incontinence debarred from inheriting the estate of her husband, and the question arises whether the same rule applies to the succession of a daughter to the estate of her father. In the text of Katyayana quoted by the Mitakshara, the chastity of the widow is made the express condition on which she can take, but there is no such provision as to the daughter. And applying the principle embodied in the maxim "expressio unius est exclusio alterius" to this case it might be fairly contended that incontinence of a daughter is no bar under the Mitakshara to her succeeding to her father's estate. It may be also stated here in support of this view that "incontinence" is not mentioned by Vijnaneswara as one of the causes of exclusion from inheritance (*a*). A text of Narada is cited in the chapter on exclusion from inhertiance, which declares

(*a*) Ch. II. Sec. X.

that "an outcaste" and "one addicted to vice" cannot inherit ; and it may be said that an incontinent daughter might come within one or other of these two classes of persons. As regards "Vice", it is one of the grounds of exclusion which has been made applicable to men and to women. But the rule must be regarded as obsolete for no man has ever been held disqualified from inheritance on the ground of "incontinence." The practice of the people and the courts have firmly established that incontinence is no reason for excluding men, why should a different rule prevail with regard to women ? Suppose the incontinence of the daughter was followed by expulsion from her caste, Act XXI. of 1850 would protect her and would not deprive her of the right, which she otherwise would have had, to inherit to her deceased father. The preceding argument makes it clear that under the Mitakshara a daughter is not prevented by unchastity from succeeding to the estate of her father. The matter, however, is an open question so far as the Calcutta and Allahabad High Courts are concerned, as there has been no cases directly speaking to the point.

Mayukha on succession of daughters agrees with Mitakshara.

The doctrine of the Mayukha as to the succession of daughters is in complete uniformity with that of the Mitakshara. Nil-

kantha cites a text from Manu :—"The son of man is even as himself, and the daughter equal to the son ; how then can another inherit his wealth, but she who stands as if it were himself" (*a*). With regard to the text of Gautama *Stridhanamaprattanam apratitisthanam*—Nilkanta says that those acquainted with traditional law hold that the term *Stri* denotes the (*Pita*) father also (*b*).

Bombay decisions affirm the same.

The Judicial decisions in Bombay lay down that in Western India there is no bar to an unchaste daughter's succeeding to her father's estate. The leading case on the subject is Advyapa *vs* Rudrapa (*c*). In this case Sir Michael Westropp, Chief Justice, after examining in great detail the view of the Mitakshara and the Mayukha on the question, said, "But, if as is the fact, there be neither text nor case which shows that, according to the law as it prevails in Western India, a daughter is by her incontinence, debarred from succession to the estate of her father, we do not think that the analogy derivable from the case of the widow would justify us in imposing such a disqualification upon the daughter".

A somewhat peculiar case arose recently

(*a*) IX, 130. (*b*) स्त्री पदम् पितरप्यु पलक्षयति सामुदायिका।
(*c*) I. L. R. 4 Bom., 104. See also Bai Mangal vs. Bai Rukhmini, I. L. R. 23 Bom., 291.

in Bombay. A Vaghya (male dedicated to the god Khandoba) had three daughters, one of whom was a Murali (female dedicated to the God Khandoba) and two married. After the death of the male his Murali daughter, who lived by prostitution and had children by promiscuous intercourse, claimed her father's property as heir to the exclusion of her sisters under the rule of Hindu law that an unmarried daughter inherits to her father before his married daughter. The High Court held, that a woman, who in her maiden condition becomes a prostitute, being neither a *Kanya* (unmarried) nor a *Kulastri* (married) but being at the same time notwithstanding her prostitution a qualified heir under the ruling in Advyapa *vs.* Rudrapa would be entitled to succeed to her father's property, only in default of either married or unmarried daughters (*a*).

Principle of succession as between married daughters.

In Baku *vs.* Mancha Bai (*b*) it was held that in the Bombay Presidency, as between married daughters, succession was regulated by their comparative endowment or nonendowment. In a recent case it has been laid down that though the Courts ought not to go minutely into the question of comparative

(*a*) Totawa vs Basawa, I. L. R. 23 Bom., 229.

(*b*) Baku vs Moncha, 2 Bom. H. C. R., 5; see also Poli vs Narotum, 6 Bom. H. C. R., 183.

poverty, yet where the difference in wealth is marked, the whole property passes to the poorest daughter (*a*).

No preference is given to a daughter, who has or is likely to have male issue over a daughter who is barren or a childless widow.

Vivada Chintamoni.

The Vivada Chintamoni says that "on failure of wives the heritage devolves on the daughters" and cites a text of Narada to the effect "on failure of male issue, the daughter inherits for she is equally, a cause of perpetuating the race ; since both the son and the daughter are the means of prolonging her father's line". Vachaspati Misra relies also on the same texts of Manu and Vrihaspati which are relied on in the passages in the Vyavahara Mayukha and the Mitakshara respectively which refer to a daughter's right to succeed. He refutes the opinion that the text of Manu (*b*) refers to an appointed daughter. For his opinion that the maiden and unmarried daughters take the heritage successively he cites a passage from Parasara:—"Let a maiden daughter take the heritage of one who dies without leaving no male issue ; if there be no such daughter, a married one shall inherit" (*c*).

Vachaspati Misra.

(*a*) Tara vs Krishna. I. L. R. 31 Bom, 495.

(*b*) See P. 292, p. 293. P. C. Tagore's Translation.

(*c*) IX, 130.

It would thus appear that in the Mithila school no distinction is recognised between poor and rich daughters in the matter of succession, as is the case both in the Benares and the Western schools.

The Mithila School on the daughter's incontinence.

It seems to us that in the Mithila school incontinence will prevent a daughter taking her father's estate. And this view is supported by the following passage from the Vivada Chintamoni :—"But what kind of daughter, is competent to receive her father's heritage, is declared by the same author (Vrihaspati). Being of equal class and married to a man of like tribe, and being *virtuous and devoted to obedience*, she (namely, the daughter), whether appointed or not appointed to continue the male line, shall take the property of her father who leaves no son, nor widow" (*a*) The words साध्वी शुश्रूषणे रता (virtuous and devoted to obedience) imply that the daughter must be chaste in order to be entitled to inherit. The words, *to obedience*, would, of course, mean devoted to the husband. In the Mitakshara this text of Vrihaspati is not referred to, perhaps deliberately as it is not intended by Vijnaneswara that the daughter should be under the same obligation to

(*a*) सदृशी सदृशेनोढा साध्वी [illegible] ता
क्रता क्रता वा पुत्रस्य पितुर्धनहरी भवेत् ॥

chastity as a widow. But when Vachaspati refers to it, the legitimate inference to draw is that his intention was to exclude an unchaste or incontinent daughter from inheritance. I have not been able to find any case on the point we are now discussing, but when the question arises, it will have to be considered whether under the Mithila school, chastity is not a necessary condition for the daughter's succession.

Daughter's succession in the Dravida or Southern School.

Passing from the law of the Mithila school on this point, we turn to the Smriti Chandrika, which is the leading authority of the Dravida or Southern school of Hindu law. In the other three schools noticed before, the daughter's right to inherit is, as we have seen, based on consanguinity alone. In the Smriti Chandrika the principle of religious efficacy is introduced as an additional reason for the inheritance and it seems the author has followed the Dayabhaga on the point.

Smriti Chandrika on precedence in succession among daughter's *inter se*.

With regard to precedence amongst daughters *inter se* the Smriti Chandrika lays down the following rule : "Where there is a competition between a daughter unprovided and one unmarried, both being of the same class with their father, and possessing the *other qualifications* mentioned in the text, the unmarried alone first takes ; the

maintenance of such daughters out of the wealth of the father being indispensable. On failure of such a daughter, the unprovided takes, such a daughter being destitute of the means of subsistence owing to the inability of the husband to maintain her, although he is bound to do so. In default of unprovided daughters, the daughter provided or enriched and possessing the qualifications of equality of class,—etc. takes, such a daughter, though provided, being competent to inherit" (*a*).

View of Smriti Chandrika regarding succession of barren daughters.

The author of the Smriti Chandrika holds that "barren daughters are not at all entitled to inherit their deceased father's estate, they being incapable to confer on him spiritual benefits through the medium of their offspring (*b*).

Madras High Court does not accept it.

The Madras High Court has refused to accept this opinion of the Smriti Chandrika in the case of Simmani Ammal *vs* Muttammal (*c*). In this case Mr. Justice Muttusami Ayyar, in giving judgment said : "In the absence, therefore, of a regular course of decisions or other evidence of usage, indicating a consciousness in the country that this opinion of the author of the Smriti Chandrika is living law, we do not feel warranted in

(*a*) Smriti Chandrika, Ch. XI. Sec. 11., 28.

(*b*) Ibid, Ch. XI., Sec. II, 21.

(*c*) I. L. R., 3 Mad., 265.

departing from the doctrine of the Mitakshara". So contrary to the rule laid down in the Smriti Chandrika it has been held in Madras that sonless or barren daughters are not excluded from inheritance by their sisters who have male issue. And the principle of this decision has been affirmed in a very recent case (*a*).

Is chastity a preliminary condition to a daughter's succession?

The High Court of Madras has rejected the authority of the Smriti Chandrika in another matter connected with the principles on which the daughter's right of succession is based. It holds contrary to what would seem to follow from the Smriti Chandrika, that chastity is not a preliminary condition to a daughter's succession to her father's estate (*b*). The Smriti Chandrika, after quoting the text of Vrihaspati relied on in a passage in the Vivada Chintamoni already cited, insists upon "the daughter being virtuous and devoted to obedience". There can be no doubt, for the reasons which we have stated when we were dealing with the opinion of Vachaspati Misra on the point, that the author of the Smriti

(*a*) (1908) Vedammal vs Vedanayaga, I. L. R. 31 Mad., 100 (108.)

(*b*) Kojiyadu vs Lakshmi, I. L. R. 5 Mad., 149; Angammal vs Venkata Reddy. I. L. R. 26 Mad., 509; Vedammal vs Vedanayaga, I. L. R. 31 Mad., 100 (106).

Chandrika imposes the condition of chastity on the daughter's right to inherit.

Principles of succession of daughters in the Bengal School.

It remains now to consider the principles of succession of daughters in the Bengal school. Jimutvahana introduces the rule of religious or spiritual efficacy in determining the rules of their inheritance to their father's estate. After quoting the text of Narada:—"On failure of male issue, 'the daughter inherits for she is equally a cause of perpetuating the race : etc etc.," Jimutvahana says: "It is the daughter's son, who is the giver of a funeral oblation, not his son ; nor the daughter's daughter ; for the funeral oblation ceases with him. Therefore the doctrine should be respected, which Dicshita maintains ; namely that a daughter, who is mother of male issue, or who is likely to become so, is competent to inherit ; not one, who is a widow, or is barren, or fails in bringing male issue as bearing none but daughters, or from some other cause" (*a*). Jimutvahana says again, "A daughter's right of succession to the property of her father is founded on her offering funeral oblation by means of her son" (*b*). And he adds "the daughter is heiress of her father's wealth in right of the funeral

(*a*) Dayabhaga, Ch. XI., Sec. II, paras 2 and 3.

(*b*) Ch. XI. Sec, II, p. 15.

oblation which is to be presented by the daughter's son" (*a*). These passages are sufficient to show that the right of the daughter to inherit is dependent on the spiritual merit of being able to produce one who can offer oblations to the deceased father.

Order of succession among daughters according to Dayabhaga.

According to the Dayabhaga, the unmarried daughter is first entitled to inherit, and the reason given is that "should the maiden arrive at puberty unmarried, through poverty, her father and the rest would fall to a region of punishment as declared by the holy writ" (*b*) and Jimutvahana supports this opinion by a text from Vasistha. But if there be no maiden daughter the succession devolves on her who has, or is likely to have male issue. Daughters who are barren, or widows without male issue, or mothers of daughters only can under no circumstances inherit, agreeably to the opinion of Dicshita referred to above.

The Judicial decisions have in laying down the Bengal law of succession of daughter, accepted these rules of the Dayabhaga regulating precedence amongst daughters *interse*.

The question, whether under the Hindu law of the Bengal school a daughter is pre-

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(*a*) Ch. XI. Sec. II. P. 17.

(*b*) Dayabhaga, Chap. XI. II, 6.

cluded from inheriting the property of her father by reason of unchastity, now claims our attention. In the Dayabhaga the author, in treating of the daughter's succession, quotes the text of Vrihaspati which states that the daughter should be *virtuous and devoted to obedience* (*a*). The passage in the original साध्वी शुश्रूषणे रता which Colebrooke has translated as "virtuous and devoted to obedience" in some editions of the Dayabhaga has a slightly different reading *viz*, भर्तुर्गुश्रूषणे रता of which the correct rendering is "devoted to obedience to the husband." But whichever reading is adopted, there is not much difference in meaning, chastity being evidently the qualification intended by both. The author of the Dayabhaga, by citing the above text of Vrihaspati as the basis of the married daughter's right to inherit evidently intended to deduce the rule that chastity is a necessary qualification for entitling her to take her father's estate. We have seen already that in more than one place it is said in the above mentioned treatise that the daughter's right of succession to her father's property is founded on her offering funeral oblation by means of her son, that is, on her capability of having a legitimate male issue, and for the existence of this foundation of

Dayabhaga regards chastity as a necessary condition to the right of the daughter to succeed.

(*a*) सद्वृत्ता सद्गुणोढ़ा साध्वी शुश्रूषणे रता।

her right, chastity is an essential condition. There is another passage in the Dayabhaga bearing upon this question towards the end of the section treating of the succession of the daughter and the daughter's son. Jimutvahana, after stating that the daughter, like the widow, takes a qualified interest in the estate which at the death of either goes, not to her heirs, but to the next heir of the last full owner, and after giving in support of that view a certain reason, adds another and a better reason in these words :—"Or the word 'wife' is employed with a general import : and it implies, that the rule must be understood as applicable generally to the case of a woman's succession by inheritance" *a*). Raghunandana, whose authority is accepted in Bengal, in commenting on this passage of the Dayabhaga says : "The word 'wife' implies females generally. In the text of Katyayana : 'Let the childless widow, preserving unsullied the bed of her lord and abiding with her venerable protector, enjoy with moderation the property until her death. After her let the heirs take' ; and in the first half of the next text of the same sage, namely, 'the wife who is chaste takes the wealth of her husband,' the word 'wife' is illustrative." The above passage

(*a*) Dayabhaga Chap. XI. Sec. II, 31.

from Jimutvahana (Ch. XI, Sec II, 31) read along with the gloss of Raghunandan leaves no room for doubt that chastity is an essential condition for the daughter to inherit to her father under the Dayabhaga.

Judicial decisions confirm the view.

The decisions of the Bengal High Court are in conformity with this view (*a*) of the Dayabhaga. The last of the two cases cited above accordingly lays down that according to the Bengal school of Hindu law, a daughter who is unchaste is precluded from inheriting the property of her father.

Mother's right to succeed.

The mother is the next female heir who is mentioned in the text of Yajnavalkya as coming after the daughter. Her claim to succeed to her son is recognised by Manu in express terms in the following verse :—"Of a son dying childless the mother shall take the estate : and the mother also being dead the paternal grandmother shall take the estate" (*b*). Kulluka, in commenting on this text, says that the mother inherits only on failure of son's widows, daughters, and that the mother and father inherit conjointly. Narayana, another commentator of Manu, places the mother before the father in the order of succession. One theory is that the

(*a*) Ramnath vs Durgasundari, I. L. R. 4 Cal., 550 ; Ramananda vs Rai Kissori, I. L. R. 22 Cal., 347.

(*b*) Manu, IX. 217.

gloss of Kulluka marks the changes in the law since the time of Manu (*a*). Amongst the other Smriti writers, Vishnu, Vrihaspati and Katyayana recognise the claim of the mother to succeed, but they do not agree as to the order in which she takes the inheritance. Vrihaspati places her after the wife and male issue (*b*); Vishnu places her after the male issue, the widow, the daughter and the father (*c*). Yajnavalkya, as we have seen already, places both parents after the daughter and there is a divergence of opinion amongst the commentators as to the preference between father and mother to succeed.

Divergence of opinion amongst commentators as to right of mother to succeed in preference to father.

Viswarupa, the earliest commentator on Yajnavalkya Smriti, says that the mother has priority (*d*); so does the Mitakshara (*e*).

The Mitakshara states that the preference of the mother to the father is due to her greater propinquity. It is said: "The father is a common parent to other sons, but the mother is not so: and since her propinquity

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(*a*) Mayne's Hindu law and Usage, P. 707. (7th. Ed.)

(*b*) XXV. 64. Sacred Books of East, Vol. 33, p 379.

(*c*) Vishnu, XVII, 2.

(*d*) See translation by Sitaram Sastri, Mad. Law Journal, vol. 9 p. 420.

(*e*) Chap. II., Sec. III., 3.

Mitakshara prefers mother to father.

is consequently the greatest, it is fit, that she should take the estate in the first instance conformably to the text '*To the nearest sapinda, the inheritance next belongs*'." The portion in italics indicates that the ground of her (mother's) claim is *sapinda* relationship by reason of connection with her deceased son through particles of the body (*a*). Nilkantha considers that this exposition of Vijnaneswara is unsound, because it is opposed to the texts of Vishnu and Katyayana and holds that in default of the daughter's son comes the father, in default of him, the mother(*b*). The author of the Smriti Chandrika, after noticing three different views of the mother's right, rejects them all and comes to the same conclusion as the Vyavahara Mayukha. Some argue, says the

Mayukha prefers father to mother.

(*a*) The word *Sapinda* does not mean one who is connected by funeral oblations as Colebrooke thinks. In the Acharkhanda of the Mitakshara it is distinctly stated, therefore one ought to know that wherever the word *sapinda* is used, there exists (between the persons to whom it is applied) a connection with one body, either immediately or by descent. (See comments of Vijnaneswara on Book I, verse 52.) See Colebrooke's translations of Mitakshara, Ch. II., sec. III., P. 4. See Umaid Bahadur vs Udai chand, I. L. R. 6 Cal., 119 F. B.; also per Mookerjee J. in Sham singh vs. Kishun sahai, 6 C. L. J., 198 (201).

(*b*) Vyavahara Mayukha, Ch. IV., Sec. VIII., 14.

author, that the mother alone succeeds to the estate, notwithstanding the existence of the father for she confers greater benefits on the son by bearing the child in her womb and nurturing him during his infancy and because it is argued "a mother surpasses a thousand fathers in point of veneration" (*a*). Others argue that the father is a common parent to the sons of a rival wife also, but the mother is not so; and hence mother's propinquity is more immediate compared with the father's. "A third class of authors," says Devananda Bhatta, "advocate the great propinquity of the mother, by saying that such propinquity is inferrible from a text relating to the succession of the property of a uterine brother." All these three opinions are controverted in the Smriti Chandrika by weighty arguments to the contrary. The opinion of Sricara that both the parents may divide between them and take the inheritance has not been accepted.

Smriti Chandrika agrees with Mayukha.

The Vivada Chintamoni places the mother before the father and before the daughter's son, who comes in even after the father. In placing the daughter's son after the parents, the author has practically changed the order of succession as laid

Vivada Chintamoni also places mother before father.

(*a*) Smriti Chandrika, Ch. XI., S. III., 3.

down by Yajnavalkya's text. But the Sudder Dewany Adalat has disregarded this opinion of the Vivada Chintamoni, and after a full examination of the views of the Mithila legal writers, declared the right of the daughter's son to come in after the daughter as in the other schools (*b*). So under the Mithila school of Hindu law the mother succeeds to a childless man in default of the widow, the daughter, and the daughter's son.

In the Bengal school father preferred to mother.

Under the Dayabhaga school the mother comes in after the father, because the latter presents to others two oblations in which the deceased participates ; and because in a comparison of the male with the female sex, the male is pronounced superior.' Here again, as in the case of the daughter, the author of the Dayabhaga introduces religious or spiritual merit as the test of succession. He rejects the notion that 'superior title to veneration is the reason of a right of inheritance, on the ground that, if it were so, the succession would devolve on the spiritual preceptor before the father for the former is more venerable of the two.'

We have thus seen that there is a divergence of opinion in the different schools of

(*a*) Page. 293. P. K. Tagore's translation.

(*b*) Surja Kumari vs. Gundharp singh, 6 S. D., (168-179) New Ed.

Hindu law as to the order in which the parents take. Nowhere is this divergence more easily noticeable than in the Bombay Presidency—in some portions of which, the Mitakshara is the paramount authority, while in the other parts of the Presidency it gives way to the Mayukha. It has accordingly been held *(a)* that in the Ratnagiri District of the Bombay Presidency, where the Mitakshara is obeyed, the rule of the Mayukha, that the father is to be preferred to the mother, being directly opposed to the Mitakshara, cannot prevail ; while, on the other hand, in Guzerat, where the Mayukha is of special authority, the father succeeds in preference to the mother *(b)*. In Bengal, it is firmly established that the father takes before the mother *(c)*. For the same reasons for which a daughter in Bengal is under an obligation to chastity in order to inherit, an unchaste mother will be precluded from succeeding to her son. Raghunandana has pointed out that the word "wife" in the text of Katyayana—"the wife who is chaste takes the wealth of her husband," applies to females

Effect of unchastity on mother's right to inherit.

In Bengal.

(a) Balkrishna Bapuji vs. Laksman Dinkar, I. L. R. 14 Bom, 605.

(b) Khodabai vs. Bahdhar, I. L. R. 6 Bom, 541.

(c) Hemlata vs. Goluck, 7 S. D, 108.

in general and would consequently include the mother. In the case of Ramnath Talapatro (*a*) this point expressly came up for decision and it was held that an unchaste mother is incapable of succeeding as heiress to her son. On the contrary, it has been held in Bombay and Madras that the rule which requires chastity as a necessary condition for inheritance is confined to the widow only and does not apply to the mother (*b*). In a very recent case it has been held in Madras, however, that a mother who has been party to the murder of her son, cannot succeed by inheritance to the property of such son (*c*). In Allahabad the matter has recently been decided in accordance with the Bombay view (*d*).

In Bombay and Madras.

In Allahabad.

According to Jimutvahana the word "mother" in the text of Yajnavalkya cannot include a step-mother (*e*). It has accordingly been held by a Full Bench of the Calcutta High Court that a step-mother does not in-

Mother does not include a step-mother.

(*a*) I. L. R. 4 Cal, 550. See also Nogendra vs. Benoy, I. L. R. 30 Cal. 521.

(*b*) Adyapa vs. Rudrapa, I. L. R. 4 Bom, 104. Koyudu vs. Laksmi, I. L. R. 5 Mad, 149.

(*c*) (1907). Vedammal vs. Vedanayaga, I. L. R. 31 Mad, 100.

(*d*) Dal vs. Dini, I. L. R. 32 All, 55; Baldeo vs. Mathura, I. L. R. 33 All, 702.

(*e*) Dayabhaga, iii. 2. 30. also Ch, XI Sec VI, 3.

herit the estate of her step-son (*a*). In this Full Bench case it has also been laid down that she cannot succeed either under the Mitakshara or the Mithila school of Hindu law. The reasons for this view are that under the Mitakshara, a step-mother is not included in the term mother and not having been expressly named amongst female heirs, cannot inherit to her step-son. This view had also been adopted in Allahabad (*b*). And quite recently the Calcutta High Court has held approving the earlier Full Bench decision, that in the Bengal Presidency under the interpretation of the Mitakshara law as accepted in the districts governed by that law, a step-mother is not entitled to succeed to her step-son either as *gotraja sapinda* or in preference to the father's sister's son (*c*). In Bombay although the step-mother cannot be introduced as an heir under the term "mother," yet as the widow of a *Gotraja sapinda* of the *propositus*, and, therefore, according to the doctrine of the Mitakshara and the Mayukha, a *gotraja sapinda* herself, she cannot be regarded as altogether excluded from succession to her

Step-mother not an heir in Bengal.

Step-mother not excluded from succesion in Bombay.

(*a*) Lala Joti vs Msst. Dooranae, Weekly Reporter Sp. No. 173.

(*b*) Ramanand vs Surgiani, I. L. R. 16 All. 221.

(*c*) Tahaldai Kumri vs Gayapershad, I. L. R. 37 Cal., 214.

step-son (*a*). In the case last cited her exact position in the line of heirs was not determined. Messrs. West and Buhler (*b*) however, say that the step-mother ought to be placed on account of her near relationship to the deceased, immediately after the paternal grandmother, up to whom only the succession is settled by special texts. And the Bombay High Court has recently adopted this view (*c*). A step-mother has been held entitled to succeed in preference to the paternal uncle's son on the principle enunciated by Messrs. West and Buhler.

In Madras the course of decisions has been against the step-mother's right (*d*). The leading case on the subject is the Full Bench decision in Mari *vs.* Chinammal (*e*). In this case it has been decided that a step-mother does not succeed to the estate of her step-son in preference to a *Sagotra sapinda e. g.* a paternal uncle. All the judges composing the Full Bench were agreed that the

(*a*) Kesserbai vs Valab. I. L. R., 4 Bom., 118.

(*b*) West and Buhler. P. 472 (3rd. Edition).

(*c*) Russoobai vs Zoolekhabai, I. L. R., 19 Bom., 707 (1895). See also Bhimacharyya vs Ramacharya, I. L. R., 33 Bom., 452 (462).

(*d*) Kumarbelu vs Virana, I. L. R. 5 Mad., 29; Multammal vs Vengalakshiammal, Ibid 32.

(*e*) I. L. R., 8 Mad., 107.

term "mother" in the Mitakshara did not include a step-mother. The majority thought that the claim of the step-mother as a *Gotraja sapinda* had not been established. Mr. Justice Muttusami Ayyar, while entertaining no doubt that she was a *Gotraja sapinda* in the Mitakshara sense of *sapinda* relationship, was not sure if all female *sapindas* were heirs in that Presidency. The learned judge nevertheless agreed with the Full Bench because there was no sufficient warrant for departing from decided cases, and also because there was absence of evidence of usage in favour of the step-mother's right.

Sister is not an heir in Bengal.

In Bengal the sister is not recognised as an heir. She finds no place in the scheme of succession laid down by Jimutvahana as she cannot offer any oblations which may be of any spiritual benefit to his brother. The solitary text of Sankha and Likhita viz: "The daughter shall take the female property, and she alone is heir *to the wealth of her mother's son who leaves no issue*" might support her claim as heiress. But it has not been quoted by any commentator as authority for the sister's right to succeed. Besides Jagannatha points out that the latter part of the text applies to the appointed daughter only, while Mr. Mayne suggests (*a*)

Sankha and Likhita may be cited in support of her right to succeed.

(*a*) Mayne's Hindu Law and Usage, P. 719. (7th Edition).

that the latter part of the text of Sankha and Likhita may refer to the *Stridhanam* which had passed from the mother to the son ; but the wide difference in these suggested explanations prevents either from being received with confidence (*a*).

A text of Vrihaspati in support of sister's right.

There is a text of Vrihaspati which may be said to support the right of the sister. That text runs thus :—"on the death of a reunited brother his portion is not lost, but devolves on his uterine brother and his sister is also entitled to take a share in it. This law concerns him who leaves no issue, nor wife nor father, nor mother." Although Jimutvahana refers to this text for another purpose, he does not regard it as authority for the succession of the sister. She does not fulfil the condition of religious efficacy required by him and must be omitted from his scheme of succeession.

Sister not an heir in the Benares School.

In the Benares school the sister does not inherit her brother's estate. The Mitakshara does nowhere expressly mention her. But the text of the Mitakshara, "on faliure of the father, *brethren* share the cstate" has been so interpreted by Nanda Pandita and Ballambhatta, as to bring in the sister immediately after the brother in the line of

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(*a*) Per Turner. C. J., in Lakshmanammal *vs.* Tiruvengada, I. L. R. 5 Mad., 244.

heirs (*a*). They maintain that sisters are included in "brethren" according to the true rules of Sanskrit exegesis. But this interpretation of the two ancient commentators has not been accepted by the Judicial Committee of the Privy Council (*b*), in an appeal from the North Western provinces; nor has it been admitted by Nilkantha who upholds the sister's heirship on another ground (*c*). All the other commentators and writers of *Nibandhas* who are followers of the Mitakshara differ from this opinion of Ballambhatta. It has been held in Bengal that a sister is not in the line of heirs according to the Mitakshara (*d*). In the case of Koer Golab singh *vs.* Koer Kurun singh (*e*), the question whether a sister can succeed by inheritance to her brother according to the law as received in the North Western Provinces was raised, but their Lordships of the Judicial Committee refused to decide the question as this point had not been raised by the issues in the suit. A similar view has been

(*a*) Mitakshara, Ch. II. Sec. 4. P. I. & 7 (note).

(*b*) Thakoorain sahiba *vs.* Mohun lall, 11., M. I. A., 386.

(*c*) Vyavahara Mayukha, Ch, IV., S. 8., P. 16.

(*d*) Jullessur *vs.* Uggur, I. L. R. 9 Cal., 725; Must. Gunram *vs*, Srikant 2 Sec., 460.

(*e*) 14 M. I. A. 176,

In Bombay on the other hand sister is an heir.

taken in Allahabad (*a*). In Bombay, on the other hand, the sister's right to succeed is beyond controversy. The authorities most regarded in Bombay favour her claim to inherit. Her right has been held to rest not only on the Vyavahara Mayukha, but also on the special interpretation of the Mitakshara by Nanda Pandita and Ballambhatta already referred to (*b*).

Vyavahara Mayukha.

The passage of the Mayukha (Ch. IV., Sec viii., p. 19), in which Nilkantha introduces the sister has been translated as follows :—"In case of the non-existence of that (the paternal grandmother) the sister takes according to the dictum of Manu that 'whoever is the nearest *sapinda*, his should be the property ; and according to the text of Brihaspati, that where there are many *Jnati Sakulyas* and *Bandhavas*, among them whoever is the nearest should take the property of the childless ; she, the sister, also being born in the brother's *Gotra* and so there being no difference of *Gotrajatva* (the state of being

(*a*) See Full Bench, Jagat *vs* Shee Das, I. L. R. 5 All., 311.

(*b*) Vinayak *vs*, Laksmibai. 9. M. I. A., 516. It has been said in a recent case, as, we shall see later, that this decision must be confined to those parts of the Presidency where the Mayukha is the reigning authority *viz*—Guzerat and Island of Bombay I. L. R., 32 Bom. 300.

born in the *Gotra*). But (says an objector) there is no *sagotrota* (being in the same *gotra*). True, but neither is that stated here as a reason for taking the property" : Thus we see that the Mayukha places the sister in the order of heirs as a *sapinda* (*gotraja*) *i. e. sapinda* by birth as distinguished from those who according to the Acharkhanda of the Mitakshara become *sapindas* by marriage. *Sapindaship* by birth is the reason which induced Nilkantha to give the sister so high a place in the order of succession. She is preferred to the wives of male *gotraja sapindas, for sapindaship* by birth is a qualification which the latter do not possess (*a*). Custom seems to have given to natural birth in the family of the *propositus* precedence over the second birth by marriage though the latter also is a source of heritable right (*b*). The Mayukha places the sister after the paternal grand mother. But Sir Michæl Westropp., C. J., held that according to the special interpretation given to the Mitakshara by Nanda Pandita and the lady commentator, the position of the sister would be next after the brother in the line of heirs. She would, therefore,

Mayukha places the sister in the line of heirs as being a *sapinda* by birth.

(*a*) Sakharam *vs*, Sitabai, I. L. R. 3 Bom. 353 (361.)

(*b*) Kesser bai vs Valab Raoji, I. L. R. 4 Bom., 188 citing from Messrs, West & Butler.

be preferred even to the half-brother (*a*). It is true that this was a case from Konkan, where the Mayukha is the paramount authority, but the observations of the learned Chief Justice are general and seem to lay down the law for the whole Presidency.

Bombay decisions on the sister's right to inherit.

The leading case on the rights of a sister in the Bombay Presidency is Vinayak Anandrav *vs.* Laksmi Bai (*b*). In this case sisters were held by the Judicial Committee to take absolutely the immoveable property of their brother (who died without leaving male issue) in preference to first cousins, who were the sons of his paternal first uncle. This decision was rested as well on Nanda Pandita's and Ballambhatta's construction of the term "brethren" in the Mitakshara, as upon Nilkantha's mode of bringing the sister as an heir. The doctrine laid down in this case was considered in two earlier cases to give the general rule of succession as to sisters in the whole of the Bombay Presidency. In one of these Sir Michael Westropp, C. J., on the strength of the interpretation of Ballambhatta and Nanda Pandita, held that sisters came immediately after brothers and excluded even a half-brother (*c*).

Vinayak v, Laksmi Bai.

(*a*) See the case last cited. Sakha vs Sita.

(*b*) 9 M. I. A., 516.

(*c*) Sakha vs Sita, I. L. R. 3 Bom, 353.

In the later case the learned Chief Justice(*a*) reiterated the fact of the acceptance in the Bombay Presidency of Ballambhatta's doctrine.

Examination of earlier decisions by Sir Lawrence Jenkins, C. T.

These decisions have been subjected to a critical examination by Sir Lawrence Jenkins, Chief Justice, in the case of Mulji Purshotum *vs* Cursandas Natha (*b*) and the conclusion arrived at by his Lordship as to the legitimate scope and effect of these decisions can best be given in his own words. His Lordship said :—"From this examination of the cases, it will, I think, be seen that the authority in favour of the view that Ballambhatta's doctrine has been accepted in Bombay is Sir M. Westropp's opinion to that effect. That opinion is entitled to the greatest respect even though it may not have been necessary for the decision of the case in which it was pronounced. But so far as it purports to rest on Vinayak Anandrava's case and that seems to be its real basis—I think it proceeded on a misapprehension of what was decided in that case. .....The conclusion, therefore, to which I come on a consideration of all the authorities, is that there is no actual decision that Ballambhatta's doctrine has

(*a*) Kesserbai vs Valab,, I. L. R. 4 Bom., 188.

(*b*) I. L. R. 24 Bom, 563.

been accepted here, though there are the opinions to which I have referred in favour of that view". It was held in this case that both under the Mayukha and under the Mitakshara, the sister comes in as a *gotraja sapinda* and, as such, must be postponed to a brother's son who is a sapinda. Sir Lawrence Jenkins, C. J., also said that the decision in Sakharam *vs* Sitabai was right for whether the Mitakshara as interpreted by Ballambhatta or the Mayukha, in fact governed the case, the result would have been the same, for according to each, the sister is entitled to preference to a half-brother.

Sister comes in after grandmother in some parts of Bombay.

In a recent case, (*a*) which came from that part of Bombay where the Mitakshara is paramount, it has been held that a sister comes in as an heir to a deceased Hindu immediately after the grandmother, so that where the competition is between her and a half-brother's son, the latter being higher in the line amongst heirs specifically mentioned in the Mitakshara is entitled to preference over her as heir, though it would be otherwise in cases purely governed by the Vyavahar Mayukha. Mr. Justice Chandravarkar examined the full passage in Ballambhatta's commentary bearing on the question of

(*a*) Bhagwan vs Warubai, I. L. R. 32 Bom, 300.

sister's right to inherit and pointed out that neither the Supreme court of Bombay nor the Privy Council had before them this full passage while they were dealing with Vinayak Anandrav's case, but that they proceeded on the remarks as to Ballam bhatta's doctrine in a foot note by Colebrooke in the translation of the Mitakshara. The learned judge declined to accept Ballam-bhatta's interpretation on two grounds: viz., firstly, that an examination of Ballambhatta's order of succession showed that it introduced a sweeping change in the order given in Yajnavalkya's text relating to obstructed succession as explained in the Mitakshara, and secondly, that in the Mitakshara itself there were clear indications that Vijnaneswara did not think that the word "brothers" necessarily included "sisters." In support of these two grounds two passages from the Mitakshara were referred to. The first of these passages is Vijnaneswara's exposition of two texts of Yajnavalkya (Nos 157 & 158) given in the sixth chapter of the section on "Rituals". The second passage is in placitum 36 at page 424 of Stoke's Hindu Law Books. In giving judgment in this case Mr. Justice Chandravarkar said :—"These passages from the Mitakshara are, in our opinion, conclusive as showing that Ballambhatta's interpretation

Ballam bhatta's theory examined and rejected by Bombay High Court.

is inconsistent with and contrary to Vijnaneswara's meaning of the word 'brothers.' The *dicta* in the decisions of this court, accepting that interpretation, must therefore be held to be erroneous and founded on a misapprehension of not only what Ballambhatta has said in support of his doctrine but also of the Mitakshara itself." The effect of this decision is that in those parts of the Bombay Presidency where the Mayukha is the "reigning authority," sister takes precedence over the half-brother whereas in those parts which are governed by the Mitakshara the order is reversed.

Sister preferred to half-brother where Mayukha para mount, not so in other parts of Bombay.

But it is settled that even outside Gujarat and the Island of Bombay the sister must be conceded a position not lower than that given her by Nilkantha, so that she is entitled to preference over the paternal first cousin (*a*), the step-mother (*b*) and the brother's widow (*c*).

In Bombay the doctrine of the Viramitrodaya, viz., where there has been an intervening holder between a brother and a sister, the sister is excluded by the next male heir, has not been accepted (*d*).

(*a*) Lakshmi vs Dada, I. L. R. 4 Bom ; 210 ; Biru vs Khandu, I. L. R. 4 Bom ; 214. (*b*) Ibid.

(*c*) Rudrapa vs Irava, I. L. R. 28 Bom ; 82.

(*d*) Dhondu vs Gangabai, I, L. R. 3 Bom., 353.

Sister's right in Madras.

In Madras the right of the sister to inherit her brother's estate was not formerly admitted on the ground of its being in opposition to existing usage (*a*). In the case of Chelikani *vs* Suraneni (6 M. H. C. R. 278) Mr. Justice Holloway expressed a strong opinion that in the view of the author of the Mitakshara the sister came in after the brother in the absence of preferable heirs, though he appeared to admit that in the Madras Presidency her right was not allowed. In the year 1875 her right to succeed was for the first time recognised in the case of Kutti Ammal *vs* Radha Kristna Aiyan (*b*). She came in, not as a *sapinda* but as a relation falling within the description of "as well as other relations" in the text of the Mitakshara (Para 4, Ch II, sec 3) where the author deals with the rule of propinquity. The real ground of her right as an heir seems to have been "that all *relatives* however remote, must be exhausted before the estate can fall to persons who have no connection with the family." The learned judges do not in this case assign to the sister any special place in the line of heirs ; they

Sister's right to inherit not originally recognised in Madras.

Sister subsequently admitted as heir.

(*a*) Chinnasamner vs K. Chuma, M. S. D (1859) P. 247; Nagalinga vs Vaideimja, M. S. D. (1859). P. 247.

(*b*) 8 M. H. C. R. 88.

concede to her a right of succession superior to that of strangers in blood.

Mr. Mayne's criticism of Kutti Ammal's case.

The propriety of this decision has been questioned by Mr. Mayne *(a)*. This decision and the criticism of it by Mr. Mayne has been noticed in a later Madras case *(b)*. Sir Charles Turner, C. J., in giving judgment said that there were grounds other than those mentioned by Mr. Mayne which would have to be considered before the ruling in Kutti Ammal's case could be pronounced erroneous. The learned Chief Justice held that the sister was a *sapinda* and had at one time a place in the line of *sagotra sapindas* but came afterwards to be regarded as a *bhinna gotra sapinda*. His Lordship added: "As a *Bhinna gotra sapinda* a sister falls within the definition of *Bandhu*, and, except on the construction of the rule respecting female inheritance, that it absolutely excludes all but certain excepted females, and does not merely postpone their claims, there seems no sufficient reason for refusing her the position to which this court has declared her entitled" The underlying principle of this decision is

Madras High Court rejects Mr. Mayne's view.

(a) Mayne on Hindu law and Usage, pp. 725 6, (7th. Ed.)

(b) Lakshmanammal's case, I. L. R. 5 Mad., 241 (247.)

that Vijnaneswara, the author of the Mitakshara, recognises the claims of female heirs generally ; that he nowhere expressly accepts the position that the claims of such females only are to be admitted as have the support of express texts, and that he has made consanguinity the basis of title to succession in the absence of preferential male heirs. This case settles the law for Madras as to the sister's right of succession as a *Bandhu*.

Half-sister as an heir in Bombay.

In Madras a half-sister has been held not entitled to succeed in competition with a *sapinda* of the deceased (*a*). In Bombay, on the other hand, a half-sister has been held entitled to inherit (*b*). According to the received doctrines of the Bengal and Benares schools, women are held incompetent to inherit, unless named and specified as heirs by special texts. This exclusion is founded on a short text of Baudhayana which we have discussed at the commencement of this chapter. The principle of the general incapacity of women for inheritance founded on the text of Baudhayana has not been adopted in Western India and we accordingly find that a large number of females are admitted to succession in Bombay, who have no place in the line of heirs either in Bengal or in

Principle of general exclusion of women from inheritance not accepted in Western India

Brother's

(*a*) Kumara Velu vs Virana, I. L. R. 5 Mad., 29.

(*b*) Kesserbai vs Raoji, I. L. R. 4 Bom., 188.

widow and uncle's widow are not heirs under the Benares and Bengal Schools.

Benares. Different effects flow from these different principles. In Bengal, the son's widow and the wives of *gotraja sapindas* in the descending and in the collateral lines are not heirs according to Mitakshara (*a*). In another case it has been held that according to the law and usage of the Benares school the brother's widow is not in the line of heirs at all (*b*). Similarly, in Allahabad, it has been decided that the widow of the paternal uncle of a deceased Hindu not being expressly named as heir, is not entitled to succeed to his estate (*c*). In Bombay, on the contrary, the wives of *gotraja sapindas* have been held competent to inherit. In 1869, in the case of Lakhsmibai *vs* Jayram Hari (*d*), their right to succeed was rested on the following text of the Mitakshara : "On failure of the paternal grandfather's line, the paternal great-grandmother, the great-grandfather, his sons and their issue inherit" (*e*), and the gloss upon it by Visveswara, the author of Subodhini, the most celebrated commentary of the Mitakshara.

Contrary rule in Bombay.

If this case is rightly decided it must be taken as conclusive of the rights of widows of *gotraja sapindas* to succeed next in order

(*a*) Ananda *vs.* Nownit, I. L. R. 9 Cal. 315. (*b*) Jagadamba *vs.* Secretary of State, I. L. R. 16 Cal. 367. (*c*) Gouri *vs*, Rakho, I. L. R. 3 All. 45. (*d*) 6 Bom. H. C. R. 244. O. C. J. (*e*) Ch. II, S. 5, p. 5.

to their deceased husbands representing collateral lines according to the law of the Mitakshara. This case was examined in the leading case of Lallubhai *vs* Mankuvarbhai (*a*) by Mr. Justice West, who said with reference to it as follows:—"Seeing how uniformly, as cases have arisen, the Hindu law officers have construed the Mitakshara as admitting the widows, it cannot, we think, be said that the case was wrongly decided." The recognition of the widows of *gotraja sapindas* as themselves *gotraja sapindas*, however slender the basis on which it rested so far as collaterals are concerned, has become a part of the customary law, wherever the doctrines of the Mitakshara prevail and the Courts must give effect to it accordingly. The whole question as to the claims of the widows of collaterals to inherit was exhaustively considered by Chief Justice, Sir Michael Westropp and Mr. Justice West. The views of the Mitakshara and Mayukha were analysed by Mr. Justice West with the result that he was led to the conclusion that "if the foundation of the rights of widows of *gotrajas* under the Mitakshara is slender, under the Mayukha it may be called almost shadowy". The learned Judge points out "that Nilkantha, while he admits the paternal grandmother, makes no provi-

Rights of widows of gotraja sapindas to succeed by inheritance very slender under the Mitakshara and Mayukha.

sion for the paternal great-grand-mother by his subsequent arrangements, if they are to be considered in any way exhaustive he rather implicitly excludes her. ..... The admission of the paternal grandmother stands as the sole recognition of wives and widows in the family as *gotrajas*, and this itself is met by a disposition apparently excluding or suggesting the exclusion of all females more remote than the paternal grandmother" (*a*). But notwithstanding these observations unfavourable to the right of the wives of *gotraja sapindas* to succeed on the authority of the Mitakshara and Mayukha, Mr. Justice West allows their claim on the ground of positive acceptance and usage. In concluding his judgment in this case, the learned Judge said : "But we must, in matters of inheritance, administer to the Hindu community such a law, however vague and nebulous, as it has been content to devise for itself, or to accept from tradition. By that law the widow of the *gotraja sapinda* of a nearer collateral line appears entitled to precedence over the male *gotraja* in a more remote line". These observations amply justify the remark of Sir Lawrence Jenkins, Chief Justice, that "the widows of gotraja

Mr. Justice West admits them as heirs on the ground of positive acceptance and usage.

(*a*) See Vyavahara Mayukha, Ch. IV. S. VII., p. 1. 20.

sapindas were admitted by this High Court as heirs in spite of the texts rather than because of them ; the texts were bent to fit in with the established customs and conscience of the people" (*a*). The decision of the Full Bench in Lallu Bhai *vs* Mankuvar bhai was affirmed by their Lordships of the Judicial Committee in appeal, who, in giving judgment said :—"Their Lordships do not find any satisfactory grounds which should induce them to dissent from the conclusion of the High Court that the doctrine which has actually prevailed in Bombay is in favour of the right of the widow ; nor any sufficient reason for holding that the doctrine which has so prevailed has not the force of law" (*b*), Thus we see that the eligibility for inheritance of female *gotraja sapindas*, who have become such by marriage is no longer open to dispute in Bombay.

Female *gotraja sapindas* in the nearer line succeed in preference to male *gotraja sapindas* in the remoter line.

The decision of the Privy Council has also settled that where the contest lies between a female *gotraja* representing a nearer line and a male *gotraja* representing a remoter line of *gotraja sapindas*, the former inherits by preference over the latter. The question, however, as to who is entitled to

(*a*) Vallabhdas vs Sakarbai I. L. R. 25 Bom., p. 281 (286.)

(*b*) Lallubhai vs Cassibai, I. L. R. 5 Bom., 110.

preference where the competition is between the male and female *gotrajas* belonging to the line of the same ancestor of the *propositus* is one which cannot be treated as covered by the decision in Lallubhai *vs* Mankuvarbhai (*a*). It has accordingly been held that the sons of a paternal uncle inherit in preference to the widow of another paternal uncle of the *propositus* (*b*). The grand-son of the paternal uncle of the *propositus* is entitled to succeed in preference to the widow of the son of a younger paternal uncle, the principle being that a widow is postponed to a male *gotraja sapinda* in the same line with herself. A widowed daughter-in-law is entitled to succeed to the property of her father-in-law after the death of the mother-in-law in priority to the paternal first cousin of her deceased husband (*c*).

The widow of a collateral succeeds in the Bombay Presidency because she is a *gotraja sapinda* of her husband's family and so of the *propositus*. The widow of a daughter's son is not a *gotraja sapinda* of her husband's

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(*a*) See I. L. R. 2 Bom., 388 (420.)

(*b*) Rachava vs Kalingapa, I. L. R. 16 Bom., 710.

(*c*) Vithaldas vs Jeshubai. I. L. R. 4 Bom., 219. Madhaoram vs Dave, 21 Bom., 739 (744).

maternal grand-father and therefore her claim to succeed to his estate was rightly rejected in a recent Bombay case (*a*). The fact of her being a *gotraja sapinda* of her husband and his agnates, does not affect the situation, since the maternal grand-father is not one of her husband's agnatic relations. In Madras it is firmly established that the widows of *gotraja sapindas* are not in the line of heirs at all. In 1864 in the case of Pedamuttu *vs* Appu Rau, (*b*) the learned judges held that the authoritative text of the Mitakshara that 'a wife takes the whole estate of a man, who being separated from his coheirs, and not subsequently reunited with them, dies leaving no male issue,' (*c*) recognises the widow's right to succeed *only* as the *immediate heir* of her husband. She can only succeed to property vested in her husband prior to his death as his widow, and not to a *sapinda* who survives her husband, as a female *gotraja sapinda*. This view has been approved in the recent case of Balamma *vs* Pullayya, where it has been dedecided that in the Madras Presidency all *gotraja sapindas* such as brothers' and paternal uncles' widows are excluded from the

In Madras widows of *gotraja sapindas* are not in the line of heirs.

(*a*) Vallabhdas vs Sakarbai, I. L. R. 25 Bom, 281.
(*b*) 2 M. H. C. R., 117.
(*c*) Ch. II. Sec. 1, p. 39.

table of heirs as prescribed by the Mitakshara (*a*).

Females admitted as heirs in Bombay and Madras but not in Bengal and Benares.

It is necessary to notice the case of some female relations who are admitted as heirs in Bombay and Madras but cannot inherit under the Bengal and Benares schools. While a man's daughter is an heir under all the schools, his daughter's daughter(*b*), brother's daughter (*c*), uncle's daughter (*d*), or nephew's daughter (*e*) are excluded from inheritance both under the Benares and Bengal law, and this follows as a necessary result of the adoption by the Eastern lawyers of the principle enunciated by Baudhayana that women are incompetent to inherit. The only Hindu commentator who supports the rights of inheritance of the daughter of all male *sapindas*, the daughter's daughter and the sister's daughter is Ballambhatta. But as the learned writer was herself a woman it is natural that she would advocate

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(*a*) I, L. R. 18 Mad., 168 ; see also Thayammal vs Annamalai, I. L. R 19 Mad., 35.

(*b*) Koomud chunder vs Seetakanth, W. R. S. P No. (F. B. Ruling). 75. Nanhi vs Gauri, I. L. R. 28 All, 187. See contra, Bansidhar vs Ganeshi, I. L. R. 22 All ; 338.

(*c*) Gobind vs Mohesh, 23 W. R. 117.

(*d*) Guru vs Anad, 18 W. R. (F. B.) 49.

(*e*) Kashi vs Raj Gobind, 24 W. R., 229 ; Radha vs Durga, 5 W. R ; 131.

the rights of all women. Indeed it has recently been said by a learned judge that her advocacy of the rights of women is thought by Hindus to be more or less extravagant(*a*). The reason, she advances for the view, namely, that the male gender includes the female gender, has not any where been accepted.

In Bombay, however, the son's daughter, uncle's daughter and nephew's daughter have obtained recognition as heirs on the ground of their being *gotraja sapindas*. In Madras the son's daughter (*b*) and the daughter's daughter (*c*) are entitled to succeed to the estate of their grandfather because both are regarded as *Bandhus* on the principle that consanguinity may be recognized as the basis of title to succession in the absence of preferential male heirs.

Rights of women over property inherited by them—nature and extent of.

We now proceed to consider the nature and extent of the rights of women over inherited property. The texts of Yajnavalkya and Vishnu under which the widow, the daughter, the mother and other females are recognized as heirs do not seem to make any distinction between the estate taken by

(*a*) Per Chandravarkar in Bhagwan vs Wambai, I. L. R. 32 Bom, (300—312.)

(*b*) Nallanna vs Ponnal, I. L. R. 14 Mad, 149.

(*c*) Ramappa vs Arumugath, I. L. R. 17 Mad, 182.

them and the estate taken by male heirs who take under the same texts. If the male heirs took an absolute estate, it would seem to follow that women would do the same. One would therefore *prima facie* suppose that so far as the *smriti* authority goes there is indeed very little in it to support the limited estate of women in inherited property. But at the same time the doctrine of the qualified right of the widow in the estate inherited by her from her husband is so firmly established by judicial decisions that it would be heresy to doubt it. It is equally settled that the same principle should govern estates inherited by the daughter and other females except in the Bombay Presidency where the sister is said to be an absolute heir, as well as the daughter. Nothing is more interesting than the development of this branch of Hindu law regarding the extent of the rights of females in inherited property. The assertion can be made without rashness that the cases relating to the extent and nature of woman's estate which come before our Courts are more numerous than the other cases on Hindu law put together. We shall first deal with the nature and extent of an estate inherited by a widow from her husband ; for the same limitations and res-

Smritis do not restrict the rights of women in inherited property.

trictions apply to the estate of other female heirs, the only exception being the estate of a sister and a daughter in Bombay. The text of Vrihaspati which declares that a widow is the surviving half of her husband, the text of Yajnavalkya and Vishnu laying down the order of succession and the text of Vrihat Manu :—"the widow of a childless man, keeping unsullied her husband's bed and persevering in religious observances shall present his funeral oblation and obtain *his entire share*"—do not suggest any limitation on the rights of the widow. But it is said that the texts of Katyayana and Narada quoted below negative the absolute right of the widow in inherited property. Katyayana says :—"The childless widow preserving unsullied the bed of her lord, and abiding with her venerable protector, should enjoy with moderation the property until her death. After her the heirs should take it" (*a*). "Women are not," says Narada, "entitled to make a gift or sale; a woman can only take a life-interest, whilst she is living together with the rest of the family such transactions of women are valid when the husband has given his consent, in default of the husband, the son, or in default

Nature and extent of an estate inherited by a widow.

Katyayana.

Narada.

(*a*) See Katyayana quoted in the Dayabhaga, Ch. XI., Sec. 1, p 56.

of the son, the king. She may enjoy or give away goods according to her pleasure except immoveables, for she has no proprietary rights over the fields and the like" (*a*).

Mahabharata.

A text from the Mahabharata viz., "For women the heritage of their husbands is pronounced applicable to use. Let not women on any account make waste of their husband's wealth" (*b*) with the gloss of the Vivada Chintamoni that waste means "sale and gift at their own choice," has also been relied on in support of the doctrine of the qualified right of the widow in the estate inherited by her from her husband.

Comment on the *smriti* texts.

With regard to the text of Katyayana all that need be said is that it is only by stretching the language of the text that it can be made to support the theory of the restricted estate of a Hindu widow. One fails to see why alienation of property should not be regarded as one of the modes of enjoyment. In many cases where the widow inherits moveable property, conversion may be essential to its enjoyment. The authority of the text quoted from the Mahabharata is considerably weakened when we remember that the text occurs in a chapter on "the Religious

(*a*) Institutes of Narada by Dr. Jolly, Verse 28-30.

(*b*) Vivada Chintamoni, P. K. Tagore's translation 256, 266

merit of gifts" (*a*) and could not consequently have been intended to lay down a legal injunction. Besides this the Mahabharata is a *Purana* and as a source of law is regarded as of lesser authority than the *smritis* so that the passage in the Mahabharata cannot prevail over express texts of the *smritis* like those of Yajanavalkya, Manu, etc., to the contrary ; and, more over, people generally look to the Mahabharata not for legal rules but for rules of ethics and morality in which it does truly abound. With regard to the texts of Narada it is clear that it is stated so broadly that it cannot really represent the true view of the law. His verse would apply even to *Stridhan* over which women have undoubtedly absolute right of disposition. Besides they are not cited by any commentator, not even by the Dayabhaga, in support of the theory which curtails the rights of women in inherited property.

The commentaries on the widow's power of disposition of her husband's estate.

Passing from the *smriti* texts to the commentaries we find that the Mitakshara does not impose any restraint on the widow's power of disposition of her deceased husband's estate. On the other hand, it would appear clear from a plain reading of

The Mitakshara.

(*a*) Viramitrodaya, p. 137. Mr. G. C. Sarkar's translation.

certain texts of the Mitakshara to which we shall presently invite attention, that the widow of a member of a divided family takes the whole estate of her deceased husband, which devolves on her by inheritance absolutely. In chapter II., section 1, the Mitakshara cites the texts from Yajnavalkya, Vrihat Manu, Vishnu, (to which we have referred before) which are in favour of the unqualified right of the widow. He does not cite the text of Katyayana to which we have just referred. On the contrary, he cites another text of the same sage, viz :—"Let the widow succeed to her husband's wealth, provided she be chaste, and in default of her, the daughter inherits if unmarried." There is in this text of Katyayana no suggestion of any restriction on her estate. But paragraph 1 of the 2nd chapter of the 11th section of the Mitakshara which defines woman's property, leaves no doubt that Vijnaneswara could not possibly have intended any such limitations on woman's estate obtained by inheritance.

The important part of the paragraph is:—"The author now intending to explain fully the distribution of woman's property, begins by setting forth the nature of it. What was given to a woman by the father, the mother, the husband, or a brother, or received by

her at the nuptial fire, or presented to her on her husband's marriage to another wife, as also any other (separate acquisition), is denominated a woman's property. The word in the original text is (ādi) आदि. The Mitakshara interprets the word "ādi" to include property which she may have acquired by *inheritance*, partition, purchase, seizure or finding, which according to the author, is also denominated by Manu and the rest as woman's property or *Stridhan* (*a*). Vijnaneswara tells us that when he uses the word "*Stridhan*" he uses it not in its technical sense for "if the literal sense is admissible, a technical one is improper". The interpretation by the Mitakshara does afford a strong foundation for the argument in favour of the right of women to the entire interest in property acquired by inheritance which has been classed as *stridhan* or woman's property. This is quite in harmony with the view of Vijnaneswara that women are generally competent to inherit. But the mode of devolution of *stridhan* (including inherited property) as given in the Mitaksara (*b*) fully supports the view

The Mitakshara on the nature of woman's property.

(*a*) पितृ मातृ पति भ्रातृ दत्त मध्यग्न्युपागतम् ।
आधिवेदनिकाद्यं च स्त्रीधनं परिकीर्त्तितम् ॥
आद्यशब्देन रिक्थक्रय संविभाग परिग्रहाधिगमप्राप्तमेतत् स्त्रीधनं मन्वादिभिरुक्तं । Mitaksara Ch. II, Sec. XI, 2. (*b*) Ibid Ch. II, Sec. XI, p. 8.

that the widow takes an absolute estate. For he says : "A woman's property has been thus described. The author (Yajnavalkya) next propounds the distribution of it. Her kinsmen take it if she die without issue" which means that her estate descends to her own heirs and not to the heirs of the last male owner. Dr. Julius Jolly points out that all the evidence which has been collected from hitherto unpublished works tends to confirm this theory of the Mitakshara. He refers to the opinion of Kamalakara, Ballambhatta, Nanda Pandita, Viseswara in his Subodhini, Saraswati Vilasa and Apararka (*a*).

Yajnavalkya on the devolution of *stridhan*.

The Viramitrodaya has a long discussion on the point. Mitra Misra says that the restrictions against alienation applies only to gifts to player, dancers etc. for secular purposes. After noticing several texts of Katyayana, and the text from Mahabharata, he sums up the discussion thus : "Therefore, it is established that in making gifts for spiritual purpose as well as in making sale or mortgage for the purpose of performing what is necessary in a spiritual or temporal point of view, the widow's right does certainly extend to the entire estate of her husband ; the restriction, however, is intended to

The Viramitrodaya on the widow's right of disposition of her husband's estate.

(*a*) Pages 248-251. T. Lectures 1883.

prohibit gifts to players, dancers and the like, as well as sale or mortgage without necessity" (*a*). Again the same author tells us: "On this it is to be said. Is it, that even when a gift or the like disposition of her husband's property is made by the widow,—this is *per se* invalid? This, however, is not reasonable, since her succession to the entire estate of her husband being declared in the texts of Manu and other sages, her proprietary right arises thereto; hence it would be contradictory to say that gifts made by her are *per se* invalid" (*b*). The whole arm of the discussion is to show that a moral offence or sin is committed if she spends property for useless purposes.

Nilkantha

Nilkantha, in his Vyavahara Mayukha, also says that gifts of money to *Bandis*, *Charan* and the like triflers are prohibited, but gifts for religious or spiritual objects and mortgage and the like for those purposes are, of course, permitted (*c*). The Smriti Chandrika is of the same opinion (*d*). It is only when we come to the Dayabhaga that we get for the first time a definite pronouncement imposing a restriction on the widow's

(*a*) Viramitrodaya, p. 141; G. C. Sarkar's translation.

(*b*) Ibid. p. 138. (*c*) Ch IV, See VIII 4.

(*d*) Ch. XI, Sec, 1, pp. 28, 29, 30, 31.

Dayabhaga on the widow's power of disposition of property inherited from the husband.

right to alienate property inherited from her husband. Jimutvahana says "But the wife must only enjoy her husband's estate after his demise." Thus Katyayana says, "Let the childless widow, preserving unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. After her let the heirs take it. Abiding with her venerable protector, that is, with her father-in-law or others of her husband's family, let her enjoy her husband's estate during her life; and not as with her separate property, make a gift, mortgage or sale of it at her pleasure" (*a*). The Dayabhaga thus makes it clear that property inherited by a widow from her husband is not woman's property; where as the Mitakshara would treat such property as *Stridhan*. But the Dayabhaga doctrine, which was meant to be confined to those places that obey the authority of Jimutvahana, has been extended to provinces governed by the Mitakshara by the highest judicial tribunal in the realm.

Property inherited by a widow is not woman's property, according to the Dayabhaga.

Extension of the Dayabhaga doctrine to provinces governed by the Mitakshara.

This brings us to the decisions of the Courts of justice on the point. In the case of the Collector of Masulipatam *vs* Cavaly Vencata (*b*) the Judicial Committee considered,

(*a*) Dayabhaga, Chap. XI, Sec. 1, 56-57.

(*b*) 8 M. I. A. 529.

it "clear" that under the Hindoo law the widow, though she takes as heir, takes a special and qualified estate. Their Lordships took it as "admitted on all hands" that if there were collateral heirs of the husband, the widow cannot of her own will alien the property except for religious and charitable purposes. The reason for the fetter on the widow's power is, in the opinion of their Lordships, not merely the protection of the material interests of her husband's relations but the state of perpetual tutelage to which every woman is subject according to numberless authorities from Manu downards. This case before the Judicial Committee was governed by the Mitakshara, and their Lordships came to this conclusion although the argument, it is submitted, was rightly pressed on them that there was nothing in the Mitakshara to support the distinction between the estate taken by a male and that taken by a female, both of which stood on the same footing. In the case of Thakoor Dayhee *vs* Rai Baluck Ram (*a*) the same view was taken by the Privy Council as in the case last cited. Their Lordships while conceding that the portion of the Mitakshara which had been translated by Colebrooke is silent as to the disabilities

Widow, taking as heir takes a qualified estate.

Thakoor Dayhee v. Rai Baluck Ram.

(*a*) 11 M. I. A., 139.

of woman or as to the interest which she takes in her husband's estate, observed that they might be dealt with in other parts of the work, which had not then been translated. In this case their Lordships further held that the texts of Narada and Katyayana must prevail against the unamibiguous text of the Mitakshara. It is submitted, with the greatest respect to their Lordships, that in deducing the rule restricting the widow's right from the texts of Katyayana and Narada, and not from what was said in the Mitakshara, their Lordships disregarded the principles which they laid down for the guidance of European Judges administering Hindu law in the case of Collector of Madura *vs* Moothoo Linga Sathu Pathi (*a*). In the case of Bhagwandeen *vs* Myna Baee (*b*), adopting the principle of the two earlier decisions, just mentioned, their Lordships held that by the Hindu law prevailing in the Benares school, no part of the husband's estate, moveable or immoveable, forms part of his widow's *Stridhan* and she has no power to alienate the estate inherited from her husband, to the prejudice of his heirs which devolves on them. In giving judgment their Lordships said :—"The reasons

Bhagwandeen v. Myna Baee.

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

(*b*) 11 M. I. A. 487.

for the restrictions which the Hindu law imposes on the widow's dominion over her inheritance from her husband, whether founded on her natural dependence on others, her duty to lead an ascetic life, or on the impolicy of allowing the wealth of one family to pass to another, are as applicable to personal property invested so as to yield an income as they are to land. The more ancient texts importing the restriction are general." In this case it was again argued that the text of the Mitakshara was explicit, and that it included under the head of *Stridhan* all property inherited from the husband and that from the fact of its inclusion the power of disposition over it was *prima-facie* to be inferred, but their Lordships overruled the contention by referring to the text of Katyayana : The childless widow preserving unsullied the bed of her lord etc :— It may therefore be taken to be settled law that a widow takes only a limited estate and that at her death it passes to her husband's heirs. No exception is made to this rule in Bombay, save perhaps in regard to moveable property *(a)*. Mr. Justice West,

Restrictions on widow's dominion over inheritance from her husband apply to landed and other property.

Exception to the general rule in Bombay.

(a) Pranjeevandas vs Dewcoverbaee, 1 Bom H. C. 130 ; Jaimayabaram vs Bai Jamna 2 Bom. H. C. R. 10 ; Laksmi Bai vs Ganpat, I. L. R. 4 Bom, 163 ; Bhaskar vs Mahadeo, 6 Bom H. C. 1. Harilal vs Pranballav Das, I. L. R. 16 Bom., 229.

Mr. Justice West's view regarding the restriction on widow's inheritance.

however, is of opinion that this restriction on the widow's estate can only be justified by a strained construction of the famous text of Katyayana. In giving judgment in the Full Bench case of Bhagirthi Bai *vs.* Kahnu jirav(*a*)this distinguished judge said:—"From the mass of decisions, Sir M. Westropp deduced the general rule that all widows, inheriting in their family of marriage, take only *duranti viduitate* (*b*). The logical cogency of the learned judge's argument cannot be denied, though it leads to a conclusion unrecognized by the native jurists of the Western school." In some of of the early decisions of the Bombay High Court, the widow's power over moveables inherited from her husband was held to be absolute in the sense that the undisposed residue at her death passed to her heirs (*c*) but a Full Bench (*d*) decided that "the ruling of the Privy Council, that the property inherited by a widow from her husband devolves on his heirs at her death, must have effect given to it throughout the

Early Bombay decisions with regard to moveables inherited from husband.

The view of the Full Bench.

(*a*) I. L. R. 11 Bom, 285.

(*b*) Tuljaram vs Mathuradas, I. L. R. 5 Bom., 662.

(*c*) Damodar v. Purmanandas, I. L. R. 7 Bom, 158.

(*d*) Gadadhar vs Chandra Bhaqabai, I. L. R. 17 Bom., 690. See also Sha Chamanlal vs Doshi, I. L. R. 28 Bom, 453.

Presidency with regard to the devolution of moveables so inherited, and to that extent, if the decision in Damodar *vs* Purmanandas is to be regarded as necessarily giving the moveables that remain to the widow's heirs, it must be treated as of no authority". This Full Bench leaves the question of the widow's power of alienation of moveables inherited from her husband open in that Presidency.

Widow's power over moveables in the Mithila school.

In the Mithila school of Hindu law it seems a widow has an absolute power over moveables inherited from her husband. This view is amply supported by the two commentaries which are the leading authorities for that school. Vachaspati Misra maintains that the two texts of Katyayana (*a*) cited below apply to the moveables and immoveables "inherited" by a widow from her

Commentaries support the view that it is absolute.

(*a*) "The husband's *daya* (gift or heritage), a woman may deal with according to her pleasure when her husband is dead ; but when he is alive, she shall carefully preserve it ; otherwise (*i.e.* when he has no property) she should remain with his family."

"A son's widow keeping unsullied the bed of her lord, and abiding by her venerable protector, shall, being moderate, enjoy until death ; afterwards the heir shall take it."

For a full discussion on the point See Mr. Golap Chandra Sarkar's Hindu law Pages 407-411. The cases on this point have already been cited at page 157 *ante*.

husband, because the term "*daya*" in these texts may mean either heritage or gift. The Vivada Ratnakara cites a text of Narada to show that a wife has full power over the moveables given to her by her husband as well as the two texts of Katyayana just referred to and comes to the same conclusion as the Vivada Chintamoni. So that according to the Mithila school the wife's right to moveables inherited from the husband is absolute (*a*). Under the Bengal, Benares and Madras schools, the widow has no larger power of disposition over moveables than she has over immoveables (*b*).

Not so in Bengal, Benares and Madras schools.

In Pandharinath *vs.* Gobind (*c*) it has been held that a widow does not, under the Mitakshara law, take such absolute interest in the moveables as to be able to make a valid gift of it.

Character of estate inherited by mother and grandmother.

Same as that of widow.

It may now be taken to be settled beyond controversy that the mother and grandmother inheriting from a son or grandson take an estate subject to the same limitations and restrictions as the estate of a widow inheriting from her husband. This statement correctly represents the law as laid down in

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(*a*) P. K. Tagore's Translation p. 262.

(*b*) Durga vs. Chintamoni, I, L. R. 31 Cal, 214; Narasimha vs Venkatadri I. L. R., 8 Mad, 290; Buchi vs. Jagapati, *Ibid* 304. (*c*) I. L. R. 32 Bom., 59.

the judicial decisions in all the Presidencies(*a*) except the Bombay Presidency where the general rule was stated, by a recent Full Bench to be, that females inheriting take the full estate transmissible to their own heirs, an exception being the case of a widow inheriting from her husband (*b*).

In Bombay, females inheriting take the full estate except winow.

The nature and extent of the interest taken by a daughter in property inherited from her father next claims our attention. Analogy would suggest that the same reasons, which exist in the case of the widow for holding that her estate is special and qualified, exist equally in the case of the daughter, as they rest upon "the principle of her natural dependence on others," and "on the impolicy of allowing the wealth of one family to pass to another" and the necessity of preserving the estate for the heirs *i. e.* heirs of the last male holder. The leading case on the subject in the Bengal High Court is Chotay lal *vs.* Channoolal (*c*) where Chief Justice Sir Richard Couch reviewed all the authorities on the point

Nature and extent of daughter's inheritance.

(*a*) See as to Mithila, Panchananda *vs.* Lalshan, 3 W. R. 140. As to Madras, Bachiraju *vs.* Venkatappadu, 2 Mad. H. C., 402 ; Kutti *vs.* Radhakrishna, 8 Mad. H. C. 88. Vellanki *vs.* Venkata, I. L. R, 1 Mad, 174. (P.C..)

(*b*) Gandhi *vs.* Bai Jadab, I. L. R. 24 Bom., 192 (217).

(*c*) 14 B. L. R., 235 ; 22 W. R. 496.

and came to the conclusion that there was an uniform current of decisions in all the Presidencies except Bombay which lay down that the estate inherited by a daughter from her father resembles a widow's estate both in respect of the restricted power of alienation, and of its descent after her death to her father's heirs and not her own. This was a case under the Mitakshara, and this would of course be the law under the Dayabhaga, where it is expressly stated that the right of the daughter, who succeeds on the failure of the widow, is weaker than that of the latter (Dayabhaga, Chap. XI., Sec. 2., 30). This decision has been affirmed by the Judicial Committee of the Privy Council (*a*) and settles the law on the point in Bengal as regards cases falling under the Mitakshara, the Mithila and the Dayabhaga schools. The Madras High Court has taken the same view in the case of Muttu Tevar *vs.* Dora Singha Tevar (*b*). The Judicial Committee, in confirming this decision of the Madras Court said, "No attempt has been made to distinguish this case from that of Chotailall, except the suggestion that decisions upon the Mitakshara as applicable to Benares are

Decision of Privy Council in *Chotay Lal v. Channuo lal* settles the law in Bengal both under the Mitakshara and Dayabhaga and also n Mithila.

(*a*) I. L. R. 4 Cal., 744.

(*b*) I. L. R. 3 Mad., 309.