To The Right Hon'ble Lord Robertson —
with the writer's best respects —

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HINDU LAW

WITH AN APPENDIX OF

MAHOMEDAN LAW OF INHERITANCE

BY

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SECOND EDITION.

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TO

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Professor of Sanskrit, Cambridge, Sometime Principal Sanskrit College and Professor Presidency College, Calcutta.

THIS BOOK

IS

DEDICATED

AS AN HUMBLE TRIBUTE OF GRATITUDE

for his unfailing kindness and generous encouragement to the students placed under his care in India,

AND

AS A SMALL TOKEN OF THE SINCERE RESPECT

for his memory which is treasured up in the minds of the Indian students with feelings of Affection and Reverence,

By one of them,

Specially benefited,

THE AUTHOR.

उत्सर्गः ।

परमभट्टारक-श्रीलश्रीयुक्त इ, वि, काउएल्—
परमाराध्य-गुरुदेव-महोदय—
करकमलेषु

प्रज्ञानिधे प्रकृतिसौम्य महर्षिमूर्त्ते !
हे भारतीतनयरत्न गुरो! नमस्ते ।
हित्वा चिरं वससि यद्यपि नः सुदूरे
त्वं तत्रथापि हृदयानि जहासि नैव ॥

अस्माकमाराध्यतमो गुरुस्त्वं
प्रिया वयं ते सुतनिर्विशेषाः ।
अस्माकमेवं स्पृहनीय आस्तां
सम्बन्धबन्धो जननान्तरेऽपि ॥

विना भवन्तं तव पुत्रकोऽहं
कस्मै मदीयां कृतिमुत्सृजामि ।
स्व-हस्त-संवर्द्धित-पादपस्य
फलं यथा गन्धमिमं गृहाण ॥

कलिकाता ।
१८१९ प्रकाब्दाः
ज्यैष्ठः ।

प्रणत-भक्त-सेवकस्य
श्रीगोलापचन्द्रशास्त्रिणः ।

PREFACE TO THE SECOND EDITION.

Since the publication of the last edition of this work in 1897 important decisions have been passed by the Judicial Committee as well as by the High Courts, which have either settled some doubtful questions, or rectified errors, or introduced innovations apparently contrary to traditional interpretations of law, and to usages hitherto accepted by the profession and the people. These have been noticed and discussed in this edition, and the work has been carefully revised. But owing to the unexpected rapid sale of the last edition, the book had to be hurriedly passed through the Press for meeting the demand of the students of law, and some imperfections may have crept into the work. Some additions and alterations have also been made in this edition for improving the usefulness of the work.

One of the innovations introduced by our courts is worthy of special notice, in consequence of its being a development of law which is not only in conformity with natural justice and in accordance with the natural course of legal growth and progress, but is also agreeable to the sentiments of the Hindus. The general exclusion of female relations from Inheritance, save and except a few specially enumerated ones, is a survival of an archaic institution, which has come to be regarded by the Hindu society itself as an unnatural and unreasonable rule that should no longer be enforced. The Hindu law embodied in the Codes has been modified, changed and developed by the Hindu commentators, by means of the Fiction of Interpretation. The change of law relating to the exclusion of women from Inheritance, which has been introduced by the Madras High Court, and accepted by the Allahabad High Court, owes its origin to the misconception of a passage, which practically amounts to a Fiction of Interpre-

tation. The Sections I to VII of Chapter II of Colebrooke's translation of the Mitákshará, deal with Succession to a male's estate, and are a running commentary on the text of Yájnavalkya, cited in Section I, paragraph 2, which lays down the order of Succession, and in which "the gentiles, the cognates, a pupil, and a fellow-student" are declared to become heirs in their order. The sixth Section of the second chapter of the Mitákshará explains the succession of "the cognates"; and the seventh Section deals with succession in default of "the cognates." The opening words of the original of this Section are,—"बन्धूनाम् अभावे आचार्यः। तदभावे शिष्यः &c.",—which literally mean,—"In default of 'the cognates,' the preceptor (inherits); on failure of him, the pupil, &c.". The term "the cognates" in this passage refers to this word as used in the text of Yájnavalkya (Mit. 2, 1, 2), and means the persons whose succession has been dealt with in the immediately preceding Section 6th. But Colebrooke translated the passage thus,—"If there be no *relations* of the deceased, the preceptor, or on failure of him, the pupil, inherits, &c.": (Mit. 2, 7, 1). The learned Judges of the Madras and the Allahabad High Courts take this term "relations" in its ordinary sense of relatives male or female, and hold that it follows from this passage by necessary implication, that the preceptor and the like strangers cannot inherit, should there be any female relations of the deceased in existence, who are therefore entitled to succeed in preference to those strangers. In coming to this conclusion, their Lordships relied on the words in Colebrooke's translation which is misleading, and had not their attention drawn to the text of Baudháyana, declaring the general incapacity of women to inherit. It is, no doubt, true, that that text is not cited in the Mitákshará, but it is quoted and commented on in the Smriti-Chandriká and the Víramitrodaya, commentaries declaratory of the law of the Drávira and the Benares schools, respectively; and the rule therein laid down appears to have all along been followed and acted upon by the Courts, as being one recognised by these two Schools. But the text of Sruti cited by Baudháyana as supporting his view that

women are excluded from inheritance, admits of a different interpretation, as is maintained by some commentators, and there is a difference of view on the subject among Sanskrit lawyers. However, the rule is not approved by the Hindus of the present day, who are not only prepared to accept the above innovation, but are desirous that some dear and near female relations should have earlier positions assigned to them in the order of succession. They also feel that some decisions of the superior courts are contrary to their law and have prejudicially affected their family organisation and are causing great hardship and considerable distress. But there is no machinery for introducing any change in Hindu law as it is understood by our Courts, however beneficial that change may be regarded by the Hindus. Our Courts, however, are required to administer the Hindu law as it is, and have no power to introduce any change, and have also deprived themselves of the power of reviewing their own decisions into which errors may have crept in consequence of the proper materials for right conclusions not having been placed before them,—by holding themselves bound by the maxims *stare decisis* and *communis error facit jus*.

When the Government has conferred on the Hindus the highly valued privilege of being governed by their own law, and when that law is locked up in a dead and difficult language to which our Judges have no access, and its accurate interpretation in some respects depends on the knowledge of that language as well as of actual customs and usages, it appears to be necessary that some machinery should be constituted by the Government for ensuring the correct administration of Hindu law, and for remedying any unsuitable departure from the same, and also for introducing any desirable change, by legislation or otherwise, according to the wishes and sentiments of the Hindus.

While making this suggestion, I must not be understood to suggest the codification of Hindu law, which would be contrary to the sentiments of the Hindus who believe their law to be of divine origin. And the change of law which the Hindus are desirous of introducing by legislation, is not to

be supposed to be contrary to their divine law, but is to be in the nature of giving effect to the true interpretation, the received view being taken to be erroneous; and the legislation is to purport as declaratory of the correct view of the Divine Law, as was done when the Hindu Widow's Remarriage Act was passed.

My thanks are due to Babu Surendra Chandra Sen, B.L., for preparation of the Index, and also to Babu Narendrakumar Basu, B.L., for going through the proof sheets.

G. S.

20, SANKHARITOLA, EAST:
Calcutta, 17*th December*, 1902.

PREFACE TO THE FIRST EDITION.

In 1882, when I was appointed a lecturer on law in the Metropolitan Institution of Calcutta, a pamphlet was prepared by me on some of the subjects of Hindu law, for the use of my pupils. As there was a general demand for a book of that description, I was induced to revise the pamphlet and republish it in a more complete form in December, 1887. That edition was sold out more than two years ago, and I was requested by friends and students to prepare a complete work on Hindu Law to meet the wants of both students and practitioners.

I have not, however, been able to comply with their request for two reasons: first, owing to the multifarious duties I have to attend to in an indifferent state of health, I have very little time and energy to spare for a work of that kind; second, the admirable work on Hindu Law and Usage, by Mr. Mayne, has supplied practitioners with all references to cases and texts, required by them. His work, however, is not suited to the wants and capacities of students so well as of practising lawyers. The present work is designed specially for the benefit of students and young practitioners.

What I have endeavoured to do in this work is, to explain the principles underlying the Hindu Laws and Usages, from a Hindu point of view, and point out the departures by our Courts from the Hindu Law as explained by Sanskrit commentaries and traditional interpretations. As the students are mostly Hindus, I have directed my efforts to set forth the reasons in support of such of the Hindu customs and usages as are at variance with those of the civilized countries of Europe, in the hope that the students may be in a position to form an idea of the true character of those customs and usages.

As Sanskrit is now widely taught in our schools and

colleges, I have given the original Sanskrit texts wherever they could conveniently be introduced, with the object that the law would be better understood and more easily remembered with the help of those texts, than from an English translation. Such translation has also been appended to them.

References have been given to all the leading cases on the subject of Hindu Law; a complete digest of cases is not within the scope of this work; a selection has accordingly been made, and generally the latest on a point has been given, the perusal of which will enable the reader to find out the earlier ones.

The general rules of inheritance, according to both the Sunni and the Shia School of Mahomedan law, are given in the appendix.

My thanks are due to Babus Sivaprasanna Bhattacharya, B.A., B.L., and Krishnaprasád Sarvádhikárí, M.A., B.L., for going through the proof sheets, and to Babu Surendra Chandra Sen, B.A., B.L., for preparing the Index.

G. S.

20, MIRZAPORE LANE:
Calcutta, 9th June, 1897.

ABBREVIATIONS.

A. S. = I. L. R., Allahabad Series.
B. S. = I. L. R., Bombay Series.
C. S. = I. L. R., Calcutta Series.
M. S. = I. L. R., Madras Series.
I. A. = Law Reports, Indian Appeals.
W. N. = Calcutta Weekly Notes.
M. I. A. = Moore's Indian Appeals.
B. L. R. = Bengal Law Reports.
W. R. = Southerland's Weekly Reporter.
B. H. C. R. = Bombay High Court Reports.
M. H. C. R. = Madras High Court Reports.
D. B. = Dáyabhága.
D. T. = Dáyatattva.
Mit. = Mitákshará.
Vir. = Víramitrodaya.

ERRATA.

Page	33	line	39,	For	"Lordship"	read	"Lordships."
,,	86	,,	4,	,,	"perform"	,,	"performs."
,,	113	,,	29,	,,	"commentators"	,,	"commentators."
,,	124	,,	10,	,,	"*obitur*"	,,	"*obiter.*"
,,	126	,,	42,	,,	"inheritence"	,,	"inheritance."
,,	134	,,	9,	,,	"patrimoney"	,,	"patrimony."
,,	152	,,	5,	,,	"420"	,,	"429."
,,	155	,,	1,	,,	"*familia*"	,,	"*familias.*"
,,	178	,,	23,	,,	"view the"	,,	"view of the."
,,	185	,,	35,	,,	"dissention"	,,	"dissension."
,,	186	,,	35,	,,	"alloted"	,,	"allotted."
,,	204	,,	21,	,,	"dwell"	,,	"dwells."
,,	207	,,	29,	,,	"show"	,,	"shows."
,,	217	,,	35,	,,	"122"	,,	"226."
,,	220	,,	27,	,,	"cal."	,,	"col."
,,	239	,,	38,	,,	"state"	,,	"estate."
,,	242	,,	30,	,,	"benefitted"	,,	"benefited."
,,	305	,,	29,	,,	"share to which"	,,	"share which."
,,	306	,,	7,	,,	"*obitur*"	,,	"*obiter.*"
,,	328	,,	28,	,,	"goes"	,,	"go."
,,	332	,,	35,	,,	"him"	,,	"them."
,,	,,	,,	38,	,,	"his life, flocked to him"	,,	"their lives, flocked to them."
,,	336	,,	25,	,,	"353"	,,	"253."

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TABLE OF CASES.

ADDENDA.

1. While this edition was passing through the Press, the Judicial Committee have overruled the decisions of the Calcutta and the Madras High Courts (*infra*, pp. 136, 137), in which it was held that survivorship is limited to the property to which right by birth accrues, *i.e.*, to the *unobstructed* heritage, and that it does not apply to *obstructed* heritage though jointly inherited by two or more joint undivided brethren ; and their Lordships have held that when two brothers who were members of a joint Mitákshará family inherited their maternal grandfather's property, and one of them died before partition, his interest passed by survivorship to the other brother : *Raja Chelikani* v. *Raja Chelikani*, 7 W.N., 1.

2. At page 173, *infra*, are not cited the cases showing the difference of opinion between the Calcutta and the Bombay High Courts, with respect to the question whether a mere money-decree against the father can be executed against the son after the father's death. The cases are therefore given here ; they are as follows :—

Juga Lal v. *Audh Behari*, 6 W.N., 223, and
Umed Hathising v. *Goman Bhaije*, 20 B.S., 385.

3. I have stated at pp. 333-334, that, although according to the Smritis a Sudra cannot be a Sannyási, yet a Sudra can be a Sannyási or ascetic according to modern usage, and there are now Sudra Sannyásis who are members of modern religious brotherhoods. I wish to give here one of the authorities in support of this improvement in the status of Súdras. The spread of Buddhism compelled the Bráhmanas to make concessions in favour of the other castes and also of non-Hindus: accordingly, they introduced the Tántrik system, which is a compromise between Bráhmanism and Buddhism. The following passages in the eighth chapter of the Mahá-Nirvána-Tantra, show the changes introduced by the Tántrik system in Hindu society,—

श्री-सदाशिव उवाच,—

चत्वारः कथिता वर्णा—आश्रमा—अपि सुव्रते ।
आचारस्यापि वर्णानाम् आश्रमाणां पृथक् पृथक् ।
कृतादौ, कलिकाले तु वर्णाः पञ्च प्रकीर्त्तिताः ।

ब्राह्मणः क्षत्रियो वैश्यः शूद्रः सामान्य एव च ॥
एतेषां सर्व्ववर्णानाम् आश्रमौ द्वौ महेश्वरि ।
ब्रह्मचर्य्याश्रमो नास्ति वानप्रस्थोऽपि न प्रिये ।
गार्हस्थ्यो भिक्षुकश्चैव आश्रमौ द्वौ कलौ युगे ॥
भैक्षुकेऽप्याश्रमे देवि वेदोक्तं दण्डधारणं ।
कलौ नास्त्येव तत्त्वज्ञे यतस्तत् श्रौतसंस्कृतिः ॥
श्रौतसंस्कारविधिनावधूताश्रमधारणं ।
तदेव कथितं भद्रे सन्न्यासग्रहणं कलौ ॥
विप्राणामितरेषाञ्च वर्णानां प्रवले कलौ ।
उभयत्राश्रमे देवि सर्व्वेषामधिकारिता ॥
ब्राह्मणः क्षत्रियो वैश्यः शूद्रः सामान्य एव च ।
कृताावधूतसंस्कारे पञ्चानाम् अधिकारिता ॥

महानिर्वाणतन्त्रं । अष्टमोल्लासः ॥

"The great ever-auspicious God said,—

O Virtuous Goddess! In the *Satya* (golden) and the other (two) ages, the castes and also the orders of life are declared to be four; and the usages also of the (four) castes, and of the (four) orders of life are separately declared for each. But in the Kali age, the castes are declared to be five, namely, the Bráhmana, the Kshatriya, the Vaisya, the Sudra, and the general body of human beings (other than these four). O great Goddess! of *all* these (five) castes, the orders of life are two; for, O dear Goddess! the order of life called Brahmacharjya or studentship, and the order of life called Vána-prastha or hermitage (the first and the third respectively of the four orders), do not now exist, (but) the two orders of life, namely, the Gárhasthya or the order of the householder, and the Bhikshuka or the order of the ascetic or religious mendicant, only, exist in the Kali age. O wise Goddess! the holding of a staff declared in the Vedas, by the order of the Bhikshu or ascetic, also, does not exist in the Kali age, because that is prescribed for the order of ascetics initiated according to the Vedas. O auspicious Goddess! the adoption of the order of Avadhútas or ascetics according to the rules of initiation prescribed by the God Siva (in the Tantras), is alone declared to be the adoption of

Sannyása (Renunciation or asceticism) in the Kali age. O Goddess! in the advanced state of the Kali age, the Bráhmanas and the other (four) castes are *all* entitled to these two orders of life. The Bráhmana, the Kshatriya, the Vaisya, the Súdra, and the general body of human beings, these five are entitled to be initiated as Sannyásis or ascetics according to the Tántrik system."

The above slokas are not continuous, but are cited from different parts of the Mahá-Nirvána-Tantra, Chapter 8.

4. The following sloka is cited at p. 334, but its English translation is not given, the omission being accidental. It is given here,—

विद्याविनयसम्पन्ने ब्राह्मणे गवि हस्तिनि ।

शुनि चैव श्वपाके च पण्डिताः समदर्शिनः ॥ ५ । १८ ॥

"Learned persons look equally on a Bráhmana endowed with learning and humility, a cow, an elephant, as well as a dog and a man of the lowest outcast class." For, God pervades them all equally.—5, 18.

HINDU LAW.

CHAPTER I.

INTRODUCTORY.

ORIGINAL TEXTS.

१ । अहं प्रजाः सिसृक्षुस्तु तपस्तप्त्वा सुदुश्चरम् ।
पतीन् प्रजानाम् असृजम् महर्षीन् आदितो दश ।
मरीचिम् अत्र्यङ्गिरसौ पुलस्त्यं पुलहं क्रतुम् ।
प्रचेतसं वशिष्ठञ्च भृगुं नारदम् एव च ॥ मनुः – १ । ३४-३५ ॥
इदं शास्त्रन्तु कृत्वासौ माम् एव स्वयम् आदितः ।
विधिवद्-ग्राहयामास मरीच्यादींस्त्वहं मुनीन् ॥
एतद्-वोऽयं भृगुः शास्त्रं श्रावयिष्यत्यशेषतः ।
एतद्धि मत्तोऽधिजगे सर्व्वम् एषोऽखिलं मुनिः ॥ मनुः – १ । ५८-५९ ॥

1. Being desirous of creating beings, I (Manu) performed very difficult religious austerities, and at first created ten Lords of beings, eminent in holiness, namely, Maríchi, Atri, Angirás, Pulastya, Pulaha, Kratu, Prachetás, Vasishtha, Bhrigu and Nárada. (Manu, i, 34-35.) He (the self-existent) having made this Sástra (Code of Manu), himself taught it regularly to me (Manu) in the beginning: afterwards I taught Maríchi and the other holy sages. This Bhrigu will repeat to you this Sástra without omission; for, this sage learned from me the whole of it, perfectly well.—Manu, i, 58-59.

२ । वेदः स्मृतिः सदाचारः स्वस्य च प्रियम् आत्मनः ।
एतच्-चतुर्विधं प्राहुः साक्षाद्-धर्म्मस्य लक्षणम् ॥ मनुः – २ । १२ ।

2. The Veda, the Smriti, the approved usage, and what is agreeable to one's soul (where there is no other guide), the wise have

declared to be the quadruple direct evidence of law (*dharma*).—Manu, ii, 12.

३ । श्रुतिः स्मृतिः सदाचारः स्वस्य च प्रियम् आत्मनः ।
सम्यक् सङ्कल्पजः कामो धर्ममूलम् इदं स्मृतम् ॥ याज्ञवल्क्यः—१ । ७ ।

3. The Sruti, the Smriti, the approved usage, what is agreeable to one's soul, and desire sprung from due deliberation, are ordained the foundation (or evidence) of law (*dharma*).—Yájnavalkya, i, 7.

४ । पुराण-न्याय-मीमांसा-धर्मशास्त्राङ्गमिश्रिताः ।
वेदाः स्थानानि विद्यानां धर्मस्य च चतुर्दश ॥ याज्ञवल्क्यः—१ । ३ ।

4. The (four) Vedas, together with their (six) Angas or subsidiary sciences, the *Dharma-sástras* or Codes of Law, the *Mímánsá* or disquisition of the rules of scripture, the *Nyáya* or science of reasoning, and the *Puránas* or records of antiquity, are the fourteen sources of knowledge and law.—Yájnavalkya, i, 3.

५ । द्वे विद्ये वेदितव्ये, इति ह स्म यद्-ब्रह्मविदो वदन्ति,—परा चैवापरा च ।
तत्रापरा,—ऋग्वेदो यजुर्वेदः सामवेदोऽथर्ववेदः, शिक्षा कल्पो व्याकरणं निरुक्तं छन्दो ज्योतिषम् इति ॥ अथ परा,—यया तद्-अक्षरम् अधिगम्यते ॥
मुण्डकोपनिषद्, १ । १ । ४, ५ ॥

5. Two sciences should be known—this is what was said by those who knew the Revelations:—the Ultimate and the Non-Ultimate.

Of these, the Non-Ultimate consists of the (four) Vedas, namely, the Rik, the Yajus, the Sáman and the Atharvan, and (of the six Angas, namely,) the Sikshá (or the science of proper articulation and pronunciation = Orthography and Orthoepy), the Kalpa (or the regulation of the manner of performing sacrifices), the Vyákarana (or grammar), the Nirukta (or thesaurus, with explanation of the etymology of words), the Chhandas (or prosody) and the Jyotisha (or astronomy).

And the Ultimate is that by which the Imperishable is known, (and consists of the Upanishads).—Mundaka Upanishad, i, 1, 4 and 5.

६ । मन्वत्रिविष्णुहारीतयाज्ञवल्क्योशनोऽङ्गिराः ।
यमापस्तम्बसम्वर्ताः कात्यायनबृहस्पती ॥

पराशर-व्यास-शङ्ख-लिखिता दक्षगौतमौ ।

शातातपो वसिष्ठश्च धर्म्मशास्त्रप्रयोजकाः ॥ याज्ञवल्क्यः – १ । ४-५ ।

नेयं परिसंख्या किन्तु प्रदर्शनार्थं, अतो बौधायनादेरपि धर्म्मशास्त्रत्वम्

अविरुद्धम् । इति मिताक्षरा ।

6. Manu, Atri, Vishnu, Hárita, Yájnavalkya, Usanás, Angirás, Yama, Ápastamba, Sambarta, Kátyáyana, Vrihaspati, Parásara, Vyása, Sankha, Likhita, Daksha, Gautama, Sátátapa and Vasishtha, are the compilers of the *Dharma-sástras* or Codes of Law.—Yájnavalkya, i, 4-5.

The Mitákshará on this passage says:—This is not an exhaustive enumeration, but illustrative; hence, the compilations of Baudháyana (Nárada, Devala) and others being *Dharma-sástra,* is not contrary to it.

७ । धर्मस्य शब्दमूलत्वाद्-अशब्दम् अनपेक्ष्यं स्यात् । १ ।

अपि वा कर्तृसामान्यात् प्रमाणम् अनुमानं स्यात् । २ ।

विरोधे त्वनपेक्ष्यं स्यात्, असति ह्यनुमानं । ३ ।

हेतुदर्शनाच्च च । ४ ॥ जैमिनिः, १ । ३ । १ – ४ ॥

7. (It may be contended that) as the words of Revelation form the foundation of Law, therefore that (such as the Smriti) which is not embodied in such words should not be regarded as authority.

But (the anwer is,) the Smritis being compiled by the sages who were also the repositories of the Revelation (from whom it was handed down by tradition until recorded in writing), there arises an inference that the Smritis are founded on the Sruti or Revelation, and therefore (they should be regarded as) authority.

But if there be conflict (of any precept of the Smriti with one of the Sruti) the Smriti must be disregarded (as spurious); since the inference arises (only) when there is no such conflict.

(A Smriti must be disregarded as spurious,) also, when there is found a reason (for fabricating it, such as the covetousness of priests, or the like).—Jaimini's Purva-Mimánsá, i, 3, 1-4.

The argument in the second of the above aphorisms is explained in the following sloka cited and commented on by Pártha-Sárathi in his Sástra-Dípiká,—

वैदिकैः स्मर्य्यमानत्वात् तत्परिग्रहदार्ढ्यतः ।

संभाव्यवेदमूलत्वात् स्मृतीनां वेदमूलता ॥

Revelation is (inferred to be) the source of the Smritis, because they are *remembered* (and compiled) by those who admit the Veda alone (and nothing else) to be the source of law, and because they have been adopted and acted upon as authoritative by such persons, and because their being founded on the Veda is probable.

८। सरस्वती-दृषद्वत्यो-र्देवनद्यो-र्यद् अन्तरम्।
तं देवनिर्मितं देशं ब्रह्मावर्तं प्रचक्षते॥
तस्मिन् देशे य आचारः पारम्पर्य्य-क्रमागतः।
वर्णानां सान्तरालानां स सदाचार उच्यते॥ मनुः – २। १७-१८॥

8. The holy country lying between the holy rivers *Sarasvatí* and *Drishadvatí* is called *Brahmávarta:* the custom in that country, which has come down by immemorial tradition and obtains among the castes pure and mixed, is called *approved usage.*—Manu, ii, 17-18.

९। यस्मिन् देशे य आचारो व्यवहारः कुलस्थितिः।
तथैव परिपाल्योऽसौ यदा वशमुपागतः॥ याज्ञवल्क्यः – १। ३४३।

9. Whatever customs, practices and family usages prevail in a country, shall be preserved intact, when it comes under subjection (by conquest).—Yájnavalkya, i, 343.

१०। यस्मिन् देशे य आचारो न्यायदृष्टस्तु कल्पितः।
स तस्मिन्नेव कर्त्तव्यो न तु देशान्तरे स्मृतः॥
यस्मिन् देशे पुरे ग्रामे त्रैविद्ये नगरेऽपि वा।
यो यत्र विहितो धर्म-स्तं धर्मं न विचालयेत्॥ देवलः पराशरमाधव-धृतः।

10. But if any usage required by utility is established in a locality (contrary to the written texts of law), it should be practised therein only, but not in any other district. Whatever customary law is prevalent in a district, in a city, in a town, or in a village, or among the learned, the said law (though contrary to the Smritis) must not be disturbed.—Devala, cited in the Parásara-Mádhava.

११। सर्व्वेषाम् एवमादीनां प्रतिदेशं व्यवस्थया।
आपत्तम्बेन संहत्य दुष्टादुष्टत्वम् आश्रितं।
येषां परम्पराप्राप्ताः पूर्व्वैरप्यनुष्ठिताः।
त एव तैर्न दुष्येयु-राचारै र्नेतरे पुनः॥ — कुमारिलस्वामिनेदं परमत-मित्युपन्यस्तं तन्त्रवार्त्तिके प्रथमाध्याये तृतीयपादे॥

11. Apastamba has briefly explained the reprehensibility or non-reprehensibility of all such usages (as are contrary to the written texts of law), by referring them to different localities. By these usages *they* do not become liable to censure, *who* have got them by tradition, and *whose* predecessors used to practise them: others, however, are not so (but become guilty of violating the written texts of law, if they practise those usages).—This is stated as the opinion of others, by Kumárila Swámin who himself maintains the invalidity of such usages, in his Tantra-Vártika, first Chapter, third Páda or Section.

१२। अष्टादशपुराणानि पुराणज्ञाः प्रचक्षते।
ब्राह्मं पाद्मं वैष्णवञ्च शैव भागवतं तथा॥
अथान्यं नारदीयञ्च मार्कण्डेयञ्च सप्तमम्।
आग्नेयम् अष्टमञ्चैव भविष्यं नवमं तथा॥
दशमं ब्रह्मवैवर्त्तं लैङ्गम् एकादशं स्मृतम्।
वाराहं द्वादशञ्चैव स्कान्दञ्चात्र त्रयोदशम्॥
चतुर्दशं वामनञ्च कौर्म्मं पञ्चदशं स्मृतम्।
मात्स्यञ्च गारुड़ञ्चैव ब्रह्माण्डञ्च ततः परम्॥
सर्गश्च प्रतिसर्गश्च वंशो मन्वन्तराणि च।
सर्व्वेष्वेतेषु कथ्यन्ते वंशानुचरितञ्च यत्॥ विष्णुपुराणम्, ३। ६। २१-२५।

12. Eighteen *Puránas* are enumerated by those versed in the *Puránas*:—the Bráhma, the Pádma, and the Vaishnava, the Saiva, the Bhágavata likewise, another is the Náradíya, and the Márkandeya is the seventh, and the Agneya is the eighth, likewise the Bhavishya is the ninth, the tenth is the Brahma-vaivarta, the Lainga is ordained the eleventh, and the Váráha is the twelfth, and the Skánda is the thirteenth in this (enumeration), the Vámana is the fourteenth, the Kaurma is ordained the fifteenth, posterior to these are the Mátsya, and the Gáruda and the Brahmánda:—In all these the subjects dealt with are, the creation, the secondary creation, the dynasties (of gods, sages and kings,) the ages of the world, as well as the career of the dynasties.—Vishnu-Purána, iii, vi, 21-25.

१३। श्रुतैर्द्वैधे स्मृतैर्द्वैधे सम्यगेदः प्रकल्प्यते।
श्रुतिस्मृतिविरोधे तु श्रुतिरेव गरीयसी॥

13. There being two contradictory precepts of the Sruti or of the Smriti, different cases are to be assumed (to which they are respectively applicable): but if there be a conflict between the Sruti and the Smriti, the Sruti alone must prevail.

१४ । स्मृत्योर्विरोधे न्यायस्तु बलवान् व्यवहारतः ।

अर्थशास्त्रात् तु बलवत् धर्म्मशास्त्रम् इति स्थितिः ॥ याज्ञवल्क्यः—२ । २१ ।

14. But in the case of a conflict between two passages of the Smriti, reasonable reconciliation based on usage must prevail: but the rule is, that the sacred books on law are more weighty than sacred books on politics.—Yájnavalkya, ii, 21.

१५ । श्रुतिस्मृतिपुराणानां विरोधो यत्र दृश्यते ।

तत्र श्रौतं प्रमाणन्तु तयोर्द्वैधे स्मृतिर्वरा ॥ व्याससंहिता ।

15. When there is a conflict between the Sruti, the Smriti and the Puráṇa, the Sruti must prevail; but in a conflict between the latter two, the Smriti must prevail.—The Code of Vyása.

१६ । कायेन मनसा वाचा यत्नाद्-धर्मं समाचरेत् ।

अस्वर्ग्यं लोकविद्विष्टं धर्म्ममम् अप्याचरेन्-न तु ॥ याज्ञवल्क्यः—१ । १५६ ॥

16. Practise with care what is lawful, by body, mind and speech. But practise not that which is abhorred by the world, though it is ordained in the Sacred Books; for, it secures not spiritual bliss.—Yájnavalkya, i, 156.

१७ । अस्वर्ग्यं लोकविद्विष्टं धर्म्ममम् अप्याचरेन्-न तु ॥

समुद्र-यात्रा-स्वीकारः कमण्डलु-विधारणम् ।

द्विजानाम् असवर्णासु कन्यासूपयमस्तथा ॥

देवरेण सुतोत्पत्तिर्मधुपर्के पशोर्वधः ।

मांसदानं तथा श्राद्धे वानप्रस्थाश्रमस्तथा ॥

दत्ताक्षतायाः कन्यायाः पुनर्दानं परस्य च ।

दीर्घकालं ब्रह्मचर्य्यं नरमेधाश्वमेधकौ ॥

महाप्रस्थानगमनं गोमेधञ्च तथा मखम् ।

इमान् धर्म्मान् कलियुगे वर्ज्यान् आह-मनीषिणः ॥

बृहन्नारदीयम्—२२ । १२-१५ ।

17. But practise not what is abhorred by the people, though it is ordained in the sacred books; for, it secures not spiritual bliss. Taking sea-voyage, carrying a waterpot (by students), likewise marriage by regenerate men, of damsels not belonging to the same tribe, procreation of son (on a woman) by her husband's younger brother, slaughter of cattle for entertaining honoured guests, offering of flesh meat in ancestor-worship, retirement to a forest (or adoption of the third order of life), gift over again of a daughter once given in marriage though still a virgin to another (bridegroom), Vedik student-ship for a long time, man-sacrifice, horse-sacrifice, walking on pilgrim-age with intent to die, and likewise cow-sacrifice :—these practices though permitted by the sacred books, the wise declare, avoidable in the Kali age.—Vrihan-Náradíya-Purána, xxii, 12-16.

१८। दत्तौरसेतरेषान्तु पुत्रत्वेन परिग्रहः।

शूद्रेषु दास-गोपाल-कुलमित्रार्द्ध-सीरिणां।

भोज्यान्नता, गृहस्थस्य तीर्थ-सेवातिदूरतः।

ब्राह्मणादिषु शूद्रस्य पक्वतादिक्रियापि च।

भृग्वग्निमरणञ्चैव वृद्धादिमरणं तथा।

इमानि लोकगुप्त्यर्थं कलेरादौ महात्मभिः।

निवर्त्तितानि कर्म्माणि व्यवस्थापूर्व्वकं बुधैः।

समयश्चापि साधूनां प्रमाणं वेदवद्-भवेत्॥ आदित्यपुराणवचनम्॥

18. Recognition of sons other than the Aurasa and the Dattaka; participation (by a Bráhmana) of food from the following descriptions of Súdras, namely, (his) slave, (his) cowherd, (his) family-friend, and the cultivator (of his land) delivering half the produce; pilgrim-age by a householder to a very distant holy place; participation by the Bráhmanas and the like, of food prepared by a Súdra; suicide by falling from a precipice or by cremation; likewise suicide by a person extremely old or the like :—In the beginning of the Kali age, these practices have been prohibited after consideration by the learned for the protection of the people: for, a resolution also, arrived at by the virtuous, has as much authority as the Veda.—Aditya-Purána quoted by Raghunandana.

१९। तत्रासीनः स्थितो वापि पाणिम् उद्यम्य दक्षिणम्।

विनीतवेषाभरणः पश्येत् कार्य्याणि कार्य्यिणाम्॥

प्रत्यक्षं देशदृष्टैश्च शास्त्रदृष्टैश्च हेतुभिः।

अष्टादशसु मार्गेषु निबद्धानि पृथक् पृथक् ॥
तेषाम् आद्यम् ऋणादानं निक्षेपो-ऽस्वामिविक्रयः ।
सम्भूय च समुत्थानं दत्तस्यानपकर्म च ॥ ३ ।
वेतनस्यैव चादानं संविदश्च व्यतिक्रमः ।
क्रयविक्रयानुशयो विवादः स्वामि-पालयोः ॥ ५ ।
सीमाविवादधर्मश्च पारुष्ये दण्डवाचिके ।
स्तेयञ्च साहसञ्चैव स्त्रीसंग्रहणमेव च ॥ ६ ।
स्त्रीपुंधर्मो विभागश्च द्यूतम् आह्वय एव च ।
पदान्यष्टादशैतानि व्यवहारस्थितौ विदुः ॥ ७ ॥ मनुः ८ । २-७ ॥

19. In his Court of Justice, either sitting or standing, holding forth his right arm, unostentatious in his dress and ornaments, let the king, every day, decide, one after another, causes of suitors, classified under eighteen Forms of Action, by rules founded on *local usages* and *Codes of Law*. Of these (Forms of Action) the first is the Recovery of Debts, (the others are),—(2) Deposit and Pledge, (3) Sale without ownership, (4) Joint Concerns (or Partnership), (5) Resumption of Gifts, (6) Non-payment of Wages, (7) Breech of Contracts, (8) Rescission of Sale and Purchase, (9) Dispute between the Owner (of cattle) and the Shepherd, (10) Dispute relating to Boundaries (or Trespass), (11) Violence consisting of Assault, (12) and (Violence) consisting of Abuse (or Slander and Defamation) (13) Theft, (14) Force (consisting of robbery, hurt or violence on women) (15) Adultery, (16) Duties of Man and Wife, (17) Partition (and Inheritance), and (18) Gambling and Betting :—these are in this world the eighteen foundations upon which litigation rests.—Manu, viii, 2-7.

20. Nárada has added another form of Action called **प्रकीर्णकम्** or Miscellaneous, which includes various matters that cannot come under those declared by Manu, and in which the Action arises at the instance of the king. The first and the last lines of Nárada's description of it are as follows :—

प्रकीर्णके पुनर्ज्ञेयो व्यवहारो नृपाश्रयः ।
न दृष्टं यच् पूर्व्वेषु सर्वं तत् स्यात् प्रकीर्णके ॥

In the Miscellaneous Form of Action, the litigation depends upon the king. Whatever is not considered in the foregoing (Forms of Action), all that would come within the Miscellaneous.

२१ । स्मृत्याचार-व्यपेतेन मार्गेणाधर्षितः परैः ।

आवेदयति चेद्-राज्ञे व्यवहार-पदं हि तत् ॥ याज्ञवल्क्यः, २, ५ ॥

21. If a person wronged by others in a way contrary to the *Smriti* or *custom* complains to the king, that is a Cause of Action.—Yájnavalkya, ii, 5.

ORIGIN AND SOURCES OF LAW, SCHOOLS, &c.

Divine origin of laws.—The Hindus believe their law to be of divine origin, and they believe this not only of what Austin calls the laws of God, but positive law is also believed by them to have emanated from the Deity. The idea of sovereign in the modern juridical sense was unknown to them. They had kings, but their function was defined by the divine law contained in the Smritis, and they were bound to obey the selfsame law, equally with their subjects. By this original theory of its origin, the law was independent of the state, or rather the state was dependent on law, as the king was to be guided in all matters connected with Government, by the revealed law, though he was not excluded from a control over the administration of justice. The king being theoretically the administrator of justice his decrees must have been recognized as binding on suitors from the very earliest times. And this gradually introduced the view recognized by commentators that royal edicts in certain matters have as much binding force as divine law, should the former be not repugnant to the latter.

The earlier notion of law was gradually modified to a certain extent, as may be gleaned from the remarks of the commentators. And the conception of positive as distinguished from divine law, presented to us by the commentators, nearly approaches the ideas of modern jurisprudence.

The sources of law.—The divine will or law is evidenced by the Sruti, the Smriti, and the immemorial and *approved* customs.

Sruti.—The Sruti is believed to contain the very words of the deity. The name signifies what was *heard*.

The Sruti contains very little of lawyer's law: they consist of hymns and deal with religious rites, true knowledge and liberation. There are, no doubt, a few passages containing an incidental allusion to a rule of law or giving an instance from which a rule of law may be inferred. The Sruti comprises the four Vedas, the six Vedángas, and the Upanishads.

Smriti.—The Smriti means what was *remembered*, and is believed

to contain the precepts of God, but not in the language they had been delivered. The language is of human origin, but the rules are divine. The authors do not arrogate to themselves the position of legislators, but profess to compile the traditions handed down to them by those to whom the divine commands had been communicated.

The Smritis are the principal sources of lawyer's law, but they also contain matters other than positive law. The complete Codes of Manu and Yájnavalkya deal with religious rites, *positive law*, penance, true knowledge and liberation. There are some that deal with positive law alone, such as the Code of Nárada, now extant. Many others contain nothing of civil law. The Smritis as a whole deal with man as a being of infinite existence, whose present life is like a point in a straight line infinite in both directions.

It should be noticed that writers on the Mímánsá system of Hindu Philosophy discuss the question,—Why should Smritis composed by human beings be taken as evidence of *Dharma* or Law, of which Revelation is admitted by all to be the only source? They maintain that the Smritis must be *inferred* to be founded on lost or forgotten Sruti, inasmuch as they are compiled from memory, and are declared as embodying binding rules of conduct, by the sages who were perfectly familiar with the Vedas, and who admitted the Sruti alone and nothing else, to be the foundation or evidence of Law; and as they have all along been adopted and followed in practice by the sages, as well as by other persons learned in the Vedas and entertaining the same view with respect to the origin and source of Law. They also notice an objection that may be raised to this, namely,—Why then have not the very words of the original revelations that are supposed to be the foundation of the Smritis, been preserved? And they refute it by saying that human memory being frail, there is no wonder that precepts should be remembered while the exact words in which they had originally been expressed might be forgotten. There is a great distinction between the sacred literature dealing with rules regulating the conduct of men in this world as members of society, and that relating to purely religious matters; the precepts of the former are observed in practice, while the latter is rather theoretical in character, the wording of which was therefore of greater importance than that of the former. The rise of different Sákhás or schools of Vedik literature affords evidence of the loss of the exact wording of portions of the latter kind of Revelation, since parts of the Vedas, found in one Sákhá are wanting in others, showing that when the Vedic literature used to be handed down by tradition, parts were omitted by different Sákhás with a view to lighten the burden on the memory of students: and the practice with the teacher of a particular Sákhá, who was familiar with the other Sákhás also, was not to teach to a pupil of his own Sákhá, the exact wording of those portions of other

Sákhás, that were wanting in his own, but to give their purport in his own language, so that the same might not be mistaken as part of his own Sákhá.

It is worthy of notice that the inference set forth above forms the foundation of the authority of the Smritis. When this inference cannot properly be made with respect to a particular precept of Smriti, then the same must be disregarded as spurious. Thus, if a Smriti is in conflict with Sruti, it must be rejected as being not founded on Revelation. Similarly, a passage of Smriti the origin of which may reasonably be attributed to the covetousness of priests, or to the selfishness or the like improper motive of some persons who might introduce any interpolation in it, cannot be regarded as authoritative, but should be discarded as a fabrication and interpolation :—see Texts, No. 7.

Customs.—Divine will is evidenced also by immemorial customs, indicating rules of conduct; in other words, such customs are presumed to be based on unrecorded revelation. Manu and Yájnavalkya declare सदाचारः *approved* custom or usage to be evidence of law. The commentators use the word शिष्टाचारः = *usage of the learned* instead of, and as equivalent to, सदाचारः = approved usage. But it should be observed that the usages observed by tradesmen and artizans who are ignorant of the sacred literature, are also included by the term सदाचारः which may also mean *usage of the virtuous*. There is a difference of opinion among commentators on the Mímánsá with respect to the evidentiary force of customs and usages; some commentators are of opinion that usages give rise to an inference of being based on unrecorded or forgotten Sruti or Revelation, in the same way as Smritis do. While others maintain that as the learned of modern times cannot be taken to have been so familiar with the Vedas as Manu and other sages were, the usages observed by the learned of comparatively recent times cannot give rise to an inference of being founded on Sruti, but can only give rise to an inference of being based on some now lost or forgotten *Smriti* with which they may be presumed to have been familiar. Accordingly they hold that usages are inferior to Smritis, and must not be followed when in conflict with them. But agreeably to the former view usages and Smritis are of equal authority as evidence of law ; and in case of conflict beween them, the former must be taken to be of greater force as being actually observed in practice.

This view appears to accord with reason more than the other, and has been adopted by the highest tribunal which observes,—" Under the Hindu system of law, *clear proof of usage will outweigh the written text of the law.*"

Customs are either general, *i.e.*, observed by all the people of a locality, or tribal, *i.e.*, observed by a particular tribe, or mercantile, *i.e.*, appertaining to a class of tradesmen or artizans, or *kuláchár*, *i.e.*, confined to a single family. According to Hindu law and the

decisions of the highest tribunal, the Indian courts are bound to decide cases agreeably to such customs when proved to exist, although they may be at variance with the School of Hindu law, prevalent in the locality. This appears to be a most salutary rule, regard being had to the facts that many precepts in the Sástras are recommendatory in character, and that many innovations have been introduced by Pandits of the Mahomedan period, in their commentaries on Hindu law, who were neither judges nor lawyers.

This resembles the view taken by German jurists, of customary law, and is opposed to that of Austin who maintains that the rules of customary law become positive law *when* they are adopted as such by the courts of justice or promulgated in the statutes of the State. The great jurist seems to have been thinking of the state of things in England, and not in a country like India where there was no statute law, but where the entire body of laws was based upon immemorial customs and usages.

Antiquity, certainty and continuity are essential to the validity of a custom. On this subject the Lords of the Judicial Committee observe as follows: "Their Lordships are fully sensible of the importance and justice of giving effect to long established usages existing in particular districts and families in India, but it is of the essence of special usages, modifying the ordinary law of succession that they should be ancient and invariable: and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends."—*Rama* v. *Siva*, 14 M.I.A., 585.

Family Customs.—These observations apply to both local and family customs: a family usage also must be ancient and invariable.—*Raja Nagendra* v. *Raghunath*, W.R., 1864, 23.

But a family usage differs from a local custom in this that it may be given up and discontinued, and the discontinuance whether accidental or intentional will have the effect of destroying it. On this subject the Privy Council remarks:—"Their Lordships cannot find any principle or authority for holding that in point of law a manner of descent of an ordinary estate, depending solely on family usage, may not be discontinued, so as to let in the ordinary law of succession. Such family usages are in their nature different from a territorial custom which is the *lex loci* binding all persons within the local limits in which it prevails. It is of the essence of family usages that they should be certain, invariable and continuous, and well established discontinuance must be held to destroy them. This would be so when the discontinuance has arisen from accidental causes; and the effect cannot be less, when it has been intentionally brought about by the

concurrent will of the family."—*Raja Rajkissen* v. *Ramjoy*, 19 W.R., 8 (12)=1, C.S., 186 (195).

The primary sources of Hindu law are (1) the Sruti, (2) the Smriti, and (3) immemorial customs. The first though of the highest authority is of very little importance to lawyers. The last again are of very great importance, as being the rules by which the people are actually guided in practice, and their value has come to be specially recognized under the British rule, and authorized records of customs of various localities have been compiled. They override the Smritis and their accepted interpretation given by an authoritative commentator, should these be inconsistent with them. They prove that the written texts of law are either speculative and never followed in practice, or obsolete. The Hindu commentators have not, except in a few instances, devoted much attention to these unrecorded customs and usages, though they recognize their authority as a source of law. They have confined their attention to the Smritis alone, which constitute the primary *written* sources of law.

The Sruti and the Smritis are comprehended by the term *Dharma-sástra* which, however, is technically used to designate the Smritis alone, with a view to mark their importance. *Sástra* imports teacher, and *Dharma* means law or duty, or essential quality of persons or things, and is derived from the root *dhri* to hold, support or maintain; and *Dharma* is popularly understood to be the body of rules which have been laid down for the well-being of a people or of mankind or of the whole world.

The exact number of the Smritis cannot be stated, many of them are not extant, being either lost or unprocurable. From the quotations in the various commentaries you may make a list of the Codes. Most of them are written in metre, and a few in both prose and metre. They do not appear to have been written at the same time, nor do they lay down the selfsame law: and a process of development may be perceived in them. Thus there is conflict of law as laid down in the different Codes on various matters.

Conflict of law and commentaries.—Conflict of law, however, is opposed to the theory of its divine origin, from which perfect harmony between the different Codes must necessarily be expected. The conflict between the Smritis, seeming or real, has given rise to the commentaries or digests that are called Nibandhas. Conflict between the Sástras, however, is admitted and the mode of reconciling them is pointed out thus: "When there is a conflict between two texts of the Sruti or of the Smriti, they are to be presumed to relate to different cases; but where a text of the Sruti is opposed to one of the Smriti, the former must prevail." (Texts Nos. 10–12.)

Scope of Sástras.—This admission of the existence of conflict of law, opposed to the theory of its origin, has landed the commentators

upon a difficulty, which they attempt to get over in the following way :—The proper object of the Sástras, say they, is to teach of things that lie beyond the scope of human reason; what men would do or refrain from doing of their own accord from purely human motives need not be laid down in the Sástras; accordingly they classify the precepts laid down in the Sástras thus :—where a precept forbids men to do what they may do under the natural impulses, it is called a *Nishedha* or prohibition : but where a precept enjoins men to do a certain thing, when no reason could be suggested for doing it, it is called an *Utpatti-vidhi* or an injunction creating a duty : and a precept regarding what men may do, of their own accord, may come within the purview of the Sástras, if it enjoins that act at a particular time or place ; such a precept is called a *Niyama-vidhi* or restrictive injunction : there is a third kind of *vidhi* or injunction called *Parisankhyá* which is an injunction in form, but a prohibition in purport, as for instance,— "Man shall eat the flesh of the five five-clawed animals,"—which means that man shall not eat the flesh of the five-clawed animals excepting that of the five specified ones : but precepts that do not fall under any one of the above descriptions are called *Anuváda*, or superfluous rules that need not have been laid down in the Sástras.

Positive law and Sástras.—The commentators do, either expressly or by necessary implication, hold that the Sástras, in so far as they deal with positive law, are generally *Anuváda* or superfluous, inasmuch as the rules of positive law are deducible from reason, in other words, from a consideration of what best conduces to the welfare of the community and suits the feelings of the people. They do in fact draw a distinction between positive law on the one hand, and the rules of religious or moral obligation on the other.

Thus the author of the Mitákshará (1, 3, 4,) cites and follows a text which runs thus :—"Practice not that which is legal, but is abhorred by the world, for it secures not spiritual bliss." This text does virtually suggest the maxim *Vox populi est vox Dei* and maintain that popular feelings override an express text of law contained in the Sástras, taking of course, the term law in the limited sense of lawyers.

Factum valet.—On the very same principle does rest the so-called doctrine of *factum valet quod fieri non debuit*, usually though not correctly, thought to be peculiar to the Bengal School and enunciated for the first time by the author of the Dáyabhága, the founder of that school. For, it has been held, and if I may presume to say so, correctly held by the Privy Council in the case of Wooma Deyi, 3 C.S., 587, that the doctrine is recognized by the Mitákshará School also. There appear to be considerable misconception and difference of opinion as to what was intended to be laid down by the author of the Dáyabhága in the passage वचनमतेनापि वस्तुनोऽन्यथाकरणाशक्तेः —which means, "A thing (or the nature of a thing) cannot be altered

by a hundred texts." The rule intended to be laid down may be thus formulated,—An act or transaction done by a man in the exercise of a right or power, natural or recognized by law, cannot be undone or invalidated by reason of there being texts in the Sástras prohibiting such act or transaction.

The above passage of the Dáyabhága, was rendered by Colebrooke into,—"For, a *fact* cannot be altered by a hundred texts." The founder of the Bengal School holds that an alienation by a father or a co-heir, of his self-acquired immovable property, or of his undivided share in joint family property, respectively, is perfectly valid, even when made without the consent of his sons in the one case, or of his co-sharers in the other, notwithstanding texts of law requiring such consent. And in support of this position he sets forth the above reason. His argument is this:—Ownership consists in the power of dealing with property according to pleasure; it cannot but be admitted that the father and the co-heir have ownership, respectively, in the self-acquired immovable and in the undivided share, and consequently power of alienation: hence, the *nature of the thing* ownership, or its incidents such as sale or other alienation, cannot be affected by a hundred texts prohibiting alienation without consent; such texts therefore, are to be taken as admonitory but not imperative. Of the same effect are texts prohibiting gift or other alienation of the whole of his property by a man having wife and children to support. Parallel to them are passages forbidding the gift in adoption, of an only son by a person in the exercise of *patria potestas* or parental property in a child. This is one of the many principles upon which commentators differentiate between rules of legal, and religious or moral, obligation, which are blended together in the codes of Hindu law.

There is no real difference between the two schools, as regards the tests for distinguishing the rules of legal obligation from those that are merely preceptive. The Mitákshará rule that a co-heir cannot alienate his undivided coparcenary interest in joint property without the consent of his coparceners, is a necessary logical consequence of the doctrine that co-heirs are *joint tenants*, and not *tenants in common* as in the Bengal School. Hence the distinction in this respect does not support the opinion that the doctrine of *factum valet* is not recognized by the Mitákshará School to the same extent as in Bengal.

The following observation of the Lords of the Judicial Committee on this maxim is instructive and should be carefully read:—"Their Lordships ought to state their concurrence with the learned Chief Justice in his remarks on the so-called doctrine of *factum valet*. That unhappily expressed maxim clearly causes trouble in Indian courts. Sir M. Westropp is quite right in pointing out that if the

factum, external act, is void in law, there is no room for the application of the maxim. The truth is that the two halves of the maxim apply to two different departments of life. Many things which ought not to be done in point of morals or religion are valid in point of law. But it is nonsensical to apply the whole maxim to the same class of actions and to say that what ought not to be done in morals stands good in morals, or what ought not to be done in law stands good in law." *Sri Balusu* v. *Sri Balusu*, 22 M.S., 423 = 26 I. A., 113, 144.

Practices to be eschewed in Kali age.—So also Raghunandana in his treatise on marriage (Udváha-Tattva) prohibits, contrary to the Smritis and the earlier commentaries, the intermarriage between different tribes, and in support of this position cites a passage from the Áditya-Purána, which after laying down that certain practices including intermarriage, though authorized by the Sástras, are not to be followed in the Kali age, concludes thus—"In the beginning of the Kali age these practices have been prohibited after consideration by the learned for the protection of the people: *and a resolution come to by the virtuous has as much legal force as a text of the Veda.*" (Text No. 14).

Thus we see that the rules of the Sástras in so far as they relate to secular as distinguished from purely spiritual matters, are not inflexible, but may be modified or replaced if repugnant to popular feelings, or if in the opinion of the learned the exigencies of Hindu society require a change. The Sástras therefore, do not present any insurmountable difficulty in the way of social progress, and Hindus may reconstitute their society in any way they like without renouncing their religion.

Whether these practices (Text No. 14) have become illegal by reason of the said prohibition, is a question which has not as yet been considered by our courts. In one case the affirmative was assumed, and an intermarriage was pronounced invalid: Melaram *v.* Thanooram, 9 W. R. 552.

Puránas.—The above quotation from the Áditya-Purána shows that the Puránas also are considered by the later commentators as a source of law. Jurisprudence, however, does not come within the scope of the subjects that are, according to the Puránas themselves, dealt with in them: (Text No. 9). They are voluminous mythological poems professing to give an account of creation, to narrate the genealogy of gods, of ancient dynasties and of sacerdotal families, to describe the different ages of the world, and to delineate stories of gods, ancient kings and sages; and in doing so they also relate religious rites and duties. These works are said to have been composed by Vyása or the celebrated compiler of the Vedas, and are enumerated in some of the Puránas to be eighteen in number. But there are many other works of the same kind, the authorship of which

is not attributed to Vyása, which appear to have been written subsequently, and which are on that account styled Upa-Puránas, and are respectively deemed supplementary to one or other of the eighteen Puránas. The Puránas are not considered authoritative so as to override the Smritis, but are deemed to illustrate the law by the instances of its application, that are related by them: (Text No. 12). With respect to their authority in matters of positive law, Professor Wilson rightly observes that "the Puránas are not authorities in law; they may be received in explanation or illustration, but not in proof." It should be observed that the doctrine of prohibition in the Kali age, of certain practices which are authorized by the Smritis, is enunciated by some of the Upa-Puránas, and cannot, therefore, be entertained by our courts, if the Puránas are not authorities in law.

Sources of positive law.—It has already been indicated that the Smritis and customs are the sources of the positive or lawyer's law. The definition given by Yájnavalkya, of Cause of Action, implies the same view: (Text No. 21). For, it is declared, that a Cause of Action arises when a person wronged in a manner *contrary* to the *Smriti or a Custom*, complains to the King. Manu also appears to support the same view; for, he ordains that the King should decide causes of suitors according to rules founded on *local customs and the codes of law*: (Text No. 19).

But it has already been observed that certain innovations have been introduced by the latest commentators of the Mahomedan period, and are contained in the Upa-Puránas or minor subsidiary Puránas which are modern fabrications by Bráhmanical writers. It is on the authority of these spurious works, that some recent commentators maintain that certain practices sanctioned or ordained by the Smritis must not be followed in this Kali age. Some of these practices were condemned by the Smritis themselves, some are declared by the Mitákshara and other principal commentaries to have ceased to be binding at present on the ground of the same being abhorred by the people, while the rest appear to have been opposed to the Bráhmanical interests. For instance, the caste superiority of the Bráhmanas depended according to the Smritis entirely on the study of the sacred literature and on possession of superior merit, in the absence of which they could not claim to be better than Súdras. The object which these writers seem to have in view, was, to secure by these innovations their hereditary superiority and exclusiveness by preventing mixture with lower castes. But Puránas cannot override the Smritis which are admittedly superior to the Puránas in authority. In order to obviate this difficulty, these comparatively recent commentators cite by the name of Smriti, those passages of these secondary Puránas which are विधायक-वाक्यानि, that is, which declare rules of conduct, or in other words, which enjoin men to do or abstain from doing anything.

Accordingly, the Pandits who were appointed to advise the judges of the British Indian courts, on points of Hindu law and usage, misled them by incorrectly representing these innovations to be as authoritative as the Smritis.

And Sir William Jones was misled into giving prominence to certain passages of an Upa-Purána on these innovations, by inserting their English version at the end of his translation of Manu's Code, which passages were palmed off on him, as Smritis or passages of law.

But it should be observed that the names of *Smriti* and *Purána* are given to different works; and while dealing with the relative authority of these *works*, the *Smritis* have been pronounced to be superior to the *Puránas*. Hence it is difficult to understand how some passages of the *Puránas* can be called *Smriti*.

It has already been observed that even passages of the Smriti, the origin of which may reasonably be traced to covetousness of the priests, or selfishness of any persons, are to be rejected as spurious and fraudulent interpolations.

Hence these innovations, in so far as they appear to be dictated by improper motives of the writers, cannot be regarded to be of any weight; far less can they be treated as authority.

As regards the relative authority of Smritis and customs when they are in conflict, it has already been shown that it is now settled law that the latter override the former.

But Kumárila Swámin and other commentators of the Mímánsá school of philosophy, who were opponents of the Buddhists and supporters of Bráhmanism, and took upon themselves the task of refuting the peculiar doctrines of Buddhism, felt themselves bound to maintain the superiority of the Sástras over human institutions, and were therefore unwilling to accept the authority of customs and usages that are contrary to the Sástras. Accordingly, those who reluctantly admitted the binding character of such customs and usages, did, however, maintain that their authority should be confined only to the locality or to the caste or the class of persons, where or among whom, they are found to prevail, that is to say, the authority of the Sástras should be curtailed only to that extent and no further.

Commentaries.—The Sruti and the Smriti are, theoretically speaking the sources of law. But all these are now practically replaced by the Nibandhas or digests or commentaries that are accepted as authoritative expositions of Hindu law in the different provinces. The commentators profess to interpret the law enunciated by the Smritis or Codes of Hindu law. A critical reader of the different commentaries on Hindu law will be impressed with the idea, that the positions maintained by them respectively, which are at variance with each other, cannot all be supported by the texts of the Smritis, which they profess to interpret, but which appear

to have been made subservient to their views, by ringing changes upon the language of the texts, rather than correctly interpreted. This fiction of interpretation is found in every system of law. A rule of law is sometimes enlarged in its operation so as to include a case not covered by its language, or curtailed so as to exclude a case that falls within its terms: and this is designated rational interpretation based upon intention. Whenever you have a rule that is rigid in theory and you wish to get out of its terms, you must have recourse to the fiction mentioned above. This mode of change of law is not peculiar to Hindu law, but is common to many systems of jurisprudence. The commentaries, however, have replaced the Smritis; and it is not open to any one to examine whether a particular position maintained by an authoritative commentary accepted as such in a locality, is really supported by the Sástras.

Of Hindu and Mahomedan periods.—The commentaries of the Hindu period appear to have been composed by practical lawyers, while those that came into existence during the Mahomedan rule, were written by "Sanskritists without law," who seem to be narrow-minded Bráhmanas having no concern with the administration of justice, and whose works are more religious and speculative than secular and practical, and contain many innovations of a retrograde character. The Mitákshará and the Dáyabhága, the two commentaries of paramount authority giving rise to the two principal schools of Hindu law, are works of the former description, compiled by persons of advanced views, who have developed and improved the Hindu law in many respects. There are many works of the latter description, including the treatises on adoption, which properly speaking, are not entitled to any authority as regards the novel rules sought to be introduced by them, upon the authority of the Upa-Puránas fabricated by Bráhmanical writers for the benefit of their own class.

Two schools.—The different commentaries have given rise to the several schools of Hindu law, which are ordinarily said to be five in number. But properly speaking there are only two principal schools, namely, the Mitákshará and the Dáyabhága Schools.

The Mitákshará is a running commentary on the Institutes of Yájnavalkya, by Vijnánesvara called also Vijnána-yogin who cites texts of other sages, and reconciles them where they seem to be inconsistent with the Institutes of Yájnavalkya. This concise commentary is universally respected throughout the length and breadth of India, except in Bengal where it yields to the Dáyabhága, on those points only in which they differ; but it may be consulted as an authority even in Bengal, regarding matters on which the Dáyabhága is silent. The Dáyabhága, however, is not a commentary on any particular code, but professes to be a digest of all the codes, while it maintains that the first place ought to be given to the code of Manu.

This commentary, or that portion of it which is now extant, is confined to the subject of partition or inheritance alone, whereas the Mitákshará is a commentary on all branches of law in its widest sense, professing as it does to elucidate the Institutes of Yájnavalkya.

The Mitákshará School may be subdivided into four or five minor or subordinate schools that differ in some minor matters of detail, and are severally accepted in the different provinces, where the Mitákshará is concurrently with some other treatises or with local customs, accepted as authority, the former yielding to the latter, where they differ.

Schools and Commentaries.—The schools, and the commentaries that are respected as authorities respectively, may be stated thus :—

Bengal School	...	Dáyabhága. Dáyatattva. Dáya-krama-sangraha. Mitákshará. Víramitrodaya.
Benares School	...	Mitákshará. Víramitrodaya.
Mithila School	...	Mitákshará. Vivádа-ratnákara. Vivádа-chintámani.
Bombay School	...	Mitákshará. Vyavahára-mayúkha. Víramitrodaya.
Madras School	...	Mitákshará. Smriti-chandriká. Víramitrodaya.
I may add, The Punjab School	...	Mitákshará. Víramitrodaya. The Punjab customs, compiled in the Riwaz-i-am.

The Víramitrodaya generally follows and maintains the doctrines of the Mitákshará. It refutes the contrary doctrines of the Bengal school meeting the arguments put forward by the founder of that school and by his follower Raghunandana the author of the Dáyatattwa, to support the positions that are opposed to the Mitákshará school. In the unchastity case, *Moniram* v. *Keri*, 5 C.S., 776 = 7 I.A., 115, the Judicial Committee held that the Víramitrodaya "may also, like the Mitákshará, be referred to in Bengal in cases where the Dáyabhága is silent."

The Schools of Hindu Law are recognized by the later commentators, and they cite the opinion of the founders of other schools

thus: (इति प्राच्याः, or इति दाक्षिणात्याः, and so forth) so say the eastern lawyers or the southern lawyers.

Works on adoption.—The Dattaka-Mímánsá and the Dattaka-Chandriká are two treatises on adoption, which have come to be regarded as authority by reason of their being translated into English at an early period of British rule, and of the mistaken view of their being works of authoritative commentators: and it is said that where they differ, the latter is accepted as an authority in Bengal and in Madras; while the former is respected in the other schools. But the truth is that the first purports to be written by a Benares Pundit in the middle of the seventeenth century, and the second appears to be a literary forgery; and the innovations introduced by them were nowhere followed by the people in practice, nor is there any cogent reason why they should be.

Dattaka-Chandriká a literary forgery.—There is great dispute regarding the authorship of the Dattaka-Chandriká. The work professes to have been written by Mahámahopádhyáya Kuvera. But notwithstanding, Sutherland, the learned translator, came to the conclusion that it was composed by the author of the Smriti-Chandriká, apparently from a misconception of the meaning of the sloka with which the book opens. The styles of the two works are so different that they cannot be held to have been written by the same author. In Bengal, however, there is a tradition that it was a literary forgery by Raghumani Vidyábhúshana who was the pundit of Colebrooke. There are only two slokas in the book, composed by the author; the opening one misled the learned translator of the work into the opinion mentioned above, and the concluding one which is an acrostic, supports the Bengal tradition. It runs as follows:—

र—म्येषा चन्द्रिका दत्त- पद्धते र्दर्शिका स्व-घु।

म—नोरमा सन्निवेशै -रक्षिणां धर्मसार—णिः॥

The tradition furnishes us with an account of the circumstances under which the book was written, and the internal evidence afforded by the book itself lends considerable support to it. The circumstances under which it was composed may shortly be stated thus: There was a well-known titular Raja of Bengal, who had adopted a son before a son was born to him. After his death a dispute arose between the real and the adopted sons regarding succession to the estate left by the titular Raja. The estate left by the Raja was supposed to be a Raj, and one of the questions raised was whether the adopted son could take a share of the Raj; and the other question was whether the adopted

son could take an equal share with the real legitimate son, regard being had to the fact that the parties were *Káyasthas* of Bengal, who were taken to be Súdras. Both these questions were to be answered in the affirmative according to the exposition of law contained in this book, and the book itself is believed to have been written at the instance of the party claiming by virtue of adoption.

The Dattaka-Mimánsá—also appears to be written on purpose to invalidate the affiliation of a daughter's son. It is doubtful whether it was really written by Nanda Pandita. The biased and forced arguments advanced by its author in support of the innovations introduced by him, especially in the second Section, give rise to a suspicion that it is similar to the Dattaka-Chandriká as regards its origin.

There is no cogent reason for regarding these treatises as authority. But the adventitous circumstance of being translated into English at a comparatively early period, and the ignorance of their age, led the judges to treat them as authority. Justice Knox who is a Sanskrit scholar held that their authority is open to examination, explanation, criticism, adoption, or rejection like any scientific treatises on European jurisprudence. But the Judicial Committee observes that their Lordships cannot concur with that learned judge, because, "such treatment would not allow for the effect which long acceptance of written opinions has upon social customs, and it would probably disturb recognised law and settled arrangements." Their Lordships, however, add,—"But, so far as saying that caution is required in accepting their glosses where they deviate from or add to the Smritis, their Lordships are prepared to concur with the learned judge."—Sri Balusu *v.* Sri Balusu, 26 I.A., 113, 132 = 22 M.S., 398.

Collector of Madura *v.* Mootoo Ramalinga.—The following extract from the judgment of the Privy Council in the case of Collector of Madura *versus* Mootoo Ramalinga Sathapathi, 12 M.I.A., 397, throws considerable light on several points and should be carefully perused:—

"The remoter sources of the Hindu Law are common to all the different schools. The process by which those schools have been developed seems to have been of this kind. Works universally or very generally received became the subject of subsequent commentaries. The commentator puts his own gloss on the ancient text; and his authority having been received in one and rejected in another part of India, schools with conflicting doctrines arose. Thus the Mitákshará, which is universally accepted by all the schools except that of Bengal, as of the highest authority, and which in Bengal is received also as of high authority, yielding only to the *Dáyabhága* in those points where they differ, was a commentary on the Institutes of Yájnavalkya; and the Dáyabhága which, wherever it differs from the Mitákshará, prevails in Bengal,

and is the foundation of the principal divergences between that and the other schools, equally admits and relies on the authority of Yájnavalkya. In like manner there are glosses and commentaries upon the Mitákshará which are received by some of the schools that acknowledge the supreme authority of that Treatise, but are not received by all. This very point of the widow's right to adopt is an instance of the process in question. All the schools accept as authoritative the text of Vasishta, which says, 'Nor let a woman give or accept a son unless with the assent of her lord.' But the Mithila School apparently takes this to mean that the assent of the husband must be given at the time of the adoption, and, therefore, that a widow cannot receive a son in adoption, according to the Dattaka form, at all. The Bengal School interprets the text as requiring an express permission given by the husband in his lifetime, but capable of taking effect after his death; whilst the Mayúkha and Kaustubha Treatises which govern the Mahratta School, explain the text away by saying, that it applies only to an adoption made in the husband's lifetime, and is not to be taken to restrict the widow's power to do that which the general law prescribes as beneficial to her husband's soul. Thus upon a careful review of all these writers, it appears, that the difference relates rather to what shall be taken to constitute, in cases of necessity, evidence of authority from the husband, than to the authority to adopt being independent of the husband.

"The duty, therefore, of an European Judge who is under the obligation to administer Hindu Law, is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular school which governed the District with which he has to deal, and has there been sanctioned by usage. For, under the Hindu system of law, *clear proof of usage will outweigh the written text of the law.* * * *

"The highest European authorities, Mr. Colebrooke, Sir Thomas Strange and Sir William Macnaghten, all concur in treating as works of unquestionable authority in the South of India the Mitákshará, the Smritichandrika, and the Madhavyam, the two latter being, as it were, the peculiar Treatises of the Southern or Dravida School. Again, of the Dattaka-Mimansa of Nanda Pandita, and the Dattaka-Chandrika of Devanda Bhatta, two Treatises on the particular subject of adoption, Sir William Macnaghten says, that they are respected all over India; but that when they differ the doctrine of the latter is adhered to in Bengal and by the Southern Jurists, while the former is held to be the infallible guide in the provinces of Mithila and Benares."

Non-Hindu view of Hindu Law.—Those that are not inclined to accept the Hindu idea of a divine origin of laws would have no hesitation to allow that they are based upon immemorial customs and usages, and call them the *unwritten* laws of India; and as being the law of the majority of the population these may be deemed the common law of the country. But the Hindu Law is not now the territorial law of Hindustan. In Hindu times the validity of customs was admitted, and the law of inheritance, marriage, &c., under the Smritis was therefore not purely territorial. The Hindus, however, had a complete code of laws, both adjective and substantive, and the latter was discussed under eighteen heads called topics of litigation, which resemble the *actions* of the English Common Law.

Branches of Hindu Law, now in Force.—Under the British rule the Hindus have been suffered to be governed by their own law as regards Succession, Inheritance, Marriage, Religious Institutions, and Caste:—Reg. IV of 1793, Sec. 15. Hindu Law has therefore become the personal law of the Hindus.

The Jurisprudence or positive law as dealt with in the Codes of the Hindu sages appears to be complete and exhaustive, and includes all branches of law, suitable to the exigencies of Hindu society, and actually prevalent therein; so that it cannot be said that the Codes were defective, and left out of consideration any department of law. And the charge of incompleteness brought forward by Sir Henry Maine in his Village Communities, in consequence of there being a singular scarcity of rules relating to tenure of land, and to the mutual rights of the various classes engaged in its cultivation,—appears to be erroneous and due to the misconception that the present system of land tenures which came into existence since the Permanent Settlement had always existed here.

The Hindu Jurisprudence is divided into two parts: the first deals with adjective law under the name of Vyavahára-Mátriká meaning literally "mother of litigation," and the second deals with the substantive law. All possible wrongs were at first divided into eighteen classes, and there were eighteen Forms of Action corresponding to them. Later on, another class was added to obviate the difficulty created by the earlier classification, similar to that which gave rise to the Court of Chancery in England, and another Form of Action was recognised corresponding to that class under the name of Miscellaneous प्रकीर्णक, in which the proceeding commenced at the instance of the King, who had to be moved by parties in cases instituted for their benefit, when these cases could not come under any one of the eighteen Forms of Action.—See Introduction to the English translation of the Viváda-Ratnákara, pages XVII *et seq.*

English versions of Sanskrit law-books.—Hindu law is locked up in Sanskrit the most perfect and difficult of the ancient classical languages: the codes and the commentaries are all written in it, to which our lawyers and judges have no access. They have, therefore, to acquire the knowledge of Hindu law from the English versions of the Sanskrit works, the English text-books on Hindu law, and the reports and the digests of the case-law.

As regards the translations of works on Hindu law, a few purport to be done by persons who were either almost ignorant of Sanskrit, or had but a smattering of the same. The Vivádá-chintámani purports to be translated into English from the original Sanskrit by a Bengali gentleman who had very little knowledge of Sanskrit: it was translated into Bengali by a Pandit appointed by him, and then the Bengali version was done by him into English. This accounts for the many mistakes that are found in this work. The author of the English version of the Smriti-Chandriká also, had only an imperfect knowledge of Sanskrit.

It is remarkable that some persons are affected by a peculiar weakness which creates a hankering after the false reputation of being a Sanskrit scholar, which may no doubt be of some advantage to a lawyer. It is not difficult for an educated Hindu whose mother tongue is derived from Sanskrit, to pick up a smattering of Sanskrit, and to deceive those that are completely ignorant of it, by a show of his really second-hand knowledge, and to pass for a Sanskrit scholar before them; and sometimes such a person is found to become ultimately so self-deceived as to fancy himself a master of that language, which in truth he is not. Mistakes arise not only from the translator's imperfect acquaintance with the original, but there are various other causes and circumstances from which errors and imperfections creep into the English translation, even when done by genuine Sanskrit Scholars. The Sanskrit works on law cannot be fully understood even by a Sanskrit scholar except with the aid of learned Pandits familiar with the traditional interpretations of them.

Besides, lawyers and judges without Sanskrit, sometimes misconstrue and misunderstand the meaning of passages of the English versions, in consequence of their ignorance of the method of writing and the process of reasoning adopted by the commentators. The Full Bench decision in the case of *Apáji* v. *Rám*, 16 B.S., 29, furnishes an instance of misapprehension of the meaning of a passage of the Mitákshará by the majority of the learned judges.

The division of the English versions into small paragraphs, made by Colebrooke and other translators, solely for the convenience of reference, misleads the readers to think each of these paragraphs to correspond to a verse in the original, and to be

complete in itself, whereas the originals are written in prose, quoting passages from the Smritis, which are no doubt in verse, in the majority of instances, and a paragraph may be a link in a chain of argument extending to more than one paragraph.

Who are governed by Hindu Law?—The Hindu law applies to Hindus by birth, that have not openly renounced Hinduism by adopting any other religious persuasion. Buddhists, Jainas and Sikhs of India who had been Hindus, continued to be governed by Hindu Law, notwithstanding their renunciation of the Hindu religion, as there was no civil law intimately connected with their religion: and they are still amenable to Hindu law. The Hindus and Buddhists were expressly excluded from the operation of the Succession Act, the present territorial law on the subject; and the Sikhs and Jainas appear to have been included under the term 'Hindu' in that Act. Hindu perverts to Islamism are subject to the Mahomedan law of inheritance which forms part of their divine law. Some difficulty had been felt about the law to be applied to Hindu apostates to Christianity, there having been no territorial law on the subject before the passing of the Succession Act in 1865 A.D. Hindu Law was applied to those that followed the customs of the Hindus in other respects.

In the case of Fanindra Deb Raikat (11 C.S., 463) the Judicial Committee have laid down that a family that was not Hindu by descent and origin, but had gradually adopted Hindu customs, was not, on that account, to be governed in all matters by Hindu Law unless proved to have been introduced into it as custom: and held that as the custom of succession upon adoption was not shewn to have been so, the party relying upon adoption had no title.

Migration and School of Law.—The Schools of Hindu Law applying as they do to Hindus of particular localities, may be called *quasi*-territorial. Hence it is the *primâ facie* presumption that a Hindu is governed by the school of law in force in the locality where he is domiciled. But this presumption may be rebutted by proof that the family to which he belongs had migrated from another province in which a different school prevails; for, in such a case, the presumption of law is in favour of the retention by the family, of the law and usage of the country of its origin. But this presumption again may be rebutted by proving that the family has adopted the law and customs of the place of its domicile, and then it will be subject to the School prevailing in that place. (Ram *versus* Chandra, 20 C.S., 409; Soorendra *versus* M. Heeroomonee, 10 W.R., P.C., 35; Lukkea *versus* Gunga, W.R., G., 56).

The mode in which the religious ceremonies are performed is relied on as the test for determining whether a family proved to have

migrated from one province to another, adheres to the law of the former place or has adopted the doctrines prevalent in the place of its new domicile. (Rutchputty *versus* Rajendra, 2 M.I.A., 102; R. Padma *versus* B. Dooler, 4 M.I.A., 259; R. Srimuty *versus* R. Koond, 4 M.I.A., 292; Ram *versus* Kaminee, 6 W.R., 295).

Statutes on Hindu law.—The Hindu law has to a certain extent been modified and supplemented, (1) by legislative enactments, and (2) by judicial decisions of the highest tribunals in England and India.

The Acts relating to Hindus are—Act XXI of 1850, cited as the *lex loci* Act, which repeals those provisions of the Hindu and the Mahomedan laws, that exclude from inheritance persons professing a religion different from that of the person, succession to whose estate is in dispute;

Act XV of 1856, which legalizes the re-marriage of Hindu widows in certain cases, and declares their rights and disabilities on re-marriage;

And Act XXI of 1870 called the Hindu Wills Act and Act V of 1881 called the Probate and Administration Act, which extend to Hindu Wills certain provisions of the Succession Act with some additions and alterations.

Case law.—I now come to the most important source of the present Hindu law, namely, the case-law consisting of the decisions of the Judicial Committee of His Majesty's Privy Council, and of the Highest Courts of Justice in this country. These have practically superseded the Nibandhas or Commentaries. These decisions immediately affect the parties to suits, but as precedents they are binding on the entire community. In applying the law to particular cases, the judges expressly or by necessary implication enunciate what the law is: and the view of the law expressed and acted upon by them serves as a guide in similar cases arising subsequently, and is taken to have a binding force. An expression of opinion on a point of law, not necessary to be determined for the purpose of deciding the case, though respected, is not considered to be binding and is called an *obiter dictum*.

European authorities and judges.—The Hindu law as contained in the Commentaries is silent on many points of detail, and the judges of the superior courts have had to supply this deficiency by laying down rules on such points as they were called upon to decide. The administration of Hindu law by the English judges shows forth in a clear light the administrative capacity, the indomitable energy, the scrupulous care and the strong common sense of the English nation. They commenced to administer justice with the aid of Pundits appointed to advise them on Hindu law. Within a short time the leading treatises

and a few others were gradually done into English by Sir W. Jones, Mr. Colebrooke and Mr. Sutherland. Systematic and concise treatises on Hindu law were also composed by Sir F. Macnaghten, Sir T. Strange and Sir William Macnaghten. The opinion of these learned text-writers is respected as being based upon considerable research, and consultation with learned pundits. It cannot but be admitted by an impartial and competent critic on perusing the reports of cases, that in the majority of instances the conclusions arrived at by the English judges are perfectly consistent with the law and feelings of the Hindus. But there were difficulties almost insurmountable by foreigners in the way of a correct understanding and appreciation of the argumentative works on a system of ancient law suited to the condition and the feelings of a people, opposed to their own; especially when they had no access to the original books, and the principles of the system of reasoning, followed by the Hindu writers. The rules of Hindu law on many points *seemed* to the English lawyers to be vague and capable of any interpretation. Where therefore arguments *pro* and *con* seemed to them to be equally balanced on any particular point of law they would naturally be disposed to adopt a view that accorded with their own feelings, associations and *præsumptiones hominis*, but which might be altogether opposed to the Hindu view.

In this connection should be read the following observations made by the Judicial Committee in the case of Runguma *v.* Atchama, 4 M.I.A., 1 (97):—"At the same time it is quite impossible for us to feel any confidence in our opinion upon a subject like this, when that opinion is founded upon authorities to which we have access only through translations, and when the doctrines themselves, and the reasons by which they are supported or impugned, are drawn from the religious traditions, ancient usages, and more modern habits of the Hindus, with which we cannot be familiar."

The learned writers mentioned above who are called European authorities on Hindu law, are entitled to the gratitude of the general body of Hindus for having brought to light, as it were, their law which had been locked up in a dead language, the knowledge of which was practically the monopoly of the Bráhmanical hierarchy, who would teach it to none but the members of the regenerate classes.

Sanskrit learning.—Although the members of all the regenerate classes were entitled to *learn* the Sástras, yet the Bráhmanas claimed for themselves the exclusive privilege of *teaching* them. The regenerate classes other than the Bráhmanas have almost disappeared or become reduced to the position of Súdras; so that in Bengal if the Bráhmanas, a few Rajputs

claiming to be Kshatriyas, and a section of the Vaidyas claiming to be a mixed regenerate class, be excepted, the rest of the Hindus who form the majority follow the practices prescribed by the Sástras for Sudras, and most of them are either Sudras or inferior to them. The Bráhmanas were so jealous of their exlcusive privilege of Sanskrit learning, that even the Pundits who accepted the appointment of professors in the Government Sanskrit College of Calcutta, established in 1824 A.D., and who were on that account considered heterodox by the more orthodox members of their own class, could not be induced to impart instructions to students belonging to other than the twice-born castes, so that the Government was at first compelled to adopt the rule that none but boys of the regenerate classes could be admitted as students of that College. It was in 1848 A.D., that the Káyasthas, and later on other classes of Hindus, obtained the privilege of becoming students of that College. It was, however, not so much by the action of the Government in conferring the privilege on all Hindus, of reading in the Sanskrit College, as by the action of the Calcutta University in making Sanskrit the compulsory second language for Hindu students, that Sanskrit learning has been disseminated amongst Hindus. Previously Sanskrit was not taught in our English schools, and the result was that the Hindu students of all classes, educated in those schools, who had graduated before 1869 A.D., were as a general rule ignorant of the classical language of their own country.

Her Majesty, Defender of Hindu Faith.—The people of the present day are not aware of the moral thraldom and the religious disabilities under which the general body of the Hindus laboured, and which have been, and are silently and gradually being, removed by the benign influence of the British rule. It is indeed a very high privilege conferred by the British Government on the general body of the Hindus, that they do now enjoy an easy access to their sacred books which were beyond the reach not only of the ordinary people, but also of the Hindu students of the former English schools without Sanskrit. Englishmen as well as the people of this country will perhaps be astonished to hear that practically the British Government has bestowed on the mass of the Hindus the privilege of perusing their own religious books which is expressly denied them by the Bráhmanical legislation providing severe punishment for Súdras trying to pry into the sacred literature. And such was the ignorance of the religious truths taught in the sacred books, that the English-educated Hindus had their faith in their religion considerably weakened, and some of them had recourse to other systems of faith. But with the revival of Sanskrit learning, there has been a revival of the

Hindu faith to an extent unknown before. And as it is during Her Majesty's prosperous and glorious reign, that this grand consummation has taken place, Her Majesty may properly be styled the Defender of the Hindu Faith. The Hindu religion being moulded on the principles of asceticism, the revival of the Hindu faith can by no means be politically dangerous, as is erroneously thought by some persons.

Tying up of property, and alienation.—The law of an independent country may be taken to represent the character and feelings of the people. For instance, the English law is said to abhor the tying up of property. And regard being had to the fact that England is a commercial and manufacturing country, that its people are characterized by prudence and self-reliance, and that a high tone of morality is generally prevalent amongst them, the above feature of the English law is required by the exigencies of English society and is conducive to its welfare. But the same rule cannot be applied to India, where the state of things is quite different, and where the tying up of property was the general rule, and alienation of it could be justified only for special causes. If we bear in mind that India is an agricultural and not a commercial nor a manufacturing country, that its people are more subjective than objective, that the caste of the Hindus debars them from the freedom of choice in respect of a calling or occupation, that the father gets his minor sons married, and that the sons look to the ancestral property for the support of themselves and of their family, we cannot entertain any reasonable doubt that the rule of Hindu law which imposes limitations on the father's right of alienation of the ancestral property, except for legal necessity, was the most salutary one. And what the exigencies of Hindu society require, and whether it requires a change in the law, are questions most difficult to solve. And I may say without meaning any offence that the effect of an exclusive English education has been more or less to anglicize its Hindu recipients in their ideas and feelings, and to create a wide gulf between them and the bulk of the Hindu community who retain their old habits of thought.

The safest principle to follow seems to be that the Hindu law as it is should in all cases be adhered to, and no change should be introduced under the pretext of interpreting the same: the Legislature may be appealed to should any rule of law require a change.

It is remarkable that as regards the treatment of debtors and creditors the Legislature and the Highest Tribunals appear to be guided to a certain extent by opposite principles. While the Legislature thinks that in this country the debtors should be

protected against the creditors, and passes such Acts as the Chota-Nagpore Encumbered Estates Act, the Oudh Encumbered Estates Act, and the Deccan Ryots Relief Act, for the protection of the debtors, and recognizes the same principle in framing the Bengal Tenancy Act which does not allow the voluntary transfer of occupancy rights; our courts of justice are changing the Mitákshará law by enabling the father's creditors to seize and sell the family property, and to deprive the family of its hereditary source of maintenance.

Development of Hindu Law by our Courts.—As you are required to read certain chapters of the Mitákshará and the Dáyabhága, I think it my duty to point out to you the principal points in which there seems to be a divergence between the Commentaries and the judicial decisions. They are as follows:

1. That there is no distinction in Bengal between the grandparental or ancestral and the father's self-acquired property as regards his power of alienation when he has male issue.

2. That the Hindus governed by the Dáyabhága School, and others in respect of their separate property, have the power of testamentary disposition.

3. That in Bengal a son has not even the right to maintenance as against his father possessed of ancestral property.

4. That according to the Mitákshára School the son's interest in the ancestral property is liable for the payment of the father's debts if not contracted for an illegal or immoral purpose.

5. The alteration in the order of succession according to the Dáyabhága and its well-understood traditional interpretation.

6. The curtailment of the rights of females under both the Schools of law, and especially of those under the Mitákshará law by extending the Dáyabhága principles to them.

7. The theory that an adopted son is entitled to all the rights and privileges of a real legitimate son, save and except those that have been expressly withheld from him.

You will observe that the second and the third propositions depend upon the first, which again seems to have been arrived at by a misapplication of the doctrine of *factum valet*. A careful perusal of the second chapter of the Dáyabhága will convince the reader that the father's estate in ancestral immoveable property resembles 'the widow's estate' with this difference that the restrictions on the father's right of alienation except for legal necessity are imposed upon his estate for the benefit of his male issue, whereas the limitations on the widow's estate form the very substance of its nature, and are imposed upon her not merely for the benefit of reversioners. If the intention of the founder of the Bengal School had been to imply that a father is,

as against his male issue absolute master of the ancestral real property, he would not have entered into a long discussion in order to maintain that on partition of such property, the father is entitled to a share twice as much as is allotted to each of his sons. To argue out at great length that the father on partition of ancestral property is entitled to a double share, and at the same time to declare him the absolute owner of the ancestral estate, would be like the ravings of a madman, to use a favorite expression of the Hindu commentators. The misapprehension appears to have arisen from the extension to ancestral property, of the doctrine of *factum valet* which relates to the property acquired by the father himself.

The acute English lawyers that were connected with the Supreme Courts, either as judges or as advocates, are responsible for some of the changes noted above. The Supreme Court had to deal mostly with the Bengal school, and its decisions were respected by the Sudder Court that had to administer three schools of Hindu law, prevalent in the territories within its jurisdiction, in the greater portion of which the Dáyabhága is followed. The judges and the pleaders of the latter Court were more familiar with the Bengal law, and unconsciously extended the Dáyabhága rules to the Mitákshará cases. And when this had been done in some cases, and the correctness of the decision was then called into question, it was held to be too late to re-open the point: for, *Communis error facit jus.*

In early times women laboured under great disabilities, the Mitákshará confers on them rights and privileges so as to place them almost on a par with men. In some respects women are placed by the founder of the Bengal School in a more favorable position than what they occupy under the Mitákshará, but it is fenced in by limitations. The Mitákshará females have been subjected to the Bengal limitations, while the advantageous position enjoyed by the Bengal females could not be given them. Under both the schools, however, the law relating to females appears to have been construed rather against them. It may be that the Anglo-Hindu lawyers could not conceive the idea that in India which is so backward in material civilization, females could enjoy privileges that were denied to them in England.

The order of succession according to the Bengal School has also been changed upon the assumption that it is based entirely upon the *pinda* theory introduced by the founder of the school. And the theory has been so explained as to render the order of succession expressly laid down by Jímútaváhana, inconsistent with the theory attributed to that acute logical writer. According to the present view, a fraternal nephew's daughter's son is to

be preferred to the nephew's son's son, a cognate taking in preference to an agnate of the same degree, although they would succeed in the reverse order to the estate of the brother and the nephew, through whom they are related to the *propositus*: a somewhat unique development of law, opposed to the very spirit of Hindu law, and unknown to any other system of Jurisprudence. It is a doctrine to which no Hindu Pandit versed in Hindu law, can be found to give his assent.

Stare decisis & Communis error facit jus.—Whilst making the above observations, I must ask you to specially note that the law as laid down in the decided cases must be accepted for the present as settled law, and justice will be administered in the courts in accordance therewith, so long as they are not upset by authority. When a particular view of law has been taken in a series of cases, the judges though convinced of its erroneousness, think themselves bound to follow it, for otherwise they might disturb innumerable titles. But having regard to the facts that the people of this country are extremely conservative and tenaciously adhere to their customary law, that they do oftener consult the pundits than lawyers on matters of Hindu law, that justice is administered by the highest tribunals in a language strange to the people, and that the case-law is not made accessible to the people by translating the reports of cases into their languages, it is doubtful whether the strictest adherence to the maxim *stare decisis* is justifiable in all matters.

In the recent case of *Bhagwan Sing* v. *Bhagwan Sing*, the Lords of the Judicial Committee are reported to have observed:—"For 80 or 90 years there has been a steady current of authority one way, in all parts of India. It has been decided that the precepts condemning adoptions such as the one made in this case are not monitory only, but are positive prohibitions, and their effect is to make such adoptions wholly void. That has been settled in such a way and for such a length of time as to make it incompetent to a Court of Justice to treat the question now as an open one:"—21 A.S., 412.

In another case their Lordships have declared that *Communis error facit jus* is a sound maxim: Jagdish *v.* Sheo, 28 I.A., 100 (109)=5 W.N., 602.

It is, however, to be regretted that their Lordship did not consider the question whether these maxims should be followed in all cases governed by Hindu law, having regard to the peculiar circumstances and difficulties connected with the administration by their Lordships, of justice according to that law, as well as to the fact that some of the principles underlying these maxims are wanting in this instance.

CHAPTER II.

DEFINITIONS.

ORIGINAL TEXTS.

१। सपिण्डता तु पुरुषे सप्तमे विनिवर्त्तते।

समानोदकभावस्तु जन्मनाम्नोरवेदने॥ मनुः—५। ६०।

1. But the *sapinda* relationship ceases in the seventh degree (from the father); the *samánodaka* relationship, however, ceases if the descent and the name are unknown.—Manu v. 60.

२। सपिण्डता तु पुरुषे सप्तमे विनिवर्त्तते।

समानोदकभावस्तु निवर्त्तेताचतुर्दशात्।

जन्मनाम्नोः स्मृतेरेके तत्परं गोत्रमुच्यते॥ मिताक्षरोद्धृत-

बृहन्मनुवचनम्॥

2. But the *sapinda* relationship ceases in the seventh degree (from the father); the *samánodaka* relationship, however, ceases after the fourteenth; according to some, it exists if the descent and the name are remembered: the word *gotra* is declared to comprise these.—Vrihat-Manu cited in the Mitákshará 2, 5, 6.

३। प्रपितामहः पितामहः पिता स्वयं सोदर्य्या भ्रातरः सवर्णायाः पुत्रपौत्रप्रपौत्राः। एतान् अविभक्तदायादान् सपिण्डान् आचक्षते। विभक्तदायादान् सकुल्यान् आचक्षते। सत्स्वपत्येषु तद्गामी ह्यर्थो भवति सपिण्डाभावे सकुल्यः तदभावे चाचार्य्योऽन्तेवासी ऋत्विग्वा हरेत् तदभावे राजा॥

दायभागधृत-बौधायनवचनम्।

3. The paternal great-grandfather, the paternal grandfather, the father, the man himself, his brother of the whole blood, his son and son's son and son's son's son by a woman of the same tribe: all these participating in undivided *dáya* or heritage are pronounced *sapindas*. Those who participate in divided *dáya* or heritage, are called *sakulyas*. Male issue of the body being left; the property must go to them: on failure of *sapindas*, the *sakulyas*;

in their default, the preceptor, the pupil, or the priest; in default of these, the king; shall take (the property.)—Baudháyana cited in the Dáyabhága xi, i, 37.

The author of the Dáyabhága takes the word "*dáya*" in this text, to mean *pinda* or funeral oblation. See D.B., xi, i, 38.

४। त्रयाणामुदकं कार्य्यं त्रिषु पिण्डः प्रवर्त्तते।
चतुर्थः सम्प्रदातैषां पञ्चमो नोपपद्यते॥
अनन्तरः सपिण्डाद्-यत्तस्य तस्य धनं भवेत्।
अत-ऊर्द्धं सकुल्यः स्याद्-आचार्य्यः शिष्य एव वा॥

मनुः—९। १८९-१८७।

4. To three must libations of water be made, to three must *pinda* or oblations of food be presented; the fourth is the giver of these offerings: but the fifth has no concern with them. Whoever is the unremote from (among) *sapinda*, his property becomes his. After him the *sakulya* is the heir, (then) the preceptor or the pupil.—Manu ix, 186-187.

The third line in the above extract from Manu has been translated by Colebrooke, thus: "To the nearest *sapinda* the inheritance next belongs." I have given the literal rendering for the purpose of showing the peculiar wording of the line, such as requires grammatical explanation. The text is cited in the Mitákshará 2, 3, 3, and Visvesvara Bhatta and Bálambhatta, the two commentators of the Mitákshará, have explained the above text of Manu, while commenting on that part of the Mitákshará, where the same is cited, thus:

"यः सपिण्डात् अनन्तरः" सन्निहितः "तस्य" सपिण्डसन्निहितस्य "धनं तस्य" सपिण्डसन्निहितस्य "धनं भवेत्"। विश्वेश्वरभट्टः।

"Whoever is the unremote" *i.e.*, nearest "from (among) the *sapinda*, his," *i.e.*, the nearest *sapinda's*, "property becomes his," *i.e.*, the nearest *sapinda's* "property."—Visvesvara Bhatta.

सपिण्डादिति दूरान्तिकार्थैरिति षष्ठ्यर्थे पञ्चमी। तथाच, सपिण्डस्य योऽनन्तरः सन्निहितः तस्य सपिण्डस्य धनं तस्य सपिण्डसन्निहितस्य धनं भवेत् इत्यर्थः। बालम्भट्टः।

The ablative case in the word "from (among) the *sapinda*," is used in the genitive sense, agreeably to (the aphorism of Pánini

the celebrated grammarian) दूरान्निकार्यैः &c., accordingly the meaning is,—"whoever is unremote," *i.e.*, nearest "of the *sapinda*, his," *i.e.*, the *sapinda's* "property becomes his," *i.e.*, the nearest-of-the-*sapinda's* "property."—Bálambhatta.

These are merely grammatical comments, but the rule intended to be laid down is what is clearly expressed in Colebrooke's lucid translation of the text, given above. The context of the Mitákshará, in which the above text of Manu is cited, shows beyond the shadow of a doubt that the word *sapinda* in that text is taken by the Mitákshará in its etymological sense of any relation near or distant, and that the rule applies to heirs of all descriptions whether *sapindas* technically so called, or *samánodakas*, or *sagotras* or *bandhus*. Hence the suggestion made by some writer that Visvesvara Bhatta and Bálambhatta mean to indicate by those comments that two persons must be *sapindas* of each other, in order that they may inherit from each other,—is not only fanciful but simply absurd, being founded as it is upon the erroneous assumption that the word *sapinda* in the above text of Manu bears the limited sense of relations within seven degrees or five degrees,—an assumption contrary to the Mitákshará itself which those commentators are elucidating in these passages.

५। पितरो यत्र पूज्यन्ते तत्र मातामहा ध्रुवं ॥

5. Where the paternal ancestors are worshipped, there the maternal ancestors also should certainly be worshipped.

६। अविभक्त-धनाख्येते सपिण्डाः परिकीर्त्तिताः। ब्रह्मपुराणम्।

6. But these whose property is undivided, are pronounced *sapindas*.—Brahma-Purána.

DEFINITIONS.

Sapinda.—The term *sapinda* means one *of the same pinda*. The word *pinda* is used in various senses: it signifies thickness, mass, corridor of a house, a ball, food, body which is but assimilated food; and food for departed ancestors, such as a ball composed of rice, &c., presented to the *manes* of ancestors at the Sráddha ceremony.

In the Hindu law books the term has been used in two different senses: in the one sense, it means a relation connected through the same body; and in the other, it means a relation connected through funeral oblations of food.

According to the Mitákshará.—In the Mitákshará the term *sapinda* is used in the sense of, one *of the same body, i.e.*, a blood relation. In this literal sense the term would include all relations however distant. But this derivative denotation of the term, is curtailed by a technical limitation; and so it includes relations within the seventh degree according to the Hindu mode of computation. Then again there is this further restriction that this term when used without qualification, signifies agnatic relations only, *i.e.*, the relations of the same *gotra*, the relations of a different *gotra* being included under the term *bandhu* in the Mitákshará.

According to the Mitákshará, therefore, the *sapindas* of a person are, his six male descendants in the male line, six male ascendants in the male line, and six male descendants in the male line of each of the six male ascendants,—altogether forty-eight relations. (See table *infra* p. 41).

The lawfully wedded wives of these relations as well as of the person himself are his *sapindas*. The sacrament of marriage is believed to constitute physical unity of persons of the husband and the wife.

Computation of degrees.—The Hindu mode of computation of degrees is the same as that adopted by the canonists and is different from the English or Civilian mode which is adopted in the Succession Act, Sections 21 and 22, and according to which you are to exclude the *propositus*, and to count as one degree each ancestor, and each descendant lineal or collateral down to the relation whose degrees of distance from the *propositus* you are computing. According to the Hindu or canonist mode which is also called the classificatory mode, you are to count the *propositus* as one degree, and then count his as many ancestors as will make up the given number, taking each ancestor as one degree, and then count as many descendants of the *propositus* himself, and of each of the said ancestors, as together with the *propositus* or that ancestor respectively, will make up the given number. In the above enumeration of the male *sapindas* according to the Mitákshará, you have an instance of relations within seven degrees; and in the enumeration given below, of the first class Dáyabhága *sapindas*, you have an instance of relations within four degrees.

In this connection, I should draw your attention to a Madras decision (7 M.S., 548), in which it has been held that a person's maternal grandfather's brother's daughter's daughter is beyond five degrees and therefore eligible for his marriage according to the Mitákshará. It is difficult to understand how she could be held to be beyond five degrees except according to

the English mode of computation of degrees. The Hindu judge who was a party to that decision appears to have been "a lawyer without Sanskrit"; otherwise, the error would not have crept into the judgment.

According to the Dáyabhága.—The above definition of *sapinda* is not altogether lost sight of, in the Dáyabhága. But the author of that treatise explains it to relate to marriage, mourning, &c., and not to inheritance. For the purpose of inheritance, he takes the word *sapinda* in the sense of one connected through the same funeral oblation.

According to the Dáyabhága as understood by the Full Bench in the case of *Guru Gobinda Shaha Mandal*, 5 B.L.R., 15=13 W.R., F.B., 49, the term *sapinda* includes three classes of relations.

The first class includes those relations of a person with whom that person, when deceased, and after the *sapindíkarana* ceremony, partakes of undivided oblations. They are his three male descendants in the male line, three male ascendants in the male line, and three male descendants in the male line, of each of the three male ascendants: or in other words, the son, grandson and greatgrandson; the father, grandfather and great-grandfather: the brother, brother's son and brother's grandson; the paternal uncle, his son and grandson; as well as the paternal granduncle, his son and grandson;—altogether fifteen relations. The lawfully wedded wives of these relations as well as of the person himself are his *sapindas* in this sense. It is worthy of remark that the Hindus living in joint families could not conceive an idea of heaven without joint family, the first class *sapindas* are in fact the members of the joint family, associated together in heaven after death. (See table *infra* p. 40).

The second class comprises those relations of a person that present oblations participated in by that person, when deceased, but do not partake of undivided oblations with him. They are the grandsons, by daugther of the person himself, of his three paternal ancestors, as well as of the son and grandson of the person himself and his three paternal ancestors,—altogether twelve relations. (See table *infra* p. 40).

The third class comprehends the three maternal grandsires, to whom the deceased was bound to offer oblations, and those relations that present oblations to them. They are the three maternal grandfathers, three male descendants of each of them, and the grandsons by daughter, of the three grandsires and of two male descendants of each of the three grandsires,—altogether twenty-one relations. (See table *infra* p. 41).

You will yourself be in a position to draw out the list of

relations falling under each class mentioned above, if you bear in mind the following propositions in connection with the *Párvana Sráddha* ceremony, namely: (1) A person is bound to offer funeral cakes to his three immediate *sagotra* ancestors male as well as female, and to his three immediate maternal male grandsires. (2) A person after his death, and after the *sapindíkarana* ceremony partakes of undivided oblations with his three *sagotra* male ancestors with whom he is united by that ceremony. The *sapindas* of a person are (according to the Full Bench) those relations with whom he partakes of undivided oblations, those who offer oblations enjoyed by him, those to whom he was bound to present oblations, as well as those who offer oblations to those to whom he was bound to present oblations.

In connection with this subject it ought to be particularly borne in mind that if a person die during the lifetime of one or two of his three immediate *sagotra* ancestors, then his *sapindíkarana* ceremony which must be performed with three *sagotra* ancestors, is to be performed by uniting him with two or one respectively of his paternal ancestors further removed than three degrees. Thus, most, if not all, of the *sakulyas* may come under the first class of *sapindas*.

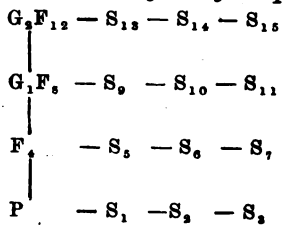
According to all the Sanskrit commentators, the term *sapinda* in the sense of connected through funeral oblations, includes the first class only: of these also, the three ancestors only are *sapindas* in the primary sense, the rest are so in a secondary sense. And it is extremely doubtful whether the author of the Dáyabhága intended to apply the term to all, if to any, of the latter two classes, except in a figurative sense. Srikrishna the commentator of the Dáyabhága and author of the Dáyakrama-sangraha, however, refuses to call them *sapindas*.

Sakulya.—The term *sakulya* means one belonging to the same *kula* or family, and designates two groups of heirs according to the Dáyabhága. The first group of *sakulyas* of a person comprise the 4th, 5th and 6th male descendants in the male line of that person, and of his father, grandfather and great-grandfather; as well as the 4th, 5th and 6th paternal male ancestors in the male line, and six male descendants in the male line of these ancestors; altogether thirty-three relations. The term *sakulya* therefore includes those male *sapindas* according to the Mitáksharà, that do not fall under the first class Dáyabhága *sapindas* as enumerated above. The term *sakulya* is not used in the Mitáksharà for denoting any class of heirs.

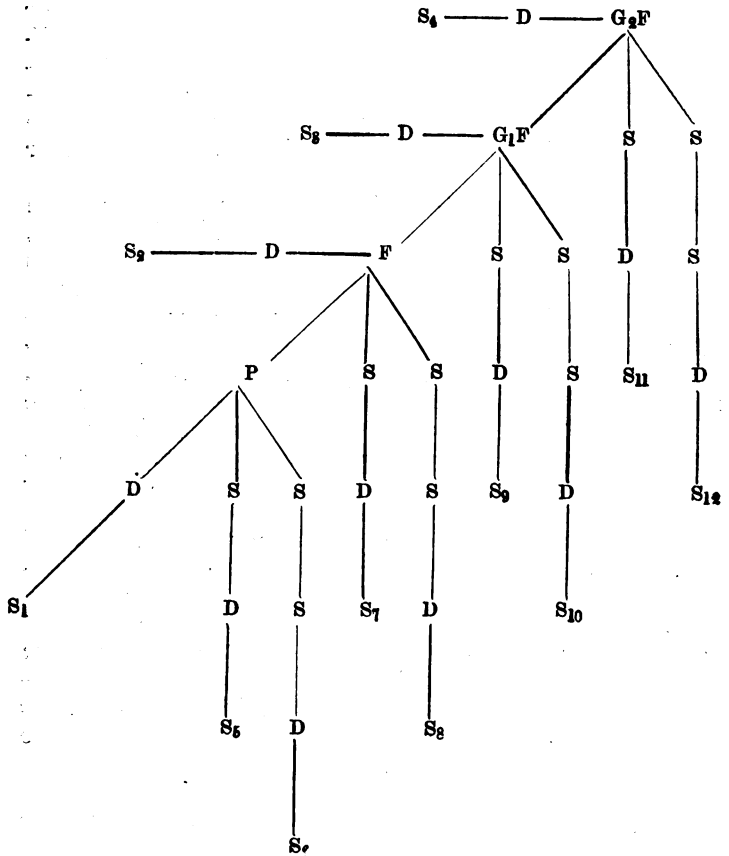
Besides the above meaning, the author of the Dáyabhága puts upon the term *sakulya* as used in Manu's Text No. 4, another sense in which it includes the group of heirs also called *samánodakas*.

The following tables will help you in understanding the *sapinda* and the *sakulya* relationship.

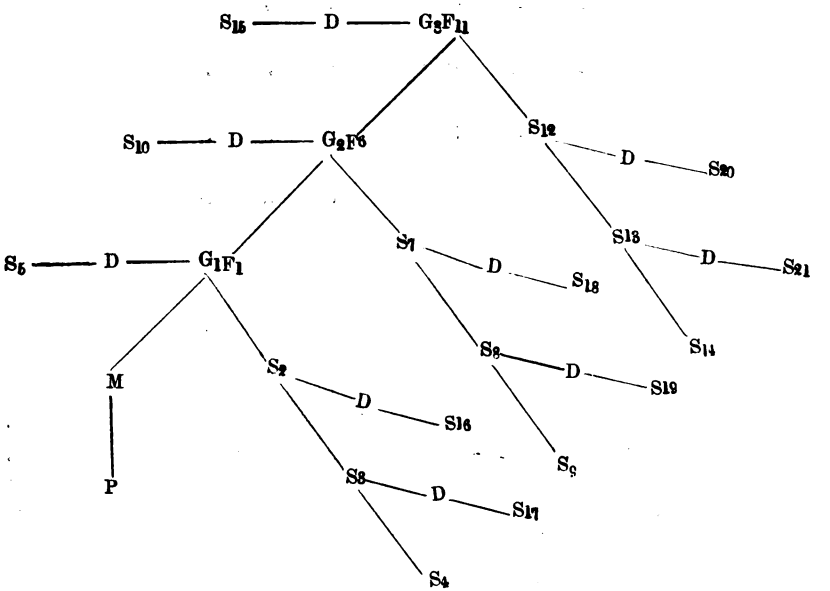
The first class *Dáyabhága sapindas.*



The second class *Dáyabhága sapindas.*



The third class *Dáyabhága sapindas.*



The *Mitákshará sapindas.*

G_5F_{19}	— S_{20}	— S_{21}	— S_{45}	— S_{46}	— S_{47}	— S_{48}	
G_4F_{16}	— S_{17}	— S_{18}	— S_{41}	— S_{42}	— S_{43}	— S_{44}	
G_3F_{13}	— S_{14}	— S_{15}	— S_{37}	— S_{38}	— S_{39}	— S_{40}	
G_2F_{10}	— S_{11}	— S_{12}	— S_{33}	— S_{34}	— S_{35}	— S_{36}	
G_1F_7	— S_8	— S_9	— S_{29}	— S_{30}	— S_{31}	— S_{32}	
F_4	— S_5	— S_6	— S_{25}	— S_{26}	— S_{27}	— S_{28}	
P	— S_1	— S_2	— S_3	— S_{22}	— S_{23}	— S_{24}	

The first group of *Sakulyas*.

$G_5F_{21} - S_{23} - S_{29} - S_{30} - S_{31} - S_{32} - S_{33}$

$G_4F_{20} - S_{21} - S_{22} - S_{23} - S_{24} - S_{25} - S_{26}$

$G_3F_{13} - S_{14} - S_{15} - S_{16} - S_{17} - S_{18} - S_{19}$

$G_2F - S - S - S - S_{10} - S_{11} - S_{12}$

$G_1F - S - S - S - S_7 - S_8 - S_9$

$F - S - S - S - S_4 - S_5 - S_6$

$P - S - S - S - S_1 - S_2 - S_3$

Samánodakas.—The term *samánodaka* includes all agnatic relations of the same *gotra* or family, within fourteen degrees calculated according to the Hindu mode of computation; that is to say, thirteen male descendants in the male line, thirteen similar ascendants, and thirteen similar descendants of each of these thirteen ascendants, excepting, however, those included under the terms *sapinda* and the first group of *sakulya*. According to some, it comprises all such *sagotras* or agnatic relations whose common descent and name are remembered. The meaning of the term *samánodaka* is the same as *sagotra*, in the Mitákshará: but in the Dáyabhagá, it is limited as mentioned above.

Sagotras.—Two persons are *sagotra*, or of the same family, if both of them are descended in the male line from the *rishi* or sage after whose name the *gotra* or family is called, however distant either of them may be from the common ancestor. Every Hindu knows the *gotra* to which he belongs.

The later Bráhmana writers say, that properly speaking Bráhmanas alone belong to some *gotra* or other as being descended from the *rishi* who is the founder of the *gotra* or family; but the three inferior tribes have no *gotra* of their own. But this theory seems to be opposed to admitted facts. For Visvámitra, who was a Kshatriya by birth, and Vasishtha who was not a pure Bráhmana by birth, are admittedly founders of *gotras*, or ancestors of many founders of *gotras*.

Thus a text of Smriti cited by Raghunandana says:—

जमदग्नि-भरद्वाजो-विश्वामित्रात्रि-गोतमाः ।
वसिष्ठ-काश्यपागस्त्या-सप्तयो-गोत्रकारिणः ।
एतेषां यान्यपत्यानि तानि गोत्राणि मन्यते ॥

Which means,—"The sages—Jamadagni, Bharatvája, Visvámitra, Atri, Gotama, Vasistha, Kásyapa, and Agastya—were progenitors of *gotras*: those that were descendants of these, are known to be the *gotras*."

The fact that persons of different castes have the same *gotras*, rather proves that the caste system itself is a later institution or classification based upon occupations and qualifications,—a theory supported by many Sanskrit works of authority.

The samána-pravaras are descendants in the male line of the three paternal ancestors of the founder of a *gotra*. The term is used in the Dáyabhága, but not in the Mitákshará. Raghunandana cites the explanation given by Mádhava-Áchárya of the term *pravara*, thus,—प्रवरस्तु मौल-प्रवर्तकस्य मुनेः-अपत्यानां-मुनि-गणः, इति माधवाचार्यैः।,—which means "Mádhava-Áchárya says, that *pravara* is the group of sages distinguishing the sage who is the founder of a *gotra*." It seems that two different *gotras* may have the same name, and they are distinguished from each other by their *pravaras*.

———o———

BANDHUS.

Bandhu.—The term *bandhu* is used in the Mitákshará, and not in the Dáyabhága, to designate a class of heirs; and according to the Mitákshará, it means and includes, as I have already said, the *bhinna-gotra sapindas* or relations belonging to a different family. The meaning of the term *sapinda* is explained in the Mitákshará while commenting on the slokas of Yájnavalkya's Institutes, in which the qualifications of the damsel to be married by a man are dealt with. It is declared that the intended bride must, amongst others, be non-*sapinda*, must not belong to the same *gotra* or *pravara*, and must be beyond the fifth and the seventh degree from the mother and the father respectively.

Meaning of Sapinda in Mitákshará.—In explaining the term non-*sapinda*, the Mitákshará says that the word *sapinda* means one connected through the same body, *i.e.*, any blood-relation however distant. It is observed that the husband and the *Patni* or lawfully wedded wife become *sapindas* to each other in this sense, because a text of revelation says that the sacrament of marriage unites them "bones with bones, flesh with flesh, and skin with skin." It is erroneous to say that they become *sapindas* through their child; for, if that were so, they should not be *sapindas* before childbirth, whereas the true theory is, that they become *sapindas* from the moment of their marriage.

After giving the above exposition, the Mitákshará says that wherever the word *sapinda* is used in that work, it should be understood in the sense of a blood-relation.

The Mitákshará then goes on to observe that the qualification non-*sapinda* applies to all castes, but the qualification of not belonging to the same *gotra* or *paravara* applies to the regenerate classes only.

Sapinda relationship for Marriage.—It is next observed that in explaining the word non-*sapinda* it has been said that *sapinda* relationship means immediate or mediate connection through the same body, but as such connection may be taken to exist between all persons, marriage itself would be impossible; hence, Yájnavalkya has declared that the bride should be "beyond the fifth and the seventh degree from the mother and the father respectively." The Mitákshará adds that *sapinda* relationship should be taken to cease beyond those degrees, evidently meaning, for the purpose of marriage; and then explains the mode of computation of degrees (which I have already explained), and goes on to observe that the same mode should be adopted in all cases (of contemplated marriage).

It should, however, be specially noted that the Mitákshará does not say whether or not, the lines of the six and the four ancestors of the *propositus* on the paternal and the maternal side respectively, may pass through males or females or both indifferently, although it is admitted on all sides that the lines of descent from those ancestors may pass through males or females or both, without any distinction. But in illustrating the mode of computing the degrees, the Mitákshará refers only to the lines of the father's and the mother's male ancestors in the male line.

Conflicting texts noticed.—The Mitákshará then cites a text of Vasishtha which says: "The fifth or the seventh from the mother and the father respectively (may be married),"—and a text of Paithínasi, which says: "(A girl may be taken in marriage, who is) beyond the third from the mother and the fifth from the father;"—and explains these texts away by saying that they do not intend to authorize marriage of girls distant by lesser number of degrees (given in these texts) than in the above sloka of Yájnavalkya, but they intend to prohibit the espousal of the girls of nearer degrees indicated in them.

Reconciliation unsatisfactory.—The above mode of reconciliation, adopted by the Mitákshará does not appear to be satisfactory at all, nor is the view put forward by that treatise, respected and followed in practice. The customs and usages relating to the prohibited degrees for marriage, are so divergent in different localities, and among different tribes and castes, that it may be

safely affirmed that as regards marriage, the written texts of law found in the Smritis and the Commentaries are nowhere followed in practice.

Conflicting rules on prohibited degrees.—If prohibited degrees for marriage be taken, as the standard of *sapinda* relationship, then it would extend to eight degrees on both the mother's and the father's side, according to Manu: to five and seven degrees respectively on the mother's and the father's side, according to Yájnavalakya; to four and six degrees respectively on the mother's and the father's side, according to Vasishtha; and to three and five degrees respectively on the mother's and the father's side, according to Paithínasi; and to still lower degrees on the two sides according to custom prevailing in many places and among many classes of people.

It should be remarked that as damsels belonging to the same *gotra* are separately prohibited to the regenerate tribes for marriage, the *sapinda* girls on the father's side, who need be considered for the purpose of marriage among these tribes, are those that are cognate to the bridegroom, that is to say, between whom and the bridegroom females intervene. But as regards the Súdras who form the majority of Hindus, both the agnate and cognate *sapinda* damsels should be taken into consideration in this connection, for, they only are prohibited to the Súdras.

As regards the regenerate tribes, the only rule of prohibited degrees for marriage, which seems to be followed in all parts of India, is, that a damsel of the same *gotra* with the bridegroom is not taken in marriage.

Marriage usages, contrary to Sástras.—But it should be specially noticed that as regards prohibited degrees outside the *gotra*, that is to say, girls who are *bhinna-gotra sapindas*, or relations belonging to a different family, the usages are most divergent. We have already seen that the *Rishis* or lawgivers propound different rules on the subject. If we now turn to the actual practice observed by the people, we find that even amongst the Bráhmanas of Madras there is no *bhinna-gotra sapinda* relationship for marriage, at all: because, there they marry even their father's sister's daughter and their mother's brother's daughter. So also among the Chhatris or Rajputs claiming to be Kshatriyas, domiciled in Bengal and Chhota-Nagpore, very few cognate girls are eschewed for marriage. The reason appears to be, that when in a particular locality there are only a few families belonging to the same caste, so that the observance of the prohibited degrees as propounded in the Sástras would render marriage itself impracticable for want of lawfully eligible brides, then we find a departure from the Sástras, to a greater

or lesser extent, according to the exigency. The prohibited degrees are not observed also by the Kulin Bráhmanas of Bengal, whose so-called high position depends only on marriage of girls of certain families according to the modern and artificial rules of *Kulinism*, and who are often found to contract what may be called incestuous marriages for maintaining their *Kulinism* by disregarding the rules propounded by the Sástras, and explained by Raghunandana whose authority is said to be respected in Bengal.

The golden rule of prohibited degrees for marriage, to follow, therefore, in a case where the validity of a marriage is called into question on the ground of being within prohibited degrees, is, to pronounce it valid if found to be celebrated in the presence, and with the presumed assent, of the relations and caste people, notwithstanding written texts of law to the contrary, which must be taken to be recommendatory in character, as appears from the language of Manu's text on the subject :—

असपिण्डा च या मातु-रसगोत्रा च या पितुः।

सा प्रशस्ता द्विजातीनां दारकर्मणि मैथुने ॥

Which means,—"She, who is non-*sapinda* also (non-*sagotra*) of the mother, and non-*sagotra* also (non-*sapinda*) of the father, is *commended* for the nuptial rite and holy union among the twice-born classes." Similarly, the Mitákshará expressly says that many of the qualifications of the bride, ordained by Yájnavalkya are directory only.

Prohibited degrees are not Bandhus for inheritance.—Thus you see that the prohibited degrees for marriage can by no means be taken to be *bhinna-gotra sapindas* or *bandhus* for the purpose of inheritance, on account of the following reasons :—

(1) While explaining *sapinda* relationship for the purposes of marriage, the Mitákshará says that wherever in that work the word *sapinda* is used, it shall be taken in the sense of one connected through the same body ; but it does not say that the restriction of *sapinda* relationship within seven degrees on the father's side and five degrees on the mother's side, which is undoubtedly laid down by Yájnavalkya for the purpose of marriage, is to be understood as applicable for all purposes :

(2) If the intention of the Mitákshará had been to apply the said restriction to inheritance and other purposes as well, it would not have explained the degrees of *sapinda* relationship again, while dealing with the *Párvana Sráddha*, and with Inheritance, by citing the text of Vrihat-Manu (Text, No. 2), but

would have referred to the earlier explanation of it given for marriage:

(3) The principles upon which marriage is prohibited between certain relations, are not the same on which inheritance is based:

(4) *Sapinda* relationship for marriage has reference to female relations of the intended bridegroom, whereas *sapinda* relationship for inheritance relates mainly to male relations, females, as a general rule, being excluded from inheritance:

(5) The proposition that if A can marry B's sister, then B cannot be A's heir, is not correct; for, a Bráhmana of Madras can marry his maternal uncle's daughter whose brother is expressly recognised as an heir, and Súdras can marry within the same *gotra*, a girl whose brother is a *samánodaka* and as such an heir:

(6) *Sapinda* relationship for marriage not being uniform but divergent, as shown above, cannot be the basis of a rule of inheritance, which must be invariable, certain and uniform: And,

(7) There is neither authority nor reason for excluding a *bhinna-gotra* relation from inheritance when his relationship can be traced, seeing that the Mitákshará says that *bhinna-gotra sapindas* are included under the term *bandhus* declared heirs after *sagotras*, and that the term *sapinda* means any relation, and seeing further that when the estate of a Bráhmana goes to his caste-people in default of *bandhus*, a very strong presumption arises against cutting down and confining the meaning of the term to some relations only, with a view to exclude others.

Meaning of the word Bandhu.—Having regard to the structure and organisation of Hindu society founded upon the caste system, it appears that the Hindus have special reasons for attachment to even their most distant relations as well as to their caste people. A well known sloka says:—

उत्सवे व्यसने चैव दुर्भिक्षे राष्ट्रविप्लवे।

राजद्वारे श्मशाने च य-तिष्ठति स बान्धवः॥

Which means,—"He, who stands by you, on the occasions of joy and distress, at a time of famine or of political revolution, and in the King's Court as well as in the cremation ground, is your *Bándhava* or relation."

Thus the agnate *sapindas* are *bandhus* or relations *par excellence*, and in this sense the word has been used in the text of Vishnu, dealing with inheritance: see original text No. 2 under Mitákshará Succession. I should tell you that the words *bandhu* and *bándhava* are both derived from the root *bandh*=bind, and

means any relation agnate or cognate. In Manu, Ch. ix, Slokas 159 and 160, the word *bandhu* has been used in the sense of *sagotra* or member of the same *gotra*: see original text No. 12 under Adoption. In the text of Yájnavalkya (ii, 135) dealing with the order of succession, the word *bandhu* has been used in the sense of a cognate, the agnates being denoted by the term *gotrajas;* hence, it means cognates in the Mitákshará. But in many texts of the Smriti the term appears to be used in the sense of *sagotra* or in the wider sense of a *relation.*

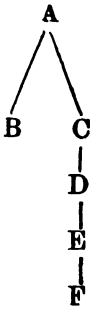
Conclusion as to who are Bandhus.—The conclusion, therefore, which appears to legitimately follow from the foregoing considerations, is, that the word *bandhu* in the Mitákshará means and includes either all cognate relations without any restriction, or at any rate, all cognates within seven degrees on both the father's as well as on the mother's side. This view, however, is opposed to an *obiter dictum* thrown out for the first time in the Full Bench case of *Umaid Bahadur* v. *Uday Chand*, 6 C.S., 119= 6 C.L.R., 500, and repeated in the case of *Babu Lal* v. *Nanku Ram*, 22 C.S., 339.

Obiter dictum on Bandhus.—It was held by the Full Bench that a person's sister's daughter's son is his *bandhu* and heir, but it is added that his sister's daughter's son's son would not be his *bandhu* and heir. The question for consideration by the Full Bench was whether the sister's daughter's son is an heir, but whether his son also is an heir was not a matter for consideration by the Court in that case. The word *sapinda* was erroneously rendered into "Kinsmen connected by funeral oblations of food," by Colebrooke in his version of the Mitákshará. This error was exposed by two learned oriental scholars, West and Bühler, the former of whom was an eminent judge, in their valuable Digest of Hindu law, by giving a translation of portions of the passages of the Mitákshará, dealing with marriage, where the meaning of the term *sapinda*, and *sapinda* relationship for marriage, have been explained. The correct view was adopted in the case of *Lallubhai Bapubhai* v. *Mankuver Bhai*, 2 B.S., 422. The Calcutta Full Bench in their judgment in the above case followed this Bombay decision on that point, and then made the following observation:—

"The next question for consideration is, whether the defendant in the case that has been referred to us, stands in such a relation to Mooktar Bahadur (the *propositus*) that they are each other's *sapindas* as defined by the author of Mitákshará in Áchára Kánda."

Then proceeding to explain what is intended by the above passage, the facts of the case relating to relationship, are referred

to, and then, the following table is given for illustration, and the same is elucidated as follows :—



" A is the common ancestor; B, his son is the *propositus*; C, a daughter of A; D, her daughter, both dead; E is the son of D, and has a son F.

" Now B and E are *sapindas* to each other, but not B and F. Although F is within six degrees from the common ancestor, yet B, not being a descendant of the line of the maternal grandfather, either of F or of his father and mother, they are not *sapindas* to each other; but B being a *sapinda* of E through his mother, they are *sapindas* of each other."

Dictum inexplicable.—I have not been able to find out anything in the Áchára-Kánda, in support of the above view: in fact, there is nothing anywhere in the Mitákshará which may justify the foregoing *dictum*. On the contrary, B being a relation on F's father's side and being within seven degrees, is a *sapinda* of F: the circumstance of two females intervening cannot make any difference; for, F is admittedly a *sapinda*, and E is not only a *sapinda* but also heir, of B. Bearing in mind that the word *sapinda* means a *relation* according to the Mitákshará, it is difficult to conceive any case in which A is B's *sapinda*, and at the same time B is not A's *sapinda*: it seems to be opposed to common sense. This somewhat anomalous view appears to be due to the misapprehension of the meaning of the comments made by Visvesvara Bhatta and Bálambhatta on the text of Manu (see *supra*, Text No. 4), as appears from the later judgment referred to above.

I shall return to the subject later on, while dealing with the succession of *bandhus*, after having treated the subject of marriage, with which the present point has been mixed up.

Village Community, and the above terms.—It may be interesting to enquire into and trace the etymological meaning of some of the terms, and the probable connection of the same with the village community system, and with their explanation as given above. The words *sapinda*, *sakulya*, *samánodaka*, *sagotra* and *samánapravara* mean respectively those whose *pinda*, *kulya*, *udaka*, *gotra* and *pravara*, are common. *Gotra* is derived from *go* a cow and *trá* to protect, and means that which protects the cow, such as a pasturage; *Udaka* is water or a reservoir of water such as a well; *Kulya* may be derived from *kula* (similar to Latin *colo*) to cultivate, and means a field or cultivated land; and *pinda* means food.

According to the rules laid down by Manu (8, 237-239) and Yájnavalkya (2, 171-172) relating to the establishment of villages, there should be a belt of uncultivated land, set apart for pasture, at least four hundred cubits in breadth, immediately round that part of a village, where the dwelling houses are situated, separating it from the cultivated land; and on that side of this belt, which is contiguous to the fields, hedges should be erected so high that a camel might not see over them, so that the cattle might not trespass into the fields.

Assuming that a single family established a new village, and bearing in mind that a pasturage, and a reservoir of water indispensable in a tropical country, are not divisible according to Hindu Law, we may take the words *sagotra* and *samánodaka* to mean all members of the family, holding in common the pasturage and the reservoirs of water used for domestic or agricultural purposes; the word *sakulya* to signify those members that jointly carried on cultivation; and the word *sapinda* to comprise those that lived in common mess. When a family increased in the number of its members, they would separate in mess first, and might still continue to hold in common their *kulya* or property, consisting mainly of land, by jointly carrying on the cultivation and dividing the produce according to their shares; and when this was felt to be inconvenient, they divided the family land, continuing, however, to use and occupy jointly the *gotra* or the land reserved for grazing the cattle, and the *udaka* or reservoirs of water, which remained common to the most distant agnatic relations. The plain meaning of the texts of Baudháyana and of the Brahma-Purána cited above, lends some support to this view.

CHAPTER III.

MARRIAGE.

ORIGINAL TEXTS.

१। असपिण्डा च या मातुरसगोत्रा च या पितुः।
सा प्रशस्ता द्विजातीनां दारकर्म्मणि मैथुने॥ मनुः ३, ५।

(The Mitákshará, however, reads the first line of this text thus:—असपिण्डा च या मातु-रसपिण्डा च या पितुः।)

सपिण्डता तु पुरुषे सप्तमे विनिवर्त्तते।
समानोदकभावस्तु जन्मनाम्नोरवेदने॥ मनुः ५, ६०।

1. She, who is the mother's non-*sapinda* also (non-*sagotra*) and the father's non-*sagotra* also (non-*sapinda*), is commended for the nuptial rite and holy union amongst the twice-born classes.—Manu iii, 5.

(According to the reading of this text, adopted by the Mitákshará it would mean:—She, who is non-*sapinda* also of the mother, and non-*sapinda* also of the father, is &c.)

But *sapinda* relationship ceases in the seventh degree (from the mother and the father); and the *Samánodaka* relationship ceases if (common) descent, and name be not known.—Manu v, 60.

२। न सगोत्रां न समान-प्रवरां भार्य्यां विन्देत,
मातृत-स्त्वापञ्चमात् पुरुषात् पितृत-स्त्वासप्तमात्॥ विष्णुः २४, ९–१०।

2. Let not a damsel be married, who is of the same *gotra*, of the same *pravara*, within the fifth degree on the mother's side, or within the seventh on the father's side.—Vishnu xxiv, 9-10.

३। अविप्लुत-ब्रह्मचर्य्यो लक्षण्यां स्त्रियम् उद्वहेत्।
अनन्य-पूर्व्विकां कान्ताम् असपिण्डां यवीयसीं।
अरोगिणीं भ्रातृमतीम् असमानार्ष-गोत्रजाम्।
पञ्चमात् सप्तमाद् ऊर्द्ध्वं मातृतः पितृतस्तथा॥ याज्ञवल्क्यः १, ५२–५३।

3. Let a man who has finished his studentship, espouse an auspicious wife who is not defiled by connection with another man, is agreeable, non-*sapinda*, younger in age and shorter in stature, free from disease, has a brother living, is born from a different *gotra* and *pravara*, and is beyond the fifth and the seventh degree from the mother and the father respectively.—Yájnavalkya I, 52-53.

३। पञ्चमीं सप्तमीञ्चैव मातृतः पितृतस्तथा। मिताक्षरादृत-वशिष्ठवचनं।

4. (A man may espouse a damsel who is) the fifth and the seventh (in degree) on the mother's and the father's side respectively.—Vasishtha cited in the Mitákshará on Yájnavalkya, I, 53.

५। आसप्तमात् पञ्चमाच्च बन्धुभ्यः पितृमातृतः।

अविवाह्या सगोत्रा च समान-प्रवरा तथा॥ नारदः १२, ७।

सप्तमे पञ्चमे वापि येषां वैवाहिकी क्रिया।

ते च सन्तानिनः सर्व्वे पतिताः शूद्रतां गताः॥ रघुनन्दनधृत-नारदवचनं।

5. A damsel within the seventh and the fifth (degree) from among relations (*bandhus=sapindas*) on the father's and the mother's side respectively, should not be married, likewise one of the same *gotra*, and one of the same *pravara*. (Nárada xii, 7). Those among whom marriage rite takes place within the seventh and the fifth (degree) respectively, are all with the offspring become degraded, and reduced to the position of Súdras.—Nárada cited by Raghunandana.

६। असमानार्षेयीं कन्यां वरयेत्, पञ्च मातृतः परिहरेत् सप्त पितृतः, त्रीणा मातृतः पञ्च पितृतो वा। पैठीनसिः।

6. Shall espouse a damsel not belonging to the same *gotra*, shall avoid five (degrees) on the mother's side, and seven on the father's; or three (degrees) on the mother's side, and five on the father's.—Paithínasi cited in the Mitákshará and by Raghunandana.

७। मातृपितृसम्बद्धाः आसप्तमाद्—अविवाह्याः कन्या भवन्ति, आपञ्चमाद्-अन्येषां मतं, सर्व्वाः पितृपत्न्यो मातरः, तद्भ्रातरस्तु मातुलाः, तद्दुहितरो भगिन्यः, तदपत्यानि भागिनेयानि, ताश्चाविवाह्याः, अन्यथा सङ्कर-कारिण्यः, तथाध्यापयितुरेतदेव। रघुनन्दनधृत-सुमन्तुवचनं।

7. Damsels connected on the mother's or the father's side shall not be taken in marriage, up to the seventh degree; up to

the fifth degree, is the opinion of others: all the wives of the father are mothers, their brothers are maternal uncles, their daughters are sisters, their daughters are nieces, they too shall not be married, otherwise they would cause disorder; this applies also to the daughter of the *preceptor*.—Sumantu cited by Raghunandana.

८। असम्बद्धा भवेद् या तु पिण्डेनैवोदकेन वा।

सा विवाह्या द्विजातीनां त्रिगोत्रान्तरिता च या॥ बृहन्मनुः।

8. She, who is not connected by funeral oblations of food or by libations of water, is fit for marriage among the twice-born classes, as also she who is distant by three *gotras*.—Vrihat-Manu cited by Raghunandana.

९। आयाहीन्द्र पथिभिरीलितेभि-र्यज्ञम् इमं नो भागधेयं जुषस्व।

दत्तां मातुलस्येव योषा भागस्ते पैतृष्वसेयी वपाम्॥ वेदः।

9. Indra! Come by paths that are praised, to this our sacrifice, accept the offering; well-cooked meat is offered (by us to thee), which is thy due, as (one's) maternal uncle's daughter or father's sister's daughter (is his due). Veda.

१०। तस्माद् वा समानाद् एव पुरुषाद् अन्ता चान्यश्च जायते।

उत दृतीये सङ्गच्छावहै चतुर्थे सङ्गच्छावहै॥ वाजसनेयके।

10. From the very same common stock are descended the enjoyer (husband) and the enjoyed (wife): we marry in the third or we marry in the fourth (degree).

११। त्रिंशद्वर्षो वहेत् कन्यां हृद्यां द्वादशवार्षिकीं।

त्र्यष्टवर्षोऽष्टवर्षां वा धर्म्मे सीदति सत्वरः॥ मनुः ९। ९४।

11. Let a man of thirty years marry an agreeable girl of twelve years, or a man of thrice eight years, a girl of eight years; one marrying earlier deviates from duty, (or one may marry earlier to prevent failure of religious rite).—Manu ix, 94.

१२। प्राप्ते द्वादशमे वर्षे यः कन्यां न प्रयच्छति।

माता चैव पिता चैव ज्येष्ठो भ्राता तथैव च।

त्रयस्ते नरकं यान्ति दृष्ट्वा कन्यां रजस्वलां॥

यस्यां विवाहयेत् कन्यां ब्राह्मणो मदमोहितः।

असम्भाष्यो ह्यपाङ्क्तेयः स विप्रो वृषलीपतिः॥ यमः २२-२३।

12. If a girl be not given in marriage when she has reached the twelfth year, her mother and father as well as her elder brother, these three go to the infernal regions, having seen her catamenia before marriage. That Bráhmana who being blinded by vanity espouses such a girl, should not be accosted, and should not be allowed to sit at a feast in the same line with Bráhmanas, for, he is deemed the husband of a Súdrá wife.—Yama 22-23.

१३। प्राग्-रजोदर्शनात् पत्नीं नेयात् गत्वा पतत्यधः।

व्यर्थीकारेण शुक्रस्य ब्रह्महत्याम् अवाप्नुयात्॥ निर्णयसिन्धुधृत-

आश्वलायनवचनं।

13. (A man) shall not approach the wife before the appearance of catamenia; approaching, becomes degraded, and incurs the sin of slaying a Bráhmana by reason of wasting the virile seed.—Aśvaláyana cited in the Nirnayasindhu.

१४। पिता पितामहो भ्राता सकुल्यो जननी तथा।

कन्याप्रदः पूर्व्वनाशे प्रकृतिस्थः परः परः॥

अप्रयच्छन् समाप्नोति भ्रूणहत्याम् ऋतावृतौ।

गम्यं त्वभावे दातॄणां कन्या कुर्य्यात् स्वयं वरं॥ याज्ञवल्क्यः १, ६३–६४।

14. The father, the paternal grandfather, the brother, a *sakulya* or member of the same family, the mother likewise; in default of the first (among these) the next in order, if sound in mind, is to give a damsel in marriage; not giving, becomes tainted with the sin of causing miscarriage at each of her courses (before marriage); in default, however, of the (aforesaid) givers, let the damsel herself choose a suitable husband.—Yájnavalkya, i, 63-64.

१५। पिता पितामहो भ्राता सकुल्यो मातामहो माता चेति कन्याप्रदः

पूर्व्वाभावे प्रकृतिस्थः परः परः। विष्णुः २४, ३८–३९।

15. The father, the paternal grandfather, the brother, a *sakulya*, the maternal grandfather and the mother: in default of the first among these the next in order, if sound in mind, is the giver of a maid in marriage.—Vishnu xxiv, 38-39.

१६। पिता दद्यात् स्वयं कन्यां भ्राता वानुमते पितुः।

मातामहो मातुलश्च सकुल्यो बान्धवस्तथा।

माता त्वभावे सर्व्वेषां प्रकृतौ यदि वर्त्तते।

तस्याम् अप्रकृतिस्थायां कन्यां दद्युः स्वज्ञातयः॥ नारदः १२, २०–२१।

16. The father himself shall give a girl in marriage, or with his assent the brother, the maternal grandfather and the maternal uncle, and a *sakulya*, a *bándhava* likewise; on failure of all, however, the mother, if she is in sound mind; if she be not in sound mind, the people of the same caste shall give a damsel in marriage.—Nárada xii, 20-21.

१७। पिता रक्षति कौमारे भर्त्ता रक्षति यौवने।

पुत्रो रक्षति वार्द्धके न स्त्री स्वातन्त्र्यमर्हति॥ मनुः ९, ३।

17. A woman is not entitled to independence: her father protects her in her maidenhood, her husband in her youth, and her son in her old age.—Manu ix, 3.

१८। रक्षेत् कन्यां पिता, विन्नां पतिः, पुत्रस्च वार्द्धके।

अभावे ज्ञातयस्तेषां, न स्वातन्त्र्यं क्वचित् स्त्रियाः॥ याज्ञवल्क्यः ८५ १,।

18. A woman is never entitled to independence: let the father protect her when maiden, the husband when married, the son when old, and in their default their kinsmen.—Yájnavalkya i, 85.

१९। कन्या वरयते रूपं माता वित्तं पिता श्रुतं।

बान्धवाः कुलमिच्छन्ति मिष्टान्नमितरे जनाः॥

19. The bride is anxious for beauty, her mother for wealth, her father for education, her relations for family honor (in the bridegroom), and all the rest for a sumptuous feast.

MARRIAGE.

Marriage necessary according to Sástrás, exceptions.—The institution of marriage which is the foundation of the peace and good order of society, is considered as sacred even by those that view it as a civil contract. According to the Hindu Sástrás it is more a religious than a secular institution. It is the last of the ten sacraments or purifying ceremonies. The Sástrás enjoin men to marry for the purpose of procreating a son necessary for the salvation of his soul. According to our Sástrás a man may not at all enter into the order of householder, or the married life, but may choose to continue a life-long student when he is desirous of *moksha* or liberation from the necessity of transmigration of souls, or in other words, the necessity of repeated deaths and births. But you must not mistake for life-long students all bachelors,

most of whom do not marry, not because they are averse to the pleasures of marriage, but because they are unwilling to take upon themselves the responsibilities of conjugal life. These do not bear the remotest resemblance to the life-long students that are to lead the austere life of real celibacy.

Marriage in ancient law, and the religious principle.—In ancient times marriage involved the idea of the transfer of dominion over the damsel, from the father to the husband. Slavery, or the proprietory right of man over man, was a recognised institution among all ancient nations, and it appears to have owed its origin to the *patria potestas* or the father's dominion and unlimited power over his child. A daughter was an item of property belonging to her father who could therefore transfer her by sale, gift or other alienation like any other property, and marriage consisted in the transfer, in any one of the said modes, of the parental dominion over the bride, to the bridegroom who acquired by the transaction, the marital dominion over her. Marriage by capture was also based on the same principle. The condition of a slave, a wife, and a son or daughter, was similar in ancient law, and founded on the same principle of absolute dependence on the one side, and of unlimited power, extending to even that of life and death, on the other. The earliest and common form of marriage was the sale of the bride for a price paid to the father by the bridegroom. The father's choice in the matter is under such circumstances likely to be influenced more by the amount of the price offered, than by a consideration of the alliance being beneficial to the daughter. This purely selfish and secular principle became in course of progress, repugnant to refined feelings, and the Hindu sages sought to establish the altruistic and religious principle as the only guide for the father's selection, by laying down that the free gift, without any other consideration than her happiness, of a daughter decked with dress and ornaments, to a suitable husband to be found out by him, is an imperative religious duty imposed on the father,—and by condemning the existing practice of marriage by sale in consideration of the *sulka* or bride's price, as being unworthy of persons having a sense of spiritual responsibility, and a pretension to purity, whose conduct should be characterized by higher principles, although that practice might be allowed to Súdras among whom purity of conduct could not be expected.

Religious and secular marriages.—Accordingly the Hindu sages divided marriages into eight kinds for the purpose of distinguishing those that are approved on account of there being no improper motive on the part of any person concerned in them and are therefore declared to be religious, from those that are condemned

on some ground or other, and are therefore disapproved and pronounced to be irreligious. In the marriage called Bráhma, the father or other guardian of the bride has to make a *gift* of the damsel adorned with dress and ornaments to a bachelor versed in the Brahma or Veda, and of good character, who is to be sought out and invited by the guardian. In the Daiva marriage the damsel is given to a person who officiates as a priest in a sacrifice performed by the father, in lieu of the Dakshina or fee due to the priest; it is inferior to the Bráhma, because the father derives a benefit, which being a spiritual one is not deemed reprehensible. Still inferior is the Ársha marriage in which the bridegroom makes a present of a pair of kine to the bride's father, which is accepted for religious purpose only, otherwise the marriage must be called Ásura described below. Another kind of approved marriage is called Prájápatya which does not materially differ from the Bráhma, but in which the bridegroom appears to be the suitor for marriage and he may not be bachelor, and in which the gift is made with the condition that "you two be partners for secular and religious duties." These are the four kinds of marriage, the male issue of which confers special spiritual benefit on the ancestors.

The four disapproved and censured kinds of marriage are the Gándharva, the Ásura, the Rákshasa, and the Paisácha. The Gándharva marriage, which is not disapproved by some sages, appears to be the union of a man and a woman by their mutual desire, and to be effected by consummation; this seems to be inconsistent with the father's *patria potestas* over the damsel, and it appears to relate either to cases where a damsel had no guardian, or to cases where consummation by mutual desire had already taken place, and the law requires that the father should give his assent to the daughter's marriage with the man. The Ásura marriage amounted to a sale of the daughter: the Sulka or the bride's price was the moving consideration for the gift by the father, of the daughter in marriage. The Rákshasa was marriage by forcible capture. The Paisácha marriage was the most reprehensible as being marriage of a girl by a man who had committed the crime of ravishing her either when asleep or when made drunk by administering intoxicating drug. You must not think that this is an instance in which fraud is legalized by Hindu law; the real explanation appears to be that chastity and single-husbandedness were valued most, and so the Hindu law provided that the ravisher should marry the deflowered damsel. It appears, therefore, that the Gándharva, the Rákshasa and the Paisácha marriage were preceded and caused by sexual intercourse, in the first case with the consent of the girl, in the second by force, and in the third by fraud. The Ásura and the

Gándharva seem to resemble respectively the *Co-emptio* and the *Usus* in Roman law which, however, positively forbade the Paisácha marriage.

The Hindu ideal of marriage is, that it is a holy union for the performance of religious duties; hence, where the sexual pleasure is the predominant idea in the mind of a party to it, it is disapproved and is condemned as a secular marriage, as distinguished from that in which the religious element prevails. The custom of marriage of girls before puberty proves that the idea of sexual pleasure is not associated with the holy nuptial rite of the Hindus. The legal consequences of the approved and the condemned marriages, are different; a wife married in an approved form becomes a *Patní*, but one espoused in the disapproved form does not become a *Patní*. According to the Mitákshará a *Patní*, or the lawfully wedded wife, or the indispensable associate for religion, becomes his *sapinda*, and may become his heir, and her husband also may become her heir: whereas a wife who is married in a disapproved form, and conseqnently does not become *Patní*, does not become her husband's *sapinda*, and cannot inherit from her husband, nor can he inherit from her.

It should be remarked that these eight kinds of marriage are not really eight different *forms* of marriage, as they are loosely called; the form appears to be the same in all cases except perhaps in the Gándharva and the Rákshasa, namely, the gift and acceptance of the damsel, coupled with religious rites which are necessary and more multiplied in the approved ones. This form of gift and acceptance seems to be observed even by Christians, among whom it is undoubtedly a survival.

Definition of marriage, and marriage without consent.—Marriage is defined by Raghunandana to be the acceptance by the bridegroom, of the bride, constituting her his wife. The bride is not, in one sense, a real party to the marriage which is a transaction between the bridegroom and her guardian, in which she is the subject of the gift. The expression 'bride's marriage' is said to be a figurative one. The Hindu law vests the girl absolutely in her parents and guardians by whom the contract of her marriage is made, and her consent or non-consent is not taken into consideration at all: 21 B.S., 29. According to the sages a man has to choose a damsel agreeable to himself for his wife, and the lowest age for his marriage is twenty-four. But contrary to the Sástrás a custom has grown up according to which marriages are negotiated by the guardians of the bridegrooms and are celebrated at an earlier age; and excepting in a few instances, the real parties to the marriage see each other for the first time, when they are actually passing through the ceremony of wedlock. But

nevertheless it is an indisputable fact that in the majority of instances Hindu marriages, though thus contracted, do not prove to be unhappy ones.

Justification of marriage without consent.—There are many persons who being dazzled and blinded by the material civilization and the political greatness of the European nations, consider their social institutions to be superior to those prevalent amongst the Hindus whose political degradation is attributed by them to the assumed inherent inferiority of their social organization and also of their religion. Marriage by mutual consent of grown up men and women is what prevails among the Christian nations of Europe, and is on that account thought to be the most civilized and proper form; whereas the contrary is the rule in India, which is therefore taken to be a barbarous usage and an evil of a grave character. The Hindus, however, say that when you cannot have your mother and father, your brother and sister, or any other relation, according to your choice, why then should you have a wife or a husband according to your own choice? If all other dear and near relations are yours without your choice, you may as well have a wife or a husband dear to you though chosen by others; and this is conclusively proved by what you find in Hindu society. The alleged superiority again of marriage by mutual consent, is negatived by the fact of there being so many divorces and separations, showing that union by choice is not the condition of the happiness of married life. As for political greatness and degradation, there are pious men who would say that the height of the political greatness of a nation is often the measure of the depth of its religious degradation; for the attainment of worldly prosperity by one nation is frequently accomplished at the expense of others, and, therefore, by transgressing the rules of religion.

Early marriage of Hindu girls, father's duty.—It is a religious duty imposed by the Hindu Sástrás upon the father or other guardian of a damsel, that she should be disposed of in marriage at a tender age not earlier than the eighth year, but before the signs of puberty make their appearance. The reason of the rule appears to be three-fold. The first is,—that marriage should be contracted from a sense of religious duty, and not from a desire of sexual pleasure, and so the immediate gratification of it is made impossible. The second is,—that by marriage a girl becomes not only the partner in life of her husband, but becomes a member of the joint family to which her husband belongs; and that, therefore, being admitted into the family at a tender age when her mind and character are yet unformed, and placed amidst the associations and peculiarities of the family of her

husband, she becomes assimilated to it, upon which she is, as it were, engrafted, in the same way as a member born in it. The third reason is the anxiety felt by the Hindu legislators for securing the chastity of females, which is the foundation of the happiness of home, of the belief in the reality of the family tie and relationship, and of the mutual love and affection of the relations towards each other based thereon, which are so prominent in Hindu society. The two strongest propensities to which man in common with the lower animals is subject, are the desire for food and the desire for offspring. With the first he is born, and the second manifests itself later on at a certain stage of development: and marriage of a damsel before that age is strictly enjoined, so that her mind may be concentrated on her husband alone as the means for the gratification of that appetite. And it cannot but be admitted that in the generality of cases the attachment that grows up between the husband and the wife is of the strongest kind, and the devotion of Hindu wives to their husbands is unparalleled.

It should, however, be particularly noticed that while the Hindu sages enjoin the early marriage of females, they do at the same time, condemn in the strongest terms, the premature consummation of the same. (Text No. 13.)

I have already told you that according to modern practice even the bridegroom is a mere passive agent in marriage. Our Sástrás, however, appear to lay down that he should be a free agent in this matter, and contract it at a mature age when he is in a position to fully understand the responsibilities of conjugal life.

Early marriage such as at present prevails in our society is considered as an evil by many 'educated' Hindus. Some condemn the early marriage of females on the ground that it may lead to premature consummation. Others disapprove of early marriage of the young men that are prosecuting their studies as students. They do really condemn the modern practice in so far as it is contrary to the Sástrás.

Objections to two rules of marriage, considered.—Exception, however, is taken to the two rules of the Sástrás, the first of which imposes the duty on the father or other guardian of girls, of providing them with suitable husbands before puberty; and the second of which enjoins all men to enter into matrimony.

The objection to the first rule has arisen from the fact that the observance of the rule entails ruin upon fathers of daughters in consequence of the heavy expenditure they are compelled to incur in disposing of their daughters in marriage. A most pernicious custom has been growing up in our society according to

which bridegrooms are becoming marketable things, and extortionate demands are made by their guardians, that are to be satisfied by the bride's father in order to bring about the marriage. The custom owes its origin to the vanity of the Calcutta people, but it is gradually extending its mischievous influence over the Muffasil. It is detrimental to the best interests of the Hindu community, and directly or remotely it affects every member of Hindu society, not excepting those that blinded by a short-sighted policy believe themselves to be gainers. The good sense of the Hindu community seems to have left them altogether, as in a matter of such vital importance to their society they do not exert themselves and make any efforts to put down the growth of this reprehensible custom.

The objection to the second rule is of a very serious character. By the contact with Western civilization the ideas regarding comforts have expanded amongst all classes of people, 'educated' or not; the simplicity in the habits of Hindu life is passing away; and marriage is almost come to be regarded as a luxury, its responsibilities having become heavier than before. To the early and improvident marriages is attributed the want of self-respect, self-reliance, independence and enterprising spirit, that, in one sense, characterises the Hindus, and that is thought to have led to their present political degradation.

The Hindu civilization and the Western civilization are different in character and somewhat opposed to each other. The western civilization is directed to the promotion of the happiness and prosperity in this world, of the people of the different localities respectively, that constitute different political states. Whereas Hindu civilization is directed to the attainment of happiness in the next world in the true sense of the term. For according to the Christian belief, their next world is not to commence until doomsday; while according to the Hindu belief, it commences immediately after death, when the human soul attains liberation or eternal beatitude, or assumes another heavenly or earthly body, according to its merits or demerits. The Hindus are therefore more religious than worldly. Self-abnegation, self-sacrifice and self-humiliation are necessary for the attainment of their religious aspiration, and the passiveness, the mildness, the tenderness and the dependent spirit of the Hindus, are the effects of their institutions moulded in a way calculated to subserve that purpose.

The great question, therefore, relates to the *summum bonum* and the mode of its attainment, and the continuance of our institutions depends upon its solution, or rather upon the belief in this respect.

It cannot but be admitted, however, that the rule itself is required by the law of nature, and non-compliance with it is attended with illegitimacy and various other vices.

The questions relating to Hindu marriage may be dealt with under five heads, namely, (1) prohibited degrees for marriage, (2) intermarriage between different castes, (3) guardianship in marriage and betrothal (4) ceremonies effecting marriage, and (5) legal consequences of marriage.

PROHIBITED DEGREES.

Principles of prohibited relationship for marriage.—The principles on which marriage is prohibited are discussed in Bentham's Theory of Legislation. The joint family system, which is a cherished institution of the Hindus, and which is the normal condition of their society, accounts for the prohibition by the Hindu sages, of marriage between larger number of relations than by other systems of jurisprudence. There are strong physiological reasons in support of the rules of Hindu law on this subject; and the same social reasons that render it necessary to forbid the marriage between brothers and sisters, would justify the prohibition of marriage between relations that may be members of a joint Hindu family. Those relations that are called to live together in the greatest intimacy from their birth, as well as those, one of whom stands in *loco parentis* to the other, should not be allowed to entertain the idea of marrying each other, and an insurmountable barrier between their nuptial union should be raised in the form of legal prohibition, so that the belief in the chastity of young girls, that powerful attraction to marriage, may be maintained unshaken. The Hindu legislators, however, are so anxious to secure the foundation of this belief, that they ordain it to be an imperative religious duty of the father and the like relations, to dispose of damsels in marriage before the signs of puberty make their appearance, so that there might not be the shadow of a doubt in that respect.

Sages on prohibited degrees.—I have already told you that the different sages have laid down different rules on the subject of prohibited degrees for marriage (p. 45). Most of their texts are given at the commencement of this chapter. (See Texts Nos. 1–10). On a perusal of these you will perceive the divergence between them; Manu prohibits the largest number, while Pathínasi the smallest. There is another important respect in which Manu and Sumantu differ from the other sages, namely, that the former prohibit the same number of degrees on both the father's and the mother's side, whereas the others forbid a larger

number on the father's than on the mother's side: the former view appears to be agreeable to popular feelings and in accordance with the actual practice. Another point deserves special notice, namely, that the language of Manu's text clearly shows that the rule propounded by him is recommendatory in character; and the actual usages of marriage, prevalent, in various localities and among divers tribes, prove the rules propounded by all the sages to be of that character.

Mitákshará on prohibited connection for marriage.—I have already given you the substance of the comments made by the Mitákshará upon the texts of Yájnavalkya on this subject (pp. 43, 44), while discussing the definition of the term *Bandhu*. But I think it necessary to give some details in the present connection. The Mitákshará says that the qualification that the bride should be non-*sapinda* applies to all castes, for the *sapinda* relationship exists everywhere: but the qualification that she shall not belong to the same *gotra* and *pravara* applies only to the three (regenerate) tribes; although the Kshatriyas and the Vaisyas have no *gotras* of their own, and therefore no *pravaras*, yet (in their case) the *gotras* and the *pravaras* of their priests are to be understood; in support of this a text of Ásvaláyana is cited, and then the Mitákshará goes on to say that the status of wife does not arise (among regenerate tribes) should the bride be a *sapinda* or *samána-gotra* or *samána-pravara*: but the status of wife does arise although she may be diseased or the like, for there is only inconsistency with perceptible reasons (in the case of the marriage of a damsel having the other disqualifications mentioned in Yájnavalkya's texts, such as disease.) Then the Mitákshará observes that as the qualification that the bride shall be non-*sapinda*, *i.e.*, non-relation, is too wide, according to the meaning of the word *sapinda* already explained, namely, a connection through the same body, therefore Yájnavalkya has added,—" beyond the fifth and the seventh from the mother and the father respectively." And then goes on to explain this passage in the following manner:—

" The purport is, that *sapinda* relationship ceases beyond the fifth from the mother, *i.e.*, in the mother's line, and beyond the seventh from the father," *i.e.*, in the father's line; hence, although the word *sapinda* by its etymological import applies to all relations, yet it is restricted in its signification like the word *pankaja* (the derivative meaning of which is " growing in the mud," but which by usage, means a lotus, being a species of its primary import), &c.; accordingly the six (ascendants) beginning with the father are *sapindas*, as also the six (descendants) beginning with the son, the man himself being the seventh: in the case also of divergence of the line, the counting shall be made until the

seventh, including him from whom the line diverges (*i.e.*, a collateral within the sixth degree of descent, from an ancestor within the sixth degree in ascent, is a *sapinda*); thus is the computation to be made in all cases (of contemplated marriage). Accordingly, it is to be understood that the fifth from the mother is she who is (the fifth) in the line of descent from (any ancestor up to) the fifth ancestor (and counting such ancestor as one degree)—in the computation, beginning with the mother (and counting her and the *propositus* as two degrees), of the mother's father, paternal grandfather, and the like: similarly, the seventh from the father is she who is (the seventh) in the line of descent from (any ancestor up to) the seventh ancestor (and counting such ancestor as one degree)—in the computation, beginning with the father (and counting him and the *propositus* as one degree each), of the father's father, and the like: thus in marriage, two sisters, a sister and a brother, and a fraternal niece and a paternal uncle, are taken to be two branches by reason of the descent of the two from a common ancestor (from whom computation of the degrees is to be made among their descendants).

"As for what is said by Vasistha, namely—'may marry the fifth and the seventh from the mother and the father respectively,'—and by Paithínasi, namely,—'beyond the third from the mother and the fifth from the father;'—these should be taken to intend the prohibition of the nearer degrees indicated therein and not to allow the espousal of the nearer degrees expressed in them; for, thus the conflict between all the Smritis may be removed.

"This again should be understood to be applicable to those of the same caste. But there is a different rule when the caste is different; thus Sankha ordains:—'If there be many sprung from one (but) of separate soil, (or) of separate birth; they are, of one pinda, (but) of separate impurity, and the *pinda* exists in three.'—'Sprung from one' means, sprung from the same Bráhmana or the like father; 'of separate soil,' means born of wives belonging to different castes; 'of separate birth,' means, born of different wives belonging to the same caste; 'they are of one *pinda*,' *i.e.*, *sapinda*; 'but of separate impurity,'—the separate impurity will be explained in the Chapter on Impurity; 'the *pinda* exists in three,' means, *sapinda* relationship extends to three degrees only."

From the foregoing comments of the Mitákshará it appears to follow that the six ancestors on the father's side and four on the mother's, may be traced through, males or females, or both; for, although the Sanskrit word for degree is *purusha* which also means a male, yet it cannot on that account be contended that

the lines must pass through the males only, inasmuch as in computing the five degrees on the mother's side, the mother is taken as one degree or *purusha*; and I have already told you that the downward lines from each of the ancestors may pass through males or females indifferently. Hence the maternal relations of the paternal as well as the maternal grandfather, and of the paternal great-grandfather appear to be prohibited by the above rule of *sapinda* relationship for marriage.

Let us now see what the later commentators say on the subject.

Later commentators on prohibited degrees.—The rules regarding prohibited degrees, extracted from the foregoing texts of the sages, by Raghunandana in his Udváhatattva, a treatise said to be respected in Bengal, are to be found in Dr. Banerji's valuable Tagore Lectures on the subject (pages 60–67). The same rules are reiterated by Kamalákara Bhatta, the author of the Nirnaya-sindhu which is said to be an authority in the Benares School.

The rules contained in these works may be summarised as follows:

I. A man cannot marry a girl of the same *gotra* or *pravara*. This rule is called exogamy. This rule does not apply to the Súdras who are said to have no *gotras* of their own; but it applies to the Kshatriyas and the Vaisyas, although it is alleged that neither have they any *gotra* of their own. The *gotras* of these three inferior castes are said to be those of the Gurus or preceptors or the priests of their ancestors.

II. A man cannot marry a girl who is a cognate relation of any of the following descriptions:

(*a*) If she is within the seventh degree in descent from the father or from any of his six male ancestors in the male line, namely, the paternal grandfather and so forth.

(*b*) If she is within the fifth degree in descent from the maternal grandfather or from any of his four paternal ancestors in the male line.

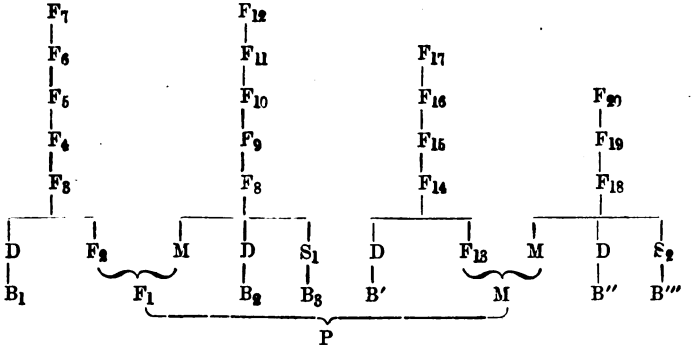
(*c*) If she is within the seventh degree in descent from the father's *bandhus* or from any of their six ancestors, through whom the girl is related.

(*d*) If she is within the fifth degree in descent from the mother's *bandhus* or from any of their four ancestors, through whom the girl is related.

III. A man cannot marry certain damsels though there is no consanguine relationship between them. They are the stepmother's sister, her brother's daughter, and his daughter's daughter; the paternal uncle's wife's sister, and the wife's sister's

daughter, and the preceptor's daughter. This rule appears to be of moral obligation only, since it is not respected. Accordingly, it has been held that a marriage between a Hindu and the daughter of his wife's sister is valid: *Ragav* v. *Jaya*, 20 M.S., 283.

The second rule is somewhat complicated. The following diagram will enable you to understand without difficulty, those that are prohibited by this rule, especially by clauses (*c*) and (*d*).



P is the bridegroom. F_1 to F_7 are his seven paternal ancestors in the male line; F_8 to F_{12} are his father's five maternal ancestors in the male line; F_{13} to F_{17} are his mother's five paternal ancestors in the male line; F_{18} to F_{20} are his mother's three maternal ancestors in the male line; B_1, B_2 and B_3 are his father's *bandhus*; and B′, B″ and B‴ are his mother's *bandhus*.

The damsels that are prohibited to a man by the second rule are those that are within the seventh degree in descent from F_1 to F_{12}, from B_1, B_2 and B_3 and from S_1; and that are within the fifth degree in descent from F_{13} to F_{20}, from B′, B″ and B‴, and from S_2.

To this rule there is an exception, namely, that a girl, though within the seventh or fifth degree as above described, may be taken in marriage if she is removed by three *gotras*, or in other words, by two intervening *gotras*, so that there must be four different *gotras* in the line of relationship including those of the bridegroom and the bride; but according to some, five such *gotras* are necessary. This shows that the lines of descent from the ancestors may pass through females only, who are transferred by marriage to different *gotras*.

Observations on the above rules.—Upon a careful study and consideration of the above rules, the texts from which they are deduced, and the reasons by which they are supported, the following observations suggest themselves:—

1. The Bráhmanical commentators say, as I have already

told you, that the Kshatriyas, the Vaisyas and the Súdras have no *gotras* of their own, and that the *gotras* they have, are those of the preceptors or priests of their ancestors; yet they maintain that the Kshatriyas and the Vaisyas cannot marry within their *gotras*, but the Súdras can; although the reason assigned in support of this distinction, does not appear to be a cogent one.

2. In construing the texts (Nos. 1–7) prohibiting certain number of degrees on the mother's and on the father's side, the later commentators restrict the counting of the upward degrees to the male line of the paternal male ancestors only, of both the mother and the father, as in the first and the third line in the above diagram; although in counting the descendants of each of those ancestors, they admit that the lines of descent may pass through both males and females indifferently, but no reason is assigned for drawing this distinction. They then deduce the prohibition of the relations indicated by the second and the fourth line of ancestors in the above diagram, by putting a forced construction on the text (No. 5) of Nárada, which ordains that a girl within the seventh and the fifth from among the *bandhus* or relations on the father's and the mother's side respectively, is not fit for marriage,—by taking the word *bandhu* in that text in the limited sense of certain *cognates* enumerated in a particular text (Mit. 2, 6, 13) although there cannot be the slightest doubt that Nárada intended by that text to mean and include all the prohibited degrees both agnates and cognates.

The truth seems to be that the later commentators found practical difficulty in avoiding all the damsels, coming within the rule, by counting the upward degrees through both male and female ancestors without distinction; so they thought it desirable that the descendants of the four lines of ancestors given in the above diagram should only be prohibited, and accordingly they put their own peculiar construction upon the texts for supporting their foregone conclusion.

3. That the later commentators count the number of degrees from the mother and the father respectively, by excluding the *propositus* and also the mother as shown in the 1st, the 2nd and the 3rd line of the diagram, while the Mitákshará counts from the *propositus* by including him as one degree, and also the mother as one degree.

4. That the seventh and the fifth descendants of the father's and the mother's *bandhus* respectively are prohibited; and they are the ninth and the seventh respectively, from the nearest common ancestor: but there is no reason for this special rule.

5. That the sixth and the seventh descendants of F_8 to F_{12} who are P's father's maternal ancestors, are prohibited to P, but

not to his father through whom they are related to P; or in other words, those relations of the father are not *sapindas* to him for the purpose of marriage, and yet they are *sapindas* to his son,—a monstrous proposition sought to be explained by what is called "the analogy of the frog's leap" which is beyond the comprehension of human beings save the narrow-minded and speculative Sanskrit writers of the dark age of Mahomedan India.

6. That there is no reciprocity; for, P cannot espouse many damsels, whose brothers, however, may, according to the above rule, marry P's sister, and *vice versâ*. This appears to be opposed to the popular notion according to which, A may marry B's sister, if B may marry A's sister. There is no reason why a larger number of degrees should be prohibited on the father's than on the mother's side, so far as relationship is concerned: for, the human body, says the Garbha-Upanishad, consists of six parts, of which three, namely, bone, sinew and marrow are derived from the father, and three, namely, skin, flesh and blood, from the mother.

7. That marriages do, often, take place in contravention of these rules even among those who would follow the same, by reason of the ignorance of distant relationship, owing to the difficulty in tracing out the relationship at the present time when people induced by the sense of security to life and property, enjoyed under the British rule, set up permanent dwelling houses in places distant from their ancestral homes, where they reside for the practice of any profession or calling, or for service.

These rules not all followed in practice.—I have already told you that these rules are not followed in practice. Different usages prevail among different tribes and in different localities. There is so much divergence between the sages as well as between the commentators on this subject, that it would not be safe to enforce their views as binding rules of conduct. The rule prohibiting marriage within the same *gotra*, which appears to be followed by the Bráhmanas in all places, is, however, too extensive, but it was laid down at a time when there appears to have been a local union of the families having the same *gotra* and *pravara*. When this rule does not apply to Súdras, there is no reason why it should apply to the Kshatriyas and the Vaisyas, as these three tribes stand on the same footing in this respect, if what the commentators say be correct. The Bengal Káyasthas, however, follow this rule in practice, and do not marry within their *gotra*, although they are supposed to be Súdras, by reason of their observance of some usages prescribed for the latter. It would seem reasonable that the legal rule of prohibited degrees for marriage cannot be different for different castes: hence, it would follow

that what is valid marriage among the Súdras is also valid even among the Bráhmanas, notwithstanding special rules to the contrary, which should be treated as Laws of Honour, the violation of which will not invalidate the marriage, but will simply lower the position of the transgressor: (see text No. 5). It is useless to discuss this point at length, as the rules are not followed in practice, by all.

Custom contrary to Smritis.—In Madras there is a custom prevailing even among the Bráhmanas, of marriage of a man with his maternal uncle's and paternal aunt's daughter. There is a text of the Sruti (text No. 9) in support of this custom, and the instance of Arjuna's marriage with Subhadrá, his maternal uncle's daughter, forms an well known precedent. This custom appears to be observed by Kshatriyas in many places. It prevails among the families owning impartible Rajes in the Jungle Mahals of West Bengal, that claim to be Kshatriyas. The reason for this laxity has already been stated. It should be noticed that for the purpose of marriage there is no *sapinda* relationship between cognates, where or among whom this custom prevails.

The practical rule of prohibited degrees—for our courts to follow, is, as I have already told you (p. 46), to pronounce a marriage to be valid, which has been celebrated in the presence, and with the presumed assent, of the relatives and the caste-people.

INTERMARRIAGE BETWEEN DIFFERENT CASTES.

The caste system—is the peculiar social organisation of the Hindus. There being no rational principle upon which the hereditary caste system, irrespective of qualifications, could be based, it is generally represented by comparatively modern writers of the Bráhmanical class who are most interested in maintaining it, to be a divine institution existing from the beginning of creation. But the sacred books contain no uniform or consistent account of its origin: the various accounts of it given by the different works of ancient Sanskrit literature, you will find, collected together with considerable research by Dr. Muir in the first volume of his Sanskrit Texts.

In some of the Puránas, castes are described as coeval with creation; while there are others which say that originally there was but one caste which became multiplied in the Treta or third age of the world owing to deterioration of men. The Mahábhárata categorically asserts that at first there was no distinction of classes, but that these have subsequently arisen out of differences of character and occupation; and that the title of a person to

recognition as Bráhmana depends not on heredity, but on possession of superior merits :—

युधिष्ठिरः । सत्यं दानं क्षमा शीलम् आनृशंस्यं तपो घृणा ।
दृश्यन्ते यत्र नागेन्द्र स ब्राह्मण इति स्मृतः ॥

सर्पः । शूद्रेष्वपि च सत्यं च दानम् अक्रोध एव च ।
आनृशंस्यम् अहिंसा च घृणा चैव युधिष्ठिर ॥

युधिष्ठिरः । शूद्रे तु यद् भवेत् लक्ष्म द्विजे तच्च न विद्यते ।
न वै शूद्रो भवेत् शूद्रो ब्राह्मणो न च ब्राह्मणः ॥
यत्रैतल्-लक्ष्यते सर्प वृत्तं स ब्राह्मणः स्मृतः ।
यत्रैतन्-न भवेत् सर्प तं शूद्रम् इति निर्दिशेत् ॥

आरण्यकपर्वणि आजगरपर्वणि १८० मे अध्याये ।

"Yudhisthira said, he is ordained to be a Bráhmana in whom are found truthfulness, charity, forgiveness, uprightness, harmlessness, austerity and compassion.

"The serpent said, but O Yudhisthira even in Súdras (are found) truthfulness, charity, absence of wrath, harmlessness, tenderness to living beings and compassion.

"Yudhisthira replied, If in a Súdra (by birth) the characteristic (of Bráhmanas) exists, and in a twice-born (by birth) the same does not exist, then the Súdra (by birth) should not be (regarded) a Súdra, nor the Bráhmana (by birth) a Bráhmana: he is ordained O Serpent! a Brahmana in whom is observed the characteristic, and he in whom the same does not exist must be called a Súdra, &c."—Ajagara-parva, ch. 180.

The Bhágavata Puráṇa called also Srímat-Bhágavata assigns different natural dispositions and qualities to the four castes, and assumes them to be hereditary, as a general rule, but concludes by asserting the possession of the dispositions and the qualities to be the sole test of the caste of individuals, thus,—

यस्य यल्लक्षणं प्रोक्तं पुंसो वर्णाभिव्यञ्जकं ।
यदन्यत्रापि दृश्येत तत् तेनैव विनिर्दिशेत् ॥ ७, ११, ३५ ।

which means,—"Whatever (dispositions and qualities) have been described as the distinctive mark indicative of the caste of a man, if the same are found also in another (*i.e.*, in a person of a different caste by birth), then he shall be designated by that very caste (which is indicated by the qualities, and not by the caste of his descent.)"

This view that qualification is the test of caste, is indicated in several other passages of this work, one of which is as follows,—

स्त्री-शूद्र-द्विजबन्धूनां त्रयी न श्रुति-गोचरा । १, ४, २५ ।

which means,—"The three Vedas are not fit to be heard by females, Súdras, and *dvija-bandhus*," *i.e.*, male relations of the twice-born, or in other words, those males that are descended from the twice-born, but are not themselves so by qualifications.

There are also many passages in the Smritis, indicating the possession, by a man, of superior qualities to be necessary for his being a member of the Bráhmana caste in which he is born, and laying down that for certain conduct a Bráhmana shall be reduced to the position of Súdras. The converse case of a person of inferior caste being admitted to the superior rank by reason of endowment of good qualities, appears to be laid down in a few texts which, however, are interpreted by the commentators to be applicable to an exceptional case. See Manu x. 64, 65.

Heredity, therefore, is the rule of caste, subject however to a theoretical exception based upon possession or absence of the characteristic qualities. But practically the caste system has become hereditary and has lost the principle upon which it seems to have originally been founded.

Twice-born and Súdras.—The Smritis, which have thrust into prominence, this system, divide men into two large classes, namely, the *Súdras* and the *Twice-born*. The study of the sacred literature forms the principle of this distinction. They ordain that by birth all men are alike to Súdras, and the second birth depends on the study of the sacred literature. Thus Sankha one of the compilers of the Dharma-Sástras declares,—

विप्राः शूद्रसमास्तावद्-विज्ञेयास्तु विचक्षणैः ।
यावद्-वेदे न जायन्ते द्विजा ज्ञेयास्तु तत्परं ॥

which means,—"Bráhmanas (by birth) are, however, regarded by the wise to be equal to Súdras until they are born in the Veda (*i.e.*, learn the sacred literature), but after that (*i.e.*, this second birth) they are deemed twice-born."

Passages to the same effect are found in most of the codes, according to which the recognition of the title of the Twice-born to superiority over the Súdras depends upon acquisition of the knowledge of the Vedas.

Caste not peacefully established.—The caste system does not appear to have been peacefully established, in so far as regarded the division of the Twice-born into three castes, namely, Bráhmana, Kshatriya and Vaisya: the Bráhmanical pretension to superiority

was resented by the Kshatriyas from the first, when the Bráhmanas appear to have been compelled to admit into their class Visvámitra and his clan who, according to them, had been Kshatriyas before. The exaggerated story of Parasuráma the Bráhmanical hero extirpating the Kshatriya race thrice seven times, and the anecdote of Ráma the Kshatriya prince defeating that hero, proves the continuation of the antagonism between the two castes, which is deprecated by Manu (ix, 322) who advised them to cultivate friendly feeling towards each other, not perhaps until after the propagation of Buddhism by a Kshatriya prince, inculcating equality of men, and so striking at the root of the caste system. This compelled the Bráhmanas to reduce their pretensions by promulgating the Tántrikism which was a compromise between the Bráhmanism or caste, and the Buddhism. By their intellectual superiority and monopoly of the Sanskrit literature they have, however, succeeded, by fair means or foul, to maintain their ascendancy to some extent. What turn the system will take, is yet to be seen, now that the people have been emancipated by the benign British rule, from the religious, moral and intellectual thraldom under which they used to labour before.

The number of castes.—It is said that there were originally four castes, namely, Bráhmana, Kshatriya, Vaisya and Súdra; but subsequently the various mixed castes have come into existence by either intermarriage or illicit connection between them and their issue in all sorts of combination, so that we find a distinct caste for each occupation which is said to be its own. This rather leads to the conclusion that most of these mixed castes must have been in existence when the system was introduced, if the occupations be taken to be the guide.

It should, however, be observed that having regard to the differences of character and occupation, the members of every political society are divisible into four classes corresponding to the four castes of the Hindus. Those distinguished by intellectuality, learning and religion are the real leaders of society. Next in importance are persons forming the royal class or the warriors on whom the safety and the very existence of the state depends, and who are characterized by physical agility, courage, administrative capacity and intelligence. Then come those concerned in the production of wealth by agriculture, trade, and so forth, requiring intelligence and a lower standard of morality. And lastly, the labourers serving the preceding classes or practising the mechanical or similar arts, distinguished by their capacity for physical labour, and spirit of dependence. The virtues and qualities requisite for distinction in these occupations, as well as their importance to society are taken into consideration for fixing the relative rank of

the four classes; and the common story of their origin is nothing more than an allegory representing society, and its different classes of members, as one human body and its limbs respectively. The fact that there are as many castes as there are occupations proves the origin of the institution. The explanation of the mixed classes by supposing them to be the issue of intermarriage appears to be a play of imagination: where the abstract qualities of any two of the four tribes, were thought requisite for filling a particular occupation, persons following that occupation were supposed to be descended from the offspring of an intermarriage or illicit connection between a man of the one tribe and a woman of the other. Thus the Ambasthas or the members of the physician caste of Bengal are imagined to be a mixed caste sprung from the issue of a Bráhmana father and a Vaisya mother: a physician resembles a Bráhmana in his general culture and learning, and also a Vaisya inasmuch as he does in a manner trade with his learning, and so the class is fancied to be mixed of the said two tribes, the worse quality being supposed to be derived from the mother and the better from the father. The number of castes appears to have increased with the increase of occupations, in the course of progress; for, later writers enumerate many that are not mentioned in the earlier works, and they describe the origin of the new castes according to their fancy.

It should be here remarked that the Súdras are not now the lowest class, as is generally supposed; for, all the mixed castes that are deemed to be descended from the issue of a superior mother and an inferior father, are ranked beneath the Súdras. The latest Sanskrit writers on castes say that pure Súdras as well as Kshatriyas and Vaisyas have become extinct. The reason of this assertion seems to be that these Bráhmanical writers do not wish to have two other twice-born castes possessed of privileges like themselves; and as regards Súdras, many castes which they represent to be mixed ones, appear from their occupations to belong to the Súdra tribe; but the policy pursued by these Bráhmanas for the purpose of maintaining their own superiority to all, appears to have been to multiply and subdivide castes in such a manner that each of these, though inferior to the sacerdotal class, may deem itself superior to some others, so that the vanity of that caste might be satisfied to some extent. For, although the rank of the four pure tribes is in the order in which they have been enumerated, yet it is difficult to ascertain the exact position of many of the so-called mixed castes in the order regarding the relative rank of castes, having regard to the various combinations of tribes, which the Bráhmanical imagination gives in describing their origin: thus the sense of humiliation which may be felt by

a caste at the idea of being inferior to the Bráhmana and the like caste, is compensated by the conceit created by the notion of that caste itself being superior to others.

Sages, and Mitákshará and Dáyabhága on intermarriage.—The account of the origin of the mixed castes, as given by Manu and other sages, shows that there were many of them, that sprung from sexual connection between inferior men and superior women. But while dealing with marriage, the sages lay down that marriage between persons of the same caste is preferable, and they also recognise marriage between a woman of an inferior caste and a man of a superior caste to be valid; but they do not say anything about the marriage between an inferior man and a superior woman. There are, on the contrary, passages in the Smritis, providing punishment for a man having sexual intercourse with a woman of a superior class. Thus they do, by implication, prohibit intermarriage between a man of an inferior tribe and a woman of a superior tribe.

The Mitákshará and the Dáyabhága, the two treatises of paramount authority in the two schools respectively, appear to take the same view: for, partition of heritage between sons of a man by his wives of the same and the inferior tribes, is dealt with by the former in Chapter I, Section 8, and by the latter in Chapter IX. The Mitákshará also deals with intermarriage in the Achára Kánda while dealing with marriage.

It should be noticed, however, that these works take into consideration only the four original tribes and not the mixed castes, while they deal with intermarriage or partition.

It should, however, be observed that these prohibitions appear to be of moral obligation only; hence, although marriage of an inferior man with a superior woman may be disapproved and condemned still if such a marriage does in fact take place, the same must be regarded valid as between the parties to it, and the issue legitimate. They may be excommunicated, and excluded from inheritance of their relations, (Dáyabhága, XI, 2, 9): but as between themselves the relationship of husband and wife, and of parent and child must be held legitimate and there must also be reciprocal heritable right among themselves,—there being no authority for pronouncing the marriage to be invalid, however, reprehensible the same may be represented to be.

Prohibition of intermarriage by latest commentators.—The latest commentators Raghunandana and Kamalákara, however, prohibit intermarriage between the different tribes, upon the authority of some passages in the minor Puránas, enumerating practices that should be avoided in the Kali age: (See p. 6). But in this respect they differ from the two leading Treatises and

the Smritis, which recognize the lawfulness of marriage between a man of a superior tribe and a woman of an inferior tribe. And their view appears to be adopted by the Calcutta High Court which held that a marriage of a Dome Bráhmana with a girl of the Haree caste is invalid, if not sanctioned by local usage: *Melaram* v. *Thannooram*, 9 W.R., 552.

Different subdivisions of the same caste.—There is no text of Hindu law prohibiting an intermarriage of persons belonging to the different subdivisions of the same tribe or *varna*. A practice, however, has grown up, and intermarriages between the different subdivisions of the same tribe do not now take place, although there is no legal bar to the same. For instance, there is no *connubium* between the Bárenda, the Rádhíya and the Vaidika subdivisions of the Bengal Bráhmanas, nor between the Bangaja, the Uttara-Rádhíya, the Bárendra and the Dakshina-Rádhiya Káyasthas of Bengal. It is extremely doubtful whether such practice or custom may be the foundation of a rule of law, such as will justify a Court of Justice in declaring an intermarriage in fact to be invalid, when it is not prohibited either by the sages or by the commentators. In the Madras case of *Inderun* v. *Ramaswamy*, 13 M.I.A., 141 = 12 W.R., P.C., 41, the Privy Council has upheld an intermarriage between two different subdivisions of the Súdra tribe. In the case of *Narain Dhara*, 1 C.S., 1, there is one passage in the judgment from which it may be inferred that a contrary view of the law was taken. In that case the question was, whether from the fact that a man of the Kaibarta class and a woman of the Tanti class lived as husband and wife for a period of twenty years, a marriage in fact could be presumed to have taken place between them. And it was held that it could not, inasmuch as the foundation of such a presumption was wanting in that case; for, the parties being members of two different subdivisions of the Súdra tribe, between whom there is in practice no intermarriage, the court could not think it a fact likely to have happened. It was not intended to be laid down that an intermarriage in fact, between different subdivisions of the same tribe is legally invalid; nor did that question arise for decision on the facts of that case. It has, however, been clearly laid down in the case of *Upoma* v. *Bholaram*, 15 C.S., 708, that such intermarriage is valid.

It should be remarked, however, that what were taken in those cases to be different subdivisions of the Súdra tribe, are represented by the latest writers to be mixed castes.

I may mention to you that in the Eastern Districts such as Sylhet and Tippera, there is a custom of intermarriage between the Vaidyas and the Káyasthas, as well as between the Káyasthas and the Shahoos.

Guardianship in marriage.

Hindu law does not contemplate marriage of males in their infancy, and so there is no rule regarding guardianship in their marriage. According to Hindu law a man attains majority after the completion of the fifteenth year, and this rule is unaffected by the Majority Act, so far as marriage is concerned; so a young man of that age is *sui juris* and may be taken to act for himself as regards his marriage.

But the Sástras enjoin early marriage of girls, and rules are laid down relating to Guardianship in their marriage. See Texts Nos. 14-16, *supra*, p. 54.

On a consideration of the texts of Vishnu, Yájnavalkya and Nárada cited above, Raghunandana places the maternal grandfather and the maternal uncle before the mother. But the author of the Mitákshará has adopted the rule laid down in the above text of Yájnavalkya, without any such addition, probably because cognates are not much thought of in that School. It is worthy of notice that the mother, who is the nearest natural guardian, holds the last place in the above order, although she may, after the death of her husband, give away her son in adoption which affects the interests of the boy given, to the same extent as marriage does those of a girl. There are some reported cases showing that a difference does often arise between the mother and the paternal relations of a girl with respect to her marriage.

In a case of dispute *before* marriage between the paternal and the maternal relations for guardianship to dispose of a girl in marriage, the Court as representing the Sovereign and as such being the Supreme Guardian, may impose terms upon the relation having the right, for the benefit of the girl, who should not, however, be forced into a marriage odious to her: *Shridhur* v. *Hiralal*, 12 B.S., 480.

The above texts, however, appear rather to impose a moral duty on the relations in the order they have been enumerated, enjoining them to provide a suitable match for a girl before her puberty, than to lay down such a strict rule of priority between them as might invalidate a marriage that has actually taken place but not under the superintendence of a relation who, under the circumstances, is the guardian indicated by the above rule. This appears to follow from what both Raghunandana and Kamalákara say, namely, that if the betrothal of a girl is made by her father who is of unsound mind, and thereupon a marriage is celebrated with the usual ceremonies, then the fact of the father's insanity cannot render the marriage invalid.

This view of the law on this point, has, subject to certain

salutary exceptions, been taken by Justices Norris and Ghosh in the case of *Brindaban* v. *Chundra*, 12 C.S., 140, in which the paternal uncle of a girl impugned the validity of her marriage celebrated by her mother. Their Lordships lay down the law thus:—"There can be no doubt that the uncle of the girl had a right in preference to the mother, under the Hindu laws, to give the girl away in marriage, but the mother, the natural guardian, having given her away, and the marriage having not been procured by fraud or force, the doctrine of *factum valet* would apply, provided, of course, that the marriage was performed with all the necessary ceremonies."

Having regard to the fact that amongst the respectable Hindus it would be difficult to find a man willing to marry a girl who has already passed through the ceremonies of marriage with another man, no marriage should be set aside even in a suit by the girl's father, only upon the ground that it took place without his consent or against his will. For, the sacrament of the marriage rite has the effect of causing the status of wife, unless the same has been defiled by fraud or force. This view has been adopted by all the High Courts, and the texts relating to guardianship have been pronounced to be directory and not mandatory: See *Venkata* v. *Ranga*, 14 M.S., 316; *Ghazi* v. *Sukru*, 19 A.S., 515; and *Mulchand* v. *Bhudia*, 22 B.S., 812. Accordingly in a case where the mother of a girl married her in disobedience of the order of a Civil Court directing her to make over the girl to her paternal uncle for the purpose of getting her married, it was held by the Bombay High Court that the principle of *factum valet* applied: neither the disobedience of the Court's order, nor the disregard of the preferable claim of the male relations would invalidate the marriage: *Bai* v. *Moti*, 22 B.S., 509. But the case may be different when a second ceremony of marriage with another man has already taken place at the instance of the proper guardian, which is possible among low castes, and there is a dispute between the two husbands; for, then the Court may take into consideration which of the two marriages is more beneficial to the girl.

Betrothal.—Marriages are preceded by contracts of betrothal made in more or less solemn form by the guardians of the parties to them. But these contracts of betrothal are not considered to be binding or irrevocable, so as to be capable of specific performance: *Gunput* v. *Rajani*, 24 W.R., 207=1 C.S., 74. But damages may be claimed and awarded for the breach thereof: *Purshotam* v. *Purshotam*, 21 B.S., 23.

Ceremonies.

I need not enter, in detail, into the numerous ceremonies that are generally observed in marriage, as most of you are aware

of them, having passed through the same. But the question that strikes a lawyer is, What ceremonies are essential for the completion of marriage? The necessary ceremonies appear to be the formal gift and acceptance, and the performance of the nuptial Homa called Kusandiká which is vicariously performed in the case of the Súdras. It has been held that the Vriddhi-Sráddha is not an essential ceremony; and that if it be proved that the mother made a gift of the bride, and that the nuptial rites were recited by the priest, it ought to be presumed that the marriage was good in law and that all the necessary ceremonies were performed. (See *Brindabun* v. *Chundra*, 12 C.S., 140). In this case the performance of the ceremony of *saptapadi-gamana* or walking seven steps, was not proved. If the performance of some of the ceremonies usually observed on the occasion of marriage, be proved, a presumption should be drawn that the marriage has been duly completed: *Bai* v. *Moti*, 22 B.S., 509.

It should be observed here that religious ceremonies do not appear to be performed or deemed necessary in the re-marriage of women who are either widows, or relinquished, deserted or released, by their living husbands (*Jukni* v. *Parbati*, 19 C.S., 627; *Vira* v. *Rudra*, 8 M.S., 440), prevalent amongst the lower castes in all parts of India, under the name of *shunga* or *sagai* in Bengal, *karao* in the North-West, and *pat* or *nátra* in Bombay. These marriages are instances of the Gándharva form, as they take place by consent of the bride who is presumably a grown up woman. But some customary secular ceremony is performed, such as exchange of garland of flowers, or the putting by the man of a red mark of vermillion on the forehead of the bride, in the presence of assembled friends and relations (*Bissuram* v. *Empress*, 3 C.L.R., 410); and some ceremony is necessary, otherwise it would be difficult to distinguish *Gándharva* marriage from concubinage (3 A.S., 738). The Gándharva marriage does not seem to be obsolete, as it was thought in this case. The Madras High Court has held that in order to constitute a valid marriage in the Gándharva form, nuptial rites are essential: *Brinda* v. *Radha*, 12 M.S., 72. But in practice, some secular ceremony only is observed in the marriages of widows in the Gándharva form, among lower classes.

Marriage complete without consummation.—According to Hindu law marriage is a sacrament, and in a religious point of view, it causes a permanent indissoluble union of the husband and wife, extending to the next world; and when it has been solemnized with the essential rites prescribed for matrimony the status of husband and wife arises, and the marriage is complete and binding, although it may not be followed by consummation at all: *Administrator* v. *Ananda*, 9 M.S., 466.

Legal Consequences.

Guardianship.—The effect of marriage is to place the wife under the control of the husband, who is entitled to the custody of her person when she is minor, even in preference to her father, (17 C.S., 298). So, when the husband dies and the wife is a minor, her deceased husband's relations are entitled to be her guardian in preference to her paternal relations: (*Khudiram* v. *Bonwari*, 16 C.S., 584). But the husband's reversionary heir who is interested in determining her life, should not be appointed the guardian of her person.

Maintenance, residence, &c.—Although the conjugal relation is based upon a contract of either the parties to the marriage or their guardians, the rights and the duties of the married couple do not arise from any implied contract, but are annexed by law to the connubial relation as its incidents. The wife is bound to reside with the husband wherever he may choose to live. The fact of the husband having another wife will not relieve her from that duty: nothing short of habitual cruelty or ill-treatment will justify her to leave her husband's house and reside elsewhere. (*Sitanath* v. *S. Haimabati*, 24 W.R., 377). The duty which the Hindu law imposes on a wife to reside with her husband, wherever he may choose to reside, is a legal and not merely moral duty. An ante-nuptial agreement on the part of the husband that he will never be at liberty to remove his wife from her paternal abode, would defeat that rule of Hindu law, and is invalid on that ground, as well as on the ground that it is opposed to public policy: *Tekait* v. *Basanta*, 28 C.S., 751. Obedience and conjugal fidelity to the husband are duties at all times required of the wife, who is not absolved from marital obligation by apostacy (18 C.S., 264).

The husband is bound to maintain the wife, to provide a suitable place for her residence, and to live with her.

In the absence of any breach of conjugal duties, the wife is entitled to the right of maintenance against the husband personally so long as he is alive, and against his estate after his death. But if the wife resides in her father's house against the will of the husband and without sufficient cause, she cannot claim maintenance from her husband.

But when the husband habitually treats the wife with cruelty and such violence as to create serious apprehension for her personal safety, she is justified in leaving her husband's protection and is entitled to separate maintenance from him. (*Matangini* v. *Jogendra*, 19 C.S., 84).

If either party is guilty of a breach of the marital duties, the

other party may institute a suit against the former for the restitution of conjugal rights: *Surya* v. *Kali*, 28 C.S., 37.

According to Hindu law as well as to many other systems of law, the husband and wife become one person by marriage. Many legal consequences are annexed to this theory of unity of person. Amongst the Hindus this unity is now confined to religious purposes, and does not generally extend to civil matters. The wife can hold separate property, she may enter into a contract with any person and even with her husband, and may sue and be sued in her own name. But the theory that the wife is half the body of her husband, has an important bearing on several points of Hindu law.

Agreeably to the Penal Code the husband or the wife does not become guilty of the offence of harbouring an offender by screening each other.

Remarriage of women.—The Hindu sages provide single-husbandedness as the most approved mode of life for women; the females that seek religious merit, must not, according to them, ever think of a second husband. But while the Hindu lawgivers thrust into prominence the said high ideal of conjugal duty for women influenced by religious and spiritual aspirations, they do, at the same time, recognize, under certain circumstances, remarriage of women that are impelled by inclination.

Even when her first husband is alive, a woman is allowed to remarry, should she be abandoned by her first husband for adultery or any other cause, or he be not heard of for a certain period, or adopt a religious order, or be impotent, or become outcasted. Thus Nárada (xii, 97) and Parásara (iv., 27) say:—

नष्टे मृते प्रव्रजिते क्लीवे च पतिते पतौ ।

पञ्चस्वापत्सु नारीणां पतिरन्यो विधीयते ॥

which means,—"Another husband is ordained for women in five calamities, namely, if the husband be unheard of, or be dead, or adopt a religious order, or be impotent, or become outcasted." The usage of remarriage of women during the lifetime of their first husband is found to be observed by some low castes, amongst whom the first marriage is dissolved either by a decision of the caste *Punchayet*, or by the husband's *chhar chithi* or letter of release granted to the wife, who may then contract *sagai* or *nika* marriage with another man: *Jukni* v. *Empress*, 19 C.S., 627.

Widows.—The Smritis appear to provide three alternative conditions for widows, namely: (1) *sutteeism* or concremation with the deceased husband's body, (2) life of asceticism; or (3)

remarriage. The first has been abolished by British legislation. The ascetic life is the alternative adopted by the females of respectable castes, so that amongst them remarriage of women came to be regarded as illegal, although it has all along prevailed among the lowest castes. It did accordingly become necessary to pass the Act XV of 1856 for legalizing the remarriage of Hindu widows belonging to the higher castes, among whom it had become, and still is, obsolete. This statute should properly be called after the name of the late Pandit Iswara Chandra Vidyáságara to whom it owed its origin and who framed its provisions.

Justification of rule against widow marriage.—The Hindu sages recommend that the widows should live a life of austerities, and they disapprove of remarriage of women. This recommendation has been adopted as a rule of conduct by the women of the higher castes, and the rule is justified on the following grounds: (1) Women as constituted by nature, can control and repress the sexual propensity, but men cannot; (2) the number of women is larger than men; (3) there are, no doubt, young widows in Hindu society, but there are not old maids, such as there are in European society; (4) the Hindu system is characterized by justice and equity to women who are all once married, and they must blame their ill-luck but not society should they lose their husband; (5) the boasted liberty of widows in European society in this respect, is accompanied by grave injustice to other females who are on that account compelled to live as lifelong spinsters, whose compulsory single condition moves not the vain philanthropists weeping for Hindu widows; (6) remarriage of women undermines the foundation of female chastity, which is the *sine qua non* of the bond, peace and happiness of home; (7) the utility of the institution should be tested by the good secured to the whole society, for the well-being and welfare of which, individual interests are often sacrificed.

Polygamy.—The Hindu law permits a man to have more wives than one at the same time, although it recommends monogamy as the best form of conjugal life. This recommendation has practically been adopted by the Hindus, and monogamy is the general rule, though there are solitary instances of polygamy. There are various reasons for and against polygamy which is sought to be interdicted by legislation deemed by some as the *panacea* for all evils in India. The Hindu institutions are founded on the requirements of the diversified human nature and condition, and ought not to be lightly interfered with, at the instance of persons distinguished by egotistic sentimentalism and spirit of intolerance. It is far better that those men of property, that

are impelled by inclination, should take the responsibility of openly having several wives than that they should secretly contract as many left-handed marriages as they please. The modern legal distinction between public and private character lends only an external whitewash to the social structure of modern times. As to feelings of women, evidence is not wanting that there are females enjoying the liberty conferred on them by Western civilization, who would rather have a half or a quarter of a husband than none at all.

CHAPTER IV.

ADOPTION.

ORIGINAL TEXTS.

१ । जायमानो ह वै ब्राह्मणस्-त्रिभि-र्ऋणै-र्ऋणवान् जायते । ब्रह्मचर्य्येण ऋषिभ्यो, यज्ञेन देवेभ्यः, प्रजया पितृभ्यः, एष वा अनृणो यः पुत्री यज्वा ब्रह्मचारी च ॥ श्रुतिः ।

1. A Bráhmana on being born becomes a debtor in three obligations; to the Rishis (who are propounders of the sacred books) for studentship (to peruse the same); to the gods, for sacrifices; to the ancestors, for progeny: he is free from the debts, who has son, who has performed sacrifices, and who has studied the Vedas.—Revelation.

२ । शुक्रशोणितसम्भवः पुत्रो मातापितृनिमित्तकः, तस्य प्रदानविक्रयत्यागेषु माता-पितरौ प्रभवतः । न त्वेवैकं पुत्रं दद्यात् प्रतिगृह्णीयात् वा, स हि सन्तानाय पूर्व्वेषां । न स्त्री पुत्रं दद्यात् प्रतिगृह्णीयात् वा अन्यत्रानुज्ञानात् भर्त्तुः । पुत्रं परिग्रहीष्यन् बन्धून् आहूय राजनि चावेद्य निवेशनस्य मध्ये व्याहृतिभि र्हुत्वा अदूरबान्धवं बन्धुसन्निकृष्टम् एव प्रतिगृह्णीयात्, सन्देहे चोत्पन्ने दूरबान्धवं शूद्रम् इव स्थापयेत्, विज्ञायते हि एकेन बहूंस्त्रायते इति ॥ तस्मिंश्चेत् प्रति-गृहीते औरस उत्पद्येत चतुर्थभागभागी स्यात् दत्तकः ॥ वसिष्ठः ।

2. A son sprung from the virile seed and the uterine blood is an effect whereof the mother and the father are the cause; the mother and the father are, therefore, competent to give, sell, or disown him; but an only son should neither be given nor accepted; for, he is intended for continuing the lineage of the ancestors; but a woman should neither give nor accept a son without the permission of the husband. One desirous of adopting a son should after having invited his relations, informed the king, and performed in the dwelling-house the *Vyáhriti-Homa*, take one whose kinsmen are not unknown or one who is a near kinsman. But if a doubt arises (as to the caste), then the adopted son whose kinsmen are unknown, should be set apart

like a Súdra; for, it is well-known that by one many are saved. If after he has been adopted an *aurasa* or real legitimate son be born, then the Dattaka shall obtain a fourth share.—Vasishtha.

३। औरसो धर्म्मपत्नीजस् तत्समः पुत्रिकासुतः।
क्षेत्रजः क्षेत्रजातस्तु सगोत्रेणेतरेण वा।
गृहे प्रच्छन्न-उत्पन्नो गूढ़जस्तु सुतः स्मृतः।
कानीनः कन्यकाजातो मातामह-सुतो मतः।
अक्षतायां क्षतायां वा जातः पौनर्भवः सुतः।
दद्यान्-माता पिता वा यं स पुत्रो दत्तको भवेत्।
क्रीतस्तु ताभ्यां विक्रीतः कृत्रिमः स्यात् स्वयं कृतः।
दत्तात्मा तु स्वयं दत्तो गर्भे विन्नः सहोढ़जः।
उत्सृष्टो गृह्यते यस्तु, सोऽपविद्धो भवेत् सुतः॥ याज्ञवल्क्यः २,१२८।

3. The *aurasa* or real legitimate son is one begotten (by the man himself) on the lawfully wedded wife: equal to him is the appointed daughter's son: the Kshetraja or appointed wife's son is one begotten on a wife by a kinsman or any other (appointed to raise issue): the Gúdhbhaja or adulterous wife's son is a son secretly begotten on a wife: the Kánina or damsel's son is a son born of an unmarried daughter, and deemed the son of his maternal grandfather: the Paunarbhava or twice-married woman's son is one born of a twice-married woman, whether her first marriage was consummated or not: the Dattaka son is a son whom the mother or the father gives in adoption: the Krita or purchased son is one who is sold (for adoption) by the mother and the father: the Kritrima or son made is one who is adopted by the man himself: the Svayandatta or self-given son is one who gives himself: the Sahoddhaja or pregnant bride's son is one who is in the womb of his mother when she is married: and the Apaviddha or deserted son is one who is abandoned (by his parents) and adopted as a son.—Yájnavalkya 2, 128.

४। माता पिता वा दद्यातां यम् अद्भिः पुत्रम् आपदि।
सदृशं प्रीतिसंयुक्तं, स ज्ञेयो दत्रिमः सुतः॥
सदृशन्तु प्रकुर्य्यात् यं गुण-दोष विचक्षणं।
पुत्रं पुत्रगुणैर्युक्तं स विज्ञेयश्च कृत्रिमः॥ मनुः, ९,१६८-१६९।

4. A son equal in caste and affectionately disposed whom his mother or father (or both) give with water at a time of calamity, is known as the Dattrima (=Dattaka) son. A son equal in caste, competent to discriminate between merit and demerit, and endued with filial virtues, who is adopted (by the man himself), is known as the Kritrima son.—Manu ix, 168-169.

५। अपुत्रेणैव कर्त्तव्यः पुत्रप्रतिनिधिः सदा।
पिण्डोदकक्रियाहेतो-र्यस्मात् तस्मात् प्रयत्नतः॥
पिता पुत्रस्य जातस्य पश्येच् चेत् जीवतो मुखं।
ऋणम् अस्मिन् संनयति अमृतत्वञ्च गच्छति॥
जातमात्रेण पुत्रेण पितृणाम् अनृणी पिता।
तदर्हि मुद्रिम् आप्नोति नरकात् त्रायते हि सः॥
एकस्या बहवः पुत्रा यद्येकोऽपि गयां व्रजेत्।
यजेत वाश्वमेधेन नीलं वा वृषम् उत्सृजेत्॥ अत्रिः।

5. By a sonless person only, should always a substitute of a son be anxiously made, for the sake of funeral oblations, libations of water, and obsequial rite. If the father sees the face of a living son after birth, he transfers the debts to him, and attains immortality. As soon as a son is born the father becomes absolved from the debts to ancestors; on that day he acquires purity, since the son saves from the infernal regions. Many sons are to be secured, if even one may go to Gya, or celebrate the horse-sacrifice or dedicate a Nila bull.—Atri.

६। देशानान्तु विशेषेण भवेत् पुण्यम् अनन्तकं।
गयायाम् अक्षयं श्राद्धे प्रयागे मरणादिषु॥
गायन्ति गाथां ते सर्व्वे कीर्त्तयन्ति मनीषिणः।
एकस्या बहवः पुत्रा श्लीलवन्तो गुणान्विताः॥
तेषां तु समवेतानां यद्येकोऽपि गयां व्रजेत्।
गयां प्राप्यानुषङ्गेण यदि श्राद्धं समाचरेत्॥
तारिताः पितरस्तेन प्रयान्ति परमां गतिं॥ उशनाः।

6. But in particular places the religious merit is endless, it is inexhaustible in a Sráddha at Gayá, and in death and the like at Prayága (or concourse of the Ganges and the Jumna.)

All those sages sing and proclaim the following verse,—"Many sons should be secured, possessed of good character and endowed with virtue: if amongst them all, even one goes to Gya, and if having arrived at Gya perform the Sráddha, the ancestors being saved by the same attain the highest state."—Usanas.

७। कांक्षन्ति पितरः सर्व्वे नरकाद् भय-भीरवः।

गयां यो यास्यति पुत्रः स न-स्त्राता भविष्यति।

एतस्या-वह्नवः पुत्राः यद्येकोऽपि गयां व्रजेत्।

यजेत वाश्वमेधेन नीलं वा वृषम् उत्सृजेत्॥ बृहस्पतिः।

7. All the ancestors apprehending fear of the infernal regions are desirous that that son who will go to Gya will become our saviour. Many sons should be secured if even one may go to Gya, perform the horse-sacrifice or dedicate the Nila bull.—Vrihaspati.

८। एतस्या वह्नवः पुत्रा यद्यप्येको गयां व्रजेत्।

यजेत वाश्वमेधेन नीलं वा वृषम् उत्सृजेत्॥ लिखितः।

8. This is almost the same as the second verse of Vrihaspati.

९। अपुत्रेण सुतः कार्य्यो यादृक् तादृक् प्रयत्नतः।

पिण्डोदकक्रियाहेतोर्नामसंकीर्त्तनाय च॥ दत्तकमीमांसाधृतमनुवचनं।

9. By a sonless person, should any description of son be anxiously made, for the sake of funeral oblations, libations of water, and obsequial rite, as well as for the celebrity of name.—Cited in the Dattaka-mímánsá as a text of Manu.

१०। ऋणम् अस्मिन् सन्नयति अमृतत्वञ्च गच्छति।

पिता पुत्रस्य जातस्य पश्येच्चेत् जीवतो मुखं।

अनन्ताः पुत्रिणां लोका नापुत्रस्य लोकोऽस्तीति श्रूयते॥ वसिष्ठः।

10. If the father sees the face of the living son on birth, he transfers the debt to the son, and attains immortality. It has been revealed that endless are the heavenly regions for those having male issue, but there is no heavenly region for a sonless man.—Vasishtha.

११। गोत्ररिक्थे जनयितुर्न हरेद्-दत्रिमः सुतः।

गोत्ररिक्थानुगः पिण्डो व्यपैति ददतः स्वधा॥ मनुः, ९। १४२।

11. The adopted son is not to take away (with him when he is passing from the family of his birth to that of adoption), the *Gotra* and the *Riktha* of the progenitor: the *Pinda* is follower of the *Gotra* and the *Riktha*, the Swadhá (or spiritual food) goes away absolutely from the giver.—Manu ix, 142.

Gotra is generally rendered into family, but it means here, "the status of being the son:" *Riktha* means wealth, but it means here property to which the right of the male issue arises by birth, or to which the right of the boy has already arisen.

Sir William Jones, however, translated the first line of this text thus,—"A given son must never *claim* the family and estate of his natural father," and this version has been accepted by the translators of Sanskrit works on law, in which this text is cited. But this version is inaccurate and misleading.

१२। पुत्रान् द्वादश यान् आह नृणां स्वायम्भुवो मनुः।
तेषां षड् बन्धुदायादाः षड् अदायाद-बान्धवाः॥
औरसः क्षेत्रजश्चैव दत्तः कृत्रिम एव च।
गूढोत्पन्नोऽपविद्धश्च दायादा बान्धवाश्च षट्॥
कानीनश्च सहोढश्च क्रीतः पौनर्भवस्तथा।
स्वयन्दत्तश्च शौद्रश्च षड् अदायादबान्धवाः॥ मनुः, ९। १५८-१६०॥

12. The self-existent Manu has declared twelve sons of men: of these six become members of the *Gotra* and coparceners, and six become members of the *Gotra* but not coparceners. The *aurasa* or true legitimate son, the appointed wife's son, the Dattaka, the Kritrima or son made, the secretly begotten son of the wife, and the deserted son—these six become coparceners and members of the *Gotra*: the maiden daughter's son, the pregnant bride's son, the purchased son, likewise the twice-married woman's son, the self-given son, and the son by a Súdra wife,—these six become members of the *Gotra* but not coparceners.—Manu, 9, 158–160.

ADOPTION.

Sons in ancient law.—The usage of adoption is the survival of an archaic institution based upon the principle of slavery, whereby a man might be the subject of dominion or proprietory right, and might be bought and sold, or given and accepted, or relinquished, like the lower animals. The above text of Vasishtha shows that children were absolutely under the power of the father

who could give, sell or disown them. The *patria potestas* of the Roman law in its earlier stage furnishes us with a true conception of the father's unlimited power over children in primitive society. Marriage in ancient law, consisted in transfer of the father's dominion over the damsel to the husband. Lifelong subjection was the condition of women who were under the dominion of either the father or the husband or their relations. Male children, however, became *sui juris* on the death of the father and the like paternal ancestors.

A careful consideration of the descriptions of the twelve kinds of sons will give an idea of the primitive conception of family relationship. The *aurasa* or a son begotten by a man on his own wife is what is now understood by the term son. But the Kshetraja or appointed wife's son was a son begotten on one man's wife by another man who was appointed by the husband or his kinsmen for that purpose. This resembles the usage of levirate prevalent among the Jews (see the Bible, Book of Ruth, and Deuteronomy xxv, 5-8.) The son so produced became the son of the woman's husband. So also was a son whom a wife secretly brought forth by adultery, this son called Gúdhhaja became the son of the woman's husband. A son born of an unmarried daughter became the son of the maternal grandfather. The pervading principle appears to have been that a wife and a maiden daughter belonged respectively to the husband and the father, and a son born of them belonged to their owner in the same way as a calf produced by a cow becomes the property of the owner of that cow. So was the *putriká-putra* or a son of an appointed daughter who was given in marriage to the bridegroom, with the condition that the son born of her would belong to her father, the marriage in such a case did not operate as a transfer of dominion over the damsel, from the father to the husband. Similarly the child in the womb of the pregnant bride was transferred by marriage to the bridegroom. The son of a twice-married woman is now deemed *aurasa* or real legitimate son, but he is separately enumerated, as remarriage of women was disapproved by the sages. A man became the father of these seven descriptions of child by the operation of ancient law. It should be observed here that although the Smritis purport to give the above classification of sons, it must necessarily include daughters as well.

Then come the five descriptions of sons by adoption, *viz.*, the Dattaka and the Kríta are sons given or sold respectively by their parents to a man who takes the boy for affiliating him as a son. The Kritrima and the Svayandatta are the sons made and self-given, they are destitute of parents and therefore *sui juris*

and free to dispose of themselves, they become the sons of the adopter with their own consent, the difference between them being that in the case of the Kritrima or son made the offer comes from the adopter, while in the case of the self-given son the offer is made by him. An *apaviddha* or deserted son is one who is abandoned or disowned by his parents and is adopted by a person as his son; this is like the appropriation by the finder of a thing without an owner.

The above description of the divers kinds of sons recognized in ancient times, discloses that sexual relation was very loose, and chastity of women was not valued. The relation of husband and wife, of father and son, and of master and slave, appears to have involved the idea of absolute power on the one hand, and abject subjection on the other, or of the one being the property of the other. Procreation by the father was not a necessary element in the conception of sonship.

The hankering after sons, proved by the recognition of the different kinds of sons, appears to have owed its origin to the exigencies of primitive society composed of families governed by patriarchal chiefs. In the unsettled state of tribal Government in early times, the number of male members capable of bearing arms was of special importance; and the same cause that enhanced the value of sons operated to lower the position of women as well as of men labouring under bodily disability or infirmity such as blindness.

Doctrine of spiritual benefit.—The Hindu society appears to have been civilized by means of religious influence. India is the land of religion, where all conceivable systems of theological doctrines arose and are still prevalent, ranging from polytheism to monotheism and from Sánkhya atheism to Vedantik pantheism. It has no place in the political history of the world, but holds the most prominent position in its intellectual and religious history.

It is erroneous to suppose that the law of adoption owed its origin to the doctrine of spiritual benefit conferred by sons. You cannot associate the sacred name of religion with practices based upon immorality and looseness of sexual relation: there is no system of religion known, that countenances an institution partly founded on adultery, seduction and lust. The Hindu religion which is moulded on asceticism, is least likely to sanction the immoral usages relating to several descriptions of sons recognized by ancient society. As regards ancestor-worship upon which the erroneous view is founded, its ritual shows that that ceremony is performed not so much for the purpose of conferring any benefits on the ancestors, as for the purpose of receiving benefits from them.

On the contrary, the doctrine of spiritual benefit seems to have been invoked for the purpose of discouraging the institution of subsidiary sons. The Hindu sages who are the propounders of the Smritis or Codes of Hindu law, appear to have introduced the doctrine of spiritual benefit derived from male issue, with the view of suppressing the laxity of marriage union, the looseness of sexual morality, the institution of subsidiary sons, and the improper exercise of *patria potestas*. They endeavoured to impart a sacred character to marriage, to impress the importance of female chastity, to discourage the immoral usages of affiliation, and to ameliorate the condition of sons and wives over whom the *pater familias* had absolute dominion extending to the power of life and death.

If you carefully read the passages of the Smritis, extolling the importance of sons in a spiritual point of view, you will find that they relate primarily to the real legitimate sons, and not to the secondary sons. In fact the sages divide sons into primary and secondary, with a view to mark the superiority of the Aurasa or real legitimate son. They also divide the sons into two or three groups to show their relative rank: the real legitimate son and the appointed daughter's son are declared to hold the highest position in a spiritual point of view; to the sons by adoption is assigned a middle rank; while the sons by operation of law, owing their origin to adultery, unchastity and looseness of sexual relation, are condemned and pronounced to be useless in a spiritual point of view.

Law of adoption simple.—The law of adoption, as propounded in the Smritis and explained in the Mitákshará, the Dáyabhága and similar commentaries respected by the different schools, is very simple. But many useless and arbitrary innovations were, for the first time, introduced by Nanda Pandit in his treatise on adoption, entitled the Dattaka-Mímánsá, composed some time after his Vaijayantí a Commentary on the Institutes of Vishnu, which was completed in Sambat 1679 = 1623 A.D., or a little over a century and a quarter before the establishment of British rule in India. There is no cogent reason why the position of a Legislator should be accorded to Nanda Pandita a mere Sanskritist without law, who had nothing whatever to do with the then government of the country, and the novel rules unfairly deduced by him from a few texts unnoticed by, if not unknown to, all the authoritative commentators most of whom appear to have compiled their works under the auspices of reigning Hindu kings—should be inflicted upon the Hindus as binding rules of conduct. The adventitious circumstance of the work being translated into English at an early period mainly contributed to the notion that it was an

authoritative work on adoption, respected all over India; and this erroneous view originating with the learned translator who assumed it to be an ancient work, has been often repeated without question, though there is abundant evidence in the reports of cases and records of customs that its peculiar doctrines are not respected in most places. The character of the work has only recently been judicially considered by a Full Bench of the Allahabad High Court presided by Sir John Edge, the Chief Justice, who has in an elaborate and exhaustive judgment dealt with the matter and come to the conclusion that the innovations introduced by Nanda Pandita should not be followed as binding rules. The majority of the judges have concurred in that view, but the minority would follow the maxim *Communis error facit jus*, and hold that the Dattaka-Mímánsá is binding, because it has several times been erroneously asserted to be a work of paramount authority on questions of adoption, although there is neither reason nor rhyme why it should be so regarded. See *Bhagwan Sing* v. *Bhagwan Sing*, 17 A.S., 294. The Judicial Committee, however, have set aside the view of the majority, and upheld that of the minority, for reasons cited at page 33.

Evidence as to Dattaka-chandrika being a forgery.—I have already told you that there is a well-grounded tradition in Bengal, that the Dattaka-chandriká is a literary forgery by one Raghumani Vidyábhúshana in the false name of Kuvera. The same tradition is also stated in the Tagore Lectures on Adoption. But with respect to it, a learned judge of the Allahabad High Court has made the disparaging remark, that "he is not prepared to place any value on," what he erroneously imagines to be, "the story which" the Tagore Professor "has stated" (17 A.S., 313). Had the learned judge glanced at the reference given at the bottom of page 124 of the Tagore Lectures, and procured the book therein referred to, he would have found that the tradition was stated in 1855 A.D., by the greatest Bengali of the present century. However, it has, therefore, become necessary to set forth the evidence supporting the conclusion that the Dattaka-chandriká is a literary forgery. The evidence consists of the following :—

(1) Sutherland the learned translator, believed that this treatise was not really composed by Kuvera by whom it purports to be written, though he was not informed of the real author.

(2) In 1855 A.D., Pandit Iswara Chandra Vidyáságara published his Disquisition on the Legality of the Re-marriage of Hindu Widows, in both the English and the Bengali languages, and succeeded in inducing the Legislature to pass the Act XV of 1856 for legalizing the re-marriage of Hindu widows. In a note appended to the Bengali version of that work he states to the

effect,—that Raghumani Vidyábhúshana composed the Dattaka-chandriká under the false name of Kuvera, and did at the same time, make it known by the acrostic in the last śloka that he was the real author. (See sixth edition of the Disquisition, page 182).

(3) In 1858 A.D., Pandit Bharat Chandra Siromani published in the Bengali character the original Dattaka-Mímánsá and Dattaka-chandriká with his own Sanskrit Commentary thereon. He had been a Hindu-law-officer attached to the District Court of Burdwan, and after the abolition of that post, became the Professor of Hindu law in the Government Sanskrit College of Calcutta. While commenting on the last śloka of the Dattaka-chandriká (see *ante* p. 21) he says as follow :—

श्रीरघुमणिविद्याभूषणश्लोकेयम् इति प्रसिद्धिः, अस्मिन् श्लोके तन्नामोल्लीखनप्रसिद्धिश्च। प्रथमचरणप्रथमाक्षर-द्वितीयचरणाक्षर-तृतीयप्रथम-चतुर्थचरणैः रघुमणिरिति नामोद्गमश्च। (See second edition of those works in Deva-nágari character, page 41 of the Dattaka-chandriká)

which means,—"It is a widely known tradition that this is the work of Raghumani Vidyábhúshana, it is also a widely known tradition that his name is made known in this śloka; the name Raghumani is given out by the first syllable of the first foot, the last of the second foot, and the first of the third foot, and the last of the fourth foot."

The venerable Pandit, however, adds इदम् अस्माभं न रोचते which means literally,—"This to us is distasteful." The idea is undoubtedly most painful and humiliating that a learned man like Raghumani was guilty of a literary forgery committed for the purpose of perpetrating a fraud upon the court of justice. Assuming that the Pandit meant to say that "it is not acceptable to me," yet that does not affect the tradition at all.

(4) The tradition is well-known to all Bengali Pandits professing to be *Smártas* or Hindu lawyers. It is curious that the tradition which has all along been so well-known to the Smárta Pandits is unknown to the English-educated native lawyers without Sanskrit.

(5) In 1863 A.D., when I was a student of the Smriti class in the Sanskrit College, I heard it from Pandit Bharat Chandra Siromani who also told the names of the parties to the law-suit for which the book was fabricated, and other details including the objects.

(6) The tradition is well known to the descendants of the litigant parties, of whom the claimant by adoption was to be benefited by the book. And I have heard it from that claimant's

son's daughter's son who was a Vakil of the Calcutta High Court, but is now retired.

(7) The tradition is well known to the descendants of the family to which Raghumani belonged, and I have heard it from his brother's great-grandson who also told that Raghumani was the Pandit of Colebrooke and was an inhabitant of Bahirgachi in the District of Nuddea.

(8) The case for which the book was fabricated is referred to in Sir Francis Macnaghten's Considerations on Hindu Law; he was the counsel for the adopted son, and as he says that from the law as it was understood at that day, he was certain that his client would have been entitled to *one-third* of the estate, had the cause been not settled by the parties themselves,—therefore it is clear that his attention was not drawn to the book, according to which his client would have been entitled to *one-half*, instead of *one-third*, of the estate. Had the book been in existence at the commencement of the litigation, the counsel for the adopted son the plaintiff, should undoubtedly have known it which is so favourable to his client. The book appears to have been forged subsequently, and it did not become necessary to invite the counsel's attention to it as the case was settled out of Court. The book appears to have been written in the year 1800 A.D.

(9) The book is said to be of special authority in Bengal, and yet it was altogether unknown to Pandit Jagannátha Tarkapanchánana, whose digest of Hindu law published in 1796 A.D., does nowhere refer to it.

This is not the only instance of literary forgery of the kind. Subsequently in 1832 A.D., some Pandits of the Calcutta Sanskrit College gave a Vyavasthá supported by the authority of certain Manuscript books, in a case between Jainas. (See 5 Bengal Select Reports, page 326, new edition). Those books were really fabricated by the Pandits, but the Librarian of the College was bribed and the books were placed in the Library, and their names entered in the list of books contained therein. The plan was well designed, but unfortunately for them, Dr. H. H. Wilson the then Secretary of the Sanskrit College had in his possession another list of the Library books, and the fraud was detected. As the Pandits confessed their guilt to Dr. Wilson, the only punishment inflicted on them was, that they were deprived of the source of income derived from giving Vyavasthás, by an imperative rule to the effect that the Pandits of the Sanskrit College shall not, on pain of dismissal, give any Vyavasthá intended to be used in a law-suit. The rule has ever since been in force and followed. Similar fabrications seem to have been made

later on, but became unsuccessful: see *Dey* v. *Dey*, 2 Indian Jurist, N.S., 24.

But you must not jump to a general conclusion against the Pandits from these isolated instances. While we find some of these heterodox Pandits, who were considered degraded by reason of teaching the sacred literature to Europeans or by reason of accepting service under them, tempted to deviate from the path of rectitude, we also find many orthodox Pandits possessed of virtues of a superior order, who are on that account respected as gods by the Hindu community. But in these days of Mammon-worship, their number is fast decreasing.

The object of adoption—is twofold, the one is spiritual and the other secular: a son is necessary for the attainment of a particular region of heaven, for the performance of exequial rites, and for offering periodically the funeral cakes and the libations of water; as well as for the celebrity of name and for perpetuation of lineage. The spiritual objects may be obtained by a man destitute of male issue through the instrumentality of other relations, such as the brother's son. But the secular object may be gained only by means of a son real or subsidiary. A man again that aims at *moksha* or liberation from transmigration of the soul, does not require a son and cannot adopt one.

Dattaka and Kritrima.—The Dattaka and the Kritrima are the only forms of adoption which are now recognized by our Courts. Of these the Dattaka is said to be in force everywhere, and the Kritrima, confined to Mithila only. The Kritrima form, however, appears to be prevalent in many districts in Northern India if not also in Deccan.

Putriká-putra.—It is most natural that a person destitute of male issue, should desire to give to a grandson by daughter the position of male issue. The appointed daughter's son is not regarded by Manu as a secondary son, but is deemed by him as a kind of real son. This form of adoption appears to prevail in the North-Western Provinces, and neighbouring districts. The Talukdars of Oudh submitted a petition to Government for recognising the appointed daughter's son; and accordingly in the Oudh Estates Act "son of a daughter treated in all respects as one's own son" is declared to be heir, in default of male issue. This sort of affiliation appears to be most desirable and perfectly consistent with Hindu feelings and sentiments; there is no reason why it should not be held valid, when actually made by a Hindu.

Sahodha and Paunarbhava.—The pregnant bride's son and the twice-married woman's son are both recognised at the present day, but they are deemed as *aurasa* or real legitimate son, and not as secondary or subsidiary sons. However it is thus clear

that the opinion of the authors of the two treatises on adoption is not respected in this respect.

Division of subjects.—I. Dattaka, II. Kritrima and other forms.

The subject of the Dattaka adoption may be discussed under five heads: (1) who may adopt, (2) who may give away in adoption, (3) who may be given and taken in adoption, (4) what ceremonies are necessary, and (5) what is its effect on the status of the boy.

Dattaka: who may adopt.

Capacity of Males.—A consideration of the definitions of twelve kinds of sons, will show that there could not be any restriction as to the number of subsidiary sons in early times, for a man could have a subsidiary son even against his will. There are passages of law, however, which recommend that a man who is destitute of son should make a substitute of son, which evidently discourages adoption by a man having an *aurasa* or real legitimate son. While commenting on these, Nanda Pandita concedes that a man may adopt a son with the consent of an existing *aurasa* son. This recommendation has now been converted into an imperative rule, and its operation has been extended by the Privy Council in the case of *Rungama* v. *Atchama*, 4 M.I.A., 1, holding that a man having an *adopted* son cannot adopt another. If the attention of their Lordships had been drawn to the injunction for securing many sons, laid down in Texts Nos. 5–8 and in passages to the same effect in other codes, the decision would have been different. Bearing in mind that in Hindu law a son's son and a son's son's son hold the same position as a son, the result is that a man having a real legitimate, or an adopted, son, grandson or great-grandson, cannot adopt.

But the existence of a son in *embryo* at the time of adoption would not invalidate it: *Hammant* v. *Bhima*, 12 B.S., 105.

So also the existence of a male descendant who is, by reason of any physical, moral, or intellectual defect, excluded from inheritance and incapable of conferring spiritual benefit, is no bar to adoption.

For, the status of sonship is constituted by the capacity to confer spiritual benefit and by the capacity to inherit, a child who is destitute of these capacities is not a son in the eye of the Hindu law.

It would seem therefore that the existence of a son who has renounced Hinduism or has, by becoming a *sannyási* or otherwise, rendered himself incapable of rendering spiritual service, is no bar to adoption. According to Hindu law such a son loses both the capacities constituting sonship; although the *Lex loci* Act has

conferred on such a son the capacity to inherit, yet it cannot be so construed as to deprive the father, of the power of adoption he has in the circumstances under the Hindu law.

A man having no son by his first wife, marries another in the hope of getting a son by the latter. It often happens that the first wife herself, who has failed to become the mother of a son, makes arrangements for her husband's second marriage and induces him to take another wife for the purpose of continuing the lineage and securing spiritual benefit. Such noble self-sacrifice can only be found among Hindu females. However, this second marriage also often proves barren ; and then the man has recourse to adoption. The most natural and reasonable course for him to follow is, to adopt and give a son to each of his two wives, and there are many cases of such double adoption in Bengal. After *Rangama's* case in which successive adoption of two sons was held invalid, the expedient hit upon to evade that ruling was to make simultaneous adoption of two sons for two wives, and there have been many instances of such adoption in Bengal. But simultaneous adoption was pronounced invalid in several cases, though the decision turned upon other grounds and was favourable to the adopted sons. But it has, at last, been judicially held invalid in the case of *Doorga* v. *Surendra*, 12 C.S., 686, affirmed on appeal by the Privy Council, see *Surendra* v. *Doorga*, 19 C.S., 513.

It is, however, worthy of special remark that notwithstanding the declaration by our courts of justice, that such adoptions were invalid, the adopted sons have been and are treated by Hindu society as sons of their adoptive fathers. This anomaly is the effect either of ignorance of the sentiments and usages of the people, or want of sympathy with the same. It is also partly due to the absence of English translation of the texts of law bearing on the subject, which appear not only to permit but to enjoin plurality of adopted sons. See texts Nos. 5-8.

It has been held that a bachelor (*Gopal* v. *Narayan*, 12 B.S., 329) and a widower (*Nagappa* v. *Subba*, 2 M.H.C.R., 367), may make a valid adoption. In these cases a difficulty arises as to who should be deemed the maternal grand-sires of the boy adopted.

It has also been held that a minor may adopt and give authority to his wife to adopt: (*Rajendra* v. *Sarada*, 15 W.R., 548, and *Jummoona* v. *Bama*, 1 C.S., 289). It is not clear from these decisions whether it is sufficient for the competency of a minor that he should attain the age of discretion or that he should attain the age of majority according to Hindu law, *i.e.*, complete the fifteenth year. The validity of adoption by a minor is maintained solely on religious ground, and it is looked upon as a

purely religious transaction, not affecting the civil rights of the adopter. This view may be quite true in Bengal where it has been held that sons acquire no rights to even the ancestral property during the father's lifetime, but it is not so where the Mitákshará prevails, inasmuch as the adopter's civil rights are materially affected by adoption, for the adoptee becomes the adopter's co-sharer with co-equal rights as regards ancestral property.

So strong, however, is the sentiment of ladies for the continuation of the family and lineage by adoption, especially in those instances in which the extinction of families has been prevented by adoptions, that they take the precaution of having authorities to adopt executed by infants as soon as they attain the age of discretion such as twelve or thirteen years, in favour of their infant wives. They are also made to give verbal permission to adopt, to their wives in the presence of witnesses.

A minor in Bengal under the Court of Wards cannot validly adopt or give authority to adopt, except with the assent of the Lieutenant-Governor, obtained either previously or subsequently.

Pollution on account of the death or birth of a relation does not vitiate an adoption made during it; the secular formalities of gift and acceptance may be performed by a person under it, while the religious part of the ceremony may be delegated to a priest or a relation free from impurity: *Santap* v. *Bangap*, 18 M.S., 397; *Lakshmi* v. *Ram*, 22 B.S., 590.

Capacity of females.—According to the ancient Hindu law as well as to Roman law a woman was placed through her whole life under the tutory of her husband or his agnates when she ceased to be under the paternal power. She was not permitted to be *sui juris* at any period of her life. (See Texts, Nos. 17 and 18 *ante*, p. 55). But important rights were conferred on women by the Mitákshará and the Dáyabhága, so as to make their position almost equal to that of males, specially as regards the right to hold property. A great deal of misconception prejudicial to women, often arises from not distinguishing the later development of law from its earlier stages.

The text of Vasishtha (*ante*, p. 83) provides—"But a woman should neither give nor accept a son except with the permission of the husband." This text has been very differently construed by the different schools. See *ante*, p. 22.

Some say that the husband's assent is absolutely necessary for an adoption by a woman. Of these again, some assert that the husband's assent must be given at the very time of adoption, so that according to them a widow cannot adopt at all. While others say that the word "husband" in the above text is illustrative, it means the tutor or guardian of the woman for the time

being, that is to say, when the husband is alive his assent is necessary, and after his death the assent of his agnates who are his widow's guardians is necessary and sufficient for enabling her to adopt.

There is a third view entertained by some who maintain that adoption by the widow being conducive to the spiritual benefit of the sonless husband, his assent is always to be presumed in the absence of express prohibition.

It should be observed that according to those who maintain that a widow can adopt with the assent of her husband's kinsman, the husband's assent cannot be operative after his death, on the ground of his not being the guardian of his widow. But this distinction is not practically observed.

The doctrines of the different schools, as enforced by our courts at the present day are as follows:

In Mithila it is absolutely necessary that the husband should give his assent at the time of adoption; therefore a widow cannot adopt a *dattaka* son there.

In Bengal the husband's express assent is absolutely necessary and it is operative after his death, so as to enable a widow to make a valid adoption.

The Bengal doctrine has been applied to cases governed by the Benares school.

In Madras, Bombay and the Punjab a woman may adopt either with the husband's assent or with his kinsmen's assent if he died without giving any.

In Bombay widows whose husbands were not members of joint family, may also adopt of their own accord without any assent of either the husband or his kinsmen. It should be observed that in this case the husband's estate is vested in the widow.

A Jaina widow also can adopt of her own accord without any authority from either the husband or his kinsmen; the reason perhaps is that she becomes absolute owner of her deceased husband's self-acquired property inherited by her: *Sheo* v. *Dakho*, 1 A.S., 688; *Manik* v. *Jagat*, 17 C.S., 518.

According to what is stated in the commentaries, it would seem that the widow adopts in her own right, but she being in a state of perpetual tutelage, the discretion which she is deemed to want is supplied by the *Auctoritas* of her legal guardian. According to some, the husband is the only guardian of a woman in the matter of having a son; while others regard adoption as an appointment of an heir and disposition of property, and therefore the assent of the husband's kinsmen whose interests are affected, is necessary and sufficient; there are some again who think that the widow inheriting the husband's estate is

practically *sui juris* and is also competent to deal with the property for religious purposes, so she may, of her own accord, make a valid adoption which is conducive to the husband's spiritual benefit, and which is an act of self-denial on her part, as by it she divests herself of the husband's estate which vests in the boy adopted.

But the modern view regarding woman's capacity to adopt is, that she has no right herself, but that she is deemed to act merely as an agent, delegate or representative of her husband, or that she is only an instrument through whom the husband is supposed to act: (*Collector of Madura*, 12 M.I.A., 435=10 W.R., P.C., 17). It should, however, be observed that the wife is the only agent to whom authority for adoption may be delegated; a man cannot authorize any other person to adopt a son for him. A joint power to the widow and other person or persons is invalid. But the widow's choice of a boy for adoption may be restricted by the husband by requiring the consent of persons named by him. If it turns out that such consent cannot be procured, she has no authority to adopt: *Amrita* v. *Surno*, 27 I.A., 128=27 C.S., 996.

Accordingly the "assent of the husband" is looked upon as power. It has been held that a man who has a son in existence, and is therefore himself incapable of adopting a son, may nevertheless give a conditional authority to his wife to adopt a son, to be exercised in the event of the existing son dying without leaving male issue: 7 W.R., 392; 1 M.S., 174; 22 W.R., 121.

It follows, therefore, that the widow's right of adoption depends entirely on the power, and must accordingly be subject to the restrictions and limitations that the husband may choose to impose in that behalf. If the widow is authorized to adopt one son, she cannot adopt a second, if the first adopted son dies; if he directs the adoption of a particular boy, she cannot adopt any other. In this manner, the authority is strictly construed. It would, however, be more consistent with the feelings of the Hindus, should the authority given by them be liberally construed, specially when it appears that they evince a general intention to be represented by a son, and a particular intention with respect to the mode of carrying out the same; in such a case, effect might be given to the former irrespective of the latter. This principle was acted upon in *Lakshmi* v. *Raja*, 22 B.S., 996.

If a person has more wives than one, and authorizes one of them, she alone is entitled to adopt. If any other particular direction is laid down, that must be followed; should a general authority to all the wives be given, then there might be some difficulty in case of disagreement and dispute. But if one is

willing to loyally carry out the husband's wishes by adoption and the others are opposed for selfishness, then the former may adopt by giving notice to the latter, 18 C.S., 69. But all of them may agree in ignoring the authority.

For, however, solemnly a husband may enjoin his wife to adopt a son unto him, she is not legally bound to fulfil his dying request; her rights to the husband's estate are not in the least affected by her omission or refusal to adopt: *Uma Sunduri* v. *Sourobinee*, 7 C.S., 288.

An authority is void if it directs adoption under circumstances in which the man himself if living could not have adopted.

An authority may be given either verbally, or by a will, or by a writing called *anumati-patra* which must now be engrossed on a stamp paper of ten rupees and must also be registered.

When a widow is authorized to adopt in the event of the death of an existing son, and the son dies and the estate vests in the son's widow or any heir other than the first-named widow, then the first-named widow cannot adopt, as her power of adoption is then "incapable of execution and at an end," in other words, it is absolutely suspended so as to render an adoption then made absolutely void: *Pudma Kumari* v. *Court of Wards*, 8 I.A., 229=8 C.S., 302; 10 M.S., 205; 17 C.S., 122. But the power revives when the estate reverts to, and becomes vested in her: *Bhoobunmoyee* v. *Ramkishore*, 10 M.I.A., 279; *Manikchand* v. *Jagatsettani*, 17 C.S., 518. But the Bombay High Court has construed that expression of the Privy Council to mean that the power is absolutely extinguished by the vesting of the estate in the son's widow, and cannot revive on the estate reverting to the widow of the donor of the power after the daughter-in-law's death: *Krishna* v. *Shankar*, 17 B.S., 164. It should, however, be observed that in such cases it must be owing to some accident that the son dies without making any provision for the continuation of the family. Having regard to the intention of sons in such cases, that die making provisions in this respect, and to their feelings on the subject, it is natural to presume the revival of the mother's power to be what the son would have assented to, had he expressed his views. Such revival appears to be agreeable to the sentiments of the Hindus. Besides, a Hindu widow inherits her husband's estate in the character of being the surviving half of her deceased husband; as soon as she gives up that character by remarriage her estate comes to an end: her life is deemed as a continuation of her husband's life. Why should then the vesting in the son's widow, of the son's estate, or correctly speaking, the continuation of that estate in her, which had vested in her jointly

with the husband since the time of their marriage, extinguish the mother's power when it is unaffected by the vesting in the son, otherwise than being merely suspended. Moreover, the position of the mother is the same whether she inherits the son's estate just after his death, or after the death of his widow; the estate becomes vested in her as the son's heir in both cases, without any distinction whatever. It is impossible to conceive any reason or principle for difference with respect to the continuance of the power. Why should it revive in the one case, and be extinguished in the other? It has been held that the son's marriage does not affect the mother's power, if his wife dies before him, and the mother succeeds on his death, she is competent to adopt: *Venkappa* v. *Jivaji*, 25 B.S., 306. Would it not be arbitrary to hold that she is not competent to adopt, if she succeeds after the son's widow's death?

Hence, that expression must be taken to be used with reference to the facts of that particular case. The principle underlying their Lordship's decision appears to be that the adoption by a widow is the execution of the power of adoption which is a kind of power of appointment of the donor's estate. If that estate is not ready to drop down on the adopted son at the time of adoption by reason of the same being vested in a person other than the widow, the power must be deemed *non est*, and the adoption void.

As a widow adopts a son unto her husband, in her capacity of being his surviving half, she cannot adopt after re-marriage; nor when she is pregnant in adultery.

As an adoption by the widow divests her of her husband's estate, therefore in an adoption by a young widow, whether infant or not, the court will expect clear evidence that at the time she adopted, she was informed of her rights and of the effect of the act of adoption upon them; and if it find that coercion, fraud or cajolery was practised upon her to induce her to adopt, or that she was not a free agent, or that there was suppression or concealment of facts from her, it will refuse to uphold the adoption. See *Somasekhara* v. *Subhadra*, 6 B.S., 524 and *Ranganaya* v. *Alwar*, 13 M.S., 214.

There is no limit of time for the exercise by a widow of the power of adoption; she may adopt at any time she pleases, when the estate is vested in her. See *Giriowa* v. *Bhimaji*, 9 B.S., 58. But it seems that there must be some limit when the husband's undivided coparcenery interest becomes vested on his death in the surviving male members of the family according to the Mitákshará.

Where a widow may adopt with the assent of her deceased

husband's kinsmen, there if the husband was a member of an undivided family, the assent must be sought from the surviving male members of the family. In such a case the assent of a divided kinsman will not be sufficient: *Sri Virada* v. *Sri Brozo*, 1 M.S., 69. It is not necessary that all the kinsmen should give their assent; the assent of the majority is sufficient in the absence of improper considerations, such assent should be presumed to have been given on *bonâ fide* grounds: *Venkata* v. *Anna*, 23 M.S., 486. The proper person to give the requisite assent is he under whose guardianship the woman should remain according to the circumstances in each case. If there is the father-in-law his assent is sufficient. *Collector of Madura* v. *Moottoo*, 12 M.I.A., 397=10 W.R., 17; *Vithoba* v. *Bapu*, 15 B.S., 110. If the husband was separate then it would seem that the consent of the presumptive reversionary heir must be taken.

The assent to be legally sufficient should be given after the exercise of discretion, and not from any corrupt motive, 1 M. S., 69 (82).

In Bombay a widow in whom her husband's property is vested, may adopt without any authority from her husband or assent of his kinsman, in the absence of express prohibition by her deceased husband, provided she does not act capriciously or from any corrupt motive: *Ramji* v. *Ghamau*, 6 B.S., 498. The husband's assent is presumed from the absence of express prohibition. But when the husband's estate is vested in other relations, she may adopt only with their assent, if the husband gave none: *Payapa* v. *Appanna*, 23 B.S., 327. But acquiescence implied by mere presence at the ceremony and the absence of any objection is not equivalent to consent: *Vasudeo* v. *Ram*, 22 B.S., 551.

When there are more than one widow, the senior alone may adopt without the assent of the junior widow, but not *vice versâ*. The senior widow's preferential right depends on her becoming the *patni* or indispensable associate for religious purposes since her marriage,—a position not affected by subsequent marriage of another wife: *Padaji* v. *Ram*, 13 B.S., 160.

Dattaka: who may give in adoption.

The father and the mother of a boy are competent to give him away in adoption. The concurrence of both would be desirable. But the father may act even against the will of the mother. The mother, however, cannot give without the assent of her husband while he is alive; but after his death she can give her son in adoption, in the absence of express prohibition by her husband.

Thus you see that there is a great distinction between the giving and the taking of a boy in adoption, as regards woman's

capacity in that behalf. Her power is almost unrestricted as regards *gift*, but not so as regards acceptance; though both seem to be dealt with in the same way, and the assent of the husband is required by Vasistha (Text No. 2), as well to the *gift* by the wife of a son in adoption, as to the *acceptance* by her of a boy for adoption as son unto the husband.

But as adoption is a kind of advancement of the boy who is to become entitled to a rich inheritance, and as such beneficial to him, it may be safely left to the discretion of a mother to make a gift of her child for adoption, and the father's assent required by the text of Vasistha may be presumed in the absence of express prohibition.

But a widow has no power, after her re-marriage, to give in adoption her son by her first husband. The Bombay High Court have held that the right to give a boy in adoption is a right of disposition, a portion of *patria potestas*, which comes to the widow by reason of her connection with her deceased husband's estate, but which is lost by re-marriage: 24 B.S., 89. The capacity to give may also be regarded as an incident of guardianship which she loses by re-marriage.

As regards the gift of an only son, the effect of which would be the extinction of the family, and the cessation of spiritual benefit derived from the son, it is doubtful whether this presumption of assent in the absence of express dissent, can legitimately be made in such a case. This appears to be the principle of the distinction, upon which Sir Michael Westropp's view is based, namely, "that assuming that a man's only son may be given in adoption by himself, yet if he has not expressly given to his widow an authority to make such a gift, it cannot be implied by law." But if the father was poor, he may be fairly presumed to have preferred the son's secular benefit by adoption, to the spiritual benefit of himself and his ancestors. And the mother's action in this respect may be taken to be governed by the same considerations, as that of the father. The attention of the Judicial Committee seems to have not been directed to the principle underlying the distinction which is therefore pronounced by their Lordships to have been quite novel. And their Lordships approved of the view expressed by the Madras High Court that the wife's power, at least with concurrence of *Sapindas* in cases when that is required, is co-extensive with that of the husband: *Sri Balusu* v. *Sri Balusu*, 26 I.A., 113, 128. But it should be observed that in this case there was the requisite assent to enable the mother to make the gift; for, according to the guardianship theory, adopted in Madras, the husband's kinsman's assent is sufficient.

Considering the consequences of adoption which appears to operate as civil death of the boy as regards the family of his birth, the law confers on the parents only, the power of making a gift in adoption. A stepmother, or any other relation cannot make such a gift: *Papamma* v. *Venkatadri*, 16 M.S., 384.

Nor can the parents delegate this power to any other person. But the gift and acceptance form the essential part of the ceremony; if the parents have performed the same they may delegate the religious portion to any relation or to their priest for performance and completion of adoption: *Lakshmi* v. *Ram*, 22 B.S., 590. When a Bráhmana died after having taken a boy in adoption, but died before the ceremony of the Datta-Homam was performed, and the same was performed by his widow, the adoption was held valid: *Subba* v. *Subba*, 21 M.S, 497.

The power which the Hindu law confers on a father to give away his son in adoption is not lost by a Hindu pervert to Islamism. If he thinks it beneficial to his son to remain a Hindu, and to be adopted as a son to a Hindu adopter, he is competent to give away the son in adoption. He may be a party to the secular gift and acceptance, and delegate to a relation the performance of the religious portion of the ceremony of adoption. In a case in which the natural father after having adopted the Mahomedan religion was desirous to give his son in adoption and authorized his Hindu brother to make the gift, and then died, and subsequently the boy was given by his said uncle, it has been held that the father was competent to delegate the authority, and the adoption was good: *Sham* v. *Santa*, 25 B.S., 551.

Dattaka: who may be given and taken in adoption.

Only son.—With respect to eligibility for adoption, the only rule on the subject, propounded by the well-known legislators, is the prohibition contained in the above text No. 2 (*ante*, p. 83) of Vasishtha, forbidding the adoption of an only son. This rule is merely recommendatory, and it was held to be so by all the superior courts in India till 1868 A.D., when, for the first time, it was held by a Division Bench of the Calcutta High Court that the adoption of an only son is invalid. One of the Judges was Justice Dwarkanath Mitter, but being a "lawyer without Sanskrit" he was not in a better position than the European Judges holding the contrary view, as regards the interpretation of Hindu law. See *Raja Opendur* v. *Ranee Bromo*, 10 W.R., 347; and 3 C.S., 443. The Bombay High Court also had since that decision been expressing their opinion against the adoption of an only son till a Full Bench of that Court did in 1889 A.D., hold such adoption to be invalid:—see *Wáman* v.

Krishnáji, 14 B.S., 249. But such adoption has all along been held valid in Madras, N.-W. Provinces and the Punjab. In 1892, a Full Bench of the Allahabad High Court did, upon a reconsideration of the law and all the previous cases, come to the conclusion that the adoption of an only son is valid: see *Beni Prasad* v. *Hardai Bibi*, 14 A.S., 67. The very fact of there being so much difference of opinion, proves the rule to be of moral obligation only.

But this controversy has been set at rest by the decision of the Judicial Committee holding the adoption of an only son to be valid: *Sri Balusu* v. *Sri Balusu*, 26 I.A., 113.

Some other similar rules held admonitory.—There are some commentators who say that a man should not give away his son in adoption when he is not in distress, and that he should not give in adoption his eldest son or one of two sons. But these are considered to be merely directory and not imperative.

The Dattaka-mímánsá and still later commentaries say that a man should adopt his brother's son if available for adoption, in default of him he should adopt a *sapinda*, in his default a *Samánodaka*, and in default of an agnate relation he should take one belonging to a different *gotra* or family. But this rule relating to preference in selection has been held by the Privy Council to be merely recommendatory. See *Wooma Daee* v. *Gakoolanund*, 3 C.S., 587.

Prohibition of certain relations for adoption by twice-born classes.—Nanda Pandita and his followers maintain that certain relations such as a brother or an uncle, or the son of a daughter or of a sister or of the mother's sister, or the like should not be adopted by a twice-born person. No such rule is laid down in any earlier commentary. Nanda Pandit deduces the rule from two texts of doubtful import, which are not noticed by any commentator of note, and one of which is said to be a text of Saunaka and the other of Sákala, neither of whom is recognized as legislator, and whose names are not found in most of the commentaries on positive law. The texts are as follows:—

दौहित्रो भागिनेयश्च शूद्रैस्तु क्रियते सुतः ।

ब्राह्मणादि-त्रये नास्ति भागिनेयः सुतः क्वचित् ॥ शौनकः ।

which means, "A daughter's son and a sister's son are made sons by *Súdras*: among the three tribes beginning with the Bráhmana a sister's son is not (made) son somewhere (or anywhere),"—**Saunaka**. The second line of this couplet is not found in many copies. This passage is found in a book on ritual, the authorship of which is attributed to Saunaka, but which on perusal would

appear to be a modern production. It does not profess to deal with law; but while dealing with the ritual of *Játa-karma* or the natal ceremony, it professes to describe the ritual of adoption, and the above passage and some others relating to adoption are found after the description of the said ritual. In the course of describing the ritual, it is said after the formal gift and acceptance have been completed, that the boy *bearing the reflection of a son* पुत्रच्छायावहं should be adorned, &c., and brought within the house where *homa* should be performed.

सपिण्डापत्यकश्चैव सगोत्रजमथापि वा ।
अपुत्रको द्विजो यस्मात् पुत्रत्वे परिकल्पयेत् ।
समानगोत्रजाभावे पालयेत् अन्यगोत्रजं ।
दौहित्रं भागिनेयञ्च मातृस्वसृसुतं विना ॥ शाकलः ।

which means—"A sonless twice-born man *shall* or *should* adopt a son of a *Sapinda* or also next to him a son of a *Sagotra*; and in default of the son of a *Sagotra*, *shall* or *should* adopt one born of a different *gotra*, except the daughter's son, the sister's son and the mother's sister's son."—Sákala.

From what book of Sákala's, these lines are quoted by Nanda Pandit, no one can tell.

From the above couplets of Saunaka and Sákala, and the words, "*bearing the reflection of a son*" qualifying the boy, Nanda Paudita deduces the rule that amongst the twice-born classes, such a boy should be adopted, as could be begotten by the adopter on the boy's mother by appointment to raise issue in the Kshetraja form, and accordingly he prohibits the adoption of the relations mentioned above.

Sutherland, the learned translator of the Dattaka-mímánsá and the Dattaka-chandriká, formulates the rule thus,—That a twice-born man cannot adopt a boy when the relationship between the boy's mother and the adopter is such that there could have been no valid marriage between the adopter and the boy's mother, had she been unmarried. This, however, does not correctly represent Nanda Pandita's view; for, this cannot exclude the relations whom he has expressly excluded.

Discussion as to there being any such binding rule.—If what Nanda Pandita says be accepted as authoritative and imperative, then the utmost that can be said is, that the relations to be avoided are only those enumerated by him. If on the other hand, it be open to us to examine the texts with a view to see whether there is any binding rule prohibiting the adoption

of any relation, then the question cannot but be answered in the negative, as has been done by the Full Bench of the Allahabad High Court (17 A.S., 294), for the following reasons:—

(1) The above text of Saunaka does not embody any command or चोदना in the language of the Mímánsá, but it is merely a statement of facts, or what is called in Sanskrit a भूतार्थवादः। As regards the words "*bearing the reflection of a son*" forming an adjective of the boy who has already been formally given and accepted, they can fairly be taken to indicate only the effect of the ceremony already performed; but they can by no means imply the meaning forced upon them by Nanda Pandita, who has rather evolved it out of his inner consciousness, than from the natural import of the words.

(2) Then, as to Sákala's text, it should be observed in the first place, that the object of the text is not to lay down who should or should not be adopted, but to declare who should be adopted first, who next, and who last; or in other words, the order of preference in the matter of selecting the boy to be adopted. It says, you *shall* or *should* adopt from amongst the *Sapindas*; in their default, from amongst the distant *Sagotras* or agnates; and in default of agnates, from amongst those belonging to a different *gotra* such as cognates; then follows the exception, "except the daughter's son, the sister's son, and the mother's sister's son." Now the question arises, to what does the exception relate? It admits of two constructions, one of which is logical (अर्थविधया), and the other grammatical (शब्दविधया).

If the text be construed *logically* or having regard to its true intention, the rule may be put thus—"If a *Sapinda* is available for adoption you *shall* or *should* not adopt a distant *Sagotra* or agnate; and if an agnate is available for adoption you *shall* or *should* not adopt one belonging to a different *gotra* or family, except the daughter's son, the sister's son, or the mother's sister's son,"—that is to say, the daughter's son, the sister's son, and the mother's sister's son, though belonging to a different *gotra*, may be adopted although there may be an agnate available for adoption: thus, the exception relates to the *order* which is the subject of the rule. And this construction is consistent with what is laid down by all the sages dealing with positive law. For, they recognize the twelve kinds of sons; therefore a daughter's son may, according to them, be the son of the maternal grandfather, as *Putriká-putra* or appointed daughter's son, or as *Kánína* or maiden daughter's son. Hence there is no reason why the same daughter's son cannot be his maternal grandfather's son as *Dattaka* or given son. Therefore, consis-

tently with what is necessarily implied by these well-known legislators, Sákala cannot be taken to prohibit the adoption of "the daughter's son" who has been declared to be most eligible as a subsidiary son under the name of *Putriká-putra* declared to be equal to the *Aurasa* or real legitimate son,—and consequently, of "the sister's son and the mother's sister's son."

Next, if the text be construed *grammatically*, then the exception is to be connected with the verb "*shall* or *should* adopt," and the text must be put thus: "In default of an agnate, he *shall* or *should* adopt one belonging to a different *gotra* except (or but not) the daughter's son, the sister's son, and the mother's sister's son,"—therefore the prohibitory proposition or sentence must *grammatically* be formed with the verb "*shall* or *should* adopt" as used in the text, and must stand thus,—"But he *shall* or *should* not adopt the daughter's son, the sister's son, and the mother's sister's son.

It should, however, be borne in mind in this connection, that the Privy Council have declared the rule propounded by Sákala relating to the order of preference, to be directory only, 3 C.S., 587. Therefore, although the word पालयेत् in Sákala's text may, having regard to its form, mean either "*shall* or *should* adopt," it must now be taken to mean "*should* adopt:" consequently, the very same word पालयेत् or "*should* adopt" being grammatically connected with the exception, the prohibitory sentence must mean, "But he *should* not adopt the daughter's son, the sister's son, and the mother's sister's son"—that is to say, the exception also must be a precept of moral obligation, like the rule. In this connection the following Sanskrit rule of construction should be borne in mind, namely सकृदुच्चरितः शब्दः सकृदर्थं गमयति or "a word once pronounced can convey only one meaning:" hence, although the word पालयेत् may mean either "*shall* adopt" or "*should* adopt," it being authoritatively settled by the decision of the Privy Council that it means "*should* adopt" in connection with the rule, it cannot but bear the same meaning when grammatically connected with the exception.

This interpretation appears to be unexceptionable and unassailable from a Sanskritist's as well as a lawyer's point of veiw: its correctness, however, depends upon the view adopted by the Privy Council, of the rule relating to the order of preference for adoption. And the view taken by the Judicial Committee appears to be supported by the Mímánsá. Those who feel curiosity to study the subject with details, are referred to Jaimini's Mímánsá with Savara-svámi's Bháshya, Ch. I, Páda or Section 2, and Ch.

XI, and specially to विधिरत्रिगदाधिकरणम् or "the topic of recommendations in the form of imperative rules," Ch. I, 2, 19 *et seq.* In this topic is discussed the question, whether precepts like the following are imperative or only recommendatory, namely, उदुम्बरो यूपो भवति, &c., or "A sacrificial post is made of (the wood of) the Udumvara tree, &c.:" and the conclusion arrived at is, that it is merely recommendatory, one of the reasons assigned being विधिसम्भवश्च स्तुतिसम्भवश्च—"the improbability of the precept being imperative, and the probability of its being a recommendation." A sacrificial post is but a means to an end, it is necessary for tying the animal to be sacrificed; any strong wood would be sufficient for the purpose, therefore the above precept is interpreted to be a recommendation only. Similarly, an adopted son is only a means to an end, and the direction that a brother's son if available should be adopted, in his default a *Sapinda*, and so on,—is, for similar reasons, merely recommendatory. The truth is, that there are various reasons for considering a rule to be recommendatory only (अर्थवादः or प्रसज्यप्रतिषेधः) and not imperative (विधिः or पर्य्युदासः),—हेतुवन्निगदः or "a precept with the reason for it," being only one of the tests for discriminating it as directory: and it is impossible for an unbiased and unprejudiced mind that is versed in Sanskrit law, to find fault with the rational view taken by the Privy Council, of the rule relating to the order of preference for adoption, and with its corollary that the exception to it is of the same character with the rule, having regard to the language of the text, and to the rules of construction.

(3) It is conceded that the adoption of the daughter's and the sister's son is valid amongst the *Súdras*. From this it may, according to Sanskrit rules of construction, be, very fairly inferred that such adoption amongst the twice-born classes is only censured, and not absolutely interdicted. But the Bombay High Court, relying on a hasty conclusion come to by Sir Raymond West, an eminent judge and Sanskritist, gets rid of that circumstance by observing that "the Hindu Law regarded the *Súdras* as slaves, and their marriages as little better than concubinage:" see 3 B.S., 273 (289). With great deference to Sir Raymond, I regret to say that the above proposition is entirely erroneous; for, the Smritis or Codes of Hindu Law did not regard the *Súdras* as slaves, and their marriages as concubinage.

According to the Smritis, every man is by birth a *Súdra*; it is by learning the sacred literature, that a man becomes twice-born. The privilege of studying the sacred literature is, no doubt, denied to the *Súdras* as well as to the females of the

so called twice-born classes. But the status of being *twice-born* depends on the acquisition of knowledge of the sacred literature. Manu (Ch. III, verse 1) ordains that a twice-born man shall abide with the preceptor, and study the Vedas for thirty-six years, or a half or a quarter of that period, or until knowledge of the same is acquired. The consequence of omitting to do the same is thus declared by Manu (Ch. II, 168):

योऽनधीत्य द्विजो वेदम् अन्यत्र कुरुते श्रमं ।

स जीवन्नेव शूद्रत्वम् आशु गच्छति सान्वयः ॥ मनुः २, १६८ ।

which means,—"That twice-born man, who without studying the Vedas, applies diligent attention to anything else, soon falls even when living, together with his descendants, to the condition of a *Súdra*." Hence the males of the twice-born classes, who have no knowledge of the sacred literature, are like their females, in the same category as *Súdras*, *i.e.*, they remain such as they are by birth. The majority of the so-called twice-born classes have accordingly become long since reduced to the position of *Súdras* by reason of neglecting the study of the Vedas from generation to generation. It follows, therefore, that according to the Smritis, the *Súdra* law should be applicable to them who are twice-born by courtesy only, and hold the position of *Súdras*. Our Courts of Justice are called upon, therefore, to enquire, in every such case, whether the so-called twice-born litigants are really so, before applying to them a rule different from that applicable to the *Súdras*; and in ninety-nine cases out of a hundred, it will be found that the parties, though twice-born by courtesy, are really *Súdras* by qualification. There are, no doubt, some modern fabrications called *Upa-Puránas*, and concocted for the purpose of avoiding the foregoing evil consequence propounded by the Smritis,—which say that the study of the Vedas for a long time is a practice which is to be eschewed in the Kali age (see *ante*, p. 6), and accordingly a farce of the Vaidik study for a day or two, is now made when the *Upanayana* ceremony is nominally performed, and fittingly called investiture with the sacred cord, though it really meant commencement of the study of the Vedas, the literal import being *taking* (a boy and handing him over) *to* (a teacher of the Vedik literature.) But these spurious books forged and thrust into prominence by the Pandits of the Mahomedan period for the benefit of the unlearned members of their class, cannot be regarded as any authority by a British court of justice. The *Puránas* and specially the *Upa-Puránas* are no authority in law. The Courts of Justice are to be guided by the Smritis and the

ancient customs only, as is declared by Yájnavalkya (ii, 5) while defining a *cause of action*, thus—

स्मृत्याचारव्यपेतेन मार्गेणाधर्षितः परैः ।

व्यावेदयति चेद्-राज्ञे व्यवहार-पदं हि तत् ॥ याज्ञवल्क्यः २,५ ।

which means,—"If a person wronged by others in a way contrary to the Smriti and the custom, complains to the king, that is a topic of litigation (or cause of action)." Our courts of justice, if rightly advised, will not listen to an unreal distinction, although the degenerate Bráhmanas by courtesy might be loudest in advancing their pretension to a false and artificial superiority.

A perusal of the Smritis will convince the reader that the *Súdras* as such were not regarded as slaves. Any person whether *Bráhmana* or *Súdra* might be a slave in the recognized modes such as capture in war, or sale by the father; (see Manu viii, 415). While dealing with the modes of acquiring subsistence by the different classes, Manu says, that a *Súdra* is to subsist by serving the twice-born classes, or by the practice of mechanical arts. But is this service the same thing as slavery? Not a word to that effect can be found in the Smritis, though no doubt the holders of service are compared to dogs, to whatever caste they may belong. There is however, a passage in the *Brahma-Purána*, which depicts the *Súdras* subsisting by service, as slaves, and that is the only slender basis on which is founded the conclusion that the Hindu Law regards the *Súdras* as slaves. But that passage does not apply at all to the *Súdras* practising the mechanical arts. Besides, slavery has been abolished within living memory, although the importation of slaves into British India, and the recognition of slavery by Government officials, were prohibited by earlier Enactments, slavery was abolished in 1860 A.D., by the Indian Penal Code. Therefore if the position of *Súdras* had been that of slaves under the Hindu Law, that state of things would have continued down to the abolition of slavery; but has any one ever heard that the general body of the *Súdras* or any section of them was *then* emancipated? The British Government has undoubtedly emancipated the people from moral thraldom. But no particular caste of Hindus was under physical thraldom at the time slavery was abolished, though there were certainly some Hindu slaves whose caste is unknown, that were liberated by British Indian legislation.

The Hindu legislators were anxious to provide every man with a source of maintenance; accordingly they ordained that the illegitimate son of a twice-born man by a *Súdra* woman not married by him, is entitled to maintenance from his estate, and as regards

Súdras they provided that an illegitimate son may, by the *Súdra* father's choice, get an equal share with a real legitimate son of his, and that after his death, he is to get a half share in comparison with what is obtained by his legitimate brothers; and that in default of legitimate heirs down to the daughter's son, he may get the whole property. Now it should be observed that *Súdras* were all poor men at the time when the above rule was laid down: the only property they might leave behind them would be a dwelling-house, and if he practised any mechanical art, also the tools of such art. Consequently a *Súdra's* illegitimate son by getting even his whole property, obtained considerably less than a Bráhmana's illegitimate son who was entitled to maintenance. It is difficult to appreciate the process of reasoning by which, from the above provisions for the benefit of a *Súdra's* illegitimate son, any inference can be drawn that the marriages of *Súdras* are licensed concubinage. Yet that is the only ground upon which that remark of Sir Raymond's is founded: there is nothing else in Hindu Law, which can even remotely lend any support to such a disparaging view as that. If we turn our attention from the law-books to the actual usage amongst the Hindus, we do not find anything peculiar to the *Súdras*, that may justify that contemptuous conclusion. On the contrary, having regard to the actual practice, the disparaging remark might be applied to marriages among the Nair Bráhmanas in Deccan; and also among a certain section of Bengali Bráhmanas by courtesy, who used to pass through the ceremony of marriage with scores of women some times exceeding a hundred, though they were too poor to provide even one of them with maintenance and residence.

Besides, it is difficult to understand the logical sequence between the adoption by *Súdras* of their daughter's and sister's sons, and the fact (even if admitted to be correct) of the Hindu Law regarding *Súdra* marriages as concubinage. If the Hindu Law had provided no prohibited degrees for marriage amongst the *Súdras*, and had allowed them to marry their daughters and sisters, then and then only could the distinction have been accounted for in the manner attempted to be done. For, in the prurient imagination of Nanda Pandita and the like, the adopted son is to be capable of being begotten by the adopter on the son's natural mother, by appointment to raise issue, merely for the purpose of justifying the prohibition propounded by him, for the first time.

For, even according to him, the fiction of adoption, is not, that the boy is begotten by the adopter on the boy's natural mother. Because if that had been so, the boy ought to have retained his relationship to his natural mother and her relations.

On the contrary it is admitted on all hands, that the real fiction of adoption is, that the boy is begotten by the adopter on his own wife, and it is on that footing that the adopted son's right of inheritance from the adoptive mother and her relations has been recognized, and that from his natural mother and her relations, denied to him. In performing the Párvana Srâddha he is to offer *pindas* or oblations to his adoptive mother's sires, not to those of his natural mother, see Dattaka-Mímánsá vi, 50. So the prohibition is utterly inconsistent with this theory of adoption, now universally accepted.

(4) There is a text of Yama, which appears to support the adoption by a twice-born person, of his daughter's son :—

दौहित्रे भ्रातृपुत्रे च होमादिर्नियमो नहि ।

वाग्दानादेव तत् सिद्धिरित्याह भगवान् यमः ॥

which means,—"The Homa or the like ceremony is not (necessary) in the case (of adoption) of the daughter's or the brother's son; by the verbal gift (and acceptance) alone, that is accomplished: this is declared by the Lord Yama."—This text was relied on by some Sástris of Bombay in 1821 A.D., who were consulted in the case of Huebut Rao, 2 Borrodaile 75, (85). I have not found it cited in any commentary of note; but Pandit Bharat Chandra Siromani used to repeat it to his pupils, and it is also cited in some unimportant works on adoption, see the said Pandit's compilation, called Dattaka-Siromani, pp. 45, 92, 244 and 246. This text, however, is not found in the Code of Yama, such as is now extant and published; it does not contain a single passage on positive law; nor do the published Codes of Vrihaspati and Kátyáyana, although numerous texts from them are cited by commentators on positive law, none of which is found in the published editions. Another text of Yama, cited in the Dáyabhaga, Ch. XI, Sec. 5, para. 37, was the subject for consideration by a Full Bench of the Calcutta High Court (1 C.S., 27), and the learned judges were anxious to see the context for the purpose of ascertaining the true meaning of that text (1 C.S., 38), and I was consulted and asked by an eminent judge of that Bench to procure the Code of Yama. I saw Pandit Bharat Chandra Siromani on the subject, but he said that the complete Code of Yama containing the chapter on positive law, he had never seen, and could not be found anywhere, so far as he was aware. Hence the above text cannot be supposed to be spurious, simply because it is not found in the published incomplete Code of Yama; it seems to have been traditionally known in the Sanskrit law-schools, when we find it cited by the Bombay Sástris and a Bengali Pandit.

Nor can it be contended that this text of Yama should be construed to refer to the *Súdras* only, and not to the twice-born classes. Because, in construing passages of law, we must take into consideration the religious disability of the *Súdras* under the Codes, to whom the privilege of performing sacrifices was denied, see Jaimini's Mímánsá (6, 1, 25 *et seq*) the topic of incompetency of *Súdras* to perform sacrifices or यागे शूद्रस्य अनधिकाराधिकरणम्। This view is entertained even now, with this difference only, that certain modern writers say that the *Homa* and the like ceremony may be performed by the *Súdras*, vicarously, through the Bráhmana priests. But the Calcutta High Court and the Privy Council have held that this modern view, however beneficial and profitable it might be to the Bráhmanical class subsisting by priest-craft, is not binding on the *Súdras*, who may, therefore, validly adopt a son without performing the *Homa* ceremony: *Behari Lall* v. *Indromani*, 21 W.R., 285, affirmed by Privy Council, *Indromoni* v. *Behari Lall*, 5 C.S., 770.

(5) Nanda Pandita was neither a lawyer nor a judge, but merely a Sanskritist and teacher of the sacred literature, and the above prohibition may be fairly taken to be intended by him as directory only, and a rule of the Law of Honour. Nor does he say that an adoption made in contravention of that prohibition is invalid, as he has done in respect of another rule, see his Dattaka-Mímánsá v, 56.

Discussion academical.—This discussion is no longer of practical importance to lawyers; since the Judicial Committee have held that as Nanda Pandita's view has been adopted and acted upon by all the High Courts for 80 or 90 years, it is incompetent to a Court of Justice to treat the question now as an open one: *Bhagwan* v. *Bhagwan*, 26 I.A., 153, 166.

Case-law.—The prohibition is not followed in the Punjab; nor in Madras where the adoption of the daughter's and the sister's sons has been declared valid by custom amongst the Bráhmanas, 9 M.S., 44; but notwithstanding, the adoption of the son of the daughter of an agnate relative has been held invalid, 11 M.S., 49. Nor did the prohibition obtain in Bombay before 1879 A.D. when, however, the adoption by a Bráhmana, of his daughter's son was declared invalid, 3 B.S., 273. The prohibition is not respected by persons adopting in the Kritrima form in Mithila. In the North-West Provinces the adoption by a Bohra Bráhmana, of his sister's son has been held valid according to custom, 14 A.S., 53; and in the recent Full Bench case of *Bhagwan Sing*, 17 A.S., 294, it has been held by the Chief Justice Sir John Edge and the majority of the Judges of the Allahabad High Court that Nanda Pandita's rule ought not to be enforced, and that the adoption of

the daughter's son and the like is valid amongst the regenerate classes. But this decision of the majority has been overruled by the Judicial Committee, as has already been noticed, according to the maxim—*Communis error facit jus.* In Bengal there is no recent reported case on the point, but there were several early decisions in conflict with each other. Here a person's daughter's and sister's son being entitled to inherit his property even when he dies joint with his co-heirs, in preference to near agnates, the question would not arise in many cases, in which the daughter's and the sister's son as such would succeed, even if their adoption be invalid,—and this accounts for the paucity of cases. In a recent case which came up to the Calcutta High Court in second appeal, but ended in a compromise, a Bráhmana had adopted his sister's son and died leaving him and a widow and also a will, and then the adopted son died during the widow's lifetime leaving sons, and thence arose the litigation between the reversioner and the sister's son's sons.

The existence of usages to the contrary, proves that there was no restriction such as is propounded by Nanda Pandita. If the works of Nanda Pandit and his followers be thrown out of consideration, there is nothing else that may suggest to a student of Hindu law, the existence of any such restriction.

Conclusion as to prohibited relations for adoption.—It should be observed that Nanda Pandita expressly prohibits a brother, an uncle, and a daughter's, a sister's, and a mother's sister's sons, of whom the last three only are to be excluded, according to the texts of Sákala and Saunaka; and Sutherland lays down the rule that a boy whose mother is prohibited for marriage to a man by reason of relationship, cannot be adopted by him. It is very difficult to say what is the effect of the Judicial Committee's decision in Bhagwan Sing's case, on this rule, since the *ratio decidendi* of their Lordship's decision in that case may be contended to be applicable even to this wide rule enunciated by the learned translator, although it is not legitimately deducible from what Nanda Pandita says on the subject. Because, right or wrong, Sutherland's rule has been reiterated by most text-writers on Hindu Law, as well as by the judges of the highest tribunals in many cases, though it appears that there is only one single case in which an adoption has been pronounced invalid by the application of this rule propounded by the learned translator: 11 M.S., 49.

Caste.—The adoption of a boy belonging to a caste different from that of the adopter is not forbidden by the Smritis. There is, however, a passage in the alleged work of Saunaka, already referred to, recommending adoption within the caste; and pro-

viding that an adopted son belonging to a different caste is entitled to food and raiment only and not to a share of the property, as he cannot serve the spiritual purpose. The caste exclusiveness has become so rigid now, that an adoption of a son known to belong to a different caste, is impossible at the present day.

In an unreported case from Sylhet the High Court upheld an adoption of a Káyastha boy by a man of the Shahoo caste, by reason of there being the usage of intermarriage between these castes.

Age and initiatory ceremonies.—Neither in the Smritis nor in the commentaries on general law is there any restriction either as to the age of, or as to the performance of any initiatory ceremony upon, a person, which limits his capacity for being adopted.

But Nanda Pandita cites a passage of the Kaliká-Purána, a modern production called Upa-Purána, laying down that a boy who has completed the fifth year, or one upon whom the tonsure has been performed though he may be within the fifth year, cannot be adopted. Nanda Pandita, however, construes the passages to mean that a boy whose age exceeds five years cannot be adopted, and that one within that age may be adopted though the tonsure has been performed upon him, but in that case the additional sacrifice of Puttreshti must be performed.

In the Dattaka-Chandriká, the passage cited from the Kálika-Purána is declared spurious: but a new restriction is laid down to the effect that the age should not exceed the primary period for the ceremony of investiture with the sacred thread, which is the eighth year for Bráhmanas, the eleventh for Kshatriyas and the twelfth for Vaisyas, and that a Súdra may be adopted if unmarried.

Our courts, however, are disposed to reject these rules, but at the same time they appear to lay down the rule that a twice-born boy may be adopted if the ceremony of the investiture with the sacred thread has not actually been performed upon him; and a Súdra, before his marriage: *Gunga* v. *Lekhraj*, 9 A.S., 253.

But there is no such restriction in the Punjab, or in Mithila as regards Kritrima adoption, or amongst the Jainas; or in Bombay where a married man with children may be adopted: *Dharma* v. *Ramkrishna*, 10 B.S., 80. It is also held in Madras that according to custom amongst the Bráhmanas the adoption of a boy of the same *gotra*, after *upa-nayana* or investiture with the sacred cord, is valid, 9 M.S., 148; the same usage obtains in Pondicherry. There are other districts in which no restriction of the kind is observed.

This is another innovation introduced for the first time by Nanda Pandit, uselessly fettering the freedom of action of persons in a matter which is, as it ought to be, left by the Smritis to their discretion.

But it is worthy of remark, that for the purpose of affiliation an infant of tender age, whose mind and affections are yet unformed is preferable. There should also be such a difference in the age of the boy and the adoptive parents, that the former may look like the son of the latter. But all this should be left to the discretion of the persons concerned; no rigid rule is desirable, and accordingly the Bombay High Court has expressed an opinion that the fact that an adopted son is older than the adopting mother does not invalidate the adoption:—*Gopal* v. *Vishnu*, 23 B.S., 250.

Dattaka: what ceremonies are necessary.

The ceremonies of *giving* and *taking* are absolutely necessary in all cases. These ceremonies must be accompanied by the *actual delivery* of the child; symbolical or constructive delivery by the mere parol expression of intention on the part of the giver and the taker, without the presence of the boy is not sufficient, (*Siddessory* v. *Doorga*, 2 Indian Jurist, N.S., 22). Nor are deeds of gift and acceptance executed and registered in anticipation of the intended adoption, sufficient by themselves to constitute legal adoption, in the absence of actual gift and acceptance accompanied by actual delivery, 19 W.R., 133.

The formalities of giving and taking may be either what may be called ordinary and secular, or what may be designated religious and ceremonial, the latter are accompanied by the recital of Vedik texts, and therefore cannot be performed by Súdras and women; and so in an adoption by them, the acceptance of the boy would be, like their acceptance of a chattel, D.M., i, 17.

In a Súdra adoption no other ceremony is necessary, giving and taking being sufficient. I have already told you that it has been held that *Homa* is not necessary for an adoption among Súdras, 5 C.S., 770; it used, however, to be, oftener than not, performed by them vicariously through their Bráhmana priests.

With respect to the three regenerate tribes the ceremony of *Homa* or burnt offering is said to be necessary in addition to giving and taking.

The females of the regenerate classes are, like Súdras, incompetent to study the sacred literature; so they cannot themselves recite the sacred texts and cannot consequently perform the sacrifices, although they may join their husbands as indispensable associates in the performance of sacrifices. Hence

widows like Súdras, can perform the *Homa* rite vicariously through the sacerdotal priests. The sacred texts are omitted if women or Súdras, perform any religious ceremony; स्त्रीशूद्रादावनन्वयं। Váchaspati Misra however, maintains in his Vivádachintámani that widows and Súdras cannot adopt at all by reason of their incapacity to personally perform the *Homa* ceremony.

It should, however, be remarked that the performance of the *Homa* ceremony might be dispensed with in the case of an adoption by a widow of the twice-born classes, for the same reasons as in an adoption by a Sudra. Hence if *Homa* be not necessary in an adoption by a Bráhmaní widow, the result would be that it is not necessary in any case.

It is worthy of remark that according to Hindu law a boy could be given and taken as a slave and not as a son, such a slave was called *Dattrima* or *given;* hence, so long as slavery was in force, the *Homa* ceremony was of very great importance, conclusively proving that the boy was adopted as the *Dattrima* or *given* son, and not given and taken as a *Dattrima* or *given* slave. But now that slavery has been abolished, it is not of much value in that way.

Dattaka: his status and rights.

In Natural Family.—Except for the purpose of prohibited degrees in marriage, the connection of the adopted son with his relations by birth becomes extinguished unless they be also his relations by adoption, as in the case of the adopter and the adoptee being related before adoption. In such cases, however, the original relationship ceases, and a new relationship based on adoption, arises as far as possible between the adoptee and the original relations, through the adoptive parents.

The consanguineal Sapinda relationship in the family of his birth continues even after adoption, and in consequence an adopted son cannot marry a damsel belonging to that family, who is within the degree of Sapinda relationship.

Dvyámushyáyana.—So also a boy who is adopted in the *dvyámushyáyana* form retains his natural relationship to all the original relations and acquires, in addition, a new relationship to his adoptive parents and their relations. He is called the son of two fathers, as he is not absolutely given away in adoption, but is made a son common to both his original as well as his adoptive parents, just as a property may be transferred so as to become the joint property of the transferor and the transferee. A son could be of this description either by operation of law or by express agreement at the time of adoption. According to some, an only son can be adopted only in this form; for, as a

matter of law, he must continue his progenitor's son notwithstanding adoption in the ordinary mode. An express adoption in this form is now rare. If an only son of one brother be adopted by another brother or his widow, he becomes, by operation of law, the son of two fathers, an express stipulation being unnecessary: Krishna v. Paramshri, 25 B.S., 537.

Absolute adoption is civil death and new birth.—An absolute adoption appears to operate as birth of the boy in the family of adoption, and as civil death in the family of birth, having regard to the legal consequences that are incidents of such adoption. He is deemed to be begotten by the adoptive father on his own wife who is the adoptive mother. His status as son of his real parents ceases in the same way as if he were dead at the time of adoption. He cannot be born again without having been dead. Manu's texts Nos. 11 and 12 as explained in the Dattaka-mímánsá and the Dattaka-chandriká, and by other Sanskrit commentators, are clear authority for the proposition that adoption is tantamount to civil death and fresh birth.

The boy cannot take away with him the natural father's *gotra* and *riktha*, when he is passing from the family of his birth to that of adoption, or more properly speaking, when he becomes divested by adoption, of the status of being the son of his progenitor, and is invested with the status of being the son of the adopter. His status of sonship to the real parents being extinguished, he ceases to be a member of the natural father's *gotra* or family, and his existing proprietory right in the progenitor's property also comes to an end, as well as his capacity to perform the exequial rites for the spiritual benefit of his natural father and other ancestors ceases; both secular and spiritual connection with the natural parents and their relations, cease for ever. At the same time the very same connection, arises with the adoptive parents and their relations; he acquires the status of sonship to the adoptive parents, and as such becomes a member of the adopter's *gotra*, becomes a coparcener of his family estate, and is invested with the capacity for offering *pinda* to him and his ancestors.

According to ancient Hindu law the status of a person appears to have been determined by three things, namely, the *gotra*, the *riktha*, and the *pinda*. The Joint Family system was and still is the distinctive feature of Hindu society, the family and not the individual was the unit of society, and each family was possessed of the *riktha* or property forming the hereditary source of maintenance of its members; and it was an imperative duty of a person to provide with *pinda* or funeral oblations, the deceased ancestors of the family to which he belonged. The members of a family

appear to have been divided into two classes, some were co-proprietors of the *riktha* or family estate, while the rest were not so, but entitled to maintenance only, out of the said estate.

The two passages of Manu, one (ix, 142) dealing with the extinction of the adopted son's status in the family of birth, and the other (ix, 158–160) with the accrual of the new status in the family of adoption, are illustrative, and are based on the principle and fiction of civil death and fresh birth. Accordingly the same legal consequences follow from adoption, as from retirement or adoption of a religious order. The adopted son is to be deemed dead in the family of birth, and succession must therefore open to any property that may belong to him at the time of adoption, of which he becomes divested.

The law on the subject has been misunderstood, owing to the mistranslation of Manu's text, ch. ix, sloka 142 (text No. 11) which clearly implies that the adopted son's existing proprietary right in the natural father's property becomes extinguished; otherwise, why should he not take away with him such property or his share in the same when he is leaving the progenitor's family for joining the adopter's family? And the text has been so understood by all the sanskrit commentators. The view expressed in the Tagore Law Lectures on adoption, that there is no authority for maintaining adoption to be tantamount to civil death,—is erroneous as being contrary to the said text of Manu, and to the commentaries on Hindu law, which do not appear to have been taken into consideration in the said Lectures; although the same view has also been taken in the case of *Behari* v. *Kailas*, 1 W.N., 121, in consequence of the proper materials for a correct decision not being placed before the learned judge.

Adopted son cannot renounce status by adoption.—The boy who is validly given away in adoption by his parents, has no choice in the matter: he cannot renounce the status as adopted son; he cannot question the power of his parents to cause the severance of his connection with his natural relations; he may give up his right of inheritance from the adopter, but he cannot give up his status as adopted son, and return to his family of birth: *Mahadu* v. *Bayaji*, 19 B.S., 239.

Status and inheritance in the adoptive family.—The adopted son's status and rights in the family of adoption, are dealt with by the commentators, as being based upon express texts, and according to them the adopted son stands in many respects on a footing very different from that of the real legitimate son. As regards inheritance, there is a conflict between the Smritis, some of which are very favourable to the adopted son while others are not so, the latter admitting his right of inheriting from the

adoptive father alone. The commentators endeavour to reconcile the conflicting texts by holding that possession of good qualities will entitle the adopted son to inherit from the adoptive father as well as from his relations; otherwise, he will inherit from the adoptive father alone. There is, however, no express authority in Hindu law recognizing the adopted son's right of inheritance from the adoptive mother's relations.

Our Courts of Justice have avoided the difficulty by laying down a rule based upon the principle of equity and justice, and so cutting the Gordian knot of conflicting texts,—the principle being that the adopted son should have the same rights in the family of his adoption, as he loses in the family of his birth, unless there be express texts curtailing the same: they have thus adopted a principle which appears to be quite contrary to that followed by the commentators, namely, that the adopted son cannot claim any right unless there be an express text giving him that right,—and have disregarded the above distinction drawn by the commentators, by tacitly assuming the adopted son to be endowed with good qualities in every case.

Accordingly it is now settled by the decisions of the superior Courts that, as regards inheritance the adopted son holds in all respects the same position as an *aurasa* son of the adoptive father and the adoptive mother, and is entitled to all the rights of a real son of the adoptive parents with the exception of only such as has been *expressly* denied him.

The result is, that he will inherit from the adoptive father, the adoptive mother and all their relations without any distinction or restriction, subject only to one exception mentioned below. The adopted son of a full brother will take in preference to the *aurasa* son of a half-brother; and one daughter's adopted son will inherit equally with another daughter's real son. See *Padmakumari* v. *Court of Wards*, 8 C.S., 302; *Kalikomal* v. *Umasunker*, 10 C.S., 232; see also 6 C.S., 289; 3 W.R., 49; 1 A.S., 255; 3 Knapp, 55; 5 W.R., P.C., 100.

Theory of adoption.—It has already been observed that the theory of adoption is complete affiliation, and consists in the fiction of new birth, the adopted boy being deemed to be begotten by the adoptive father on his own wife. But it must not be supposed that the inequality of the *aurasa* and the *dattaka* sons as regards their rights, such as is found in the commentaries, is inconsistent with this theory. For even among *aurasa* sons unequal distribution of property at partition, is laid down in the Smritis, and used to be made in former times.

Adoptive mother.—When the adopter has more wives than one, then the question may arise as to which of them will be

the mother of the adopted son. If the adopter allows any one of his wives to join him in the ceremony of taking the boy in adoption, in that case she will be his adoptive mother, and her co-wives his stepmothers, so that the adopting mother would succeed to him to the exclusion of the other wives of the adoptive father. See W.R., Gap. No., p. 71 and 18 M.S., 277. On appeal against this Madras case, the Judicial Committee held these two cases to be rightly decided. In this case a man selected one of his two wives to adopt a boy in conjunction with him, the boy inherited the adopter's estate and died an infant, leaving the two widows of the adopter; the adopting widow was held entitled to succeed to the estate in preference to the other: *Annapurni* v. *Forbes*, 26 I.A., 246.

But a difficulty arises if the adopter alone takes the boy, or when all his wives join with him, if the latter course be possible. In either case all the wives might be taken to be his adoptive mothers. But fiction would then surpass nature: joint production of a single son by several females is a phenomenon unheard of, except in the story of Jarásandha in our Mahábhárata. The Itihásas and the Puránas, however, are our books of precedent, and you may rely upon them for drawing an argument by analogy in favor of the adopted son's rights. So the adopted son who is a favourite of law would have different sets of maternal relations to inherit from, if such an anomaly be permissible.

A greater difficulty presents itself when a widower or a bachelor adopts. In the first case it might be said that the deceased wife of the adopter will be the adoptive mother, and her relations the maternal relations of the adopted son. The difficulty in the latter case, however, must remain unsolved.

But it should be observed that although the husband's son is deemed by courtesy to be the wife's son, yet acceptance by the wife is absolutely necessary to constitute the husband's adoptee, her legal son. Even when a man has only one wife, and the man alone adopts and the wife does not join in the act of adoption or concur in it, the legal relation of mother and son cannot arise between them. Nanda Pandita, no doubt, maintains that although the husband's assent is necessary for an adoption by the wife, yet the husband may adopt without the assent of the wife, and the son so adopted would belong to the wife in the same manner as any property accepted by him. But as the wife's right to the husband's property is neither co-equal nor similar to that of the husband, but is subordinate in quality and character and is assumed to enable her to use and enjoy the same to a limited extent; similarly there can be no actual and legal relation of mother and son between the wife taking no part in the adoption, and the

husband's adopted son; any more than between a wife and the husband's begotten son by her co-wife. That a stranger adopted by a man without the concurrence, or even against the will, of his wife, would become legally her son, is a proposition which must be established by authority; should there be none, the above *ipse dixit* of Nanda Pandita declaring the husband's independence of the wife as regards adoption, would not be sufficient for that purpose. It would be begging the question to say that the husbands's adopted son becomes the son of his wife, when he has only one wife, even without her consent. Nanda Pandita also, appears to indicate that acceptance by the wife is necessary to constitute her the legal mother of her husband's adopted son, by saying that the ancestors of the *mother that accepts* in adoption प्रतिगृह्णती या माता are the adoptee's maternal grandsires in the ceremony of Párvana Sráddha, performed by him: Dattaka-mimánsá vi, 50. Hence the term, 'adoptive mother' must be taken in its primary meaning of *adopting* mother, and not in the figurative sense of the adopter's wife. The Sanskrit rule of legal construction is that every word should be taken in its ordinary primary meaning न विधौ परः शब्दः। The incidents of Kritrima adoption in *Mithila*, throw considerable light on the point.

Ante-adoption agreement curtailing adopted son's rights.— It has already been noticed that a widow is not legally bound to execute the power of adoption, however solemnly she might be enjoined by the husband. Her interest in the husband's estate is not affected by her omission to adopt. Her interest is opposed to her duty to carry out the husband's wishes; these are sought to be reconciled by an agreement before adoption, between the widow and the natural father of the boy, whereby the widow retains some interest in the husband's estate for her life. Such arrangement does not appear to be open to any valid objection, if the right retained does not exceed the widow's estate which she is entitled to enjoy notwithstanding an authority to adopt, which she may ignore. It cannot be deemed to be a fraudulent execution of the power. When the donee of the power derives a benefit from the execution of the power in a particular manner, but for which he could not have got the benefit, then the execution may be regarded a fraud upon the power. But the power of adoption is a peculiar one, the like of which is not found in the English law. The Bombay High Court has held that an agreement by the natural father consenting to retention by the adopting widow, of certain interest in the husband's estate is binding on the adopted son: *Ravji* v. *Lakshmi*, 11 B.S., 381, 398.

The Judicial Committee have expressed an opinion against such agreement; in a case in which it was made after adoption. Their Lordships observed.—"No conditions were attached to the adoption. Had it been otherwise, the analogy, such as it is, presented by the doctrine of Courts of Equity in this country relating to the execution of powers of appointment would rather suggest that, even in that case, the adoption would have been valid and the conditions void."—16 I.A., 59=16 C.S., 556.

The Madras High Court have taken this view, and relying on this *obitur dictum* of the Privy Council have held that the adopted son's rights cannot be curtailed by any ante-adoption agreement of the natural father: *Jagannadha* v. *Papamma*, 16 M.S., 400.

The effect of such a view as this would be that adoptions will not take place at all in most cases, that is to say, a greater fraud will be perpetrated on the power, which the courts are powerless to prevent. It is doubtful whether this result is desirable, and whether it is not preferable that the lesser fraud, if fraud it be, should be permitted. Besides it would be no less a fraud on the Purdanashin widow who is induced to adopt upon the understanding, that the conditions subject to which she adopts are valid and binding on the adopted son, if the conditions be declared void and the adoption good.

Adopted son's share.—The only exception, agreeably to the principle above mentioned, is, as to the amount of share to be obtained by the adopted son when a real son becomes subsequently born to the adoptive father, there being express texts giving to the adopted son, a lesser share in that event. In this respect too, there are conflicting texts, some giving him a third share, some a fourth share, while there is a text of Vriddha-Gautama, cited in the Dattaka-mímánsá v, 43, which says that an adopted son endowed with excellent qualities and an after-born son are equal sharers.

In dealing with the adopted son's heritable right, our Courts have assumed him to be endowed with excellent qualities in all cases; if the same assumption be made with respect to the question as to the amount of his share, when an *aurasa* son is subsequently born, then he should get an equal share in all cases, according to the above text of Vriddha-Gautama. But the question has not been considered from this point of view, in the cases on the subject.

The expressions one-third share and one-fourth share appear to be used in the texts, as having reference to the share of the *aurasa* son; and not as being so much part of the estate, for in that case if there are many real sons born, the adopted son would have got a larger share than each of them. The conflict has

not been reconciled, nor are the terms satisfactorily explained. But the rule adopted is that in Bengal the adopted son would get half of what a begotten son gets (4 C.S., 425); and in other places, one-fourth of the same (1 Mad. H.C.R., 45; 16 B.S., 347). But it has recently been held by the Bombay High Court that he is entitled to a fifth share instead of a fourth share, (*Giriapa* v. *Ningapa*, 17 B.S., 100), in other words, to one-fourth of what a legitimate son gets.

There is no other express authority in the Smritis for curtailing the rights of the adopted son. But the author of the Dattaka-chandriká extends this rule of difference in shares, to cases of partition between male descendants in the male line down to the great-grandson, where there is competition between an adopted and a real descendant. He does so by analogy which would make the rule applicable to all cases in which there is competition between a real and an adopted relation.

The extended rule has been followed by the Calcutta High Court in a case in which the adopted son of one brother brought a suit for partition against the sons of two other brothers (4 C.S., 425); they formed members of a joint family governed by the Mitákshará. The Madras High Court doubts the correctness of this decision: (*Rájá* v. *Subbaraya*, 7 M.S., 253).

The rule was not applied to a case in which the adopted son of one daughter was a claimant together with the real legitimate son of another daughter, both of whom were held to be equal sharers (9 C.S., 70).

Another novel rule enunciated for the first time by the Dattaka-chandriká, is that a Súdra's adopted son should share equally with his begotten son, on the ground that a Súdra's illegitimate son may by the father's choice get an equal share with his legitimate sons. It is difficult to understand the cogency of this argument. This rule, however, has been followed by the Madras High Court (7 M.S., 253), for this book is said to be of special authority in Bengal and Madras.

Adopted son's right as against adopter.—The position of an adopted son is secure under the Mitákshará; for as he is entitled to all the rights of a real legitimate son, he acquires from the moment of adoption, a right to the ancestral property, so as to become the co-owner of the adoptive father with co-equal rights. But if his position be not better than that of a real legitimate son, then under the Dáyabhága, and also under the Mitákshará so far as regards the self-acquired property, the adopted son would be left completely at the mercy of the adoptive father. The proposition that an adopted son is entitled to the same rights as a real legitimate son of the adoptive parents, confers on him in

Bengal the contingent and uncertain right of inheriting from them and all their relations. But the certain right of inheriting the adopter's property ought to be secured to him by curtailing the adopter's power of giving away his property to the detriment of the adopted son, seeing that the moving consideration inducing the parents to give their son in adoption is, his advancement by his appointment as heir to the adopter's property. According to the principle of equity and justice, therefore, our Courts are competent to protect an adopted son against the capricious and whimsical disposition of his property by the adoptive father, made with a view to deprive the son of the right of inheriting the same, when the protection afforded by natural love and affection to real legitimate sons is wanting in his case. There are, however, some cases governed by the Mitákshará, in which it has been held that an adoptive father is competent to make a gift of his self acquired immoveable property either by an act *inter vivos* (*Rungama* v. *Atchama*, 4 Moore 1=7 W.R., P.C., 57) or by a will (*Purushotam* v. *Vásudev*, 8 Bom., H.C.R., O.C., 196, *Sudanund* v. *Bonamalee*, Marshall, 137=2 Hay, 205), so as to deprive the adopted son. But in these cases, the principle of equity could not be invoked, inasmuch as the adopted sons became entitled to large ancestral estates.

In Hindu law adoptions took the place of Wills which were unknown and unrecognized. Adoption is regarded by the Hindus as an appointment of the heir and successor to the adopter. The moving consideration influencing the natural parents to give away their son in adoption is the belief that it is an advancement of the child who is sure to get the rich inheritance of the adoptive father. They would not have parted with their son, if they had believed that the adopter could disinherit him, according to his pleasure : had they thought such disinherison possible they would have required the adopter to settle his property on the boy before making the gift. But this course has now become absolutely necessary, inasmuch as the Privy Council have held that in adoption there is no implied contract with the natural father that in consideration of the gift of his son, the adopter will not make a will, depriving the adopted son of his estate: (*Sri Raja* v. *Court*, 26 I.A., 83=3 W.N., 415). It is so held even in a case where there was an express agreement in which it was said that the adopter constituted the boy his heir to his estate ; their Lordships remarked that by saying that, the adopter meant only that he had given him the same right of inheritence as a natural son would have. But it should be observed that that is a right which the law gives to an adopted son, no contract was necessary for securing it to him in that case.

Adoption by widow and devesting.—When a person dies giving an authority to his widow to adopt a son unto him, then his estate must vest in the nearest heir living at the time of his death; for a Hindu's estate cannot remain in abeyance for a nearer heir who may come into existence in future. Hence if he dies without leaving male issue, his estate must vest either in his widow or widows, or in the surviving collateral male members of the joint family if governed by the Mitákshará. If again the person leaves behind him a son and authorizes his widow to adopt in the event of that son's death without male issue, his estate vests in that son, and on the latter's death may vest in a person other than the widow authorized to adopt. Between the death of the adoptive father and the adoption, succession might open to the estate of deceased relations of the adoptive parents, which would have devolved on the adopted son, had his adoption taken place before the falling in of the inheritance. Hence arises the vexed question as to what estates, already vested in other persons, may a subsequently adopted son take by divesting them, the ordinary rule of Hindu law being that an estate once vested by inheritance cannot be divested by reason of any subsequent disqualification of the heir: (*Moniram* v. *Kerry*, 5 C.S., 776), or by reason of a nearer heir coming into existence afterwards: (*Kalidas* v. *Krishna*, 11 W.R., O.C., 11 = 2 B.L.R., F.B., 103). Hence divesting by adoption is an exceptional rule founded on the peculiar character of the institution, and entirely based upon judicial decisions which do not seem to be quite consistent.

When the estate is vested in the adopting widow as heiress of her deceased husband, she becomes divested by the adoption which is an act of her own choice. If the husband's estate is vested in two co-widows, and one of them adopts a son in the exercise of the power granted by the husband, it has been held that both the widows become divested: *Mondakini* v. *Adinath*, 18 C.S., 69. So in Bombay it has been held that when the senior widow without authority from the husband adopts a son of her own accord, the junior widow is also divested of her interest in the husband's estate (5 Bom., H.C.R., A.C.J., 181; 8 *idem*, 114). But in a case where a person died leaving two widows and a son by the senior widow, and giving authority to the junior widow to adopt in the event of that son's death, and on the happening of that event the junior widow adopted a son, it has been held that the senior widow cannot be divested of the estate which became vested in her as the mother and heiress of the son: *Faiz-uddin* v. *Tincowri*, 22 C.S., 565. So also when on the existing son's death the estate vested in his widow or in his paternal grandmother or other heir, it has been held that his mother in the former case,

and his stepmother in the latter, could not adopt, and cause the estate to be divested: *Bhoobunmoyee* v. *Ramkisore*, 10 M.I.A., 279=3 W.R., P.C., 15; *Dromomoyee* v. *Shama*, 12 C.S., 246; *Annamah* v. *Mabhu*, 8 Mad., H.C.R., 108.

But if the estate vests in the adopting widow by inheritance from her son or son's son, and she then adopts, the adoption will be valid, and the widow will be divested of the estate, according to the Mitákshará school: *Jamnabai* v. *Raychand*, 7 B.S., 225; *Ravji* v. *Lakshmibai*, 11 B.S., 381; *Lakshmi* v. *Gatto*, 8 A.S., 319; *Manikchand* v. *Jugutsetani*, 17 C.S., 518. The law may be contended to be different in the Bengal school, as regards divesting in such cases, because here under no circumstances can a brother take in preference to the mother, or a paternal uncle in preference to the paternal grandmother; whereas according to the Mitákshará the male members of a joint family take, to the exclusion of the females, the undivided co-parcenary interest of a deceased member; and the adoption may be assumed to relate back to the time when the estate vested in the adopting widow. Opposite opinions have been expressed by the learned Judges of the Calcutta High Court, the preponderance is in favour of the view that the mother becomes divested: see 5 C.S., 615; 2 W.N., 389=25 C.S., 662 and 5 W.N., 20. It has, however, been held by the Bombay High Court that an adoption made by a mother who succeeded as heir to her son after his death and that of his widow, is invalid, the power being at an end: *Krishnarav* v. *Shankarrav*, 17 B.S., 164.

An adoption by the widow of a predeceased son without the assent of her mother-in-law cannot divest the latter of the father-in-law's estate vested in her: *Gopal* v. *Vishnu*, 23 B.S., 250.

When a member of a joint family governed by the Mitákshará dies giving permission to his widow to adopt a son, then his undivided co-parcenary interest vests, on his death, in the surviving male members, who, however, will be divested by the subsequent adoption made by the widow: *Sri Virada* v. *Sri Brozo*, 1 M.S., 69=3 I.A., 154; *Surendra* v. *Sailaja*, 18 C.S., 385. It should be observed, however, that vesting and divesting go on continually by births and deaths in a Mitákshará joint family, and the law in this respect, is somewhat different in the two schools. But it appears that if the male member in whom the undivided interest of another member authorizing his widow to adopt, vests by survivorship, dies and the whole family property vests in his widow, and then the other widow adopts, such adoption would be invalid by reason of the second widow being not divested: *Rupchund* v. *Rakhmabai*, 8 Bom., H.C.R., A.C.J., 114. The distinction is that if the adoption is made when the undivided co-parcenary interest,

of the adoptive father remains vested in his co-parcener taking by survivorship, the interest is divested and the adoption is valid; but if the adoption is made after the estate has passed from the co-parcener taking by survivorship to his heir then the estate cannot be divested and the adoption is invalid: *Chandra* v. *Gojarabai*, 14 B.S., 463.

An adoption made with the assent of the person in whom the estate is vested will divest him of that estate: *Payapa* v. *Appanna*, 23 B.S., 327.

As regards the estate of any other than the adoptive father, succession to which had opened before adoption, the adopted son cannot lay any claim to the same (*Kally* v. *Gocool*, 2 C.S., 295), even when the adoption was delayed by the fraud of the person in whom the succession vested: *Bhubaneswari* v. *Nilkamal*, 12 C.S., 18, affirming 7 C.S., 178.

Unauthorised alienation by widow.—As an adopted son becomes entitled to the adoptive father's estate by divesting the widow, he acquires from the time of adoption the right to recover any property that has been alienated by the widow without legal necessity. He is not to wait until the widow's death, like the reversioner; for, the widow's estate comes to an end immediately on adoption, consequently no unauthorised alienation by her, can subsist beyond the extinction of her own title which alone could pass to her transferee: *Moro* v. *Balaji*, 19 B.S., 809.

Effect of invalid adoption.—There are two elements in an adoption, *first*, the transfer of the *patria potestas* or paternal dominion over the boy from the natural father to the adopter, causing the extinction of his status in the family of birth, *second*, the investment of the boy with the status of son unto the adopter. When slavery was recognised, if the adoption was invalid, the boy would not acquire the status of sonship to the adopter, but the effect of *gift* by the father or the mother and *acceptance* of the boy, would be the loss of his status in the family of birth, and the acquisition of the condition of a slave of the adopter, and as such he was entitled to maintenance only in the family of adoption. But such an effect as this cannot arise now that slavery has been abolished: if the adoption fails, the boy's status in the family of his birth will remain unaffected by the invalid adoption. This distinction is not borne in mind. There are some decisions in which the former view was taken, which was correct before the abolition of slavery; while there are others in which the latter view has been expressed.

Limitation for declaring invalidity of adoption.—The view that if an adoption is invalid, the adopted son's natural rights remain quite unaffected, is just and equitable. There is, however,

great practical difficulty in giving effect to it, when the adoption is set aside after a considerable time has elapsed from adoption, and most of his natural rights have become barred by limitation.

While construing the provisions of the Limitation Act of 1871, on this point, the Judicial Committee observed,—"It seems to their Lordships that the more rational and probable principle to ascribe to an Act whose language admits of it, is the principle of allowing only a moderate time within which such delicate and intricate questions as those involved in adoption shall be brought into dispute, so that it shall strike alike at all suits in which the plaintiff cannot possibly succeed without displacing an apparent adoption by virtue of which the defendant is in possession": *Jagadamba* v. *Dakhina*, 13 I.A., 84=13 C.S., 308.

But nevertheless, all the High Courts did at one time hold that under the present Limitation Act the reversionary heir is entitled to twelve years after the death of the widow who inherited her husband's estate and adopted a son unto him, for instituting a suit to obtain possession of the estate on declaration of the invalidity of the adoption, and that the Article 118 applies to suits for declaratory decrees only; see 25 C.S., 354; 27 C.S., 242 and the cases cited therein. But recently, having regard to the principle enunciated by the Judicial Committee in *Jagadamba's* case, and also to an observation made by their Lordships in *Mohesnarain's* case (20 I.A., 30=20 C.S., 487), the Madras High Court, and a Full Bench of the Bombay High Court presided by Sir Lawrence Jenkins, have held that the Article 118 of the present Limitation Act governs a suit for a declaration that an adoption was invalid, whether the question as to its validity is raised by the plaintiff in the first instance or arises in consequence of the defence setting up the adoption as a bar to the plaintiff's claim to the adoptive father's estate: 20 M.S., 40, and *Shrinivasa* v. *Hanmant*, 24 B.S., 260.

This view is supported by the opinion expressed by the Privy Council in the subsequent case of *Malkarjun* v. *Narhari* (27 I.A., 216=25 B.S., 337), in which their Lordships held by applying the principle set forth in *Jagadamba's* case that one year's limitation prescribed by Article 12(*a*) of the Act of 1877, is not confined to only suits in which no other relief than a declaration setting aside a sale, is sought, but applies also to suits where other relief is sought which can only be granted by setting aside the sale. This principle is applicable *mutatis mutandis* to Articles 118 and 119 of the present Limitation Act XV. of 1877.

Invalid adoption and *Persona designata*.—When a gift is made by a Deed or a Will to a boy who has been adopted, or whose adoption is directed, by the donor, but who is not adopted

or whose adoption is held invalid, then a question arises with respect to the validity of the gift. If the intention is clear to benefit the boy who is identified irrespective of adoption, the reference to which is intended as mere description, then the gift must be held good according to the same principle as is laid down in Section 63 of the Succession Act: *Nidhoo* v. *Sarada*, 3 I.A., 253=26 W.R., 91; *Bir* v. *Ardha*, 19 I.A., 101=19 C.S., 452. But, if on the other hand, the adoption of the boy appears to be the condition of, or the moving consideration for, the gift, then the gift cannot take effect, if the adoption fails or is pronounced invalid: *Fanindra* v. *Rajeswar*, 12 I.A., 72=11 C.S., 463; *Karamsi* v. *Karson*, 23 B.S., 271.

KRITRIMA ADOPTION.

According to the Smritis and the commentaries, the Kritrima form differs from the Dattaka only in this, that in the latter the boy is given in adoption by his natural parents or either of them, whereas in the former, the consent of the boy only is necessary who should therefore be destitute of his parents, and thus *sui juris*, so as to be competent to give his assent for his adoption; in all other respects there is no difference between the two forms.

But the so-called Kritrima adoption that is now prevalent in Mithila appears to be a modern innovation and altogether a different institution from that dealt with in Hindu law.

The Kritrima form of adoption such as is now made in Mithila, does not appear to be *affiliation* but is something like a contractual relationship between only the adopter and the adoptee.

In this modern form a man and his wife may either jointly adopt one son; or may each of them separately adopt a son, so that the son adopted by the husband does not become the wife's son, and *vice versâ*; and in such a case the son of the one does not perform the exequial ceremony, nor succeed to the estate, of the other: *Sreenarain* v. *Bhya*, 2 Sel. Rep., 29 (23); see also 7 W.R., 500 and 8 W.R., 155.

The offer by the adoptive parent expressing his desire to adopt, and the consent to it by the boy, expressed in the lifetime of the former are sufficient to constitute adoption. No religious ceremonies or burnt sacrifices are necessary in this form: *Kullean* v. *Kripa*, 1 Sel. Rep., 90. There is no restriction in this form as to the capacity of being adopted, such as being an only son, particular age, or performance of the Upanayana ceremony or marriage, and particular relationship: 3 Sel. Rep., 192=145 O.E.

The adoptee in this Kritrima form does not lose his *status*

in his family of birth, and by the adoption he acquires the right of inheriting from the adoptive parents or parent alone. He cannot take the inheritance of his adopter's father or even of the adopter's wife or husband, the relationship being limited to the contracting parties only : 7 W.R., 500 ; 8 W.R., 155 ; 25 W.R., 255.

According to the authoritative commentaries of the Benares school the Kritrima form of adoption may be made in the Kali age, in addition to the Dattaka form, and it appears to prevail in many places in Northern India, if not also in the Deccan. But this form whenever met with at a place other than Mithila, must not be confounded with the modern innovation of the latter district, which though called *Kritrima* is altogether different from it. The real Kritrima form is exactly similar to the Dattaka one as regards their incidents.

Properly speaking the name *Kritrima* should not be applied to the adopted sons that are popularly called by a different name in Mithila, namely, *Kurta-putra* which does not appear to be a corruption of *Kritrima-puttra* but of *Krita-puttra*.

Mithila is the modern district of Tirhoot which is a corruption of the word *Tira-bhukti* meaning the country " bounded by the banks" of three rivers, namely, the Gandak in the west, the Kosi in the East, and the Ganges in the South.

CHAPTER V.

MITÁKSHARÁ JOINT FAMILY.

ORIGINAL TEXTS.

१। भू-र्या पितामहोपात्ता निबन्धो द्रव्यम् एव वा।
तत्र स्यात् सदृशं स्वाम्यं पितुः पुत्रस्य चोभयोः॥

1. In land which was acquired by the grandfather, also in a corrody or in chattels (acquired by him), the ownership of both father and son is similar.

२। मणिमुक्ताप्रवालानां सर्व्वस्यैव पिता प्रभुः।
स्थावरस्य समस्तस्य न पिता न पितामहः॥

2. The father is master, even of all of gems, pearls and corals: but neither the father nor the grandfather is so, of the whole immoveable property.

३। स्थावरं द्विपदञ्चैव यद्यपि स्वयम् अर्ज्जितं।
असम्भूय सुतान् सर्व्वान् न दानं न च विक्रयः॥
ये जाता येऽप्यजाताश्च ये च गर्भे व्यवस्थिताः।
वृत्तिं तेऽप्यभिकाङ्क्षन्ति वृत्तिलोपो विगर्हितः॥

3. Though immoveables and bipeds have been acquired by a man himself, a gift or sale of them should not be made without convening all the sons. Those that are born, and those that are yet unbegotten, and those that are still in the womb, all require the means of support: the dissipation of the hereditary source of maintenance is censured.

४। अविभक्ता विभक्ता वा सपिण्डाः स्थावरे समाः।
एकोऽनीशः सर्व्वत्र दानाधमन-विक्रये॥

4. Kinsmen joint or divided are equal in respect of immoveables; for, one is not competent to make a gift, mortgage or sale of the whole.

५। एकोऽपि स्थावरे कुर्य्याद्-दानाधमन-विक्रयम्।
आपत्काले कुटुम्बार्थे धर्म्मार्थे च विशेषतः॥

5. Even a single member may make a gift, mortgage or sale of immoveable property, at a time of distress, for the sake of the family, and specially for (necessary) religious purposes.

६। अनेकपितृकाणान्तु पितृतो भागकल्पना।

6. Among grandsons by different fathers, the allotment of shares is according to the fathers (i.e., *per stirpes*).

७। अक्षमस्यानीहमानस्य किञ्चिद्-दत्वा पृथक्-क्रिया।

7. The separation of one who is able (to support himself), and is not desirous (of participation in the patrimoney), may be completed by giving him a trifle.

८। विभक्तेषु सुतो जातः सवर्णायां विभागभाक्।

8. A son born of a wife of equal class, after the (other) sons have been separated, is entitled to the (parental) share.

९। अगोत्रः पूर्व्वजः पित्रो-र्भातु-र्भागे विभक्तजः।

9. A son begotten before partition has no claim on the share of the parents; nor one, begotten after it, on that of a brother.

१०। यदि कुर्य्यात् समागंश्यान् पत्न्यः कार्य्याः समांशिकाः।
न दत्तं स्त्रीधनं यासां भर्त्रा वा श्वशुरेण वा॥

10. If he make the (sons') allotments equal, his wives to whom *Stridhanam* has not been given by the husband or the father-in-law, shall be made partakers of equal allotments.

११। विभजेरन् सुताः पित्रो-रूर्द्धम् ऋक्थम् ऋणं समं।

11. Let the sons divide equally the property and the debts after the demise of the parents.

१२। पितुरूर्द्धं विभजतां माताप्यंशं समं हरेत्।

12. The mother also, of those dividing after the death of the father, shall take an equal share.

१३। असंस्कृतास्तु संस्कार्य्या भ्रातरः पूर्व्वसंस्कृतैः।
भगिन्यश्च निजाद्-अंशाद्-दत्वांशन्तु तुरीयकं॥

13. Uninitiated brothers should be initiated by those, for whom the ceremonies have been already completed; and sisters

should be disposed of in marriage, giving them as an allotment and one-fourth share.

१४। पित्र्यादविरोधेन यदन्यत् स्वयम् अर्जितम्।
मैत्रम् औदाहिकञ्चैव दायादानां न तद्-भवेत्॥
क्रमाद्-अभ्यागतं द्रव्यं हृतम् अभ्युद्धरेत् तु यः।
दायादेभ्यो न तद्-दद्याद्-विद्यया लब्धम् एव च॥

14. Without detriment to the father's estate, whatever else is acquired by a parcener himself, as a present from a friend, or a gift at nuptials, does not belong to the co-parceners. He who recovers hereditary property, which had been lost, shall not give it up to the parceners; nor what has been gained by science.

१५। पूर्व्वनष्टां तु यो भूमिम् एक-श्चेद्-उद्धरेत् क्रमात्।
यथा-भागं लभन्तेऽन्ये दत्वांशं तु तुरीयकं॥

15. But if a single co-parcener recovers ancestral land which had been formerly lost, the rest may get the same according to their due shares, having set apart a fourth part for him.

१६। सामान्यार्थसमुत्थाने विभागस्तु समः स्मृतः।

16. But if there be an accretion to the joint property (made by any parcener through agriculture, commerce, etc.), an equal division is ordained.

१७। पित्र्यां यस्य यद्-दत्तं तत् तस्यैव धनं भवेत्।

17. Whatever has been given by the parents, belongs to him to whom it was given.

१८। पितरि प्रोषिते प्रेते व्यसनाभिद्रुते ऽथवा।
पुत्र-पौत्रै र्ऋणं देयं निह्नवे साक्षिभावितं॥
ऋक्थग्राह ऋणं दाप्यो योषिद्-ग्राहस्तथैव च।
पुत्रोऽनन्याश्रितद्रव्यः पुत्रहीनस्य ऋक्थिनः॥
सुराकामद्यूतकृतं दण्डशुल्कावशिष्टकं।
न दद्यादानं तथैवेह पुत्रो दद्यान्-न पैटकं॥

18. If the father is dead, or gone to a distant place (and not heard of for twenty years), or laid up with an incurable disease, his sons and son's sons shall pay his debts which must

be proved by witnesses in case of denial. He who takes the heritage, likewise he who takes the widow, or a son if the estate is not vested in anyone else, or the heirs of one leaving no son, shall be compelled to pay the debts. A son is not liable for his father's debts incurred for indulgence in wine, women, or wager, or for unpaid fine or tax imposed on him, or for his promise to make an unlawful gift.

१९। भ्रातॄणां जीवतोः पित्रोः सहवासो विधीयते।

19. For brothers a common abode is ordained so long as the parents are alive.

MITAKSHARA JOINT FAMILY.

The Sanskrit word for Inheritance is *dáya* which is derived from the root *dá* (=Latin *do*) to give, and which primarily means a *gift*. Heritage resembles a gift in this that in the former as in the latter one person's right accrues to another person's property without any valuable consideration. Heritage may also be deemed an implied gift; for, the law of inheritance in a country is moulded and regulated by the feelings of its people, so that if every person of a community could have declared at the time of his death his intention with respect to the persons that are to take his property, then in the majority of instances the donees would have been the very persons that are declared heirs by the law: the law of inheritance, therefore, may be regarded as the General Will of the community, and hence heritage may, not improperly, be regarded as gift which the previous owner intended but omitted to make, but which the law relating to the order of succession, gives effect to by raising a conclusive presumption of such intention, founded on degrees of what are usually called *natural* love and affection but what are really feelings of sympathy occasioned and determined by the peculiar conditions, exigencies and associations of each Society, and may vary in different communities, and also in the different stages of development of the same community, so that what is regarded as quite natural in one, may be deemed contrary to natural justice in another.

Three modes of devolution in Mitákshará.—According to the Mitákshará the estate of a deceased male devolves in three different modes under different circumstances.

1. If he was a member of a joint undivided family his interest in the joint *ancestral* property and in the accretions to the same, passes by survivorship to the surviving male members of the family.

By the term *ancestral* property is to be understood the pro-

perty of the father and other paternal lineal male ancestors in the male line, to which the right of the son or other male descendant in the male line, accrues from the moment of his birth or rather conception, and which is on that account, called *unobstructed* heritage. It does not include property inherited jointly by two brothers from their maternal grandfather or from a female ancestor or from a collateral relation ; such property though joint does not pass by survivorship but devolves according to the rules of succession : *Jasoda Koer* v. *Sheo Persaud*, 17 C.S., 33 ; *Saminadha* v. *Thangathanni*, 19 M.S., 70. Nor does it include property jointly obtained as a gift by two or more brothers living jointly : *Bai* v. *Patel*, 26 B.S., 445.

It should be observed that the expression *pass by survivorship* is a contradiction in terms; for the undivided co-parcenary interest of a member in the joint property lapses on his death, and therefore nothing *passes* to the survivors whose right to the whole of the family property accrued at the time of their respective birth, and no new right is acquired on the death of a member.

2. If he was separated from his co-parceners and was not subsequently re-united with any one of them, his estate descends agreeably to the rules of succession.

The rules of succession also apply to the self-acquired and other separate property of a member of a joint family according to the ruling of the Privy Council in the *Shivaganga* case : *Katama Nachiar* v. *Raja of Shivaganga*, 9 M.I.A., 539=2 W.R., P.C., 21.

And conversely the rule of survivorship applies to any joint *ancestral* property (including accretions to the same) which may have been kept joint and undivided at the time of partition of all the rest of property : *Chowdhury Chintamun* v. *Nowluckho Konwari*, 2 I.A., 263.

The rules of succession will apply, as stated above, to even joint property other than *ancestral* and accretions to the same.

3. If he was re-united with any of his co-parceners after partition, his estate goes according to a certain course of succession, though in some cases it may seem to pass by survivorship.

It should be observed here that although there are good reasons for considering that the different courses of succession to the estate of persons were regulated by their status of being joint or separate or re-united, yet it is now settled by decisions of the Privy Council that the course of descent is determined by the character of the property, so that whether the status of the family be joint or separate, the property which is joint will pass by survivorship and the property which is separate will devolve a different course of succession. The first proposition, however still

should be restricted as being applicable only to such joint property as is *ancestral* or accretion to the same.

The joint family system—is a cherished institution of the Hindus and is the peculiar characteristic of their society of which it is the normal condition. It is only a continuation of the ancient patriarchal form of family government, deprived of its original autocratic rigor by the civilizing influences of later times. Those that are called by nature to live together, continue to do so, with the exception of daughters born in the family, who must pass out of it after marriage, and with the addition of wives of male members, brought from other unconnected families. The Hindu Sástras enjoining brothers to live together so long as the parents are alive (Text No. 19), give a religious sanction to the usage, and are unlike the Christian Scripture ordaining,—"Therefore shall a man leave his father and mother, and cleave unto his wife, and they shall be one flesh,"—which appears to have moulded the structure of European society in the individualistic mode. Originating in natural love and affection, the joint family depends for its continuance on self-control, mutual sympathy and the spirit of self-sacrifice and forbearance; while its disruption owes its origin to the spirit of selfishness and impatience in some of its members. The system founded as it is on the virtues of sympathy and self-sacrifice, and tending as it does to create a spirit of forbearance and mutual dependence, conduces to the law-abiding and religious character of the Hindus. This system, however, is opposed to the spirit of self-reliance and independence, which distinguishes the people of Europe, and is, on this account, disapproved by some English-educated Hindus who would introduce the European system; but this view of their's is looked upon by the orthodox Hindus as the outcome of selfishness.

This joint family system is organized on the principle of subordination, and not on that of co-ordination or equality of the members with respect to rank and position. Under it no two persons can be equal, one of them must be superior and the other inferior relatively to each other: an elder brother or cousin is like a father, his wife and an elder sister are similar to the mother; while a younger brother or cousin is like a son, and his wife and a younger sister are similar to daughters; the paternal uncle's wife and the father's sister or cousin are similar to the mother, and so on. Thus the idea of equality is unknown to the Hindu mind with regard to family government and social order; the title to respect among the members of a joint family of the ... ends on age and higher degree of relationship. Superior ability ... junior member is recognised to this extent, that it entitles

the member possessed of it to be the head of the family as regards the management of its property, and its affairs and dealings with the outside world.

The Hindus accustomed to live in joint family groups and to be attended and nursed by the members of their family when suffering from disease and the like, do not require the aid of Hospitals; on the contrary they appear to feel an instinctive abhorrence for being tended by strangers in Hospitals; nor do they set much value on the medical treatment provided there, as their religious belief is that "They shall die when they are to die." Accordingly they prefer to be in the midst of the family for the care of their person during illness, and even if a member is attacked by any virulent and contagious disease, the others never apprehend the slightest danger to themselves from contact with his body, nor are they deterred in the least from touching it and nursing him. For they believe that the span of a man's life is fixed before his birth; and not an inch of life can be added to or deducted from the predestined period, by any human agency. Nothing could be more repugnant and abhorrent to the Hindu mind than the Segregation rules recommended by medical men for preventing the spread of the plague now raging in this country.

The joint family takes care of its young orphans and its old and infirm members. It looks after and guards and protects the wives and children of its absent or deceased members. Under this system violence and cruelty to wives and children are impossible, and old age pension is unnecessary. The system exercises a salutary influence on the mind: as so many persons cannot live together peacefully, without self-control, sympathy, patience and forbearance. Suppression of selfishness is necessary: there cannot be a happier mode of life than under this system, if all the members work for common good, and the comforts and happiness of all be felt by each to be his duty to secure. The members of a joint family do not feel the necessity for making any separate provision for themselves in their old age or for their children, since the family affords shelter and protection to all its members, young or old, and its property is ordained to be the hereditary source of maintenance of all.

The joint family system depends for its continuation on the possession of certain virtues by its members, and fostering as it does the religious spirit it may be called the stronghold of Hinduism. The vitality of the Hindu community is derived from this system which forms the foundation of their religious and spiritual character, the existence of which depends entirely on its continuance. What is noble and good in Hindu character is its effect. The Hindus should preserve the system. It still

prevails in Hindu Society sometimes more in form than in spirit; an exclusively secular education dissociated from religion, now imparted in our schools and colleges, has been undermining the Hindu spiritualism on which the system is founded and on which its continuance depends. This institution like every other, has its advantages and disadvantages, but its advantages are both spiritual and secular, while its disadvantages are merely secular in character.

Bred up under this system, the Hindus cannot conceive of a heaven without joint family. The Sapinda relationship in the sense of connection through participation in funeral oblations implies a celestial joint family composed of the *manes* of male and female members of a mundane joint family.

It is, however, worthy of remark that Hindus English-educated at the expense of the joint family, and enjoying the advantages afforded by it, are yet often found so blinded by selfishness, as to be dissatisfied with the rule of Hindu law, imposing on them certain correlative duties to the family, in return for the diverse benefits received from it. They commit to the family, the care of their wives and children, while they are compelled to reside elsewhere, for the practice of any profession, or in the exercise of any calling, or in service, and are themselves incapable of taking care of them, or think it inconvenient to take them with themselves to the place of business. In fact, they cannot do without the joint family, and cannot sever their connection with it, which they are at perfect liberty to do at their pleasure; but at the same time, they are unwilling to participate with the joint family, their earnings, which under the circumstances the Hindu law requires them to do, as being fair and equitable.

It should also be especially noticed in the present connection that India is a very poor country, and even the ordinary expenses of English education here, are out of all proportion to the means of the middle class Hindus. The expenditure necessary to give such education to the smart boys in the family, is regarded as a sort of investment. It is not correct to suppose that the boys are entitled to the expenses of such education from the family, as its natural duty towards them. The indigenous system of education formerly prevailing in this country, was the training imparted by the secular Gurus or pedagogues in the village Páthsalas; and that is what one might say, he was entitled to have, at the expense of the family, as ordinary education. But English education should be held to be special training; and the gains by one who has received such education at the expense of the family, should be considered earned with the aid of family fund, so as to become the subject of joint right.

The Topics relating to the joint family—are, (1) the members of whom it is composed, (2) different descriptions of property belonging to them, (3) their rights and privileges to and in the family property, (4) management of the family and its property, (5) alienation of the family property and of the undivided co-parcenary interest of a member, (6) debts of the father and of other members, (7) judicial proceedings, (8) devolution of the undivided co-parcenary interest of a member, (9) partition and its incidents, (10) things that are not liable to partition, and (11) legal presumptions.

1.—*Members of a joint family.*

Males.—The members are males and females. The male members are, (1) those that are lineally connected in the male line, such as father, paternal grandfather, son and son's son, (2) collaterals descended in the male line from a common male ancestor, (3) such relations by adoption and (4) poor dependants.

Females.—The female members are, (1) the wife or the "widowed wife" of a male member, and (2) his maiden daughter. As a general rule, a married daughter is not a member of her father's family; since by marriage she becomes a member of her husband's family (*Kartik* v. *Saroda*, 18 C.S., 642); there may, however, be cases in which a married daughter continues to live as a member of her father's family, sometimes together with her husband; a widowed daughter also may sometimes come back to her father's family and live as a dependent member thereof.

Poor Dependants.—Some helpless persons mostly poor relations more or less distant, are also maintained as members of the family; the original words for *poor dependants* दीनाः समाश्रिताः indicate that they are actually getting their subsistence and living under the protection of the family.

The female slave or concubine, and the illegitimate son—mentioned in the commentaries as members of a joint family may now be so, only in very exceptional and rare cases. When slavery was prevalent a female slave would be permanently attached to a family as a dependent member thereof, and a son begotten on her by a male member would likewise be an inferior member. But although there cannot, at the present day, be a female slave, there are instances of concubines living as members of the family of the man keeping them; this we find possible either in the cases of holders of Rajes or big estates, or in the cases of low-caste people. Herein the extremes meet, the former are above public opinion, and the latter are below the same.

Some misconception appears to prevail on this subject. The Hindu commentators treat of an illegitimate son's rights while

dealing with the partition of a joint family. They evidently mean that only such an illegitimate son, as is a member of his father's family, may get maintenance if the father is of a regenerate class, and a share if the father is a Súdra. The following texts form the foundation of the law on the subject:—

अपत्यस्य शुश्रूषुर्गुणवान् शूद्रयोनिजः ।

जमेताजीवनं ग्रासं सपिण्डाः समवाप्नुयुः ॥ बृहस्पतिः ।

which means—"The virtuous and obedient son, borne by a Súdra woman to a man who has no other offspring, should obtain a maintenance; and let the kinsmen take the residue of the estate:"—Vrihaspati. This text is explained to refer to a son of a twice-born person by a Sudrá woman not married by him: See Dáyabhága ix, 28.

दास्याम् वा दासदास्याम् वा यः शूद्रस्य सुतो भवेत् ।

सोऽनुज्ञातो हरेद् अंशम् इति धर्म्मो व्यवस्थितः ॥ मनुः ।

which means—"A son begotten by a Súdra, or on a female slave or on a female slave of a slave, may take a share (on partition) if permitted (by the father): this is settled law."—Manu. According to a Sanskrit rule of construction the repetition of the particle "or" may be taken to imply "or on any other similar woman."

जातोऽपि दास्यां शूद्रेण कामतोऽंशहरो भवेत् ।

मृते पितरि कुर्य्युस्तं भ्रातरस्त्वर्द्धभागिनं ।

अभ्राढको हरेत् सर्व्वं दुहितॄणां सुतादृते ॥ याज्ञवल्क्यः ।

which means—"Even a son begotten by a Súdra on a female slave may get a share by the father's choice; but if the father be dead, the (legitimate) brothers should make him partaker of half a share: one, who has no (legitimate) brother may take the whole, in default of (heirs down to) the son of daughters."—Yájnavalkya.

These three texts are cited in the Dáyabhága. The author of that treatise lays down, on the authority of the above text of Vrihaspati, that the son of a regenerate person by any Súdra woman not married by him, is entitled to maintenance; and then goes on to discuss the law relating to such a son of a Súdra, and begins thus,—

शूद्रस्य पुनः अपरिणीतादास्यादिशूद्रापुत्रः पितुरनुमत्या पुत्रान्तरतुल्यांशग्रहः ।

as the correctness of the rendering by Colebrooke, of this passage has been doubted, it is literally translated thus,—"But of a Súdra,

a-son-by-a-not-married-female-slave-or-the-like-Súdra-woman, may share equally with other sons, by the father's permission." The words connected by the hyphens stand for a compound word in the original.

Colebrooke's translation is as follows,—"But the son of a Súdra, by a female slave or other unmarried Súdra woman, may, &c." So you see that it is difficult to maintain that Colebrooke's version is wrong, excepting this that the word "unmarried" is ambiguous and may suggest a meaning not intended by the original, namely, that the woman must be a *maiden*, whereas the real meaning is that she is not married by the man. The two words *Dásí* and *Adi* may be done, in either of the above two ways, namely, either into "a female slave or other," or into "a female slave or the like." No Sanskritist would be prepared to say that the first of these versions, which is given by Colebrooke, is wrong; the translation given in *Narain Dhara's* case, 1 C.S., 1, omits the word "Sudrá woman" altogether.

There is a difference of opinion on this subject between the Calcutta High Court and the other High Courts; the latter hold that an illegitimate son of a Súdra by a *kept woman* or *continuous concubine* would be entitled to a share under the foregoing texts, while the former take a contrary view: See *Kripalnarain* v. *Sukurmoni*, 19 C.S., 91, and the cases cited therein, and also *Ram* v. *Tek*, 28 C.S., 194, in which it has been held that a Súdra's illegitimate son not born of a female slave, is not entitled to a share where the father had parted with his interest during his lifetime.

It should, however, be observed that two commentators of the Dáyabhága, namely, Rámabhadra and Srikrishna explain the term "on a female slave of a slave" as used in the above text of Manu, thus,—

दासदास्याम् इति, दासस्य अपरिणीतरक्षितायाम् इत्यर्थः ।

which means,—"On a female slave of a slave, means, on one not married but kept by a slave." And this is consistent with what is said in the Dáyabhága with respect to the illegitimate sons of regenerate persons.

Hence, if the son begotten by a Súdra on a *kept woman of his slave* be entitled, it follows *a fortiori* that a son begotton by a man on his *own kept woman* should be entitled to a share. So these commentators of the Dáyabhága appear to support the view taken by the other High Courts.

I have already told you that the Hindu lawgivers appear to be anxious to provide a source of maintenance for every person and therefore also for an illegitimate son. It would be a little too

puritanic to deprive one publicly acknowledged as son by the father and his family, on the ground of his being illegitimate; he is not responsible for the manner in which he came into existence.

There does not appear to be any difference on this point between the commentaries of the two schools. If it be contended that in order to entitle an illegitimate son to claim a share, it is necessary that his mother must be a slave, then none would be so entitled now that slavery has been abolished, and the decisions of the other High Courts (*Ráhi* v. *Govind*, 1 B.S., 97, *Sadu* v. *Baiza*, 4 B.S., 37, *Krishnayyan* v. *Muttusami*, 7 M.S., 407, and *Hargobind* v. *Dharam*, 6 A.S., 329), as well as the ruling of the Privy Council in the case of *Jogendro Bhuapti*, 18 C.S., 151, must be pronounced wrong. It should moreover be observed in this connection that the Sanskrit word *Dási* does not necessarily mean a female slave, but may also mean a Súdra-woman: and the latter meaning is suggested by the whole context of the Dáyabhága on the subject.

But it should be borne in mind that there is no authority for the maintenance or share of an illegitimate son by a female slave or kept woman or concubine, unless they are members of the family. An illegitimate son does not acquire any right by birth to the property of his Súdra putative father, during whose lifetime he cannot claim any share: *Ram* v. *Tek*, 28 C.S., 194.

2. *Descriptions of property.*

Classification.—The different kinds of property that may belong jointly or severally to the members of a joint family, may, for different purposes, be classified thus:—

1. Unobstructed and Obstructed heritage.
2. Joint and Separate.
3. Ancestral, Ancestral lost and recovered, and Acquired.
4. Immoveable, Corrody, Moveable and Trade.
5. Partible and Impartible.

These are cross divisions.

Heritage Unobstructed and Obstructed.—Heritage is defined in the Mitákshará to be that property to which one's right accrues by reason only of his relationship to the previous owner. It is called *obstructed*, where the accrual of the right to it, is obstructed by the existence of the owner; and it is called *unobstructed*, where the owner's existence offers no obstruction to the accrual of the right. A son, a son's son, and any other remoter male descendant in the male line acquire from the moment of their birth or rather

conception, a right to the property of the father, the paternal grandfather and other paternal male ancestor in the male line, and such property is, therefore, denominated heritage without obstruction. But when the right of a person arises to the property of his paternal uncle and the like relations, only on their death without male issue, on account of his being their heir, and to which property he had no right during their lifetime, such property, is called obstructed heritage, the existence of the owner having offered the obstruction to the accrual of the right.

There is a great distinction between the father's self-acquired property and the property inherited by him in regular course of inheritance from his father and other paternal male ancestor in the male line, as regards the son's right by birth to the same, which will be dealt with in the next topic.

It should be noticed that the expression *unobstructed heritage* is a contradiction in terms; for, *Nemo est hæres viventis*: the original word *Dáya* cannot be, and should not have been, rendered into *heritage*.

Joint—property is of the essence of the notion of a joint family. It consists, (1) of the ancestral property, (2) of the accessions to the same, (3) of the acquisitions with joint exertion or joint funds, and (4) of self-acquired property thrown into the common stock, when the acquirer allows such property to be treated as family property so as to convert it into joint: immoveable property lost to the family, if recovered by any member other than the father of the family, is subject to the incidents of joint property, and so is property acquired by the special personal exertion of a member but with the aid of joint funds. In the three last cases the acquirer or recoverer is entitled to a larger share on partition, but in the first of them this distinction does not seem to be observed by the courts. It is doubtful whether survivorship will apply to acquisitions made without the aid of ancestral nucleus.

Separate—property of female members is called *Stridhana* which will be separately dealt with. Separate property of a male member consists, (1) of his self-acquired property, and (2) of property inherited by him as *obstructed* heritage according to the rules of succession. Two or more members may have jointly separate property as distinguished from the joint property of all the members of the family; for instance, in a family of first cousins, those composing one branch being the sons of one brother, may have property consisting of the separate property of their father and mother, or of property inherited by them from their maternal grandfather, such property though joint between themselves, is separate as regards the rest of the family.

Ancestral—property may be defined thus:—Property acquired by a lineal male ancestor in the male line, devolving on a son or other male descendant in the male line, becomes ancestral on the death of the ancestor, in the hands of the descendant: *Rajaram* v. *Pertum*, 20 W.R., 189. A share of ancestral property obtained by partition continues to be ancestral in the hands of the co-parcener getting the same: *Adarmani* v. *Chowdhry*, 3 C.S., 1. So also when such share is obtained according to a distribution made by a deed of gift (*Muddun* v. *Ram*, 6 W.R., 71), or by a Will, executed by the ancestor (*Tara* v. *Reeb*, 3 M.H.R., 50; *Nana* v. *Achrat*, 12 B.S., 122), it retains its character of ancestral property, except when the gift is made in terms clearly showing an intention that the donee should take an absolute estate for his own benefit only: *Jugmohundas* v. *Mangaldas*, 10 B.S., 528. Ancestral nature of estate is presumed: 24 M.S., 429.

Accretions to ancestral property, by purchase with the income thereof, or otherwise, are deemed ancestral: 10 B.S., 580; *Umrit* v. *Gouree*, 13 M.I.A., 542=15 W.R., P.C., 10.

The Sanskrit word for *ancestral* is पैतामह meaning, "belonging to पितामह *pitámaha*." This word पितामह though it is ordinarily applied to the father's father, means any paternal male ancestor in the male line, how high soever, and accordingly ब्रह्मा God the Creator is called सर्व-लोक-पितामह; *grandfather* of all persons.

Ancestral, lost and recovered.—Ancestral property lost to the family, when recovered by the father is deemed his self-acquired property as against his sons. But when it is recovered by any other member solely by his own exertion, then if the property be moveable it becomes exclusively his own; but if it be immoveable, he is entitled to a quarter share as his remuneration for the exertion in recovering it, and the residue is to be shared by all the members including him.

Acquired—property may be subdivided into, (1) what has been acquired with the ancestral funds, *i.e.*, accessions to the family estate, (2) what has been acquired with the aid of joint ancestral funds but by the special exertion of any member, (3) what has been acquired by the joint exertion of all the members,—the exertion need not be of the same kind, for instance, if of two brothers one goes out to a distant place and earns money there, and the other remains at home in charge of the family and the property of both, to take care of them, then any property acquired with the money earned by the first brother must be regarded as joint acquisition by both, (4) what has been acquired entirely by the personal exertion or influence of a member without any aid from, or detriment to, joint funds, or what is called self-acquired

property, and (5) self-acquired property allowed by the acquirer to be enjoyed by all the other members in the same manner as if it were joint property, and so thrown into the common stock: *Ram v. Sheo*, 10 M.I.A., 490, 505.

Savings of an impartible estate by a holder of such estate during his incumbency, and property acquired with the same, are considered as his separate or self-acquired property: *Maharaj* v. *Rajah*, 5 M.H.C.R., 31; *Kotta* v. *Bhangari*, 3 M.S., 145.

Wealth gained by a member of a joint family cannot be regarded joint by reason only of his having been maintained and educated at the expense of the family funds (*Dhunookdaree* v. *Gunput*, 10 W.R., 122), unless it is acquired by the practice of a profession for which he received a special training at the family expense, and falls within what is termed *gains of science*: *Lakshman* v. *Jamnabai*, 6 B.S., 225 (242); *Krishanji* v. *Moro*, 15 B.S., 32.

Immoveable—property is of very great importance in India where agriculture is the chief source of wealth of the people. The landed property of a family is looked upon as the hereditary source of maintenance of its members present and future, and Hindu law imposes restrictions against its alienation which is prohibited as a general rule, and is permitted only in very exceptional circumstances. The rule against alienation appears to be salutary in character, having regard to the exigencies of Hindu society, but it is being modified by our courts of justice to a great extent.

Corody—is the rendering given by Colebrooke of *nibandha* which means, what is settled or a settlement: it is according to the Mitákshará (1, 5, 4 and Vir. 2, 1, 13) an interest issuing out of land such as a royal grant or assignment to any person, of the king's share of the produce of any land, in part or whole. It is explained in the Dáyabhága (2, 13) to mean what is settled to be given as an annuity.

Moveable—property is not regarded so important as immoveable, by Hindu Law which allows therefore a greater freedom with respect to the alienation of the same.

A joint family trade—differs from an ordinary partnership in this, that it is not dissolved by the death of any member.

3. *Rights and privileges.*

Right by birth of sons, son's son, and the like.—A son or any other male descendant in the male line acquires from the moment of his birth, an interest in the ancestral estate in the hands of the father or the grandfather, which is co-equal to that of the latter in character, and also in extent as regards the father, but

not so as regards the grandfather when the father is alive or when there is any other co-heir claiming through the father.

Right by birth to self-acquired property.—According to the Mitákshará, a son or the like descendant acquires from his birth, a right also to the self-acquired property of the father or other paternal ancestor in the male line, the character of this right, however, materially differs from that acquired in ancestral property.

No limit as to degrees of descent.—A male descendant in the male line, however low in descent, acquires a right by birth to both ancestral and self-acquired property of a paternal ancestor. Suppose A holds ancestral property and a son B is born to him, then B and A are co-sharers with co-equal rights; a son C is born to B and acquires an interest in the property in the same way as another son of A; similarly a son D of C would be a co-parcener; and likewise D's son E would acquire a similar interest and on the same principle, and so on. If the three intermediate descendants were to die during the lifetime of A, E's rights would not be in the least affected by that circumstance. The same rules apply also to the self-acquired property of a paternal ancestor, to which right arises by birth.

But the rule is different if the paternal ancestor is separated from his descendants, and not reunited with any of them, and there is no son, or grandson, or great-grandson alive at the time of his death, but there is a great-great-grandson, then the latter would be excluded by many other heirs, such as the widow and the like relations who are entitled to take the estate in default of male issue down to the third degree, according to the rules of succession governing the devolution of separate property. But it should be borne in mind that this rule restricting the descent to three male descendants only and excluding the fourth, does not apply to an ancestor's property to which right by birth accrues and which is joint, and the undivided co-parcenary interest in which passes by survivorship. This is an important distinction, sometimes lost sight of.

Posthumous son, conception, and adoption.—A son or the like descendant in the womb of his mother at the time of the death of his father, from or through whom he would acquire a proprietary right by birth if he were in existence during the father's life, becomes entitled to the same right if he comes into separate existence subsequently, his birth relating back to the time of his father's death. The Hindu Law makes this concession only in favour of the male descendants in the male line, in whom the father and other paternal ancestors are supposed to be reproduced, and accordingly, who take an immediate interest in their property

and as such are heirs *par excellence* or rather co-heirs, for whom the family property is designed as the natural source of maintenance.

Hence a son and the like may be said to acquire the right from the moment of their conception; but it is absolutely necessary that the child *in embryo* should be born alive or come into separate existence, in order to be invested with the right; for, the course of inheritance cannot be diverted by the mere fœtal existence of a child not born alive, and no person can claim an estate, as heir of a stillborn child. But a child in the womb is not entitled to all the rights of a child *in esse*: a son's right of prohibiting an unauthorized alienation by the father, of ancestral property cannot be exercised in favor of an unborn son (*Mt. Goura* v. *Chummun*, W.R., Gap. No. 340,) nor is the existence of a son *in embryo* a bar to adoption: *Hanmant* v. *Bhima*, 12 B.S., 105.

This rule, which is applicable only to the proprietor's male issue, the greatest favourite of Hindu Law, has been extended to other heirs taking by succession, not upon the ground of there being any clear authority in Hindu Law, but on the ground that the principle has been adopted by other systems of jurisprudence: in *Biraja* v. *Naba Krishna*, Sevestre's Reports, 238, the sister's son *in embryo* at the time of the maternal uncle's death was held his heir. But it should be observed that all relations other than male descendants, are not really heirs *expectant*; they can take only in the contingency of default of male issue, and for them the inheritance is but a windfall. Besides any other son subsequently born of that sister would not be entitled.

The great distinction between the male descendants and all other heirs is that the former are deemed as the ancestor's consubstantial or own selves reproduced, and as such are entitled to become their co-heirs and co-parceners from birth, whereas the latter are entitled to become heirs after the death of the proprietor without male issue; and that the former confer spiritual benefit by their very existence, while the latter cannot do so, although that doctrine is nowhere invoked by the Mitákshará while dealing with inheritance.

Adoption is tantamount to birth in the adoptive family, and the adopted son acquires, from the moment of his adoption, an interest in the ancestral as well as the self-acquired property of his paternal ancestors by adoption.

Character of father's and son's interest in ancestral property.—The character and the extent of the interest taken by a son in the ancestral property does not differ from those of the father's, except so far as they are affected by the son's liability to pay the father's debts.

The following passage of the judgment of the Privy Council in *Surajbunsi Koer's* case (5 C.S., 148), should be read in this connection :—

"That under the law of the Mitákshará each son upon his birth takes a share equal to that of his father in ancestral immoveable estate is indisputable. Upon the questions whether he has the same rights in the self-acquired immoveable estate of his father, and what are the extent and nature of the father's power over ancestral moveable property, there has been greater diversity of opinion. But these questions do not arise upon this appeal. The material texts of the Mitákshará are to be found in the 27th and following slokás of the first section of the first chapter. It was argued at the Bar that, because in the third sloká of the above section, it is said that the wealth of the father becomes the property of his sons, in right of their being his sons, and 'that is an inheritance not liable to obstruction,' their rights in the family estate must be taken to be only inchoate and imperfect during their father's life, and in particular that they cannot, without his consent, have a partition even of immoveable ancestral property. There was some authority in favour of this proposition, notwithstanding the texts to the contrary, which are to be found in the Mitákshará itself (see slokás 5, 7, 8, 11 of the 5th section of the first chapter). But it seems to be now settled law in the Courts of the three Presidencies, that a son can compel his father to make partition of ancestral immoveable property. On this point it is sufficient to cite the cases of *Laljeet Sing* v. *Rajcoomer Sing*, 12 B.L.R., 373, and *Raja Ram Tewary* v. *Luchman Persad*, B.L.R., F.B.R., 731, decided by the High Court of Calcutta; that of *Kaliparshad* v. *Ramcharan*, I.L.R., 1 All. 159, decided by the High Court of North-West Provinces; that of *Nagalinga Mudali* v. *Subbiramaniya Mudali*, 1 Mad. H.C.R., 77, decided by the High Court of Madras; and the case of *Moro Vishvanath* v. *Ganesh Vithal*, 10 Bom. H.C.R., 444, decided by the High Court of Bombay. The decisions do not seem to go beyond ancestral immoveable property.

"Hence, the rights of the co-parceners in an undivided Hindu family, governed by the law of the Mitákshará, which consists of a father and his sons, do not differ from those of the co-parceners in a like family which consists of undivided brethren, except so far as they are affected by the peculiar obligation of paying their father's debts, which the Hindu Law imposes upon sons, and the fact that the father is in all cases naturally, and in the case of infant sons, necessarily, the manager of the joint family estate."

Distinction between ancestral moveable and immoveable.—Although sons acquire a co-equal right by birth to ancestral pro-

perty, both immoveable and moveable, yet a passage of the Law (Text No. 2) declares the father to be master of the moveables by reason, perhaps, of the character of the property and of the superior position of the father relatively to the sons. There appears to be a conflict of opinion with respect to the father's power of disposal of ancestral moveables, owing to the seeming conflict between two passages of the Mitákshará, ch. I, sect. 1, § 21 and § 27, the first of which seems to deal with the legal power, and the second with the moral duty. According to one view the power is limited only by his own discretion, and according to the other, the power is not absolute but can be exercised only for family necessity and certain prescribed purposes. A bequest by a father to one of his two undivided sons of the bulk of ancestral moveables, to the exclusion of the other, has been held to be invalid, as being an unequal distribution prohibited by Hindu Law: *Lakshman* v. *Ram*, 1 B.S., 561, affirmed by the Privy Council—*Lakshman*, v. *Ram* 5 B.S., 48=7 I.A., 181. The Hindu Law seems to contemplate alienation to strangers, while conferring on the father the power of disposal in question, and not an unjust and undue partiality to a co-heir: for the power is subject to the theory that the sons are co-owners of the moveable property, with the father; the co-ownership therefore should prevail when the question arises between the co-owners and no outsider is concerned.

Son's right in father's self-acquired property.—It has already been said that according to the Mitákshará a son acquires a right by birth to the father's self-acquired property in the same way as in ancestral property (Mit. 1, 1, 27). But the father is competent to alienate the same, and the son has no right to oppose as in the case of the ancestral property, the reasons assigned being that the father has a predominant interest in it, and that the son is dependent on him (Mit. 1, 1, 27 and 1, 5, 10). The father, however, cannot make an unequal distribution of it, except in the mode of assigning specific deductions to the eldest son, and so forth (Mit. 1, 2, 1). Nor can the son enforce a partition of the same against the father's choice, as he can in the case of ancestral property.

On a consideration of all these somewhat seemingly inconsistent propositions, it would appear that the father is authorized to make a sale or the like transfer to an outsider, but he is not allowed to show an undue and capricious partiality to any one son to the injury of another.

It has been held by our courts that the father is competent to sell his self-acquired immoveable property without the concurrence of his sons (*Muddun* v. *Ram*, 6 W.R., 71), and to make a gift to one son, to the injury of the other (*Sital* v. *Maddho*, 1

A.S., 394), as well as to make an unequal distribution among his heirs (*Bawa* v. *Rajah*, 10 W.R., 287) or a gift by a Will, which when made to a son, is taken by him as purchaser under the Will, and not by inheritance: *Jugmohandas* v. *Mangaldas*, 10 B.S., 528, (578). But intention is presumed to be otherwise: 24 M.S., 420.

But an affectionate gift by the father to a son, of his self-acquired property, is to be distinguished from a gift amounting to an unequal distribution of it, which ought to be held invalid for the very same reasons as in the case of ancestral moveables.

It should, however, be borne in mind that such property, if undisposed of by the father, is taken by the sons and the like, by survivorship, and not by descent.

The right of the son to the father's self-acquired property may be called an imperfect one, but it has been made more so by our courts, by holding that the father is competent to make testamentary disposition (wholly unknown to Hindu Law) of such property and so deprive a son wholly or partially.

Wife's right to husband's property.—The *Patní*, or lawfully wedded wife, acquires from the moment of her marriage a right to everything belonging to the husband, so as to become his co-owner. But her right is not co-equal to that of the husband, but is subordinate to the same, and resembles the son's right to the father's self-acquired property. The husband alone is competent to alienate the same, and the wife cannot interdict his disposal, but being dependent on him must acquiesce in it. Nor can the wife enforce a partition of the property. But it is by virtue of this right that the wife enjoys the husband's property, and is entitled to get maintenance out of it; and it is also by virtue of this right that she gets a share equal to that of a son, when partition does take place at the instance of the male members. See Mitákshará on Yájnavalkya I, 52. Thus the wife's right also is an imperfect one.

Unmarried daughter's right.—Similarly, an unmarried daughter acquires an imperfect right in the father's property, by virtue of which she enjoys the same and is maintained out of it until marriage, and is also entitled to a quarter share if partition takes place before her marriage, that is to say, when she continues a member of the family.

Illegitimate son's right.—So also an illegitimate son appears to acquire an imperfect right, by virtue of which he is entitled to maintenance, and may get a half share on partition made by the legitimate sons after the death of the father, and an equal share by the father's choice at a partition made in his lifetime.

A concubine—of a deceased co-parcener is entitled to maintenance, provided she remains chaste, continued continence is a

condition precedent to such claim: *Yasvantrav* v. *Kashibai*, 12 B.S., 26.

Reason for recognizing these imperfect rights.—A person's son, wife, unmarried daughter and the like dependent members living jointly with him, use and enjoy his property. This is accounted for by Hindu lawyers by assuming a right in them, otherwise they should be guilty of theft or misappropriation every time they use the property, by taking food, giving alms, and the like. The sons again continue to live with their father even after marriage which is brought about by the father himself and not by them, and the father's property is accordingly, by immemorial custom, looked upon as the source of maintenance of the sons' wives and children, and is, by the father's conduct, rendered common to all the members of his family, in the same manner as self-acquisition of a member is thrown into the common stock.

There is good reason therefore for curtailing the father's power of voluntary alienation (see Mit. on gifts) and unequal distribution of his self-acquired property, and so of depriving a dependent member of the means of his livelihood.

Joint family property, right and enjoyment.—From what has been said above, it appears that a member of a joint family, whether male or female, acquires a right to the joint property on his or her becoming a member by birth, adoption or marriage; and conversely his right ceases on his or her ceasing to be a member of the family by death, adoption or marriage. The property belongs to the family: any one acquiring and retaining the status of being its member exercises certain rights over the family property, and his rights cease on the extinction of that status. A joint family, therefore, is like a corporation: individual rights are all merged in the family or the corporate body. Every member, male or female, has the right to enjoy the family property without any restriction. A member, entitled to get the least share on partition, may, by reason of having a large family of his own to support, consume, during jointness, the largest portion of the proceeds of joint property, without being liable to be called upon to account for the excess consumption at the time of partition. The question of shares does not arise before partition: no member can bring a suit for his share of the profits of joint property so long as the family is joint: *Pirthi* v. *Jowahir*, 14 C.S., 493.

The following observations of the Judicial Committee in *Appovier's* case (11 M.I.A., 75), should be carefully read in this connection:—

"According to the true notion of an undivided family in Hindu Law, no individual member of that family, whilst it

remains undivided, can predicate of the joint and undivided property, that he, that particular member, has a certain definite share. No individual member of an undivided family could go to the place of the receipt of rent, and claim to take from the Collector or receiver of the rents a certain definite share. The proceeds of undivided property must be brought, according to the theory of an undivided family, to the common chest or purse, and then dealt with according to the modes of enjoyment by the members of an undivided family. But when the members of an undivided family agree among themselves with regard to particular property, that it shall thenceforth be the subject of ownership, in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with; and in the estate each member has thenceforth a definite and certain share, which he may claim the right to receive and to enjoy in severalty, although the property itself has not been actually severed and divided."

Extent of right, or share, vesting and divesting.—The extent of a member's right in the family property, or the share to which he is entitled cannot be ascertained before partition, for it is liable to variation by birth or death of members, it is increased or diminished respectively by the disappearance or addition of a co-heir.

It is worthy of remark in this connection that the strict rule of vesting and divesting, such as is laid down in the Blindman's son's case and the Unchastity case, does not apply to a Mitákshará joint family in which partial vesting and divesting continually take place on birth, adoption, marriage, or death of a member.

But the amount of share to which a particular member would be entitled if partition were to take place at a particular time, may be ascertained by having regard to the rules of distribution, the principles of which are:—(1) that the division among the descendants of the common ancestor is to be made *per stirpes* and not *per capita*; (2) that the first division must be made by dividing the partible property into as many shares as would satisfy the claims of the members entitled to participate, such as the common ancestor, his wife or wives, and his sons and their descendants,—the individuals composing each of the different branches descended from the common ancestor, together getting one share; and (3) that the share so obtained by one branch is to be subdivided between its members on the same principles, *i.e.*, the common ancestor of that branch, his wife, and each of the branches descended from him, getting a share each, and so on.

History of father's and son's right.—In ancient Hindu Law,

as in Roman Law, the father of the family, or *pater familia*, was the absolute master of the family property and of the person of its members; the *patria potestas*, or the authority with which the father of the family was armed by ancient Law extended to the power of inflicting punishment of death, and to absolute dominion even over the acquisitions of the members. Thus Manu (viii, 416) says:—

भार्य्या पुत्रश्च दासश्च त्रय एवाधनाः स्मृताः ।

यत् ते समधिगच्छन्ति यस्यैते तस्य तद्-धनं ॥ ८, ४१६ ।

which means,—"A wife, a son, and a slave, these three, are ordained incapable of holding property: whatever wealth they earn becomes his whose they are" viii, 416.

The exercise of absolute power by an autocrat, in the government of a family as of a State, may be cheerfully submitted to, if it is made with an eye to the happiness of all the governed, without partiality, and consistently with the principles of equity, justice and good conscience. But inequality of treatment owing to caprice or whims, undue partiality or favouritism to one, to the injury of others, and undeserved severity or leniency in the award of punishment, would render such government unpopular, and the curtailing of the power desirable. The usage of polygamy appears to have been a fertile source of discord in a family, and an old father under the undue influence of a young wife, would be betrayed into acts injurious to her stepsons. This furnishes us with the reason why unequal distribution among sons is prohibited in respect of property of which alienation is allowed. There must have been frequent abuse of the particular power, by fathers, amounting to a crying evil for which a remedy was felt necessary. Accordingly the Mitákshará curtailed it by admitting the son's right by birth as explained above, and by conferring upon sons co-equal right in ancestral property, as well as by restraining unequal distribution, while permitting alienation, of moveables and self-acquired property.

This doctrine of the son's right by birth to ancestral property, introduced by the Mitákshará as a remedy against the abuse of the father's arbitrary power, is found in many instances to be attended with grave evils of a different description. Headstrong and prodigal youths sometimes foolishly quarrel with their father, take their shares by partition, and dissipate the patrimony in no time; and then the fathers have to save those sons and their families from starvation, with the diminished means at their disposal. The author of the Dáyabhága appears to have, therefore, made a change in the law by laying down that the sons

have no right to the ancestral property during the lifetime of the father; but at the same time he laid down for the protection of the sons, that the father has no power of disposal over the bulk of the ancestral property except for legal necessity, so that the estate taken by the father in the ancestral property, is under the Dáyabhága similar to the Hindu widow's estate in property inherited from the husband.

But by what appears to be an improper application of the doctrine of *Factum valet*, our courts of justice have again thrown the sons completely at the mercy of the father, as they were by the ancient law. This change does not seem to be detrimental to the interests of sons except when the father is a spendthrift or is entirely merged in the step-mother, and under her undue evil influence perpetrates the grossest iniquity to his sons by any other wife.

4. *Management.*

Father manager.—"The father is in all cases naturally, and in the case of infant sons, necessarily, the manager of the joint family estate." The relative position of the father and the sons in a joint family is still regulated by the ancient rule that sons are dependent on the father (Mit. 1, 5, 9 and 10), with whom the government of the family rests, and whose word is still the law as regards the management of the affairs of the family. Although the sons are co-owners with the father, of the ancestral property with co-equal rights, yet so long as they continue to live joint with the father and do not enforce a partition which they are at liberty to do whenever they please, they cannot interfere with the father's management of the family and its property. They have no doubt the power of interference in the case of an unauthorized alienation by the father of ancestral immoveable property, but their enjoyment of the same is subject to other dispositions lawfully made by him, and if dissatisfied, the son's remedy is partition. Accordingly, a suit for ejectment brought by a father against his son who had against the will of the father taken possession of a house vacated by a tenant, which was partly ancestral and partly the father's self-acquired, has been allowed, and it has been held that, "while the son's interest is proprietary, it lacks the incident of dominion," when the son lives jointly with the father: *Baldeo* v. *Sham*, 1 A.S., 77.

The father has the power of disposal over property other than immoveable: (Mit. 1, 1, 27) and consequently also over the income of the family property. We have already seen that there is a difference of opinion with respect to his disposal of the ancestral moveables, p. 150.

When the other members are minors, the manager whether the father or a brother, may make a sale, mortgage or the like alienation of joint immoveable property, which is rendered necessary by any calamity affecting the whole family, or by the support of the family, or by indispensable religious duties such as obsequies of the father : (Mit. 1, 1, 28 and 29).

The father's power of alienation of the family property has been considerably extended by modern decisions purporting to be founded on the doctrine of the son's liability to pay off the father's debts. These decisions have practically changed the Mitákshará doctrine of the co-equal ownership of father and son in the ancestral property. These decisions are really, though not professedly, based on the following principle :—Sons cannot have a better friend than their own father, when, therefore, a father of even adult sons living with him, raises money by alienating property or otherwise, he must always be presumed to have done so for the benefit of the family, unless it can be proved by the sons that the father was addicted to wine, women or wager, and the money was wanted for these illegal or immoral purposes. I shall return to this subject when dealing with the topics of Alienation and Debts.

Manager other than father.—It often happens that the eldest son is allowed by the father to look after the affairs of the family under his direction, and sometimes he becomes the *karta* even during the lifetime of the father who is old and incapable, or religiously disposed and unwilling to remain concerned with worldly matters. When the father is no more, the eldest brother generally becomes the manager or *karta*, and sometimes a younger brother who is capable governs the family. It is seldom, if ever, that a manager is elected by all the members or even by those that are adults, or that more members than one act as joint managers of a family. Although there is nothing to prevent any member from taking part in the management, yet as a general rule one member only acts as the *karta*.

His power of alienation when other members minors.—It has already been said that the manager alone is competent to charge or alienate family property for a family purpose, when the other members are minors. The power of a manager for an infant to charge his property is a limited and qualified power as is pointed out by the Privy Council in the leading case of *Hunooman Prasad Panday*, 6 M.I.A., 393, thus :—"It (the power) can only be exercised rightly in a case of need, or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make, in order to benefit the estate, the *bonâ fide* lender is not affected by the

precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded. Their Lordships think that the lender is bound to enquire into the necessities for the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the manager is acting, in the particular instance, for the benefit of the estate. But they think that if he does so enquire, and acts honestly, the real existence of an alleged, sufficient and reasonably credited necessity, is not a condition precedent to the validity of his charge, and they do not think that under such circumstances he is bound to see to the application of the money."

This passage should be carefully read, as it enunciates a very important principle applied also to the case of an alienation by a Hindu female, of property in which she has a Hindu widow's estate, and it has been adopted and embodied by the Legislature in Section 38 of the Transfer of Property Act IV of 1882.

When other members majors.—As to the power of the manager when the other members are majors the law is thus explained by Justice R. Mitra after referring to previous cases :— " The result of these cases in our opinion, is, that an alienation made by the managing member of a joint family cannot be binding upon his adult co-sharers unless it is shown that it was made with their consent, either express or implied. In cases of implied consent it is not necessary to prove its existence with reference to a particular instance of alienation, but a general consent may be deducible in cases of urgent necessity, from the very fact of the manager being entrusted with the management of the family estate by the other members of the family ; and the latter in entrusting the management of the family affairs to the manager must be presumed to have delegated to him the power of pledging the family credit or estate, where it is impossible or extremely inconvenient for the purpose of an efficient management of the estate, to consult them and obtain their consent before pledging such credit or estate :" *Miller* v. *Ranganath*, 12 C.S., 389, 399.

Accordingly it has been held that the compulsory sale of the joint family property mortgaged by the managers of a trading or money-lending business of the family for the purposes of that business during the minority of the other members, in execution of a decree obtained in a suit brought against the managers only, is binding on the other members who cannot impugn the sale solely on the ground of their not being made parties to the suit, when it appears from the proceedings that the whole property was sold and bargained for ; *Daulat* v. *Meher*, 15 C.S., 70 ; and *Sheo* v. *Saheb*, 20 C.S., 453. The managers were held to represent the whole

family in the suit. I shall return to this subject when dealing with the topic, Judicial Proceedings.

Manager's liability to account.—All the adult members are entitled to take part in the management of the joint property, and if all are joint managers then no one is liable to be called upon to render an account. But if one member is the *Karta* or governor of the family, as is generally the case in practice, and as such is in exclusive management of the joint family property, exercises control over the income and the expenditure, and is the custodian of the surplus if any, then the other members have the right to an account against him, especially when they were minors. The principle upon which the right to call for an account rests, is not that the manager is to be looked upon as an agent or a partner; but it is, that when one of several joint owners receives all the profits, he is bound to account to his co-sharers for their share of the profits, after making such deductions as he has the right to make. The demand for an account may be made even during jointness by a member desirous to know the actual state of the family fund: *Abhay* v. *Peari*, 13 W.R., F.B., 75.

But the accounts must be taken upon the footing of what has been actually spent for family purposes, and not upon the footing of what should have been so, if the manager had been more prudent and less extravagant. But he is bound to make good what has been misappropriated or concealed by him.

Guardians and Wards Act VIII of 1890.—No guardian can be appointed under the Guardians and Wards Act, of the property of a minor member of a joint family governed by the Mitákshará, if he is not possessed of separate property: *Sham* v. *Mahananda*, 19 C.S., 301. Otherwise, the interference would have forced the disruption of the joint family against the will of the members thereof.

5. *Alienation.*

Alienation of family property.—Although the female members of a joint family are entitled to certain rights in the family property, yet as their right is imperfect and they hold a subordinate and dependent position, the male members alone have the right of managing and dealing with the property. When, therefore, alienation of any property becomes necessary for a purpose affecting the whole family, the male members are competent to effect the same, and they must all join in the transaction, in order to be bound by it. But if some of them are minors, then those that are adults are competent to make the necessary transfer. We have already seen (p. 157) that the manager also may alone make an alienation with the express or implied consent of the

other adult members, such consent being implied in a case of urgent necessity when it would be impossible or extremely inconvenient to obtain express consent: 12 C.S., 399. The managers of a joint family trading or money-lending business are the accredited agents of the family, and authorized to pledge its credit for all proper and necessary purposes within the scope of the agency (*Daulat* v. *Mehr*, 15 C.S., 70; *Sheo* v. *Saheb*, 20 C.S., 453), and to represent the family in suits brought on mortgages executed by them in that capacity. The father of the family has the power of alienating the whole property for the payment of his debts which the sons are held bound to pay; *Nanomi* v. *Modhun*, 13 C.S., 21.

Legal necessity.—The expression *legal necessity* is very often used, to signify the causes for which, or the circumstances under which, a single member of a joint family, or a like person, having a limited interest in property, is authorized to transfer it so as to pass to the transferee a right to the entire property. It comprises maintenance and support of the family, preservation of the family estate, management of the family business, if any, performance of necessary religious rites, such as marriage and the like initiatory ceremonies, exequial rites and *Sráddha* ceremony,—and the payment of debts contracted for the above purposes.

Alienation of undivided co-parcenary interest of a member.—The members of a joint family governed by the Mitákshará hold the joint property as joint-tenants and not as tenants-in-common as in the Bengal school. The Mitákshará theory of the tenure of joint property by members of a joint family, is, that each co-parcener's right extends to the whole; whereas the Dáyabhága doctrine is, that each member's right extends only to the share to which he would be entitled on partition, and not to the whole. From these theoretical conceptions of the nature of joint right, important legal consequences are deduced by the two schools. According to the Mitákshará, one member cannot alienate his undivided interest in the family property, for he has no definite share in it; and when he dies his interest passes by survivorship, for he has no specific defined share such as might be claimed by the heirs of his separate property. But the Dáyabhága controverts these doctrines by setting up a different theory of co-ownership as stated above, and maintains as incidents of this theory, that a single co-sharer is competent to deal with his undivided share, and that such share does not pass by survivorship, but devolves on the heirs succeeding to his separate property.

The law on the subject of a member's power of alienating his undivided interest, is different in Deccan and in this side of India.

In Bombay and Madras—the strict ante-alienation rule of the Mitákshará has been departed from, and it has been held that a co-parcener can, for *valuable* consideration, sell, encumber, or otherwise alienate his interest in undivided family property: *Vasudev* v. *Venkatesh*, 10 B.H.C., 139; *Virasvami* v. *Ayyasvami*, 1 M.H.C., 471; *Ranga* v. *Ganapa*, 15 B.S., 673.

In Bengal and North-Western Provinces—the ante-alienation doctrine of the Mitákshará is strictly followed so far as voluntary alienation by a co-parcener, of his undivided interest, is concerned. The question was considered by a Full Bench of the Calcutta High Court in the case of *Sudaburt* v. *Foolbash*, 12 W.R., F.B., 1, and it was held that a member of a joint Hindu family governed by the Mitákshará Law, has no authority to mortgage his undivided share in a portion of the joint family property, in order to raise money on his own account and not for the benefit of the family. In the case of *Balgobind* v. *Narain*, the Privy Council have laid down that under the Mitákshará, as administered by the High Courts of the North-Western Provinces and Bengal, an undivided share in ancestral estate, held by a member of a joint family in co-parcenary cannot be mortgaged by him on his own account without the consent of his co-parceners: 15 A.S., 339. So also in a case from Oudh, the Judicial Committee have held that a nephew was entitled to recover from a purchaser from his uncle the latter's undivided share after his death, which had been sold without the former's consent: *Madho* v. *Mehrban*, 18 C.S., 157.

Equity in favor of alienee when alienation set aside.—When an alienation made by a member, of his undivided share, is set aside at the instance of another member, the court may order that the property should be thenceforth possessed in defined shares, and that the share of the transferrer should be subject to a lien for the return of the purchase-money. For, equity looks on that as done which ought to have been done, and as a co-parcener may make his share available for payment of his just dues by coming to a partition with his co-sharers, and as he ought to do it and fulfil his obligation, the court of equity declares it done: *Mahabeer* v. *Ramyad*, 20 W.R., 192. But such a course would be precluded by the death of the transferrer and by the accrual of the right by survivorship before a judicial partition could be enforced in that way: 18 C.S., 157.

Involuntary sale in execution before death.—Upon the same principle of equity, is founded the doctrine settled by judicial decisions that the undivided co-parcenary interest of a member in the joint property may be seized and sold in execution of a decree against him for his personal debts: *Deen Dyal* v. *Jugdeep-narain*, 3 C.S., 198=4 I.A., 247; *Rai Balkishen* v. *Rai Sita*, 7 A.S.,

731; *Bailur* v. *Lakshmana*, 4 M.S., 302. A Hindu is bound, not only legally and morally, but also religiously, to pay off the debts contracted by him; he is also in a position to pay when he has an interest in joint family property, provided that interest be severed by partition from that of his co-parceners,—but not otherwise; the severance again depends entirely on his will, for partition may take place by the desire of a single co-sharer; the debtor, therefore, ought to have come to a partition, and applied his share to the payment of his debts; he cannot in equity and good conscience, be permitted to defraud his creditors by choosing to continue joint, and to enjoy the same: his undivided co-parcenary interest, therefore, is allowed to be seized and sold in execution of a money-decree against him, and the purchaser acquires the right of standing in his shoes for the purpose of carrying out partition, and getting his share. But this can be done only during the debtor's lifetime, and the interest must be attached before his death otherwise the right by survivorship would operate and defeat the creditor's equity: *Surajbunsi Koer* v. *Sheo Persad Singh*, 5 C.S., 148; *Madho* v. *Mehrban*, 18 C.S., 157.

Rights of purchaser of undivided share.—The purchaser of the undivided co-parcenary interest of a member of joint family, at a voluntary alienation permitted in Bombay and Madras, must be taken to purchase an uncertain and fluctuating interest, with the right of converting it, by partition after the purchase, into definite separate property. I have already told you that the interest of a member is liable to variation, according as existing co-parceners die or new co-parceners are born, until it is adjusted by partition, and so the interest purchased is liable to diminution by changes in the family, should there be delay on the part of the purchaser in suing for partition: *Ranga* v. *Krishna*, 14 M.S., 418. But a compulsory and involuntary sale in execution of a deceased member's share attached before his death, is taken to operate as a partition, in so far as regards the division of interest, and the purchaser is entitled to what the debtor would get if a partition were then made; though partition, in so far as it means division of possession, may be effected by a suit for the same: *Hardi Narain* v. *Ruder Perkash*, 10 C.S., 626.

Position of vendor co-parcener.—It should, however, be observed that the co-parcener does not become divested of his status as a member of the joint family, by the mere sale of his undivided co-parcenary interest for value; nor can the purchaser have the status of a member of the family, so as to become benefited by survivorship on the death of a member without leaving male issue. Hence it appears that although the vendee may be a loser by birth of a member before partition is carried

out by him, still the vendor is to be benefited by the death of a co-parcener: *Gurolingapa* v. *Nandapa*, 21 B.S., 797. But these questions that arise by reason of the departure from the Mitákshará law, and introduction of innovations destructive of the joint family system, are beset with considerable difficulty, and do not appear to be settled yet.

Gift.—Although on grounds of equity, the strict ante-alienation doctrine of the Mitákshará has been departed from in Bombay and Madras, in favor of purchasers for value, whom equity regards with considerable affection, yet equity does not thus act in favor of volunteers. Accordingly, it has been held that a Hindu cannot make a valid gift of his interest in undivided property; such gift is void and cannot prevent survivors from taking the share: *Baba* v. *Timma*, 7 M.S., 357; *Ponnusami* v. *Thatha*, 9 M.S., 273; *Virayya* v. *Hanumanta*, 14 M.S., 459; *Lakshman* v. *Ram*, 5 B.S., 61.

Devise of undivided interest.—A testamentary gift also, of the undivided interest stands on the same footing as a gift *inter vivos*. For, as regards testamentary power, it is now settled law that no Hindu governed by the Mitákshará can make a testamentary disposition of his undivided interest in the joint family property, which interest passes, on the moment of his death, by survivorship, to the surviving male members, so that there is nothing left on which his will can operate. The law on the subject has been explained by the Privy Council in the case of *Lakshman Dada Naik* v. *Ram Chandra Dada Naik*, thus:—

"It has been ingeniously argued that partial effect ought to be given to the Will, by treating it as a disposition of the one-third undivided share in the property to which the father was entitled in his lifetime. The argument is founded upon the comparatively modern decisions of the Courts of Madras and Bombay, which have been recognised by this Committee as establishing, that one of several co-parceners has, to some extent, a power of disposing of his undivided share without the consent of his co-sharers.

"Those cases have established that such a share may be seized and sold in execution for the separate debt of the co-sharer, at least in the lifetime of the judgment-debtor, and that it may be also made the subject of an alienation by a deed executed for valuable consideration. The Madras High Court has gone further, and ruled that an alienation by gift or other voluntary conveyance, *inter vivos*, will also be valid against the non-assentient co-parceners. And assuming this latter proposition to be law, the learned Counsel for the appellant have insisted, that it follows as a necessary consequence, that such a share may be dis-

posed of by will, because the authorities, which engrafted the testamentary power upon the Hindu law, have treated a devise as a gift to take effect on the testator's death, some of them affirming the broad proposition that what a man can give by act *inter vivos* he may give by Will.

"To this argument there are two answers. Their Lordships have to apply to this case the law as it is received at Bombay. The decisions of the High Court of Bombay have ruled that a co-parcener cannot, without the consent of his co-sharers, either give or devise his share; that the alienation of it must be for value; and if this be law, the whole argument in favour of testamentary power over the undivided share fails.

"Again, the High Court of Madras, though admitting that a co-parcener can effectually alienate his share by gift, has ruled that he cannot dispose of it by Will. Its reasons for making this distinction between a gift and a devise are, that the co-parcener's power of alienation is founded upon his right to a partition; that that right dies with him; and that the title of his co-sharers by survivorship, vesting in them at the moment of his death, there remains nothing upon which the Will can operate. This principle was invoked in the case of *Surajbunsi Koer*, and was fully recognised by their Lordships, although they decided the particular case, which was one of an execution against a mortgaged share, on the ground that the proceedings had then gone so far in the lifetime of the mortgagor, as to give, notwithstanding his death, a good title against his co-sharers to the execution purchasers. It follows from what has been said, that the weight of positive authority at Madras, as well as at Bombay, is against the proposition of the learned Counsel for the appellant.

"Their Lordships are not disposed to extend the doctrine of the alienability by a co-parcener of his undivided share, without the consent of his co-sharers, beyond the decided cases. In the case of *Surajbunsi Koer*, above referred to, they observed:—'There can be little doubt that all such alienations, whether voluntary or compulsory, are inconsistent with the strict theory of a joint and undivided family (governed by the Mitákshará law); and the law, as established in Madras and Bombay, has been one of gradual growth, founded upon the equity which a purchaser for value has to be allowed to stand in his vendor's shoes, and to work out his rights by means of a partition.' The question, therefore, is not so much, whether an admitted principle of Hindu law shall be carried out to its apparently logical consequences, as what are the limits of an exceptional doctrine established by modern jurisprudence?" 5 B.S., 61 =7 I.A., 181: see also 22 C.S., 565.

6. *Debts.*

Family debt.—When a debt is contracted for a family purpose by any member of the family, it is payable by the family or all the members. We have seen that the manager of a joint family or of its trading or money-lending business, is competent to charge or alienate the family property for a legal necessity falling within the scope of his authority.

Duty of creditor dealing with manager.—The lender dealing with a manager is bound to enquire into the necessities for the loan, and to satisfy himself as well as he can, that the manager is acting for the benefit of the family. If he does so enquire, and acts honestly, he is safe: he is not affected by the precedent mismanagement of the family property, nor by the subsequent non-application of the money to the purpose for which it is borrowed, nor even by the non-existence of the alleged necessity if it was reasonably credited and is legally sufficient. *Hanooman Persaud Panday* v. *Mt. Babooee Munraj Koer*, 6 M.I.A., 393. The Transfer of Property Act IV of 1882, Section 38, embodies the same rule by laying down that the circumstances constituting legal necessity shall be deemed to have existed if the lender, after using reasonable care to ascertain the existence of such circumstances, has acted in good faith.

Personal debt of a Member.—According to the strict theory of the Mitákshará law, the family property is not liable for the personal debts of a member. But a course of decisions has introduced two innovations destructive, to a great extent, of the Mitáksará system; one of which is the conversion into legal liability, of the son's pious duty to pay off the father's personal debts, and the consequent liability of the entire family property to satisfy the father's debts if not proved to have been contracted for immoral purposes; (*Girdharee Lall* v. *Kantoo Lall*, 1 I.A., 321=22 W.R., 56) and the other is the compulsory sale of a member's undivided co-parcenary interest in the family property in execution of a money decree against him: *Deendyal* v. *Jugdeep Narain*, 3 C.S., 198=4 I.A., 247.

But while our courts have gone far beyond Hindu Law to help the father's creditors, they do at the same time overlook and refuse to enforce the rule of Hindu Law in favour of the creditors of members other than the father.

For though a debtor's co-parcenary interest is allowed to be sold during his lifetime in execution of the creditor's decree, yet it has been held that if the debtor dies before the attachment of his undivided interest, the creditor cannot follow it into the hands of the collateral male members to whom it passes by

survivorship (see p. 135) and who are considered not liable for the debts.

Liability of the heir by survivorship.—But the Hindu Law declares the heir of a person, whether taking by survivorship or by succession, to be liable for his debts. The rules on the subject are contained in three slokas of Yájnavalkya (text No. 18, p. 111) and are explained in that part of the Mitákshará, where the Action for Recovery of Debts, is dealt with, and may be summarised as follows :—

1. That the male issue are liable to pay off the debts of their father and paternal grandfather (and great-grandfather ?), whether they inherit any property from or through them, or not.

2. That their liability arises only when the father is dead or gone to a distant place and not heard of for twenty years, or laid up with an incurable disease.

3. That they are not liable for debts incurred for indulgence in women, wine, or wager, or for other unlawful purposes.

4. That he who takes the *riktha* (=rights) or heritage of a person, *i.e.*, his heir by survivorship or by succession, is bound to pay off his debts. The term *riktha* means heritage *obstructed* or *unobstructed* : that this word signifies *unobstructed* heritage or co-parcenary interest devolving by survivorship on a collateral relation, is beyond all doubt, see Mitákshará 1, I, 13.

The Hindu Law discloses a high sense of morality as regards the payment of debts, which is declared to be religiously necessary for the salvation of the debtor's soul.

Our courts are certainly right in so far as they do not allow the creditor to follow the co-parcenary interest passing by survivorship to an heir other than the male issue. For, Hindu Law nowhere contemplates a compulsory sale of immoveable property in execution of decrees. The policy of Hindu legislators appears to have been rather against depriving people of ancestral land, the hereditary source of their maintenance. But when that policy has been departed from to an unwarrantable extent, in the case of the fathers' debts, to the prejudice and injury of the male descendants, there is no cogent reason why the remoter heirs should be exempted from a just liability and permitted to appropriate the deceased debtor's share free from the charge of paying his debts.

Father's debts and son's liability.—The pious duty of a son as such, to pay off his father's debts is independent of his inheriting any property from or through him, whereas the liability of an heir as such must be limited by the extent of the inherited property. The son's pious duty again arises, only after the father's death, as a general rule.

We have already seen that as regards ancestral property there is no distinction between the father's and the son's interest, either in extent or in character.

Our courts of justice have transformed the future pious duty into a present legal liability limited by both the father's and the son's interests in the ancestral property, if the father's debts be not contracted for illegal or immoral purposes. And accordingly it was at first held that an alienation by sale, mortgage or the like, of the family property by the head of the family for *antecedent* lawful debts is valid and binding on the sons : *Girdharee* v. *Kantoo*, 22 W.R., 56 ; *Luchman* v. *Giridhur*, 5 C.S., 855. Some nice questions then arose as to the validity or otherwise of a mortgage, or the like alienation, made by the father when there was no antecedent debt ; but it was contended that having regard to the principle enunciated in *Girdharee's* case, the consideration money paid to the father for such alienation if not proved to be spent for immoral purposes, must itself constitute a lawful debt payable by sons ; and accordingly it has been held that although the mortgage may not be valid, yet the debt being antecedent to the suit on the mortgage, the creditor is entitled to a decree directing the debt to be raised out of the whole ancestral estate inclusive of the mortgaged property : *Gunga* v. *Ajudhia*, 8 C.S., 131 ; *Khalilul* v. *Gobind*, 20 C.S., 328.

The father's creditor, therefore, is entitled to realize his debts not only from the father's undivided co-parcenary interest in the ancestral property during his life, but also from the entire property inclusive of his and the son's interests, either during his life or after his death. Thus the creditor has the right to proceed either against the father's interest or against the entire property during his life ; and it is a question of fact to be decided by having reference to the circumstances of each case, as to whether the father's interest only or the entire property was sold in execution of a money decree against the father alone. This question will be discussed in the next topic.

When a joint family consists of the father and the son, and also of collateral co-parceners, then the interests of both the father and the son in the family property are liable for the father's lawful debts, and the execution-purchaser would be entitled to have their shares allotted to him at a partition with the collateral co-parceners : *Ghanammal* v. *Muthusami*, 13 M.S., 47.

The strict rule of the Shastras, that a son is liable to pay his father's debts with interest, and a grandson those of his grandfather without interest, even though no assets have been inherited, was *legally* enforced in Bombay, until the liability was limited to assets by legislation : Bombay Act VII of 1866.

It would seem that partition is the only remedy by which a son may now protect his interests from the liability of paying off the debts of an extravagant father; but this would apply only to debts incurred after the partition.

Indian Legislature and Judicial Committee.—A student of jurisprudence would be at a loss to understand the principle on which the highest tribunals are changing the Mitákshará Law which they are called on to administer. Hindu Law as it is, seems to be suited to the exigencies, and is conducive to the welfare and well-being, of Hindu society; and the introduction of an innovation, like the legal liability of the son to pay off the father's debt, has been attended with mischievous consequences entailing great hardship. The Indian money-lenders are shrewd and astute enough to be able to protect their own interests, while men of property here are often surrounded by unprincipled servants and hangers-on who feel no compunction in robbing their masters and benefactors in collusion with money-lenders. By the operation of the doctrine introduced by the Privy Council in *Girdharee Lall's* case many ancient families are becoming ruined and reduced to poverty. But while the Judicial Committee is changing the law for the benefit of creditors, the Indian Legislature is passing Enactment after Enactment for the protection of the people against money-lenders.

7. *Judicial Proceedings.*

Personal and representative capacity.—Every member of a joint family has two capacities, one of which may be called the personal, and the other, the representative. In transactions with outsiders he represents the whole family if he acts in his representative capacity; but if they relate to his individual interests, then he acts in his personal capacity. We have already seen that in several matters a single member such as the manager, acts as the representative of the family so as to bind the whole family. A property purchased in the name of a member of a joint family is presumed to be family property, on the principle that he represents the family. How far a single member may represent the family in suits or other judicial proceedings is now considered.

The ordinary general rule is that no person can be bound by a decree to which he is not a party, it cannot even be used as evidence against him; and that a person cannot be appointed guardian *ad litem*, if his interests be adverse to those of the minor. But this rule is not followed in all cases in which the managing member alone was the party to a suit; sometimes he is held to represent the whole family, and sometimes not so. The decisions do not seem to be uniform.

Suit by the manager or a single member.—There are several cases in which it has been held that one member of a joint family, cannot alone sue on behalf of the family. When, however, the other members of the family, are minors, then the manager must necessarily represent the whole family, and may alone sue, but the defendant may always insist on all the co-owners being joined as plaintiffs on the record; *Harigopal* v. *Gokuldas*, 12 B.S., 158; 10 B.S., 32. So it has been held that the dismissal of a previous suit brought by elder brothers is not binding on a minor brother in the absence of evidence proving that they acted on behalf of the family, or that any one of them had been a *de facto* manager of the family: 10 B.S., 21.

Suit against manager alone.—It has been held that a decree in a suit against one brother alone, based on a mortgage executed by him as manager for legal necessity even during the minority of another brother, and the sale of the mortgaged property in execution of that decree, are not binding on the other brother: 11 C.S., 293; 5 M.S., 125.

The learned judges in these cases enunciate the ordinary principle that a person ought not to be deprived of his rights by judicial proceedings to which he was no party. But if the debt was one payable by that person as well as by the parties to the previous suit, and the property was sold at its proper price, and there is no other ground for impugning the decree or the sale, so far as his share is concerned save and except the mere technical objection of his not having been made a party to the previous proceedings, then it has been held in some cases, having regard to the peculiar nature of the transaction and the position of the members who alone had been made defendants in the previous suit, that all the members were bound by the proceedings although some were not joined on the record. Thus the managers of a joint family trade and of its money-lending business have been held to be the accredited agents of the family and to represent the whole family, in transactions falling within the scope of their authority such as borrowing money by pledging the family property, for the purposes of such trade or business, as well as in suits based on such mortgage, brought against them only; and the whole family property has been held to pass to the execution-purchaser, unless it can be proved by the other members who were not parties to the suit, that there was no legal necessity or that what was intended to be sold and bargained for was not the whole family property but only the co-parcenary interest of the managers who alone were parties to the previous suit: *Daulat Ram* v. *Mehr Chand*, 15 C.S., 70=14 I.A., 187; *Sheo Pershad* v. *Saheb Lal*, 20 C.S., 453. So also it has been held that

the member of the family in whose name a leasehold property stood represented the family in suits respecting the rent of the property, and that the decrees for rent against him alone may be realized by the sale of the whole family property: *Bissesur Lall* v. *Luchmessur*, 5 C.L.R., 477=6 I.A., 233; *Hari* v. *Jairam*, 14 B.S., 597.

Having regard to the low standard of morality among the money-lenders and many other classes of people in this country, this departure from the strict rule of law appears to be likely to lead to fraud, collusion and dishonesty for the purpose of depriving men of their just rights by law-suits of which they may be ignorant; and our courts would not be justified in extending this exceptional rule.

Suit against father.—The father of the family stands on a different footing from that of a brother or an uncle, and cannot be presumed to act in fraud of his sons, and therefore he may in a proceeding be deemed to represent the family.

The following extract from the judgment of the Privy Council in the case of *Mt. Nanomi Babuasin* v. *Modun Mohun* (13 C.S., 21=13 I.A., 1) shows what the law is on the subject:—

"There is no question that considerable difficulty has been found in giving full effect to each of two principles of the Mitákshará law, one being that a son takes a present vested interest jointly with his father in ancestral estate, and the other that he is legally bound to pay his father's debts, not incurred for immoral purposes, to the extent of the property taken by him through his father. It is impossible to say that the decisions on the subject are on all points in harmony, either in India or here.* * *

"It appears to their Lordships that sufficient care has not always been taken to distinguish between the question how far the entirety of the joint estate is liable to answer the father's debt, and the question how far sons can be precluded by proceedings taken by or against the father alone from disputing that liability. Destructive as it may be of the principle of independent co-parcenary rights in the sons, the decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against his creditors' remedies for their debts, if not tainted with immorality. On this important question of the liability of the joint estate their Lordships think that there is now no conflict of authority.

"The circumstances of the present case do not call for any inquiry as to the exact extent to which sons are precluded by a decree and execution proceedings against their father from calling into question the validity of the sale, on the ground that

the debt which formed the foundation of it was incurred for immoral purposes, or was merely illusory and fictitious. Their Lordships do not think that the authority of *Deendyal's* case bound the Court to hold that nothing but Girdhari's (the father's) co-parcenary interest passed by the sale. If his debt was of a nature to support a sale of the entirety, he might legally have sold it without suit, or the creditor might legally procure a sale of it by suit. All the sons can claim is that, not being parties to the sale or execution proceedings, they ought not to be barred from trying the fact or the nature of the debt in a suit of their own. Assuming they have such a right, it will avail them nothing unless they can prove that the debt was not such as to justify the sale. If the expressions by which the estate is conveyed to the purchaser are susceptible of application either to the entirety or to the father's co-parcenary interest alone (and in *Deendyal's* case there certainly was an ambiguity of that kind), the absence of the sons from the proceedings may be one material consideration. But if the fact be that the purchaser has bargained and paid for the entirety, he may clearly defend his title to it upon any ground which would have justified a sale if the sons had been brought in to oppose the execution proceedings."

What passes in execution against father alone.—In this case and in the cases of *Bhagbat* v. *Mt. Girja*, 15 C.S., 717=15 I.A., 99, *Minakshi* v. *Immudi Kanaka*, 12 M.S., 142=16 I.A., 1, and *Mahabir* v. *Moheswar*, 17 C.S., 584=17 I.A., 11, the Judicial Committee held that the entire family property passed in execution of a decree against the father alone; and in the cases of *Deendyal* v. *Jugdeep*, 3 C.S., 198=4 I.A., 247, *Suraj Bunsi* v. *Sheo Persad*, 5 C.S., 148=6 I.A., 88, *Hardi* v. *Ruder*, 10 C.S., 626=11 I.A., 26, *Simbhunath* v. *Golap Sing*, 14 C.S., 572=14 I.A. 77, and *Pettachi* v. *Sangili*, 10 M.S., 241=14 I.A., 84, it was held that the father's undivided share only passed. The following propositions appear to be laid down in these cases :—

1. The whole family property may be sold in execution of a money decree against the father alone, if the debt was not contracted for immoral purposes.

2. If the proceedings show that the intention was to sell the entire property and the same was sold and bargained for then the purchaser would be entitled to the whole ; and the sons though not parties to the proceedings, cannot claim their shares against the purchaser except by proving that the debt was contracted for immoral purposes, and that the purchaser had actual or constructive notice of that fact. A claim preferred by the sons has been held to affect the purchaser with such notice :

5 C.S., 148. When the execution-creditor is the purchaser, he is affected with full notice of all the proceedings : 14 I.A., 84.

3. Should, however, the original transaction and the proceedings in the suit, as well as the price paid, show that what was intended to be sold was the father's co-parcenary interest only, then the purchaser cannot get more than that interest : 14 C.S., 572. In the absence of circumstances showing an intention to put up the entire interest of the family in the property sold in execution of a money-decree against the father, only his interest passes to the execution-purchaser : *Maruti* v. *Babaji*, 15 B.S., 87.

4. The Court will look at the substance, and not merely at the form, of the execution-proceedings, and therefore the expression "right, title and interest of the judgment-debtor" used in the sale-proceedings and in the sale-certificate, (*Jugul* v. *M. R. Jatindra*, 11 I.A., 66=10 C. S., 985, 992,) is not to be taken to necessarily show that the father's interest only was sold.

5. The points to be determined in such cases are,—

(*a*) What was the interest that was bargained for and paid for by the purchaser ? Was it the father's interest only, or was it the interest of the entire family ? And if the latter, then

(*b*) Were the debts, for which the decree was obtained, under which the property was sold, contracted for immoral purposes ? and

(*c*) Had the purchaser notice that the debts were so contracted ? *Krishnáji* v. *Vithal*, 12 B.S., 625.

Transfer of Property Act §85.—There is, however, no strong reason why our courts should be so indulgent to money-lenders who are found as a general rule to be unscrupulous and dishonest, as to depart from the ordinary law, and hold that members of a joint family are bound by alienations and decrees and execution-sales to which they were no parties. The Allahabad High Court has held that Section 85 of the Transfer of Property Act is imperative and applies to a mortgage by the father or manager of a joint family : *Bhawani* v. *Kallu*, 17 A. S, 5-37. The Calcutta High Court has held that that section is compulsory, and that the minor son was not represented by the father who was the mortgagor and against whom alone the suit on the mortgage was brought. But their Lordships held that inasmuch as the minor sued to declare that he was not bound by the decree nor by the mortgage, the debt being contracted for illegal and immoral purposes, and as the latter point was found against him, and he is not willing to redeem, his suit must be dismissed though he was not a party to the decree, since the only right the minor plaintiff now had was the right to redeem : *Lala* v. *Golab*, 28 C. S., 517. This view has been adopted by the Allahabad High Court : 24 A. S., 211.

As regards a mere money decree against the father there appears to be difference of opinion between the Bombay and the Calcutta High Courts, with respect to the question whether the decree can be executed against the sons after the father's death the former holding that it can be, while the latter holds that a separate suit must be brought.

8. *Devolution.*

Joint-tenancy and survivorship.—The members of a joint family governed by the Mitákshará law, may be said to hold the family estate as joint-tenants. But they do not resemble, in every respect, the joint-tenants of English law, whose rights are equal in all respects, and whose joint-tenancy is accordingly said to be distinguished by unity of *possession*, unity of *interest*, unity of *title*, and unity of *time* of the commencement of such title; and all the survivors are equally entitled to the estate on the death of a joint-tenant. The joint-tenancy in English law is created by a deed or a will.

The joint-tenancy under the Mitákshará arises by the operation of the law of inheritance. There is *unity* of possession and also, in one sense, unity of *title*, namely, the right derived immediately or mediately from a common ancestor; but there is neither unity of *time* of the commencement of title, nor unity of *interest* in all cases. Nor are all the survivors entitled to the undivided share of a deceased member in all cases: there is a certain order in which some of the joint-tenants take, to the exclusion of the rest; though it is ordinarily said that, the interest of a deceased member passes by survivorship to the surviving male members alone; but this is true only in a qualified sense.

Order in devolution by survivorship.—The undivided share may be said to pass in a certain order: it devolves on the male issue in the first instance; on their default, it goes to the nearest male ascendant and collaterals descended from him; and on failure of these, to the next male ascendant and his descendants; and so on. This is true in a qualified sense only; for, females getting shares on partition, do take by survivorship together with the males, provided partition takes place, when their shares also are augmented.

Suppose for instance, A and B are two brothers, having sons and ancestral property, then all of them are entitled to undivided shares in the property; but the death of a member of A's branch will not augment the share of B and his branch. Suppose again that, A dies leaving a wife and three sons, then A's share may be said to devolve on the widow and the sons, should the latter make a partition: if one of these sons dies before partition without

leaving male issue, then his share may be said to devolve on his two surviving brothers and also on his mother, should the two brothers come to a partition during her life, otherwise on the two brothers only if they continue joint.

The result of a member's death may be stated thus:—If he dies leaving male issue, he may be deemed to exist in them; otherwise, excepting for the purpose of the maintenance of his widow and maiden daughter, if any, and the marriage of the latter, his existence may be ignored as regards the joint property, which continues to be enjoyed by the survivors as before; and their rights are, on partition, determined in the same way as if the deceased never existed, except for the purposes mentioned above.

But not such order as in succession.—Hence, although there is an order of devolution as between different branches, there is no preference given to any of the members of the same branch by reason of his being nearer in degree than another. For instance, if a family consists of three brothers, and one of them dies leaving two sons, and then another dies without male issue leaving the two fraternal nephews and one brother surviving him, then the surviving brother, though nearer, cannot claim the undivided one-third share of the sonless deceased brother to the exclusion of the nephews who are more remote in degree. The sonless deceased brother's share passes to the surviving brother and the nephews; and, on partition between the uncle and the nephews, the joint property is to be divided into two equal shares, one of which is to be allotted to the uncle, and the other to the two nephews; *Debi Parshad* v. *Thakur Dial*, 1. A.S., 105 (F.B.), *Bhimul Doss* v. *Choonee Lall*, 2 C.S., 379 (F.B.). It should be observed that, if the sonless deceased brother had been separate, the surviving brother alone would have taken his estate to the exclusion of the nephews.

Exclusion of female heirs and daughter's son.—The effect of this rule of devolution by survivorship is to exclude the widow, the daughter, and the daughter's son in all cases, if the member dies without leaving male issue. A member's grandfather's great-grandson's grandson living jointly with him, takes by survivorship his undivided interest to the exclusion of his widow: *Ratan* v. *Modhoo*, 2 C.L.R., 328. Should the circumstances of the family be such that a female heir of the deceased would be entitled to a share on partition, then she cannot be said to be excluded except in the sense of her not being entitled to claim a share if the family continues joint.

Charges on undivided share passing by survivorship.—It has already been indicated that the maintenance of the widow and the maiden daughter of a deceased co-parcener, and the

marriage expenses of the latter, are charges on his co-parcenary interest. If he leaves any male issue excluded from inheritance for any cause other than being outcasted, then such issue and his family are also to be maintained out of the deceased's undivided interest. The co-sharers taking it by survivorship are liable for these charges to the extent of the said interest. They are also, according to Hindu law, similarly liable for his debts which form a charge on the interest left by him ; but our Courts of justice have not, up to the present day, enforced this liability.

Illegitimate brother of a Sudra taking by survivorship.—It has been held by the Calcutta High Court following certain Bombay decisions (11 C.S., 702), that in a Súdra family governed by the Mitákshará a *dási-puttra* or illegitimate son by a slave girl, is a co-parcener with his legitimate brother in the ancestral estate, and will take by survivorship ; and this view has been upheld by the Judicial Committee : *Jogendro Bhupati* v. *Nityanand*, 18 C.S., 151=17 I.A., 128.

I have not been able to understand and follow the reasons upon which the above conclusion is based. According to the Mitákshará, an illegitimate son, like a maiden daughter,is not *entitled* to any share when the partition is made during the lifetime of the father, except at the pleasure of the father. But when *partition is made* by the legitimate sons, after the death of the father, they are directed to allot a half share to an illegitimate son, in the same way as a quarter share to a maiden daughter, of the father. When there is no legitimate son, an illegitimate son may take the whole estate, provided there be no widow or legitimate daughter or her son, in which case the illegitimate son takes half. It is not easy to find out, as to when does an illegitimate son become a co-parcener in the ancestral estate ; if he had been so, during the lifetime of the father, his right to a share could not have depended on the father's choice ; he would have been entitled to a share in his own right independently of the father's discretion. Nor can rules of succession and survivorship apply to the same ancestral estate ; and, therefore, it cannot be said that he acquires by *succession* a title, on the death of the father, to a half of the father's undivided share, the other half devolving by *survivorship* to the legitimate sons. How again is the co-parcenary interest of an illegitimate son affected by the existence of a legitimate daughter or her son ? A son takes even the father's separate estate by survivorship and not by succession, except when he has been separated from the father. The correct view seems to be that Sect. xii. of the first chapter of the Mitákshará,—which concludes the subject of Partition, Succession being dealt with in the next chapter,—deals

with the position of an illegitimate son to whom the preceding sections cannot apply, and defines his rights generally. He is no more a co-parcener than the father's wife, who is entitled to a full share on partition. And it is doubtful whether he is entitled to any share when there is a single legitimate son, that is to say, whether he has a right to demand partition. Accordingly, it was held by the Madras High Court in several cases that, he was not entitled to claim partition: (7 M. S., 407; 8 M. S., 557), the ordinary incident of his *status* being held to be a right to be maintained (10 M. S., 334). But the said Court thought itself bound by the above decision to hold that he is entitled to enforce partition: *Thangam* v. *Suppa*, 12 M. S., 401.

Can a female member take by survivorship?—It has already been said that a lawfully wedded wife or *Patní*, becomes from the moment of her marriage, the co-owner of her husband with respect to all his property; and it is by virtue of this right, that she becomes entitled to a share at a partition between her husband and his male descendants or at a partition between the latter. But she is not entitled to a share in other circumstances; for instance, if her husband dies without leaving male issue, his undivided interest passes to his surviving brother or other collateral male co-sharer, to the exclusion of his widow. Then what becomes of her co-ownership with the husband, or right to the family property acquired through her husband? According to one view, it subsists even after the husband's death, and she continues to get maintenance out of his property by virtue of that right; her subordinate capacity to get a share or not, at a partition which she can never demand or enforce, is no criterion of the existence or non-existence of that right. But according to another view, this right becomes extinguished by the death of the husband, the co-ownership subsists only during their joint lives. This view, however, appears to be erroneous as it is inconsistent with the reason for recognising this right, which subsists even after the husband's death. It has already been observed that the wife's co-ownership is admitted to account for her enjoyment of the family property, which continues even after the husband's death; why then should the right cease? But the law relating to females has been misunderstood and misconstrued in a manner detrimental to their interests, and it has been held that a widow of a deceased co-parcener living jointly with the last surviving male member of the family, is not entitled to take by survivorship (*Ananda* v. *Nownit*, 9 C.S., 315); although there is an earlier case *Mt: Bhagwani* v. *Gopalji* S. D., N.-W.P., 1862, Vol 1, p.306 in which the contrary view was taken, which is consistent with the original principle as well as with reason, equity and justice.

For, suppose a man died leaving his mother, widow, and a brother behind him; and then the surviving brother, who became entitled to the whole family property, dies leaving a widow, the mother and the brother's widow; it is but just and equitable that these three ladies whose position was the same during the lifetime of the male member, should jointly take the estate by survivorship, and not the last male member's widow alone, to the exclusion of the other two; for, succession applies to the estate left by one *separated* from his co-heirs. Curiously, however, the law has been strained against females on many points, as will be shown hereafter.

9. *Partition.*

What is Partition.—The tenure of joint property by the members of a joint family governed by the Mitákshará, is characterized by community of interest, unity of possession, and common enjoyment: there is no question of shares during jointness; and the members are said to be joint in food, worship and estate. And the Mitákshará theory of joint right is, that each co-parcener's right extends to the whole family property.

Partition, according to the Mitákshará, is the adjustment into specific portions, of divers rights of different members, accruing to the whole of the family property; in other words, it is the ascertainment of individual rights which are never thought of during jointness.

The word 'partition' or 'division' may be employed to mean either a division of interest or a division of possession, or both. In connection with the Mitákshará joint families, it means severance of interest and consequent defeasance of survivorship.

At whose instance?—Partition may take place under the Mitákshará by the desire of a single male member, who is therefore entitled, at his pleasure, to put an end to the joint-tenancy so far as he is concerned; the other members must submit to it, whether they like it or not: *Mt. Deo* v. *Dwarka*, 10 W.R., 273; *Pirthi* v. *Jowahir*, 14 C.S., 493; 8 W.R., 15; 5 A.S., 430 (grandson). Accordingly, an execution-purchaser of a member's interest, as well as a purchaser of the same for value in Bombay and Madras, are entitled to demand partition in right of that member.

The majority of a Full Bench of the Bombay High Court has held that although it is now settled law in all the Presidencies that under the Mitákshará, a son can claim partition of ancestral immoveable property inherited by the father, whether he assents to it or not, yet a son cannot in the life-time of his father sue his father *and uncles* for partition of such property, against the will of the father: *Apáji* v. *Ram*, 16 B.S., 29.

This decision seems to be due to a misapprehension of the meaning of a passage of the Mitákshará. There cannot be the slightest doubt in the mind of a Sanskritist, on reading the original passages of the Mitákshará (Ch. 1, Sect. v.), that no such restriction on the son's right, as is supposed by the majority of the judges to be imposed by paragraph 3 of that section, is really intended to be laid down by that treatise. It should be borne in mind that the Mitákshará is a running commentary on Yájnavalkya's Institutes; after having explained in paragraph 2, the text cited in Paragraph 1, of Sect. V.,Ch. 1, and before citing and commenting on the next text, the commentator sets out the importance of the next text, by the introductory remark that, but for the next text, two positions which are not correct propositions of law, might be deduced from the preceding passage, and that the same are obviated by the next text; and then he goes on to explain the next text, and in the course of doing so, lays down in paragraph 5, that partition does take place, and that it does take place not by the father's choice only, thereby implying that it takes place by the son's desire as well: and thus the commentator shows that the two positions mentioned in the introductory passage in paragraph 3 are obviated as not being correct propositions of law, by the next text asserting co-equality of father's and son's right. But the above view the Bombay High Court has been dissented from, and the correct view taken, by the Madras High Court in *Subba* v. *Ganasa*, 18 M.S., 179.

A suit for partition may be brought on behalf of a minor member on the ground of malversation or other circumstance shewing that separation of his share would be beneficial for him : (*Damoodur* v. *Senabutty*, 8 C.S., 537), although the minor should, by the partition, be deprived of the right to take by survivorship, which is but a contingent right; which circumstance will not therefore deter a Court of justice from securing the existing interests of the minor by ordering partition; *Mt. Deo* v. *Dwarka*, 10 W.R., 273.

What constitutes partition for defeating survivorship.— When partition may take place at the instance of a single co-sharer, whether the other members assent to it or not, it would appear that the declaration and communication by a member of his desire for separation, to the other members, is legally sufficient to sever his interests and to constitute him a tenant-in-common and separate, so as to defeat the mutual right of survivorship so far as that member is concerned, *i.e.*, between him on the one hand and the rest of the members on the other. As regards the enjoyment of the family property there is no difference between a Bengal joint family and a Mitákshará joint

family; although in the one case the members are deemed to hold as joint-tenants, and in the other as tenants-in-common, by reason of survivorship being recognized in the one, but not in the other. The distinction is a purely metaphysical one, and is founded on intention or a particular state or process of the mind: the members of a Mitákshará joint family may agree to cease to hold the family property as joint-tenants without dividing the same by metes and bounds—without, in fact, doing any physical act, and yet continue to live together as tenants-in-common, like a Bengal joint family. Hence, when a member expresses his desire to become separate, as he is legally entitled to become whenever he chooses, whether the other members wish or not, there arises a corresponding duty on the part of the other members to give effect to his desire immediately; and as no physical act is absolutely necessary for a legal severance of interest, the verbal agreement of the co-tenants being sufficient for that purpose, and as the other members are legally bound to agree to the desired partition, and as Equity presumes that to be done which ought to have been done, it appears to follow as a necessary logical consequence that a member's desire for partition is sufficient in law to constitute him separate so as to put an end to his joint tenancy and the operation of survivorship: *Radha* v. *Kripa*, 5 C.S., 474. But there seems to be some misconception about this point, as will appear from an examination of the decisions, which do not seem to be uniform.

It should be remarked that the essential idea involved in the conception of partition, is the division of the right to, or the severance of the interest in, the joint property: there may be separation in residence and food without there being separation in estate (*Badamoo* v. *Wazeer*, 5 W.R., 78; *Rewun* v. *Mt. Radha*, 4 M.I.A., 168=7 W.R., P.C., 35; *Chhabila* v. *Jadavbai*, 3 B. H. C. R., 87); and, conversely, there may be a division of right without there being any separation in food and dwelling; for the sake of convenience, the members may live in commensality, each contributing his share of the expenses.

There may likewise be a definement of shares to which the members would have been entitled had there been a partition, in the Revenue Records, under the Land Registration Act, without any one of them having the remotest idea of separation: *Ambika* v. *Sukhmani*, 1 A.S., 437; *Hoolash* v. *Kassee*, 7 C.S., 369. The intention to separate is the important and principal thing to be regarded; even the enjoyment by different members of different portions of property (*Ram* v. *Sheo*, 10 M.I.A., 490), or the division of income for the convenience of the different members, would not amount to partition in the absence of intention:

(*Sonatun* v. *Joggut*, 8 M.I.A., 86). While partition may be presumed from what shows an intention for it, such as opening separate accounts in the Collectorate (*Tej* v. *Champa*, 12 C.S., 96; *Ram* v. *Debi*, 10 A.S., 490), or separate enjoyment of different portions of property (15 B.S., 201), or participation of income in distinct and defined shares (5 A.S., 532; 23 W.R., 395), taken in conjunction with other circumstances.

In *Appovier's* case, (11 M.I.A., 75=8 W.R., P.C., 1), the Privy Council held that actual partition by metes and bounds is not necessary for the completion of division of right; an agreement by the members to hold their property in defined shares, without actually severing and dividing it, takes away from it the character of being joint and undivided; the joint-tenancy is severed and converted into a tenancy-in-common; it operates in law as a conversion of the character of the property, and an alteration of the title of the family, converting from a joint to separate ownership and is sufficient in law to make a divided family and to make a divided possession, without actual partition of the subject-matter: 8 W.R., 116=*Doorga* v. *Mt. Kundun*, 21 W.R., 214 P.C.; *Tej* v. *Champa*, 12 C.S., 96.

In these cases, there were agreements to separate without actual division, and it was held that the question in every particular case must be one of intention to effect a division. In one case, it was held that when a deceased co-owner had not merely declared his intention for partition but done everything that lay in him to carry it out, and when failure to do so was the result of the co-heir's determined opposition, it would be allowing the co-sharer to benefit by his own wrong, if he were to succeed by survivorship to the exclusion of the deceased's widow: *Joy* v. *Goluck*, 25 W.R., 355.

But there are some Bombay decisions in which it has been held that, notwithstanding a suit and a judgment or a decree for partition, the plaintiff who died before decree or execution of it respectively, is not to be deemed to have become separate, and that therefore survivorship applied to his share (4 B.S., 157; 6 B.S., 113). But these are opposed to the decisions of the Privy Council in which it has been held that the judgment or the decree in a suit for separate possession effects severance of interests, if the same is not already effected: *Joy* v. *Goluck*, 25 W.R., 355=4 C.S., 434, *Chidambaram* v. *Gauri*, 2 M.S., 83=6 I.A., 177.

In one case it has been laid down that there must be definement of shares, and distinct and independent enjoyment, in order that the mother may claim to have a share, right to which was held to be *created* by partition,—*Judoonath* v. *Bishonath*, 9 W.R., 61.

Both the principles herein laid down appear to be erroneous, and this case will be considered later on.

Thus all the cases do not appear to be reconcilable. In each of these cases, the Court had to consider whether, having regard to the facts and circumstances of the particular case, the members were joint or separate in estate. The courts appear to have dealt with the question as one of fact, and have only incidentally referred to the legal principle on the subject, without fully discussing and deciding what is absolutely necessary to constitute severance of interest.

But one important point is settled by the decisions of the Privy Council, namely, that division by metes and bounds is not necessary, but an agreement by the members that henceforth the joint property shall be the subject of separate ownership, is sufficient to cause division of right. It is also settled beyond all dispute that such agreement may be verbal:—*Rewun* v. *Radha*, 4 M.I.A., 137=7 W.R., P.C., 37.

Let us now consider what are the necessary logical consequences of these decisions, taken in conjunction with the doctrine of the Hindu Law, that partition may take place by the desire of a single member. According to the view taken by the Privy Council, the members become separate from the time of the agreement; that is to say, no physical act beyond the verbal agreement, or interchange of words conveying mutual consent, was considered necessary to effect severance of interest, in the particular case. From the moment they agree to separate, the status of the family becomes changed, though nothing else is done, and they may live together as before, as they must, for some time. But partition must take place by the desire of a single member, and the others are bound to consent and agree to it. Therefore, the declaration by a member of his desire for partition to the other members, must be sufficient, to cause the severance of his interests. That is all that he can do: if the others do not agree and obstruct his desire, and compel him to continue to live with them, for some time as before, they cannot be permitted by both law and equity to prejudice his right, and to gain an advantage by their such wrongful omission. He should thenceforward be deemed to live with them in the same manner as a member of a joint family governed by the Dáyabhága, that is to say, as a tenant-in-common, and no longer as a joint-tenant.

Partition is, no doubt, defined as the adjustment into specific portions of the joint property, of divers rights accruing to the whole of the same: it means, the ascertainment of the share or proportion of the joint property, receivable by a co-parcener, which may be done in a moment; and it implies neither more nor

less than the cessation of the other members' right to his said undivided fractional share or proportion, and the cessation of his right to the rest of the property *i.e.*, the conversion of his joint-tenancy into a tenancy-in-common.

And it is a settled doctrine of Hindu Law that it may be effected by the desire of a single member. Hence, according to both law and equity, a member of a joint family is to be deemed separate, as soon as he declares his desire to become separate, or does virtually declare himself separate, with the object of causing his share to devolve on his widow, daughter and daughter's son, to the exclusion of the male relations entitled to take by survivorship.

This view is consistent with the decisions in which it has been held that when the undivided co-parcenary interest of a son or the father is sold in execution, it is equivalent to partition and the father's wife is entitled to demand a share : *Bilaso* v. *Dina*, 3 A.S., 88 ; *Pursid* v. *Honooman*, 5 C.S., 845.

Partition and liability of manager to account.—It has already been said that the manager is liable to render an account, and it has been so held by a Full Bench of the Calcutta High Court (13 W.R., F.B., 75). There was an earlier case (9 W.R., 483) on the subject, which was virtually though not expressly, overruled by that Full Bench, and which appears to be founded on a misapprehension of the constitution of a joint-family-government, when the other members are adults. It is observed in that earlier case with respect to a family composed of adult members, —"They manage the property together ; and the *Karta* is but the mouthpiece of the body, chosen and capable of being changed by themselves. The family may in this respect be likened to a Committee with the *Karta* as Chairman."

A joint family would have been what is thus described, had it been composed of Englishmen who are distinguished by greater individuality and independence of character, and by far less reverence for age and authority, than the Hindus, amongst whom blind submission to the authority of the head of the family, be he the father or an elder brother, is the rule, when the family is joint. An European judge must always guard against the natural error of presuming that the people of this country feel and act in the same way, as Englishmen would do, if placed under the same circumstances.

In a Hindu family as in Hindu society, no two persons can be equal in rank and position, one must be superior and the other inferior : an elder brother managing the family affairs, is to be looked upon as father (Manu 9, 105), and conversely a younger brother is to be looked upon as son, an elder sister is to be looked upon as mother and a younger sister as daughter, an elder

brother's wife is similar to the mother (D.B., 4, 3, 31) and a younger brother's wife is similar to a daughter-in-law. The idea of equality and liberty, is unknown to the Hindu mind with respect to family government and social order, though of course the people of this country have now been learning this doctrine under the British rule.

The conception of the family government, such as is depicted in the above passage, is seldom, if ever, found in practice. Autocracy is the rule, democracy is nowhere met with; never is a *Karta* elected or changed; the senior member holds the office by usage. The *Karta* is all in all, exercising complete authority as if he were the sole proprietor of the whole family property, so long as absolute trust and complete confidence reposed in him by the other members, remain unshaken: and the junior members seem to be entirely dependent on him, and never dare to look into accounts for the purpose of examining their *bonâ fides* during jointness; for, as soon as suspicion arises with respect to the *bonâ fides* of the *Karta*, it must necessarily be followed by the disruption of the family. To be suspicious about the manager's good faith, and to continue joint, would be two inconsistent things. Hence the adult members other than the *Karta* cannot be supposed to take any part in the management, except as a servant by order of the *Karta*. A wide door to fraud and misappropriation would be opened if the manager of the family be held not liable to account, on the ground of the other members being adults and their consequent supposed participation, or liberty to participate, in the management of the family; for oftener than not, managers of joint families are found to defraud the other members by misappropriating joint property and its proceeds, as undoubtedly they have the opportunity to do so with impunity, as also they have, oftener than not, the necessity for so doing by reason of having the largest family of their own to provide for, in comparison with that of the younger members.

Hence the view taken by the Calcutta Full Bench ought to be followed, as being one absolutely necessary for the protection of the interests of the younger members of joint families, unless there be proved exceptional circumstances exonerating the manager from the liability: 17 B.S., 271; 7 M.S., 564 (con).

Share of father's wife.—Each of the father's wives is entitled to a share equal to that of a son on partition, whether it takes place during the father's life (*Sumrun* v. *Chunder*, 8 C.S., 17) or after his death: *Damoodur* v. *Senabutty*, 8 C.S., 537; *Damodardas* v. *Uttamram*, 17 B.S., 271. She gets the share, in virtue of the co-ownership she acquires from the moment of her marriage, in her husband's property, by reason of her being the lawfully

wedded wife or *Patní* of her husband. It is erroneous to suppose that partition creates her right to get a share (9 W.R., 61); for, according to the Mitákshará (1, 1, 17 and 23) partition does not create any right, but it proceeds upon the footing of pre-existing rights.

She is entitled to get a share, not only of the ancestral property but also of the accretions thereto: *Isri* v. *Nasib*, 10 C.S., 1017.

If *stridhan* has been given to her by the husband or the father-in-law, whether by gift *inter vivos* or by devise, she is entitled to so much only as together with the *stridhan* so received, is equal to a son's share: *Jodoo* v. *Brojo*, 12 B.L.R., 385; *Kishori* v. *Moni*, 12 C.S., 165.

It is erroneous to suppose that she gets the share in lieu of maintenance: this may virtually be true when the property is small, and the sons may relieve themselves of the liability to supply her with maintenance, by coming to a partition and allotting to her, a share. But this cannot be true when the property is very large, for in such a case she gets property far in excess of what is necessary for her maintenance. The real reason why a share is given to her will be explained in the Chapter on Female Heirs of both the Schools.

The share which she gets becomes her *stridhan*; for, the Mitákshará (1, 6, 2) distinctly says, upon the authority of a text of Yájnavalkya declaring succession to the mother's *stridhan* estate, that the daughters inherit this share, and in their default the sons, and thereby clearly implies that it becomes her *stridhan*. The same result follows by necessary implication, from the rule that she is to get only so much as together with the *stridhan* received from the husband and the father-in-law, would equal the share of a son; she must have the same sort of right in what she receives in addition to the *stridhan* as in the latter, *i.e.*, absolute right. The *obiter dictum* expressed to the contrary, (9 W.R., 61; 23 C.S., 262) is, therefore, not acceptable as being inconsistent with the Mitákshará. In the recent case of *Chhiddu* v. *Naubat* the Allahabad High Court has taken the correct view and pronounced that the share becomes *stridhan*: 24 A.S., 67; see also *Sri Pal* v. *Suraj*, 24 A.S., 82.

She cannot enforce partition, but she is entitled to get a share when partition does take place at the instance of male members, or when the interest of a single member is severed by execution sale: 3 A.S., 88; 5 C.S., 845.

Grandmother's share.—The paternal grandmother also is entitled to a share on partition: *Badri* v. *Bhugwant*, 8. C.S., 649.

But according to the Allahabad High Court she is not entitled to any share: *Radha* v. *Buchhaman*, 3 A.S., 118.

Unmarried sister's share.—At a partition made by sons after the death of the father, they must allot a quarter share to a maiden sister (*Laljeet* v. *Raj*, 20 W.R., 336). The quarter-share is ascertained in this way; suppose the partition takes place between a man's three sons, two widows, and two maiden daughters, then the property is to be divided into seven shares, and a quarter of one such share is to be given to each of the maiden daughters, and then the residue is to be divided equally between the sons and the widows: *Damodur* v. *Senabutty*, 8 C.S., 539.

Illegitimate brother's share amongst Sudras.—The half share to which an illegitimate son is entitled when partition takes place at the instance, and amongst, the legitimate sons of a Súdra, is to be ascertained in the same manner as the quarter share, of an unmarried sister, the principle being the same; but see *supra* p. 175.

Common charges on joint property.—Provision must be made before distribution for common charges such as the maintenance of a widow not entitled to a share, and of one who would have been a sharer but is excluded from inheritance by reason of some bodily deformity and the like, as well as of other dependent members of the family. If some co-sharers have been initiated or married at the expense of the family, and the others are uninitiated or unmarried at the time of partition, then the expenses for the initiation or marriage of the latter should be set apart.

Distribution *per stirpes* not *per capita*.—When a family consists of different branches, each of which is composed of unequal number of male members, then the division is to be made *per stirpes* and not *per capita*; if the common ancestor and his wife or wives are alive, then each of them is to get a share; and there should also be as many shares as there are branches descended from him, one share being allotted to the members of each branch collectively: should there be an unmarried daughter of the common ancestor she must get a quarter-share. In this manner the partition is to be carried out. Should there be any dissention amongst the members of any branch, and any one of them desire to separate, then the share allotted to that branch is to be distributed amongst the members of that branch in exactly the same mode in which the primary partition is to be made.

Partition, not necessarily separation of all members.—Thus partition may stop at the primary stage, that is to say, the members of each branch may, and oftener than not do, remain joint while the branches become separate from each other: *Bata* v. *Chinta*, 12 C.S., 262. Similarly one member or one branch only may separate from the other members or branches, while the latter continue to live jointly as before. Hence partition or

separation of one or some members is not incompatible with the jointness of the rest.

The whole thing depends upon intention. But yet a nice question arises which is not merely metaphysical but also practical by reason of being attended with different legal incidents of importance, namely, whether those who do not separate but continue to live together as before, are to be deemed *joint* or *re-united*? On the one hand it may be said that there is a disruption of the unity even when only one member separates, inasmuch as there arises a conversion of title, from the joint-tenancy into a tenancy-in-common, as between those to whom a share is to be allotted for the purpose of ascertaining the share of the co-parcener desirous to separate, while those to whom collectively one share is given may be deemed joint: *Radha* v. *Kripa*, 5 C.S., 474. On the other hand it may be said that the mere theoretical allotment of separate shares to co-sharers who are to continue joint and whose shares are to remain undivided, which is made only for the purpose of calculating and ascertaining the share to be separately assigned to the member separating, cannot have the legal effect of causing a division of right, or severance of title, of the former; hence a separation of one member does not necessarily create a separation between the other members, nor cause the general disruption of the family: *Upendra* v. *Gopee*, 9 C.S., 817. According to the first view, the undivided members are to be deemed *re-united* (11 M.S., 406); according to the second, they are to be considered joint: the distinction is an important one, for in re-union there is not survivorship as in jointness.

Acquired property and double share.—If any property is acquired with small aid from joint funds, but through the special personal exertion of a member, then he is entitled to two shares: *Sree* v. *Gooroo*, 6 W.R., 219; *Sheo* v. *Judoo*, 9 W.R., 61.

The same mode of partition should be applied to property which was self-acquired of a member, but has been thrown by him into the common stock by reason of allowing the other members to enjoy it; that is to say, two shares should be allotted to the acquirer, who cannot be placed in a worse position than one acquiring any property with slight aid from the joint funds, which must necessarily be enjoyed by all the members during jointness. Hence if joint enjoyment by all the members cannot deprive the acquirer in the latter case, of his right to a double share, then there is no reason why an acquirer without any aid from the joint estate, should not get an additional share of the property acquired by him through his sole personal labour or capital. But see *Ram* v. *Sheo*, 10 M.I.A., 490.

Renunciation by a member of his share.—If a member is pos-

sessed of sufficient separate property, and therefore does not wish to take any share of the joint property, he may renounce his share. But the Mitákshará directs that some trifle should be given him at the partition, so that no claim may be advanced by his heir in future: see Text No. 7, p. 110; 11 M.S., 407. This renunciation enures for the benefit of all the other members. But it is argued that according to the Smritis the renunciation operates as alienation of one co-parcener's interest in favour of the others, and that if he can alienate in favour of the other co-parceners as a body, there is no reason why he should not be competent to do so in favour of one of them. And accordingly it has been held that he can do so: *Peddayya* v. *Ramalingam*, 11 M.S., 406. But it has been held that a member of a joint family cannot make a gift of his undivided share (*supra* p. 163). Hence if the exceptional rule of renunciation, be carried out to its apparently logical consequences, in the manner stated above, it may as well be argued that there is no reason why he should not do so in favour of any other person; but then it would be in conflict with the rule against gift.

Partial partition.—From what has already been said it is clear, that there can be a partial partition in the sense of some members remaining joint notwithstanding the separation of the rest, also in the sense of some property being divided by metes and bounds and the rest not being so divided. But it is unlikely that there should be a partial partition in the sense of there being a severance of interest as regards part only of the property, and not as regards the whole.

It has been held that a suit will not lie for partition of a portion only of joint family property; even when the purchaser of the rights of a co-parcener sues for partition, the partition must be general: a suit for a partial partition of a single property will not lie: *Jogendra* v. *Jugobundhu*, 14 C.S., 122; *Venkayya* v. *Lakshmayya*, 16 M.S., 98; *Shivmurteppa* v. *Virappa*, 24 B.S., 128.

But if some members of a joint family hold any property jointly, in which the other members of the family have no interest, then there may be a suit for partition of that property only between the joint owners thereof; and it is not necessary to include in such a suit the other joint property to which all the members of the family are entitled, nor are the other members necessary parties to it: *Lachmi* v. *Janki*, 23 A.S., 216.

Re-opening partition.—If a male child was in the womb of its mother at the time of partition, who would have been entitled to a share had he been then in separate existence, and the child becomes born alive subsequently to partition, then a share is

to be allowed to him by re-opening the partition already made. But a son begotten after partition, cannot have any claim against his separated brothers, but his rights are limited to the father's share.

Condition and agreement against partition.—If joint enjoyment is felt inconvenient or disagreeable by a joint owner he ought to have the liberty of coming to a partition; there is no good reason for depriving a co-owner of the right of enjoying his share according to his pleasure; hence a condition prohibiting partition by donees is regarded as a restriction repugnant to the gift: *Mokoonda* v. *Gonesh*, 1 C.S., 104. Similarly an agreement restraining partition has been held to be not binding even on the parties (7 B.S., 538) as tending to create a perpetuity; far less on the descendant or a purchaser from any one of the parties: 4 M.H.C., 345; 6 C.S., 107.

Limitation.—A member of a joint family in exclusive possession of any joint property cannot plead limitation upon the ground of such possession, unless he has asserted an exclusive title to the knowledge of the co-parceners, and his possession become adverse, the burden of proving which lies on him (25 B.S., 362). If a co-parcener is excluded from his share, and such exclusion is known to him, then he may be barred by limitation: Sch. ii, Art. 127; 3 C.S., 228). But mere non-participation in the profits does not amount to exclusion: 24 M.S., 44.

10. *Impartible things.*

There are certain things that are not liable to partition. They are dealt with in the Mitákshará, Ch. I, Sec. iv, and in the Dáyabhága, Ch. vi. They are :—

(1.) Those that are not the subjects of joint right, *i.e.*, the separate property of a member;

(2.) Certain moveables, though joint, used personally by the members severally, such as wearing apparel, or ornaments given to a female, or the father's gifts to a son;

(3.) Those that cannot conveniently be divided, as for instance, a reservoir of water, a common pathway, the place for worship and pasturage;

(4.) Those that are impartible by custom, such as a *raj* or a principality, which may be the joint and undivided property of a family, but is exclusively held by one member only according to customary rules; the other members being entitled to get maintenance only, and under certain circumstances, to take possession of the estate by survivorship. This subject will be dealt with in a separate chapter.

11. *Presumptions.*

The joint family system is the normal condition of Hindu Society. Hence having regard to this peculiar feature of social organization, certain presumptions arise, which form a part of the Law of Evidence, and are only indicated here. They are:—

1. That the relations that may naturally be members of a joint family are joint: any one alleging separation must prove that fact. The Judicial Committee observed in the case of *Neel Kristo Deb Burmon*,—"The normal state of every Hindu family is joint. Presumably every such family is joint in food, worship and estate. In the absence of proof of division such is the legal presumption; but the members of the family may sever in all or any of these three things."—12 M.I.A., 523, 540 = 12 W.R., P.C., 21. See also 19 W.R., 178; 22 W.R., 248.

2. If it is admitted or proved that a family was once joint, there arises a presumption in favour of the continuance of jointness: 18 A.S., 176.

3. That the property in possession of any such relation is joint property belonging to all the members: he must prove that it is his separate property, if he says so: 5 W.R., P.C., 11 and 67; 8 C.S., 517.

4. That any property purchased in the name of such a relation is a joint acquisition, provided there be a nucleus of joint funds wherewith the purchase might be made. But if there be no nucleus, the presumption does not arise; and the same is rebutted, should the nucleus be not more than what is sufficient for the maintenance of the family: 8 W.R., 226; 10 W.R., 122; 20 W.R., 158.

5. There are some recent decisions which seem to be in conflict with the above decisions laying down the above presumptions, in which it has been held that if the parties are not members of a joint family when the suit is instituted, then the presumptions do not arise: 3 C.S., 315; 9 C.S., 237; 18 A.S., 90. But these rulings appear to apply to the peculiar facts in those cases, and are distinguishable; and are generally ignored.

There are conflicting decisions (15 W.R., 357; 10 C.S., 686; 8 M.S., 214), as to whether a property purchased in the name of a female member should be presumed to be joint family property. Considering that every Hindu female has separate property and that she is not a co-owner of the joint family property, the foundation of this presumption is wanting in her case. In the case of a male, the presumption says that he is not the sole owner; whereas in the case of a helpless female, it says that she has no right to the property, she is merely a *benamdar* for the male members.

When, however, a widow as heiress of her husband is a co-sharer of her husband's agnate relations, as she often is in a Bengal joint family, then, no doubt, the presumption may be applied to a purchase in her name; but not otherwise.

There is no presumption that property acquired by a Hindu widow who has inherited her husband's estate, forms part of that estate: *Dakhina* v. *Jagadis*, 2 W.N., 197. It has also been held that there is no presumption that property which was in possession of such a widow, had belonged to her husband: *Diwan* v. *Indarpal*, 26 I.A., 226.

See Mayne's Hindu Law and Usage §§ 289—91, for fuller information on the subject of Burden of Proof with respect to jointness of property.

CHAPTER VI.

MITÁKSHARÁ SUCCESSION.

ORIGINAL TEXTS.

१। पत्नी दुहितरश्चैव पितरौ भ्रातरस्तथा।
तत्-सुता गोत्रजा बन्धुः शिष्यः सब्रह्मचारिणः॥
एषाम् अभावे पूर्व्वस्य धनभाग्-उत्तरोत्तरः।
स्वर्यातस्य ह्यपुत्रस्य सर्व्ववर्णेष्वयं विधिः॥ याज्ञवल्क्यः, २,१३६-१३७।

1. The lawfully wedded wife, and the daughters also, both parents, brothers likewise, and their sons, gentiles (or agnates), cognates, a pupil, and a fellow-student; on failure of the first among these, the next in order is heir to the estate of one who departed for heaven leaving no male issue: this rule extends to all classes.—Yájnavalkya ii., 136-137.

अपुत्रस्य धनं पत्न्यभिगामि, तदभावे दुहितृगामि, तदभावे पितृगामि, तदभावे मातृगामि, तदभावे भ्रातृगामि, तदभावे भ्रातृपुत्रगामि, तदभावे बन्धुगामि, तदभावे सकुल्यगामि, तदभावे शिष्यगामि, तदभावे सहाध्यायिगामि, तदभावे ब्राह्मणवर्ज्जं राजगामि, ॥ विष्णुः।

The wealth of a sonless person goes to the wife; in her default, goes to the daughter; in her default, goes to the father; in his default, goes to the mother; in her default, goes to the brother; in his absence, goes to the brother's son; in his default, goes to the Bandhus; in their default, goes to the Sakulyas; in their absence, goes to a pupil; in his default, goes to a fellow-student; in his default, goes to the King, excepting the property of a Bráhmana:—Vishnu.

२। अनपत्यस्य पुत्रस्य माता दायम् अवाप्नुयात्।
मातर्य्यपि च वृत्तायां पितुर्माता हरेद्-धनं॥ मनुः, ९। २१७॥

2. Of a son dying childless, the mother shall take the estate, and the mother also being dead, the father's mother shall take the heritage."—Manu ix, 217.

३। अनन्तरः सपिण्डाद्-य-स्तस्य तस्य धनं भवेत्।

अत ऊर्द्धं सकुल्यः स्याद्-आचार्यः शिष्यः एव वा॥ मनुः, ९, १८७।

3. To the nearest *Sapinda*, the inheritance next belongs; after them, the *sakulyas*, the preceptor of the Vedas, or a pupil: —Manu ix, 187. See *supra* pp. 35-36.

४। आत्मपितृस्वसुः पुत्रा आत्ममातुः स्वसुः सुताः।

आत्ममातुलपुत्राश्च विज्ञेया ह्यात्मबान्धवाः॥

पितुः पितृव्यसुः पुत्राः पितुर्मातृव्यसुः सुताः।

पितुर्मातुलपुत्राश्च विज्ञेया पितृबान्धवाः॥

मातुः पितृव्यसुः पुत्रा मातु र्मातृव्यसुः सुताः।

मातुर्मातुलपुत्राश्च विज्ञेया मातृबान्धवाः॥ मिताक्षराधृतवचनं।

4. The sons of his own father's sister, the sons of his own mother's sister, and the sons of his own maternal uncle, are known as his own *Bandhus* : the sons of his father's father's sister, the sons of his father's mother's sister, and the sons of his father's maternal uncle, are known as his father's *Bandhus* : the sons of his mother's father's sister, the sons of his mother's mother's sister, and the sons of his mother's maternal uncle are known as his mother's *Bandhus*.—Texts cited in the Mitákshará without name of their author.

Mitákshará Succession.

The law of succession—laid down in the above two slokas of Yájnavalkya, applies according to the Mitákshará to the estate left by a male who was separated from his co-heirs and not re-united with any of them ; see Mitákshará, 2, 1, 30. Although it might be contended with good reason, that according to the Mitákshará school, the three different modes of devolution therein propounded, of a deceased man's property, according as he was joint, or separated, or re-united, apply to the *whole* of the estate left by him ; yet as regards devolution by survivorship on the ground of the deceased having been joint and undivided with his co-parceners, it is now settled by judicial decisions that survivorship applies only to such property as the deceased got as *unobstructed* heritage, *i. e.*, to property inherited from the father, the paternal grandfather and the like, and to accretions, if any, to such property ; see *supra* p. 136 : but it does not apply to his separate property, nor even to other descriptions of joint property, such as jointly inherited as *obstructed* heritage from female

ancestors, or from maternal grandfather, or from collateral relations, or jointly acquired by the common labour, or with separate funds of each; such joint property, the co-sharers are deemed to hold, as tenants-in-common and not as joint-tenants. But it should be observed that the other two courses of succession apply to the *whole* estate left by the deceased.

Survivorship and succession.—It should be observed that in a case of succession, a person acquires ownership in another man's property to which he had no right before the latter's death; whereas, survivorship applies to property to the whole of which the survivor had a right from before, and the death of a joint tenant simply removes a co-sharer having a similar right to the whole, and thereby practically augments the pre-existing right of the survivor in some cases, but does not create any new right in him.

The order of succession—is founded on the above two slokas of Yájnavalkya, (Text No. 1), and is moulded by the joint family system, the normal condition of the Hindu society. All male relations are heirs in their order; and the primary classification for that purpose is into *Gotrajas* or gentiles or agnates, or those connected through males only, or members of the same family, and into *Bandhus* or cognates, or those connected through a female, or those belonging to a different family. The former, however distant, are preferred to the latter however near they may be. There is a single exception introduced by the fiction of interpretation, namely, the daughter's son, who is said to be implied by the particle (च) "also" used after the term "daughter" in the above text (No. 1) of Yájnavalkya, which is taken to include something not expressed.

The *gotrajas* are divided into two groups, namely, *sapindas* and *samánodakas*, of whom the former succeed in preference to the latter.

The order of succession amongst the *sapindas* is worked out on the analogy of the order so far as it is given in the above text, namely, among the parents, the brothers and their sons.

Proximity of relationship is, upon the authority of the above text of Manu (Text No. 3), propounded as the principle on which the order is to be worked out; but it has not been completely worked out, so our Courts will have to do it, following the analogy of the order such as is given in the Mitákshará.

Females, as a general rule, are excluded from inheritance save and except such as have been expressly named as heirs.

But this rule of exclusion has been departed from by the Bombay High Court by recognizing agnate female *sapindas* as

heirs, and by the Madras High Court by recognizing the right of female relations to succeed as *bandhus*.

From the Mitákshará is deduced the following—

Order of Succession:—

1-3. Separated son, grandson and great-grandson.—If they were joint and undivided with the deceased, they would take even his self-acquired property by survivorship and not by succession: *Ramappa* v. *Sithammal*, 2 M.S., 182.

The right of representation obtains amongst the male issue; hence, a grandson by a pre-deceased son, and a great-grandson whose father and grandfather are both pre-deceased, succeed with a son. It should be remarked that the right of representation does not obtain amongst any other heirs, so that the nearer will take in preference to one more remote; for instance, a brother will exclude the sons of a pre-deceased brother.

The male issue again take *per stirpes*, and not *per capita*: suppose a man dies leaving two grandsons by one pre-deceased son, five grandsons by another pre-deceased son, and one great-grandson being the son of a pre-deceased grandson by a third pre-deceased son, then his estate is to be divided into three shares, one of which is to be allotted to the two grandsons by one son, another to the five grandsons by another son, and the remaining one to the single great-grandson descended from the third son.

It should be borne in mind that the division *per stirpes* applies only to the male issue in the male line; all other heirs take *per capita*; for instance, if the succession goes to the daughter's sons or the brother's sons, then if one daughter or brother leaves one son, another three sons, and a third five sons, the estate is to be divided into nine shares, one of which is to be allotted to each of the daughter's or brother's sons.

4. The lawfully wedded and loyal wife.—In default of the male issue, the *Patni* or the lawfully wedded wife succeeds, provided she was loyal to the husband.

A lawfully wedded wife is one married in any one of the approved forms of marriage: see *supra* p. 47. A wife espoused in a disapproved form is not recognised as heir. The Sanskrit term साध्वी पत्नी is generally rendered into "Chaste wife;" and it is thought that the absence of physical unchasity entitles the wife to succeed. But a woman's character may be above all suspicion, and she may be purity personified, but if she does not love her husband, refuses to live with him, and habitually acts contrary to his wishes, then she cannot inherit from him, for she is not

sádhví. The term साध्वी *sádhví* rendered by Colebrooke into "Chaste" is thus defined by Manu,—

पतिं या नाभिचरति मनोवाग्-देह-संयता ।

सा भर्तृलोकम् आप्नोति सद्भिः साध्वीति चोच्यते ॥ मनुः, ५, १६५ ।

which is rendered by Sir William Jones thus,—

"While she, who slights not her lord, but keeps her mind, speech, and body, devoted to him, attains his heavenly mansion, and is called *sádhví* or virtuous by good men." Manu v. 165.

The condition of loyalty or chastity applies to the wife only, and not to the other female heirs.

A wife who is not entitled to inherit, is entitled to maintenance provided she was and continues chaste.

The wife inheriting the husband's estate, does not become absolutely entitled to it, but takes only what is called the *widow's estate* in the same. On her death it goes to her husband's next heir, not to her heirs. This is according to judicial decisions, but not according to the Mitákshará which maintains that property inherited by a woman becomes her *stridhan.* This is another instance in which the law has been strained against females.

Two or more widows take in equal shares; on the death of one, the surviving widow takes her share.

The widow of a Hindu inherits his estate in the character of being his surviving half, or continuing the widowed wife of her deceased husband; in other words, the Hindu widow's estate lasts *durante viduitate:* her re-marriage, whether legalised by the Hindu Widow's Re-marriage Act XV of 1856, or by custom, will divest her of the deceased husband's estate, whether she marries according to Hindu rites or not: *Matangini* v. *Ram,* 19 C.S., 289; *Rasul* v. *Ram,* 22 C.S., 589. But mere unchastity in the absence of re-marriage will not divest: *Keri* v. *Moniram,* 19 W.R., 367=5 C.S., 776.

There are, however, different grades of unchastity; and it is of the gravest character when followed by conception and birth of child. In that case she must be divested of the husband's estate: the passages of Hindu law on this subject are not translated into English and were not before the Court in the unchastity case, some of them will be cited in Chapter X.

5. **Daughters.**—In default of the widow, the daughters are heirs; of them, one who is unprovided takes in preference to one who is provided.

A daughter takes a widow's estate: on her death it goes to her father's heir; a surviving daughter will take what is left by a deceased daughter, 22 W.R., 496=4 C.S., 744.

Unchastity of a daughter is no ground of exclusion from inheritance: 4 B.S., 104.

6. **Daughter's sons.**—In default of daughters, their sons take the inheritance of their maternal grandfather, they take *per capita* in equal shares.

7. **Mother.**—After the daughter's son, comes the mother who takes in preference to the father. The Víramitrodaya says that a chaste and virtuous mother is preferred to the father; otherwise, the father takes before the mother. From this it appears that unchastity does not exclude the mother from inheritance: 5 M.S., 149.

The mother takes the widow's estate.

8. **Father.**—After the mother comes the father; but they take in the reverse order according to the Bengal School.

9. **Brothers.**—Those of the whole blood take to the exclusion of the half brothers. In default of the former, the latter take.

Whole and half blood.—The preference based upon connection by whole blood, applies to all collateral relations of equal degree; propinquity being the principle of the order of succession, a relation of the full blood by reason of his proximity excludes a relation of the same degree, who is of the half blood.

All Sanskrit lawyers appear to entertain this to be the traditional true construction of the Mitákshará, according to which propinquity is the only principle of the order of succession, it is on this principle alone that the whole brother and his son are preferred respectively to the half-brother and his son; and the reason applies *mutatis mutandis* to the other collateral relations: *Suba* v. *Sarfraz* 19 A.S., 215. The Mayúkha does not follow the Mitákshará, and places the half-brothers together with the grandfather in the order of succession after the grandmother and the sister, and the half-brother's son after some other relations; see *Samát* v. *Amra*, 6 B.S., 394: and following an *obiter dictum* in this case it has been held by the Bombay High Court that the preference based on whole blood does not apply to any other relations, and that therefore a paternal uncle of the half blood inherits jointly with one of the whole blood: *Vithal* v. *Ram*, 24 B.S., 317. This view is inconsistent with the Mitákshará, nor does it seem to be supported by the Mayúkha which has introduced an innovation by giving undue preference to the whole blood by lowering the position of the half-brother and his son in the order of succession, contrary to what is given in the Mitákshará, and contrary to the modern view in favour of abolition of the distinction between the relations of whole and half blood.

10. **Brother's sons.**—In default of both full and half-brothers,

the succession devolves on the brother's sons; of them, a full-brother's son will take in preference to a half-brother's son.

Contrary to what is clearly laid down in the Mitákshará as well as in the Víramitrodaya, and contrary to what has hitherto been all along well understood by Sanskritists as the traditional true construction of these treatises, the Allahabad High Court have recently held that the brother's son's son should be placed just after the brother's son, and therefore preferred to the paternal uncle's son *(Kalian* v. *Ram*, 24 A.S., 128) according to the leading principle of the Mitákshará, that the inheritance is to go to the nearest *Sapinda*. It should be observed that both the principle and the working out of the order of succession according to that principle, rest on, and are deduced from, express texts of the sages: Yájnavalkya's and Vishnu's texts on the subject give the order of succession down to the brother's son (Mitákshará 2, 1, 286); Manu's text cited in the Mitákshará 2, 1, 7 and 2, 5, 2 places the father's mother after the mother. Having regard to these texts the author of the Mitákshará which is a running commentary on the Yájnavalkya's Institutes, to the text of which on this subject, reference is made in Ch. 2, Sect 5, paragraph 1,—places the grandmother after the brother's son. I am unable to understand on what ground the brother's grandson can be said to be nearer than the paternal uncle's son; for according to the Hindu mode of computation the brother's grandson is distant by four degrees, and the first cousin by three degrees only. But the real principle which underlies the commentators' views on the order of succession, is the principle of natural love and affection moulded by the family organisation.

The joint family system is the key to the order of succession as it is to other branches of Hindu law. To an Englishman a descendant of the brother with whom he was associated during infancy must appear nearer than the paternal uncle's son. But in a Hindu joint family, it is more likely than not, that one is associated with his paternal first cousin from his birth and looks upon him as a brother. It should be borne in mind that even now brothers often separate after they have got sons; and it should also be borne in mind that a man's affections are formed when he is young; hence to a Hindu the paternal first cousin who was associated with him as a member of the joint family, must appear to be nearer than the brother's grandson who is born when he is too old to form a new affection, and also when he may, oftener than not, be separate from the brother. So what is expressly laid down in the Mitákshará is perfectly consistent with the sentiments of the Hindus governed by the Mitákshará. In Bengal the joint family may not continue so long as in the places

where the Mitákshará prevails; but still in Bengal the brother's great-grandson is postponed to many other relations. It is not clear whether the learned Judges of the Allahabad High Court meant to hold that he must be placed just after the brother's grandson; this would however be the necessary logical consequence of the *ratio decidendi* of that decision. It is not correct to suppose that all the descendants below the grandson of the father would be cut off by the stricter construction of the Mitákshará, inasmuch as they are entitled to take as *Sapindas* before the *Samánodakas* according to that construction.

11. **Paternal grandmother.**—But see *Kalian* v. *Ram*, 24 A.S., 128.

12. **Paternal grandfather.**
13. **Paternal uncle.**
14. **Paternal uncle's son.**
15. **Paternal great-grandmother.**
16. **Paternal great-grandfather.**
17. **Paternal grand-uncle.**
18. **His son.**

19-30.—Similarly, and in the same order, the **paternal grandparents of the 4th, 5th and 6th degrees in ascent, and their two male descendants.**

31-57. Then come **the remaining Sapindas**; (Mit. 2, 5, 5; *Bhya Ram* v. *Bhya Ugur*, 13 M.I.A., 373), the order in which they take is not stated, but is to be gathered by analogy from the foregoing order: it appears to be as follows:—

31-33. The deceased's **male descendants**, if any, **of the 4th, 5th and 6th degrees** in descent, beginning with the great-great-grandson. These must be separated from the deceased; for if they were joint and undivided with him, then they would take by survivorship in preference to all other heirs.

34-37. The **father's 3rd, 4th, 5th and 6th descendants** beginning with the fraternal nephew's son. But 24 A.S., 128 *contra*.

38-41. The **paternal grandfather's 3rd, 4th, 5th and 6th descendants** beginning with the paternal uncle's son's son.

42-57. Similarly and in the same order should come the **3rd, 4th, 5th and 6th descendants in the male line of the paternal great-grandfather and of his father, grandfather and great-grandfather**: the descendants of the nearest ancestor must come before those of a remoter ancestor; and of these descendants the nearer in degree will take in preference to one more distant.

58-204. The **Samánodakas** come after the *sapindas*: they are thirteen descendants of the deceased himself, his thirteen ascendants, and thirteen descendants of each of these thirteen ascendants—all in the male line; from these the *sapindas* are to be deducted, then the remaining 147 relations come within the term *Samánodakas*. They are the distant agnate relations. According to some, the term includes remoter distant relations of the same *gotra*, if the relationship can be traced and is remembered.

This enumeration is, to some extent, theoretical; for, no man can live to see and leave behind descendants to the thirteenth degree, of his nearer ancestors, far less of himself.

The order of succession amongst these appears to be governed by two principles, namely,

(1) The descendants of a nearer ancestor succeed in preference to those of a remoter ancestor.

(2) Amongst the descendants of the same ancestor the nearer excludes the more remote.

Bandhus.

Bandhus or cognates come after the gentiles. While explaining the order of succession the Mitákshará says,—"After the paternal grandmother, the *sapindas* of the same *gotra* such as the paternal grandfather become heirs," and then it is observed,—

भिन्नगोत्राणां सपिण्डानां बन्धुशब्देन ग्रहणात् ।

which means,—"For, the *sapindas* belonging to a different *gotra* are included by the term *Bandhu* (in the above text of Yájnavalkya)."

The heirs down to the great-grandfather's son are then set forth; and it is then laid down that,—"In this manner is to be understood the succession of the *sapindas* of the same *gotra*, to the seventh degree, according to the Hindu mode of computation, which is the same as that of the canonists."

In Colebrooke's translation of this part of the Mitákshará, the term *sapinda* is erroneously rendered into "one connected by funeral oblations." The learned translator appears to have thought that this term bears the same meaning in the Mitákshará, as in the Dáyabhága.

This error in the rendering given by Colebrooke, was rectified by Messrs. West and Bühler, who gave in their very learned and valuable Digest of Hindu Law (3rd Edition, pages 120-122), the translation of the passages from the *Achára-kánda* of the Mitákshará, in which *sapinda* relationship is explained for the purposes of marriage.

It is laid down in the *Achára-kánda* of the Mitákshará (which explains the text of Yájnavalkya on Marriage, I, 52), that wherever in that work the term *sapinda* is used it must be taken in the sense of a "relation or one connected through the body" and not in the sense of "one connected through funeral oblations."

And while explaining the text of Yájnavalkya ordaining that the intended bride should be beyond the fifth and the seventh degrees respectively on the mother's and the father's side, the Mitákshará says that *sapinda* relationship is by the text limited in the said manner, and explains and illustrates the mode of computing the five and seven degrees. All this relates to marriage only: for, it is not said that this difference in the number of degrees on the two sides, is applicable to other purposes as well.

Messrs. West and Bühler have translated a portion only of the passage of the Mitákshará, in which this subject is dealt with; the concluding sentence of their translation is misleading, which runs as follows,—"and thus must the counting (of the *sapinda* relationship) be made in every case."

For, this has given rise to the error of supposing that this curtailment of *sapinda* relationship applies to inheritance also. Hence the translation of the entire passage of the Mitákshará has been given in pp. 63–64 *supra*, from which it is clear that the exposition of *sapinda* relationship therein given, is intended only for the purposes of marriage. See *supra*, pp. 43–49, where the question as to who are included by the term *Bandhu* has been discussed at length.

It would appear that according to Hindu Law all relations are heirs; they are divided by Yájnavalkya and the Mitákshará into two classes, namely, the *gotrajas* and the *bandhus*, or those belonging to the same family, and those belonging to a different family; the latter as a body are postponed to the former; excepting the daughter's son.

The fact that the Mitákshará cites the text of Vrihan-Manu (Text No. 2, p. 34) for explaining the *Sapinda* and the *Samánodaka* relationship for the purpose of inheritance, shows that what is said in the Áchára-kánda for the purpose of marriage is inapplicable to inheritance.

Hence, the *Bhinna-gotra Sapindas*, who are according to the Mitákshará included by the term *Bandhu*, may be taken to mean any relation, however distant, belonging to a different family, whose relationship can be traced; for, the term *sapinda* wherever used in the Mitákshará, must be taken in the sense of one connected through the body.

But if its meaning is to be curtailed by taking the word

sapinda in a limited sense, then it should be taken to extend to seven degrees on both the maternal and the paternal sides; for, in the text of Vrihan-Manu as well as in the text of Manu (p. 34), no distinction is drawn between the two classes of relations.

Case-law on Bandhus.—While dealing with the order of succession among *bandhus*, the Mitákshará (2, 6, 1), on the authority of a text whereof the author's name is not mentioned, divides the *Bandhus* into three classes, namely: (1) one's own *bandhus*, (2) the father's *bandhus*, and (3) the mother's *bandhus*, and enumerates nine relations as such, thus:—

One's own *bandhus* are his own	Father's sister's son. Mother's sister's son. Mother's brother's son.
Father's *bandhus* are his father's	Father's sister's son. Mother's sister's son. Mother's brother's son.
Mother's *bandhus* are his mother's	Father's sister's son. Mother's sister's son. Mother's brother's son.

In *Giridhari Lal Roy* v. *Bengal Government*, 12 M.I.A., 448, the Lords of the Judicial Committee held that the above enumeration is not exhaustive, and therefore the maternal uncle and the father's maternal uncle are *bandhus* and, as such, entitled to succeed. In coming to this conclusion their Lordships relied upon the Víramitrodaya,—where it is laid down that the term *bandhu* comprises also the maternal uncle and the like, and the reason assigned is that it would be improper to hold that their sons are heirs, if they themselves, though nearer, were not so.

Two other relations not falling within the enumeration have been held by two Full Benches of the Bengal High Court, to be *bandhus* and heirs, namely, the sister's son in the case of *Amrita Kumari Debi*, 2 B.L.R., F.B., 28, and the sister's daughter's son in the case of *Umaid Bahadur*, 6 C.S., 119. The decision in the former case, however, was founded on the doctrine of spiritual benefit; but it has been held in the latter case that in the Mitákshará School inheritance is not based upon that doctrine. In the latter case an opinion has been expressed that the sister's daughter's son's son is not a *bandhu* nor an heir; it is difficult to understand the principle upon which that opinion is based. See *supra*, pp. 39-40.

In the case of *Ananda Bibi* (9 C.S., 315), it has been held that the father's maternal grandfather's great-grandson is a *bandhu* and heir. So also daughter's son's son (11 M.S., 287), mother's maternal uncle's grandson (5 M.S., 69), grandfather's sister's grandson (12 M.S., 155), have been held *bandhus* and heirs.

Order of succession among Bandhus.—The next point for consideration is the order of succession amongst the *bandhus*. In the Mitákshará and the Víramitrodaya it is said, that of the three classes of *bandhus*, the first class succeed in preference to the other two, and the second before the third. You will observe that the first class comprises relations connected through both the parents; the second, those connected through the father alone: and the third, through the mother only: and that the relations of the first class are equal in degree but nearer than those falling under the second and the third classes. You will remark that the relations under the second and the third classes are all equal in degree, but differ in sides.

The following three rules therefore may be deduced from the above considerations, governing cases of competition between *bandhus*.

(1) The nearer in degree on whichever side is to be preferred to one more remote.

(2) Of those equal in degree, one related on the father's side is to be preferred to one related on the mother's side.

(3) When the side is the same, the circumstance of one being related through a male and another through a female makes no difference.

No light, however, is thrown by the above enumeration on a case of competition between a descendant, and a collateral or an ascendant equal in degree, computed in the mode adopted by civilians; for instance, a son's daughter's son and sister's son.

Other heirs.—When a man has no relation, then his Preceptor, Pupil, and Fellow-student are in their order, entitled to take his estate.

Fellow caste-people.—In default of all these, the estate of a Bráhmana goes to learned Bráhmanas, not to the king. But it has been held by the Privy Council in the case of the *Collector of Muslipatam*, 8 M.I.A., 500=2 W.R., P.C., 59, that the personal law of the Hindus relating to inheritance, by which they are permitted to be governed, cannot apply when there is a total failure of heirs; hence this provision of Hindu law cannot have any force and prevent the crown as the *ultima hæres* to take by escheat the property left by a Bráhmana leaving no heir properly so called, namely, a relation.

King.—But the estate of a man of any other caste escheats to the king.

Female heirs in Bombay and Madras.—The above order of succession is according to the Benares and the Mithila Schools:—

In Bombay all the female *sapindas* of the same *gotra* are recognised as heirs, and they are shuffled in among the male

sapindas, namely, the full-sister who is placed after the paternal grandmother but before the paternal grandfather (*Lallubhai* v. *Mankuvarbai*, 2 B.S., 445, affirmed 5 B.S., 110=7 I.A., 212), the half-sister (4 B.S., 188), the stepmother (11 B.S., 47), the widows of *gotraja sapindas* who occupy the place of their husbands, and the daughters of descendants and of collaterals: 4 B.S., 209 and 219; 9 B.S., 31.

In Madras certain female relations have been recognised as *bandhus* and heirs.

The rule that female relations cannot inherit save such as have been expressly named as heirs, and which is followed in northern India, has been departed from in Bombay, on the ground that the female *sapindas* are expressly recognised as heirs by the following text of Manu as translated by Sir William Jones, namely—

"To the nearest Sapinda, *male or female*, the inheritance next belongs."

The italicized words which are not in the original, but were interpolated by the learned translator from Kulluka's commentary on Manu, were supposed to be important words of the text itself. And the rule has been departed from also in Madras on the ground that as the Preceptor and the like succeed, "if there be no relations of the deceased" (= बन्धुषु स्वभावे, Mit. 2, 7, 1), therefore by implication female relations must succeed before the Preceptor and the like. Accordingly, son's daughter (14 M.S., 149), daughter's daughter (17 M.S., 182), sister, and father's sister (13 M.S., 10), have been held heirs as *bandhus*.

The Allahabad High Court—also have adopted and followed the above view of the Madras High Court, in holding that in the absence of preferential male heirs a daughter's daughter is heir to her maternal grandfather: *Bansi* v. *Ganesi*, 22 A.S., 338.

CHAPTER VII.

RE-UNION UNDER BOTH SCHOOLS.

ORIGINAL TEXTS.

१। संसृष्टिनस्तु संसृष्टी सोदरस्य तु सोदरः।

दद्यात्-तापहरेदंशं जातस्य च मृतस्य च।

अन्योदर्य्यस्तु संसृष्टी नान्योदर्य्यो धनं हरेत्।

असंसृष्ट्यपि चादद्यात् संसृष्टी, नान्यमातृजः॥ याज्ञवल्क्यः २,१३९-१४०।

1. But of a re-united (co-heir), a re-united (co-heir shall keep the share when he is deceased, or deliver it if he is born in the shape of a son), but of a uterine brother, a uterine brother shall keep the share, or deliver it (to his son) if (he is) born (in the shape of a son); but a re-united half brother may take the property, not a half-brother (not re-united); also a (brother) united (through uterus, *i.e.*, a full brother) though not re-united may take, not the (united, *i.e.*, re-united) half brother alone.—Yájnavalkya II. 139-140.

These two slokas are differently construed by different commentators: see Víramitrodaya, Chapter IV.

२। विभक्तो यः पुनः पित्रा भ्रात्रा चैकत्र संश्रितः।

पितृव्येणाथवा प्रीत्या स तत्संसृष्ट उच्यते॥ बृहस्पतिः।

2. He who having been separated dwell together again through affection, with the father, a brother, or a paternal uncle is called re-united with him.—Vrihaspati.

३। स्वर्यातस्य ह्यपुत्रस्य भ्रातृगामि धनं तदभावे पितरौ हरेयातां ज्येष्ठा वा पत्नी। शङ्खः।

3. The wealth of a person who departs for heaven leaving no male issue, goes to the brothers; in their default, let the parents take, or the senior wife.—Sankha.

४। या तस्य भगिनी सा तु ततोऽंशं जग्धुम् अर्हति।

अपत्यस्य धर्म्योऽयम् अभार्य्यापितृकस्य च॥ बृहस्पतिः।

4. But if there be a sister of his (*i.e.*, of the re-united person), she is entitled to get a share of it, this is the law regarding

the estate of a person destitute of issue, also destitute of the wife and the father.—Vrihaspati.

५। मृतोऽपत्यो ऽभार्यश्चेद् भ्रात्रादिपितृमातृकः।
सर्वे सपिण्डास्तद्दायं विभजेरन् यथांशतः॥ बृहस्पतिः।

5. If the deceased leave no issue, nor wife, nor brother, nor father, nor mother, then all the *sapindas* shall divide his property agreeably to shares (*i.e.*, in the order of proximity)—Vrihaspati.

RE-UNION, MITÁKSHARÁ SCHOOL.

If two or more parceners after partition agree to annul the partition and to live together jointly as before, and make a junction of their property with the stipulation based on affection, that what is mine is thine and what is thine is mine, then they are called re-united, and their status, re-union. Mere living together in one residence without junction of estate is not re-union.

According to the Mitákshará School, the circumstance of two or more co-parceners being *re-united*, after separation from others by partition, modifies the order of succession to some extent.

This variation in the order of succession is based upon no principle such as survivorship, or proximity of relationship, on which is founded the devolution of the estate of one who is joint or separate respectively.

The order of succession applicable to the estate of a re-united person is entirely based on the above texts and a few others repeating the same thing, which are construed by the Mitákshará School to lay down an order different from the ordinary one. From the Mitákshará and the Víramitrodaya, is deduced the following

ORDER OF SUCCESSION:—

1-3. Son, grandson and great-grandson—As in the ordinary case of succession, whether they are separated or re-united. A son who is re-united cannot claim preference to another who remains separate.

Because the above text of Yájnavalkya, containing the rule giving preference to a re-united co-parcener, forms an exception to the rule contained in the text (No. 1 *supra* page 191), relating to the order of succession; and as the rule applies to the estate of a person destitute of male issue; therefore the rule itself does not apply to the male issue; hence, the exception also cannot apply to the male issue.

4. **Re-united whole brother.**
5. **A re-united half-brother, and a separated full brother** jointly succeed; in default of the one, the other takes the whole.
6. **Re-united mother.**
7. **Re-united father.**
8. **Any other re-united co-parcener.**
9. **A half-brother not re-united** with the deceased.
10. **The mother not re-united** with the deceased.
11. **The father not re-united** with the deceased.
12. **The widow.**
13. **Daughter.**
14. **Daughter's son.**
15. **Sister.**

Subject to this modification, the succession goes to the *sapindas*, the *samánodakas*, the *bandhus* and the rest, as in the ordinary order of succession, explained in Chapter IV.

A great deal of misconception appears to prevail on the subject of re-union; it is difficult for one who has no access to the original treatises, to clearly understand the law of re-union which seems to be arbitrary in character.

It is thought by some that survivorship applies to the estate of re-united co-parceners (20 W.R., 197; 17 C.S., 33). But this is a mistake: for, there cannot be any doubt that a re-united half-brother, and a full-brother not re-united but remaining separate, succeed jointly to the estate of a re-united co-parcener; nor can there be any doubt that a separated full-brother of a person who became re-united with the parents or the paternal uncle, is entitled to succeed to that person's estate in preference to the parents or the paternal uncle who became re-united with him. Hence, it is clear that by re-union there is merely a mixture of the shares of those forming it, but the unity of their titles is not effected thereby, and so they become tenants-in-common and not joint-tenants.

It should moreover be observed that the advantage derived from being re-united is a personal privilege, which cannot be claimed by the sons of the re-united co-parceners although living jointly; for, re-union pre-supposes jointness and partition; hence, a re-united co-parcener is one who had been originally joint, then separated, and afterwards became re-united through affection with another co-sharer, by annulling the previous partition and mixing up their shares, and agreeing to live together as members of a joint family. Hence the very person who was joint at first, then separated, and then agreed to annul the separation and to become joint over again, is to be understood by the term "re-united." This is what is laid down by the above text

of Vrihaspati (Text No. 2). Suppose, for instance, three brothers forming members of a joint family, separate from each other, then two of them become re-united, subsequently each of them has a son born to him, then all the brothers die one after another, each leaving a son behind him, the two sons of the two re-united brothers continue to live joint, then one of them dies leaving the two first cousins with one of whom he lived jointly, while the other was separate: here the two first cousins living together cannot be called "re-united," hence both the surviving cousins are entitled to succeed to his estate according to the ordinary law of succession, the one living jointly with the deceased cannot claim preference, as he was not re-united. But see *contra*, *Abhai* v. *Mangal*, 19 C.S., 634.

There is also a good reason for considering the privilege to be personal and not heritable, for instance, two of three brothers may like each other and dislike the third, so they come to a partition and then the two become re-united. Now it is quite possible that each of the two brothers who dislike the third, may love his children in the same manner as the children of his re-united brother. Therefore the attachment being personal, the preference also should be, of the same character.

It is worthy of remark that when a member of a joint family, re-unites with another member after partition, it shows that he does not repose much confidence in his wife, nor does he feel love and affection towards his daughter and her son, if he has any; for, the effect of re-union is to postpone the wife, the daughter and the daughter's son to a few of the agnatic relations. The legal incident of re-union again, that a brother succeeds in preference even to the parents show that nearness of relationship is not the criterion of preference; but at the same time it shows that while the preference assigned to a brother cannot but be agreeable to the parents, it appears to be based on natural love and affection, as it excludes other remoter re-united relations such as the uncle or the nephew.

RE-UNION, DĀYABHĀGA SCHOOL.

The above text of Yájnavalkya is explained in the Dáyabhága to mean that when there is a competition between claimants of equal degree, then if any of them is re-united and the rest are not so, the re-united parcener will take the heritage to the exclusion of those who are not so. According to the Dáyabhága, the above texts do not lay down a different order of succession

applicable to the estate of a re-united co-parcener : D.B., xi, v, 10-11 and 38-39.

The above text of Vrihaspati is explained in the Dáyabhága Ch. xii., §§ 3-4, to curtail the operation of the rule of preference on account of re-union, by limiting it to the three sets of relations mentioned therein, namely, father and son, brothers, and uncle and nephew.

So that according to the Dáyabhága, if the claimants for inheritance be either two or more sons, or brothers, or paternal uncles, or fraternal nephews, and any one of each of these sets of heirs be re-united, then he is to be preferred to another of that set, who is not re-united. But if the deceased was re-united with any other relations than the four mentioned in Vrihaspati's text, then the legal incident of preference for re-union does not apply to them; such relations whether re-united or not, are entitled to succeed together.

The case-law—appears to modify the law of re-union as laid down in the Dáyabhága, by holding that the privilege extends to the sons of the brothers who became actually re-united : 1 Hyde, 214; 5 W.R., 249; 3 B.L.R., A.C.J., 7; 19 C.S., 634. In the last case Justice Ghosh examined all the passages of the Dáyabhága bearing on the subject of re-union; and the learned judge while holding that there cannot be a re-union between two agnatic first cousins so as to be attended with the legal incident of preference, thought himself constrained to follow the previous decisions and hold that the son of a re-united brother is entitled to preference to the son of a separated brother, although the former was not re-united in the legal sense.

But it should be remarked that if the separated brother had been alive, he would undoubtedly have succeeded in preference to the re-united brother's son; for, re-union gives preference, only when the claimants are of the same degree.

CHAPTER VIII.

DÁYABHÁGA JOINT FAMILY.

The Mitákshará—is universally respected and accepted as of the highest and paramount authority, by all the schools except that of Bengal where it is received also as of high authority yielding only to the Dáyabhága in those points where they differ. The Mitákshará law should therefore be followed in Bengal where the Dáyabhága is silent.

Points of difference between Mitákshará and Dáyabhága.—The cardinal points of difference between the two schools are as follows:—

1. Heritage according to the Dáyabhága bears its proper sense and means property in which a person's right arises by reason of his relationship to the former owner, *on the extinction of his right* by natural death, or civil death, such as degradation from caste for the commission of a heinous sin, or renunciation, and retirement from worldly affairs by the adoption of religious order: Ch. I, paras. 5, 31-34.

2. Right by birth is not admitted; hence, heritage is in all cases *obstructed*, and never *unobstructed*.

3. Two or more persons jointly inheriting property become tenants-in-common, and not joint-tenants in any case.

4. The Dáyabhága doctrine of the co-heirs' tenure of joint heritage is, that each co-parcener's right extends to a fractional portion only of the inherited property, in other words, to that fractional share which should be allotted to him if there were an immediate partition made. Hence it differs from that of the Mitákshará, according to which the right of each co-heir extends to the whole of the property: D. B., Ch. I, para. 7.

5. The legal incidents deduced from this doctrine are, that a co-sharer can alienate his share without the consent of the rest, (D. B., ii, 27), and that survivorship cannot apply to the undivided share of a co-heir.

6. Partition accordingly means manifesting or making known that unknown and unascertained fractional share in which alone the heritable right of a co-sharer arose when the succession fell in, and which was undetermined during the joint state; D. B., i, 8-9.

7. As regards ancestral property, a son does not acquire an equal right during the father's life, so as to compel the father to make a partition of it against his will: D. B., ii, 8. Partition of ancestral property can take place during the father's

life only by his desire, and after the mother is past child-bearing: D. B., ii, 7. On partition of ancestral property the father is entitled to two shares: D. B., ii, 20, 35–64.

But the father cannot alienate ancestral immoveable property (D. B., ii, 23), excepting a small part (D. B., ii, 24,) nor a corrody (D. B., ii, 25). He is competent to alienate the ancestral immoveable property only for the support of the family, and not otherwise: D, B., ii, 26.

Nor can the father make an unequal distribution of the ancestral property among his sons: D. B., ii, 76.

The father's estate in the ancestral immoveable property, therefore, is similar to the widow's estate in the husband's property.

Although a son cannot demand partition of the ancestral property as against the father, he is certainly entitled to maintenance out of the same: D. B., ii, 23.

8. The father making a partition of the ancestral property during his life is entitled to a moiety of a son's self-acquired property, and to two shares of any property acquired by a son with slight aid from the family funds, but principally through his personal exertion: D. B., ii, 65–72.

9. The father may make an unequal distribution of his self-acquired property among his sons, and retain as much as he chooses of such property: D. B., ii, 74–76.

Dáyabhága law changed, how?—While dealing with the texts (see *supra*, p. 133) upon the authority of which the Mitákshará maintains the co-equal right of father and son in ancestral property, Jímútaváhana says that the intention of those texts is not to declare father and son joint owners so as to make their shares equal on partition, or to entitle a son to acquire right to ancestral property during the father's life, and to enforce a partition against the father's will, but the intention is that a grandson becomes entitled to a predeceased son's right, and that the father is not entitled to make an unequal distribution of such property among his sons, nor to alienate ancestral immoveable property except for the support of the family; and he maintains that the father is entitled to two shares out of the ancestral property, if a partition be made by him.

From what he says it is clear that the father is not absolute owner of the ancestral immoveable property, his right therein resembles the right of the Hindu widow in the husband's estate. It is also clear that the sons and their wives and children are entitled to maintenance from the ancestral property which is declared the source of the maintenance of the family, and therefore inalienable except for their maintenance: D. B. ii, 22-26.

Jímútaváhana then controverts the Mitákshará doctrine of incapacity of a co-parcener to alienate his undivided share without the consent of the other members of the joint family, and maintains that he is competent to deal with his share according to his pleasure: D.B., ii, 27. The text requiring the consent of co-sharers is, according to him, intended to prohibit transfers to a person of bad character, the introduction of whom as a co-sharer would put the other members of the family to difficulty, it is not intended to invalidate an alienation: D. B., ii, 28.

He then maintains that the father may transfer his self-acquired property in any way he pleases, without the concurrence of his sons, notwithstanding a text of law to the contrary, which must be construed to impose a moral duty, and not a legal restriction so as to invalidate an alienation actually made by the father; for, the nature of the father's absolute ownership in his self-acquired property,—or the capacity to deal with such property according to his pleasure, which is the legal incident of ownership,—cannot be altered by even a hundred texts like the one prohibiting alienation without the sons' consent: D.B., ii, 29-30.

Herein the author of the Dáyabhága is said to lay down the doctrine of *Factum valet*: see *supra*, p. 14.

By an extension of this doctrine of *Factum valet* our courts of justice have come to the conclusion that the father is the absolute owner of the ancestral property, so that there is no distinction between a father's self-acquired and ancestral property as regards his right of disposing of the same either by an act *inter vivos* or by a will, and that a son has no right except that of maintenance: *Tagore* v. *Tagore*.

The process of reasoning by which this conclusion is arrived at, appears to be, that as the sons have no right to enforce partition of ancestral property, therefore they have no right to the property which is accordingly vested absolutely in the father; the father therefore is the owner of the property, and as such has the capacity to deal with the property according to his pleasure; and this capacity cannot be altered by the text restricting his power of alienation.

But this argument is fallacious; for it might as well be argued that a reversioner has no right to the property inherited from her husband by a Hindu widow during her life; the estate is absolutely vested in her, no part of it being vested in any body else; therefore she has the capacity to deal with it according to her pleasure; and this capacity cannot be altered by the texts restraining her from alienating the same.

The two cases are exactly parallel; there is no difference between them in principle: and the error has been induced by

not bearing in mind the broad distinction between self-acquired property and inherited property; in the latter case the nature of the right taken by an heir is defined and limited by the passages of the law of inheritance conferring such right. As regards the ownership of self-acquired property, its nature and character can by no means be affected by the existence or non-existence of a son. But as regards inherited property, the restrictions and limitations on the father's power of disposal are, of the same character as those imposed on the widow.

Hardship when father merged in stepmother.—Whatever may be the theoretical view of the father's and the son's right, practically there is no distinction between a Mitákshará and a Dáyabhága joint family as regards the actual enjoyment of the family property by sons. As a man cannot have a better friend than his own father, the above change of law does not prejudicially affect sons in Bengal in the majority of cases. But there are a few instances in which a great wrong is done to sons by fathers under the undue influence of their young wives, which our courts of justice ought to remedy.

It is worthy of remark that whatever view of Hindu law may be taken by our Courts of justice, the people are governed by their old customs, habits and manners. It is a notorious fact that Hindus are still married by their fathers, at a time when they cannot, and do not, earn their own maintenance, and that the family property is looked upon as the hereditary source of maintenance of the sons and their wives and children. It sometimes happens that the first wife of a man dies after presenting him several sons, the man then marries a girl of tender age, as grown up maidens are rare among Hindus. The children by the deceased wife look upon their stepmother with jealousy, and presuming upon the unusual affection naturally felt and shown by the father for his deceased wife's children, as he is to them both father and mother, they do sometimes ill-treat and even insult her, when she is young. This ill-treatment and insult make deep impression on her young mind, and she takes her revenge when she has by her charms of youth gained complete influence and ascendancy over her husband who must be considerably older than herself,—by alienating the heart of her husband from them, more especially if she has herself become mother of children. And all this ultimately results in a deed or a will whereby the sons by the deceased wife are either disinherited or cut off with a trifle. As this iniquity is the consequence of the erroneous view of the Dáyabhága law, our Courts of justice are called upon to remove the mischief introduced by them, which they may very easily and justly do, by setting aside the perpetration

of the iniquity by declaring the transaction invalid on the ground of undue influence, which is usually exercised by wives over husbands considerably older than themselves, and of which a typical instance is depicted by the great Hindu bard Válmíki in the well-known Rámáyana. The exile of Prince Ráma, the eldest and beloved son by the senior wife, to live in forests like an ascetic for a period of fourteen years, was ordered by his father, the King Dasaratha, at the instance of a junior wife, although his love for the prince was so great that he died of the grief of the separation from that prince who in obedience to his father's desire did piously and cheerfully leave the palace the instant he was informed of it, and went away for carrying it out as a filial duty. And the reason assigned by the poet, for this extraordinary conduct of the king is, that he loved the prince *equal* to his life, but he loved the prince's stepmother the younger queen *more* than his own life. Thus, it is said :—

वृद्धस्य तरुणी भार्य्या प्राणेभ्योऽपि गरीयसी ।

which means,—" An old man's young wife is dearer to him than even his own life."

If our Courts of justice do, having regard to the character of the people, take this undoubted undue influence as undue influence in the legal sense, they would certainly do justice in many hard cases which owe their origin to a misapprehension of the Hindu law.

Joint family in Bengal.—Although the joint family system which is the normal condition of Hindu society prevails in Bengal in the same manner as in other provinces, and although the real difference between the two schools, with respect to ancestral property, is that the author of the Dáyabhága, with a view to prevent the growth of disobedience in sons, deprived the sons of the right of enforcing partition against the father's will, and further provided two shares for the father in case *he* made a partition during his life, while at the same time the author deprived the father of the power of capriciously and whimsically doing any injustice to the sons by declaring him incompetent to alienate, or to make unequal distribution of, the family property; yet, according to the view taken by our Courts of justice with respect to ancestral property, there cannot be a real joint family consisting of father and sons during the father's lifetime, inasmuch as joint property which is the essence of the conception of joint family, is wanting to make them joint. Nor can there be, according to the modern view, a real partition during the father's life ; for, it must now mean neither more nor less than a gift of the property by the father to his sons.

So the position of affairs has become anomalous, owing to the divergence between actual practice and legal theory. But the evil consequences that might otherwise arise, are in the majority of instances prevented by the natural love and affection of a father to his sons, the regard to which appears to have induced the courts of justice to confer on fathers, rights not accorded to them by the commentaries on Hindu law.

But when a son acquires property with or without the aid of the family property, then a father and his son may be joint as regards such property. For, the father is, according to the Dáyabhága, entitled to a moiety of his son's acquisitions even when made without any aid of his property, and to two shares of such property when acquired with the aid of his estate, the acquirer being entitled to two shares and each of the other sons, to one share. The right of the other sons in the latter case is the same, whether partition is made during the lifetime of the father or after his death.

The father, however, must, if he wishes to take a share of his son's acquisitions, be willing to divide his property, whether ancestral or self-acquired, according to the rules laid down in the Dáyabhága, which are now to be regarded as directory in other respects.

It is after the death of the father, that the sons may really become members of a joint family. According to the theory of the Bengal School they become tenants-in-common, and not joint-tenants, in respect of the estate inherited by them from their father.

As regards the enjoyment of the joint property by the members, the management of the same, the manager's powers and the presumptions, the law appears generally to be the same in the Bengal School as under the Mitákshará.

Partition.—Real partition may take place only after the father's death. It may take place at the instance of a single co-sharer (D.B., i, 35) who has an interest in the family property according to the rules of succession, that apply to all cases without any such distinction as there is under the Mitákshará, based upon jointness, separation or re-union.

If the owner dies leaving male issue him surviving, then his son, a predeceased son's son, and a great-grandson whose father and grandfather are both predeceased, are entitled to the estate and may claim a partition.

Partition amongst the male descendants is to be made *per stirpes*.

Maiden Sister.—When partition is made by the sons after the death of their father, their maiden sister is not entitled to a

quarter share as in the Mitákshará School, but only to maintenance until her marriage, and to the expenses of her marriage, which cannot exceed a quarter share where the property is small.

Mother's share.—When the sons left by a man, are all full-brothers, and their mother is alive, then if partition is made by them, she is entitled to a share equal to that of a son. The mother's share is liable to be reduced if she has received *stridhan* property from her husband or father-in-law, in the same way as under the Mitákshará. But if her *stridhan* so received exceed what is receivable by her as her share, then she does not get any share, but retains her *stridhan*. But the stepmother, if any, is not entitled to any share, but to maintenance only.

Nature of mother's right in the share.—The share which the mother obtains appears to become her *stridhan*. The nature and extent of the mother's right in such share are not expressly stated in the Dáyabhága. But regard being had to the fact that her share may consist in part of her *stridhan*, and to the rule of Hindu law that समं सादृक्षवत् विशेषश्च "Equality is the rule where no distinction is expressed," it appears to follow that she has the same sort of right in it, as her sons have in their shares. She does undoubtedly acquire an interest in the share, and in the absence of any limitation, express or necessarily implied, the presumption is that such interest amounts to absolute ownership. The Mitákshará also supports this view. (*See supra* p. 183-4). Any other view must necessitate the introduction of principles and distinctions unknown to Hindu law, and create considerable difficulty. The property is not inherited by her, and there cannot therefore be a reversioner as regards it. The share again may fall short of her maintenance, and what should be her rights then? Is her interest a life-interest, or a widow's estate, or an absolute estate? There was no authoritative decision on the point. But there were *obiter dicta* in several cases, which appear to be against the mother's absolute right, and to introduce the estate of vested remainder in the sons.

The question has at last been settled by the decision of the High Court in the case of *Sorolah* v. *Bhoobun*, 15 C.S., 292. The mother's right to the share has been held to be similar to the widow's estate; and as regards succession after the mother's death, to the share if not consumed by her, the sons from whom she received the same are declared to have a vested remainder, so that they or their representatives will get the share equally: so this is more anomalous than the *widow's estate*.

This is another instance in which women's right has been curtailed.

Maintenance of father's wives.—When the sons are not all full brothers, then on partition between them the father's wives are entitled only to maintenance, and not to any share. Their maintenance is a charge upon the whole estate. But it has been held by the Calcutta High Court and the Privy Council in the case of *Srímati Hemangini* v. *Kedar Nath*, 13 C.S., 336=16 C.S., 758=16 I.A., 115,—in which a person left three sons and one widow who was the mother of one of these sons, and there was a partition suit between them ending in a decree,—that the widow's maintenance after partition was a charge on the share of her son, and not on the entire estate. This rule will operate with great hardship, in cases where the property is not so large as it was in the case in which the above rule has been laid down.

Other persons entitled to maintenance.—There are some other persons that are entitled to maintenance, such as dependent members of the family. They will be mentioned later on in the Chapter on Maintenance.

CHAPTER IX.

DÁYABHÁGA SUCCESSION.

The order of succession to the estate of a male, according to the Dáyabhága of Jímútaváhana, as supplemented by the Dáyatattva of Raghunandana, and as explained in Srikrishna's commentary on the Dáyabhága, and according to the traditional interpretation of the Dáyabhága which alone is regarded by the people of Bengal as the authority by which they are governed in matters of inheritance, is as follows:—

1-3. Son, grandson, and great-grandson in the same manner as under the Mitákshará, see *supra* p. 194.

4. Widow, 5. daughter (1) first **maiden (2)** and then **married and having or likely to have male issue,** a widowed sonless daughter, a barren daughter, and a daughter who gives birth to female children only, are excluded from inheritance; **6. Daughter's son.**

The widow's estate is the same as has already been explained under the Mitákshará, (*supra* p. 194). It has been held that an unchaste daughter is, according to the Dáyabhága, excluded from inheritance, 22 C.S., 347. But see *contra supra* p. 196. Daughters' sons take *per capita*, and not *per stirpes*.

7. Father, 8. Mother, 9. Brother, 10. Brother's son, 11. Brother's son's son, 12. Father's daughter's son.

It has been held that an unchaste mother is excluded from inheritance: 4 C.S., 550. But see *contra supra* p. 196. A full brother is entitled to take, to the exclusion of a half-brother; and this distinction applies to all collaterals such as the brother's son, paternal uncle and the like. But it has been held that the half-sister's son is entitled to take together with the full-sister's son, —the capacity for spiritual benefit being assumed as the sole test: 11 C.S., 69. But see Srikrishna's Recapitulation *infra* p. 122.

13. Paternal grandfather, 14. Paternal grandmother, 15 Paternal uncle, 16. Paternal uncle's son, 17. Paternal uncle's son's son, 18. Paternal grandfather's daughter's son.

19. Paternal great-grandfather, 20. Paternal great-grandmother, 21. Paternal granduncle, 22. His son, 23. His son's son, 24. Paternal great-grandfather's daughter's son.

25. Maternal grandfather, 26. Maternal uncle, 27. Maternal uncle's son. 28. Maternal uncle's son's son.

29-61. Sakulyas,—they include the 4th, 5th, and 6th descendants in the male line, if any, of the *propositus* himself, and of

his father, paternal grandfather and paternal great-grandfather; and they also include the three remoter paternal ancestors in the male line, namely, the paternal great-grandfather's father, grandfather, and great-grandfather, if any, and also six descendants in the male line, of each of these ancestors,—altogether thirty-three relations.

The order of succession amongst the Sakulyas appears to be that the descendants of the *propositus* come first, and then the descendants of his nearest ancestor; and that amongst the descendants of the same ancestor, the nearest in degree take in preference to the more remote.

62-208. Samánodakas.—They are the same as under the Mitákshará: see *supra* p. 199.

The remaining Bandhus,—such as the son's daughter's son, the daughter's son's son, brother's daughter's son, the father's and the mother's maternal relations and so forth, in the same manner as under the Mitákshará; then

Preceptor of the Vedas, Pupil, and Fellow-student in their order—then

Sagotras of the same village—more remote than the *Samánodakas*,—then

Samána-pravaras of the same village,—then

Bráhmanas of the same village,—lastly

The King—is the *ultima hæres*, but not to the estate of a Bráhmana, which goes to the members of his caste.

Heirs under Mitákshará and Dáyabhága.—There is no difference between the two schools as to the persons that are heirs. To the question who are heirs? the answer is the same in both the schools, namely, relations, agnate and cognate, are heirs. But there is some difference as to the *order of succession*.

The term *gotraja* in Yájnavalkya's text (*supra* p. 191) is, according to the Mitákshará, equivalent to *sagotra* or a member of the same *gotra* with the *propositus*. But the Dáyabhága explains the word to include cognates descended from a member of the *gotra*, such as the daughter's son, the sister's son, the father's sister's son, and so forth. And the word *Bandhu* which, according to the Mitákshará, signifies all cognates, is restricted by the Dáyabhága to cognate relations connected through the mother, the father's mother, and so forth. Thus Jímútaváhana controverts the interpretation put on the texts of Yájnavalkya (*supra* p. 191) by the Mitákshará, which postpones all cognates save and except the daughter's son, to agnates comprised by the terms *sapinda* and *samánodaka*.

The author of the Dáyabhága follows the analogy of the succession of the descendants of the *propositus* himself, in

working out the order of succession among the three paternal ancestor's descendants, and introduces their great-grandson in the male line and their daughter's son, just after their son's son respectively. Thus, in addition to the daughter's son of the *propositus*, three other cognates are introduced, namely the son of the daughter of the father, of the grandfather, and of the great-grandfather. And then reciprocally to these four cognate descendants of the family, four maternal relations are intended to be introduced by the author of the Dáyabhága, namely,

Maternal grandfather	reciprocally to daughter's son,
Maternal uncle	reciprocally to sister's son,
Maternal uncle's son	reciprocally to father's sister's son, and
Maternal uncle's grandson	reciprocally to grandfather's sister's son.

And it should be observed that the maternal uncle and his son, and his son's son are the maternal relations who confer the greatest amount of spiritual benefit on the three maternal ancestors of the deceased, to whom he is said to be bound to offer *pindas*. But nevertheless the maternal grandfather must be placed before them; for, it is through him that they are related to the deceased, and they cannot confer any spiritual benefit so long as he is alive.

Subject to this modification, the author of the Dáyabhága intended to leave the order of succession such as it is according to the Mitákshará which also is respected by the Bengal School as of high authority.

Dáyabhága order of succession misunderstood.—A question arose for the consideration of a Full Bench of the Calcutta High Court, whether a brother's daughter's son or the father's brother's daughter's son is an heir at all according to the Bengal School.

There was another question in that case, namely, if he is an heir, what is his position in the order of succession? As regards this latter question, an erroneous admission was made before the Division Bench by the learned pleader, that if they were recognised as heirs their position would be before the maternal relations. The Dáyatattva of Raghunandana was not then translated into English, and so it was not noticed that the same position is assigned by that treatise to all cognates other than those mentioned above, as they hold under the Mitákshará, and that therefore the position of those cognates in the order of succession is exactly the same as under the Mitákshará.

Doctrine of spiritual benefit no test of heirship.—At one time it was supposed that the doctrine of spiritual benefit is the key to the Hindu law of inheritance. It is, however, now

admitted on all hands that the doctrine is not recognised by the Mitákshará School, that is to say by the majority of the Hindus. In the Bengal School also, the doctrine was for the first time introduced and relied on by Jímútaváhana as a corroborative argument in support of his expositions of the texts of law relating to the order of succession. It is in fact, a pretext by which he fortifies his argument in support of the changes made by him in the order of succession, by the introduction of some near and dear cognates in preference to more distant agnates; it has nothing whatever to do with the question as to who are heirs; for, as to that, both the schools are at one, and give the same answer, namely, the relations are heirs.

Propinquity, or proximity of birth, is the principle of the order of succession, according to the Mitákshará. This is admitted also by the Bengal School, but the capacity for spiritual benefit is also taken into consideration along with it: D. T., xi, § 63. See *Toolsey* v. *Sm. Luckhy*, 4 W.N., 743, (746, Cal. 2).

Object of Dáyabhága, and the doctrine misunderstood.—According to its traditional interpretation, the Dáyabhága was all along understood to lay down a particular well-known order of succession. And this is clear not only from the order expounded by the Dáyabhága, but also from the author's express statement, see D. B., XI, vi, 30. Its object was not to lay down the so-called principle of spiritual benefit, and to leave the order of succession uncertain and unsettled. But Justice D. N. Mitter who was ignorant of Sanskrit, and therefore had no access to the original works on Hindu law, put a novel construction on the Dáyabhága, which is different from, and opposed to, its traditional interpretation. That eminent judge imagined that the object of the Dáyabhága was not to lay down an order of succession, but to lay down the principle of spiritual benefit, from which the order of succession is to be worked out. That this view is inconsistent with the Dáyabhága, and therefore unworthy of acceptance, is established by the following passage in the concluding portion of the judgment delivered by him in **Guru Gobind Shaha Mandal's case**, 5 B. L. R. 15=13 W. R., F.B., 49:

"Lastly it has been urged that the precise position which the son of a paternal uncle's daughter would be entitled to hold according to the principle of spiritual benefit, would interfere with that which has been assigned by the author of the Dáyabhága to some of the heirs specified in the earlier part (Sections 1–5) of Chapter XI. * * * * But this circumstance, even if true, cannot be accepted as a sufficient reason to justify the total exclusion of one single heir who is competent to satisfy all the requirements of that principle.

If in any case which may arise hereafter, it should become necessary for us to determine the precise position which the son of a paternal uncle's daughter is entitled to hold in the order of succession, the question would fairly arise, namely, *whether the details of a work like the Dáyabhága ought to be permitted to override the principle upon which it is admittedly based.*"

This passage shows that the principle of spiritual benefit as explained in the above judgment, is inconsistent with and opposed to the details of the order of succession among certain heirs, worked out and expressed in the clearest possible language, by the author of the Dáyabhága himself.

The interpretation put on the Dáyábhága, by assuming that its acute logical author did not understand the principle which is taken to be enunciated by himself, is one which is opposed to all canons of construction, and is inconsistent with the traditional exposition given by learned Pandits, of the views maintained by the founder of the Bengal School, and contained in that treatise which is accepted by the people of Bengal as the book of paramount authority on inheritance.

The learned Pandits who are the repositories of the traditional interpretation of the Dáyabhága hold that the doctrine of spiritual benefit is put forward by Jímútaváhana merely as a corroborative argument in support of the *order of succession* which he maintains as the one intended to be laid down by the sages in the Smṛitis.

Proper mode of reading Mitákshará and Dáyabhága.—The proper mode in which our Courts of Justice are to read these commentaries, is to ascertain the conclusions drawn by their authors. The reasons assigned by the authors for their conclusions may be good, bad or indifferent; and the duty of a Judge is not so much to inquire whether a disputed doctrine is fairly deducible from earliest authorities, namely, the texts of the codes, as to ascertain whether it has been received by the particular school and has been sanctioned by usage (12 M. I. A., 397), The Lords of the Judicial Committee have in a subsequent case pointed out the manner in which these works are to be read, thus,—

"But even if the words were more open to such a construction than they appear to be, their Lordships are of opinion that what they have to consider is not so much what inference can be drawn from the words of Catyayana's text by itself, as what are the conclusions which the author of Dáyabhága has himself drawn from them :"—*Moniram* v. *Keri*, 5 C.S., 776=7 I. A., 115.

The *order of succession* laid down by the author of the Dáyabhága embodies the conclusions drawn by the author himself from the texts and the doctrine of spiritual benefit, and it is not open

to the courts to consider what inferences *they* can draw from the words of texts, and from the arguments put forward by the author in justifying his own conclusions,—and to lay down an altogether different order.

Hence the mode of construction adopted by the above Full Bench has been pronounced by the Privy Council to be improper and unreasonable.

The author of the Dáyabhága used the vague expression "Maternal uncle and the rest" who are to inherit after the paternal great-grandfather's descendants inclusive of his daughter's son: D. B. XI, vi, 12 & 20. This has been explained in the Dáyatattva (ch. xi., §§ 69-71) by Raghunandana who says that the maternal grandfather must come before the maternal uncle; and by Srikrishna in his commentary on the Dáyabhága, who says that "Maternal uncle and the rest," includes his son and grandson. And this is also the traditional interpretation of the Dáyabhága.

Raghunandana and Srikrishna.—Raghunandana is the author of the Smriti-tattva also called Ashtávinsati-Tattva, or twenty-eight subjects or books, one of which is the Dáya-tattva or Subject of Inheritance which is thus noticed by Colebrooke in the preface to his translation of the Mitákshará and the Dayábhága:—

"The Dáyatattva or so much of the Smriti-tattva as relates to inheritance, is the undoubted composition of Raghunandana, and in deference to the greatness of the author's name and the estimation in which his works are held among the learned Hindus of Bengal, has been throughout diligently consulted and carefully compared with Jímútaváhana's treatise, on which it is almost exclusively founded. It is indeed an excellent compendium of the law, in which not only Jímútaváhana's doctrines are in general strictly followed, but are commonly delivered in his own words in brief extracts from his text. On a few points, however, Raghunandana has differed from his master; *and in some instances he has supplied deficiencies.*"

Raghunandana introduces after the Samánodakas the remaining Bandhus, *i.e.*, those other than the eight to whom a preferable position has been assigned by Jímútaváhana, (Dáyatattva ch., xi. §§ 62 and 78); he cites the same texts (*see supra* p. 192) enumerating nine cognates as Bandhus, which are cited in the Mitákshará, and thus he supplies an apparent deficiency of the Dáyabhága. But it was not translated into English when the Full Bench had to consider whether the father's brother's daughter's son is an heir or not, according to the Bengal School, and it does not appear to have been brought to the notice of the Judges.

Sríkrishna is a commentator of the Dáyabhága and the author of the Dáyakrama-Sangraha, a treatise on the order of succession. Of him, Colebrooke speaks as follows in the aforesaid preface:—

"The commentary of Sríkrishna Tarcálancára on the Dáyabhága of Jímútaváhana has been chiefly and preferably used. This is the most celebrated of the glosses on the text. It is the work of a very acute logician, who interprets his author and reasons on his argument with great accuracy and precision. * * * (It is) ranked in general estimation after the treatises of Jímútaváhana and of Raghunandana.

"An original treatise by the same author, entitled Dáyacrama-Sangraha, contains a good compendium of the law of inheritance according to Jímútaváhana's text as expounded in his commentary."

But this latter remark is correct if the passages which are not found in all copies of the Dáyakrama-Sangraha, but which have been incorporated in its English translation, be omitted as being spurious interpolations. These passages are those which relate to the succession of the brother's daughter's son and the like, and those which relate to the succession of the maternal great-grandfather and the great-great-grandfather and their descendants. The former are not at all noticed by Colebrooke in his annotation at the end of Chapter XI of the Dáyabhága,—a circumstance which shows that those passages were not in the copies of the work in his possession, (W.R., special No. 176; 23 W.R., 117); and the latter passages are noticed in the annotation by Colebrooke, but he says that these were wanting in some copies of the work—a fact proving them to be interpolations. For, had these passages been genuine, the views therein expressed would undoubtedly have been mentioned by Sríkrishna in his commentary on the Dáyabhága.

It is worthy of special remark that neither Raghunandana nor Sríkrishna nor the five other commentators of the Dáyabhága did understand that treatise as laying down the principle of spiritual benefit such as is expounded in the judgment of Justice Dwarka Nath Mitter.

When there is a conflict between the Dáyabhága on the one hand, and the other writers of the Bengal School on the other, the former must be followed. The latter cannot override the former, but are accepted as mere commentaries on the same, and as such are authoritative only on points on which the Dáyabhága is silent.

Dáyatattva misunderstood.—The Dáyatattva does not at all support the view taken by the Full Bench, of the principle of

spiritual benefit. But nevertheless a very learned lawyer contended before a Division Bench of the Calcutta High Court that the Dáyatattva supported his contention, namely, that a brother's daughter's son is entitled to preference to a great-grandson of the paternal grandfather (15 C.S., 780), and went to the length of asserting that "in the translation (of the Dáyatattva), para. 64 is somewhat different from the original." This is an instance showing how even the well-regulated mind of an advocate may be betrayed into error by taking an onesided view of a question; for no real Sanskritist could call the correctness of the translation in question. The original passage runs as follows:—

तत्र यथा दौहित्रान्त-स्य सन्तानाभावे अन्यः अधिकारी, एवं भ्रातृ-पुत्राभावे तद्दौहित्रान्तः पितुः सन्तान अधिकारी।

and the translation is as follows:—

"Accordingly, as on failure of the deceased proprietor's lineage including his daughter's son, others succeed, similarly in default of the brother's son, the father's lineage ending with his daughter's son, takes the heritage."—D.T., xi, 6 § 64.

It should be observed that the conjoint or compound word तद्दौहित्रान्तः = "ending-with-his-daughter's-son" is an adjective qualifying the term पितुः सन्तानः = "the father's lineage." In the original, the former word stands first and then the term "the father's lineage," so that if the words be placed in the same order in which they stand in the original, the last sentence would stand thus,—

"Similarly in default of the brother's son, ending-with-his-daughter's-son the father's lineage takes the heritage."

And then the question arises to what word does the pronoun "his" in the compound adjective term "ending-with-*his*-daughter's-son" relate, to the word brother, or his son, or to the father, or his lineage?

The contention which appears to have been raised before the court, was, that it relates to the word "brother" or "brother's son." This contention would have been plausible, if the pronoun "his" had not been a component part of a compound word qualifying the term "the father's lineage"; for, as it stands it cannot but relate to the principal word "father's" according to the grammatical rule of construction.

If you now turn to the logical rule of construction, then having regard to the context, there cannot be the slightest doubt on the mind of a reader as to the person to whom the pronoun "his" relates.

In order to understand the true meaning of the passage, it is necessary to understand what is really intended to be expressed by it; and for the purpose of understanding the same, what is laid down in Yájnavalkya's text on succession, and the exposition of the same as given by the Mitákshará, should be taken into consideration.

The text of Yájnavalkya, lays down the order of succession down to the brother's son, thus—

"The widow, the daughters also, both parents, brothers likewise, their sons, gentiles, &c.," *supra* p. 191.

It should be borne in mind that the order of succession down to the brother's son as laid down in this text, has been adopted with the addition of daughter's son after daughter, by both the schools. It is after the brother's son that the orders differ in the two schools: the Mitákshará maintains that after him the paternal grandmother and the like succeed; but the Dáyabhága, following the analogy of the succession of the descendants of the *propositus* himself, introduces the brother's grandson and the sister's son after the brother's son and before the paternal grandparents. And the above passage of the Dáyatattva embodies this view of the Dáyabhága school: the principal words in the proposition are, the deceased proprietor and his father,—the words "brother's son" being but words of secondary importance; he is enumerated in Yájnavalkya's text, as an heir, and so his default is mentioned in the above passage, as the question arises who is to take in his default, see Dáyatattva ch. xi, § 60. And the answer given by the above passage is, that the father's descendants shall succeed like the descendants of the *propositus* himself, ending with his daughter's son, or in other words, the father's great-grandson and daughter's son, succeed in their order after the brother's son. Had the sons of the daughters of the *propositus's* son and grandson been enumerated in the Dáyatattva as heirs taking before the parents, then and then only could it have been put forward with reason, that the pronoun "his" in the above compound word, relates to the "brother" or "brother's son."

Hence it is clear that the assertion made before the court impugning the accuracy of the translation is erroneous and unjustifiable.

And the learned Judges of the High Court were not justified in attaching the importance they did, to the *ipse dixit* of the pleader who made the bold assertion.

Recapitulation of heirs in their order, by Srikrishna—in his commentary on the Dáyabhága, as given by Colebrooke in his translation, is inconsistent with the Dáyabhága as well as with Srikrishna's comments thereon. It is difficult to account for this

error, except by assuming that Colebrooke's copy of the work was inaccurate. The following is the rendering of the recapitulation which is given in the edition of the original Dáyabhága with its six commentaries by Pandit Bharat Chandra Siromani p. 342:—

"The following is the order of successors to the estate of a deceased male according to this (*i. e.*, Dáyabhága):—(1) First, **son**; (2) in his default, **son's son**; (3) in his default, **son's son's son**,—a grandson by a predeceased son and a great-grandson whose father and grandfather are both predeceased, succeed jointly with a son; (4) in default of male issue down to great-grandson, **widow**,—having succeeded to the husband's estate she should live with the family of her husband or in their default with the family of her father, and enjoy her husband's heritage for preserving her body, she should likewise make gifts and the like, of a small portion of the property for the benefit of her husband's soul, but must not alienate it according to pleasure like her Stridhan (5) in her default, **daughters**, amongst them, first, **maiden**, in her default, **betrothed**, on failure of her, **married**, of married daughters, she who has a son, and she who is likely to have a son, are entitled to succeed jointly, but a barren daughter and a sonless widowed daughter are not entitled to succeed; (6) in default of the married daughter, **daughter's son**; (7) in his default, the **father**; (8) failing him, the **mother**; (9) in her default, **brothers**, among them first the **uterine**, in his default, a **half**-brother, if the deceased was re-united with a brother, then should there be only full-brothers, the re-united full-brother alone is entitled, in his default a full-brother who is not re-united; similarly should there be only half-brothers, then first the re-united half-brother, failing him a half-brother who is not re-united, when however a half-brother is re-united and a full-brother is not re-united, then both of them equally succeed; (10) in default of brother, **brother's sons**, amongst them also, first the full-brother's son, failing him the half-brother's son, in case of re-union, should there be only full-brother's sons, first the full-brother's son who is re-united, failing him the full-brother's son who is not re-united; should there be only half-brother's sons, then first the half-brother's son who is re-united, failing him the half-brother's son who is not re-united, when however, the full-brother's son is not re-united and the half-brother's son is re-united, then both of them, like the brothers, equally succeed; (11) in default of brother's son, **brother's son's sons**, amongst them also the order by reason of the brother being uterine or non-uterine, and the order by reason of being re-united or not, are to be understood; (12) on failure of him, the **father's daughter's son**, he again is the full-sister's son or the half-sister's son; (13)

in his default, the **paternal grandfather**; (14) on failure of him the **paternal grandmother**; (15) in her default, the **father's uterine brother**, failing him the **father's half-brother**; (16) in his default, the **father's full-brother's son**, the **father's half-brother's son**; (17) the **father's full-brother's son's son**, and the **father's half-brother's son's son** are heirs in their order; (18) in their default the **paternal grandfather's daughter's sons**, amongst them also, the **father's uterine sister's son**, and failing him the **father's half-sister's son**, this rule is applicable also to the paternal great-grandfather's daughter's sons to be mentioned below; (19) in his default the **paternal great-grandfather**; (20) on failure of him, the **paternal great-grandmother**; (21) in her default, the **paternal grandfather's uterine brother, his half-brother**; (22) **their sons**; (23) **son's sons**; (24) and the **paternal great-grandfather's daughter's son**; in default of heirs down to these who are givers of *pindas* partaken of by the deceased proprietor, the succession goes to the maternal grandfather, the maternal uncle and the like who are givers of *pindas* which were to be given by the deceased, amongst them also, (25) the **maternal grandfather** (26) in his default, the **maternal uncle**, (27) **his son** (28) and **grandson** are entitled in their order; in their default the **Sakulyas** in the descending line who are givers of *lepa* or remnants of oblations, participated by the deceased, such as the three descendants beginning with the great-great-grandson, are heirs in their order; in their default the Sakulyas in the ascending line such as the paternal great-great-grandfather and the like who are participators of the *lepa* or remnant of oblations which was to be given by the deceased, and their descendants are heirs according to their proximity: in their default, the **samánodakas** are heirs; in their default, the **preceptor**, failing him, a **pupil**, in his default, the **fellow-student**, in his default, the **sagotras** and **samána-pravaras** of the same village are heirs in their order; in default of all the said relations, the **king** should take the estate other than that of a Bráhmana, but the estate of a Bráhmana should be taken by Bráhmanas endowed with good qualities such as the knowledge of the three Vedas."

Capacity for spiritual benefit.—The principle of spiritual benefit is examined at length at the end of this chapter. It will be seen that it is not the foundation of the right of inheritance, nor is it the only criterion of the order of succession. As regards the relative amount of spiritual benefit conferred by relations other than those whose succession has expressly been discussed by Jímútaváhana, there is absolutely no test or criterion whereby the same may be determined.

Spiritual benefit may be conferred by the so-called Sapindas

in the secondary and the tertiary senses (*supra* p. 38), as well as by the *Sakulyas* and the *Samánodakas*; there are many factors to be taken into account for the purpose of ascertaining the respective amount of such benefit, that may be bestowed by different relations; and having regard to them, it is difficult to say that the so-called Sapindas confer higher amount of benefits than the Sakulyas, &c. Take for instance, the case of a brother's daughter's son and a Sakulya: as regards a *sakulya* his capacity to confer spiritual benefit by offering *pinda-lepa* or divided oblation is certain and unconditional, and is transmitted after his death to his son and other male descendants; whereas a brother's daughter's son's actual capacity arises only after his father's death, and dies with him, so that his capacity may be only *potential*, and may never become *actual*, should he die before his own father. Such being the case, how could it be said that the latter confers a higher amount of spiritual benefit than the former, when it may be that he cannot confer the slightest benefit at all.

As regards the maternal relations, admittedly they do not confer any spiritual benefit directly on the deceased proprietor himself, but, it is said that they confer benefits on the deceased's maternal ancestors to whom the deceased was bound to offer funeral cakes when he was alive. On such a ground as this, you can bring in only those who confer the greatest amount of spiritual benefit on the three maternal ancestors, in preference to the *sakulyas* who admittedly bestow benefits on the deceased himself, or on his paternal ancestors, on whom also the deceased was bound to bestow spiritual benefits. So that the only four maternal relations mentioned above who have been mentioned by Raghunandana and Srikrishna, are the only maternal relations that can properly be placed before the Sakulyas.

The Full Bench begs the question by holding that every person offering a *pinda* to the deceased or to any one of his three paternal or maternal ancestors, confers higher amount of spiritual benefit than a Sakulya; for, there is nothing in the Dáyabhága, that may support this position: and Justice D. N. Mitter misapprehended the meaning of the term *Trai-purushika-pinda* or funeral cake offered to three ancestors of the deceased; and even if his interpretation of the term be assumed to be correct, yet his argument is vitiated by the fallacy of composition or of applying to a class what is predicated of certain specified individuals of the same.

It is worthy of special remark that the arguments by which the author of the Dáyabhága supports his conclusions are some of them opposed to well-known principles universally acknowledged by learned Pandits, and also opposed to the actual usages and practices of the people.

For instance, the maternal relations are introduced before the *Sakulyas* on the ground that it was the duty of the deceased to present funeral cakes to his three maternal ancestors, and that therefore the maternal relations who offer *pindas* to the same ancestors perform the same duty, and therefore benefit the deceased.

Now, it is a well-known doctrine of the Hindu practical religion that a religious duty attaches to a person so long as he is free from impurity and pollution, and *so long as he is alive*. Hence assuming that the deceased was bound in duty to present *pindas* to his three maternal ancestors, that duty dies with him, he is not bound to make any provision for the performance of the same duty by anybody else after his death. For, although a Hindu is bound to leave a son for the benefit of his paternal ancestors, his son cannot benefit his maternal ancestors. How then can the maternal relations benefit the deceased by offering *pindas* to his maternal ancestors, who are their own paternal ancestors to whom they are personally bound to offer *pindas*? For, they only discharge their own duty by performing their ancestor-worship which they can never, nor ever do, celebrate in two different capacities.

Then again the ancestor-worship called the Párvana Sráddha, which is the foundation of the doctrine of spiritual benefit relied on as an argument by Jímútaváhana, is not really made for the benefit of the ancestors, but for the benefit of the worshipper himself, in the same manner as the worship of the various deities, celebrated by the Hindus. There is no authority in Hindu Law that the *pindas* offered at the *Párvana Sráddha* ceremony, are actually enjoyed or participated in by those to whom the same are offered and by their male descendants. The interpretation put by Jímútaváhana (D. B., 11, 1, 38) on the text of Baudháyana (D. B., 11, 1, 37) is not supported by the language of the text (see *supra* p. 34): for, the Sanskrit word *Dáya* does not mean *pinda* or funeral cake, it means primarily a gift and secondarily heritage, and it is nowhere used in the sense of *pinda*. But Jímútaváhana alone construes the word as meaning *pinda* because its etymological meaning is "what is given" and a *pinda* is also a thing *given* or offered to invisible donees.

There is scarcely a Hindu to be found that performs the *Párvana Sráddha* regularly, that is on each conjunction of the sun and the moon. A day is therefore set apart in the year, namely, the *Mahálayá* day in the month of Áswina, which is a public holiday, on which day the Hindus may, if they choose, perform the thirteen *Sráddhas* which they ought to have performed, one in every lunar month during a year.

So far as actual practices of the Hindus are found, this *Párvana Sráddha* is, seldom if ever, performed by the Hindus

not belonging to the higher castes of Bráhmanas, Vaidyas, Káyasthas and the like, and even as regards the members of these higher castes it is doubtful whether one in ten performs it, even on the *Mahálayá* day.

Hence the conferring of spiritual benefit on ancestors by presenting *pindas* to them in the *Párvana Sráddha* is a myth in the majority of instances. And I have already told you that these are intended for the good of the worshipper, and not for the benefit of the ancestors.

There is however one Sráddha which is performed by every Hindu on the day after the impurity occasioned by the death of the deceased proprietor is over, that is, on the 11th, 13th, 16th and 31st day including the day of death, in the cases of Bráhmanas, Kshatriyas, Vaisyas and Sudras respectively. This Sráddha is called the Ádya Sráddha or the first ceremony of the kind, which concludes the actual funeral ceremony commencing from the cremation rite. Fifteen other Sráddhas ending in the Sapindí-Karana Sráddha on the 1st Lunar Anniversary of the day of death are enjoined for performance within the first year of death. These ceremonies are popularly believed to be beneficial to the departed spirit who is compelled to reside for one year in what is called Preta-loka, or the region for the departed souls, which is something like the purgatory, where the spirit, being severed from the relations in this world and not being allowed to join his ancestors in the next, is to remain in something like solitary confinement, until the end of the first year when the Sapindí-Karana ceremony is to be performed for him, which enables him to enter the *Pitri-loka* or the region of the *Manes* of ancestors.

Although these sixteen Sráddhas ending with the Sapindíkarana are popularly believed to be necessary for the comfort and peace of the departed spirit, yet the *Ádya* or first Sráddha is the only one which is universally performed, and as regards the rest they are not performed by most people who cannot afford to pay the expenses necessary for their celebration.

If capacity to perform the Sráddha ceremony be regarded as a factor in the matter of inheritance, then the capacity to perform these sixteen Sráddhas and not the *Párvana* Sráddhas, should consistently with reason and popular feelings, be taken into consideration.

Besides, the doctrine of *Adrishta* which is universally believed by the Hindus as the fundamental article of faith, is opposed to any spiritual benefit being derived by the deceased from Sráddha ceremonies performed for him. *Adrishta* or the invisible dual force is the resultant of all good deeds and bad deeds, of all

meritorious and demeritorious acts and omissions, done by a person in all past forms of existence and also in the present life, and it is this *Adrishta* which determines the condition of every soul *i.e.*, is the cause of its happiness or misery; the state of a living being depends on his own past conduct.

And this affords the strongest argument for the view that only the conclusions set forth in the Dáyabhága should be accepted, irrespective of the reasons whereby the same are sought by its author to be supported, which may not be cogent at all, nor necessarily acceptable to, or accepted by, the people, and that novel inferences deduced from them are not justifiable.

It would not be out of place here to enumerate the relations on whom the duty of performing the sixteen Sráddhas or *Preta-kriyá* is cast, in their order. The following order is deduced by Raghunandana in his Suddhi-tattva from a consideration of various texts:—

"(1) Eldest son, (2) younger son, (3) son's son, (4) son's son's son, (5) widow, (6) widow having a son too young to be capable of performing the ceremony, (7) unbetrothed daughter, (8) betrothed daughter, (9) married daughter, (10) daughter's son, (11) younger uterine brother, (12) elder uterine brother, (13) younger half-brother, (14) elder half-brother, (15) son of younger uterine brother, (16) son of elder uterine brother, (17) son of younger half-brother, (18) son of elder half-brother, (19) father, (20) mother, (21) daughter-in-law, (22) son's maiden daughter, (23) son's married daughter, (24) son's daughter-in-law, (25) son's son's maiden daughter, (26) his married daughter (27) paternal grandfather, (28) paternal grandmother, (29) the paternal uncle, (30) and the like *sapinda* (on the father's side), (31) Samánodaka, (32) Sagotra, (33) maternal grandfather, (34) maternal uncle, (35) sister's son, (36) *sapindas* on the mother's side, (37) Samánodakas on her side, (38) widow of a different caste, (39) unmarried wife (continuous concubine?), (40) father-in-law, (41) son-in-law, (42) paternal grandmother's brother, (43) pupil, (44) priest, (45) preceptor, (46) friend, (47) father's friend, (48) fellow villager of the same caste who is paid for,—these forty-eight are in their order entitled and liable (to perform the *Preta-kriyá* of a male)."

It is worthy of special remark that "a son's daughter's son" or any other relation of the same kind, is not mentioned at all, although son's son's daughter is mentioned.

And it cannot but be admitted that the above order affords the strongest evidence of degrees of natural love and affection of the relations who are to perform the last services to the deceased.

The conclusion, therefore, to which we come, is that the

capacity for spiritual benefit, such as is expounded by Justice D. N. Mitter, cannot and ought not to be made the basis of an order of succession, which is opposed not only to the feelings of the people but also to the natural development of law.

Natural love, and number of degrees of relationship.—Europeans among whom the joint family system is unknown, may very well take the strength and intensity of natural love and affection between a man and his relations to be inversely proportional to the number of degrees by which they are distant from him. But the same can, by no means, be predicated of Hindus who live in joint families, the joint family system being the normal condition of Hindu society. It goes without saying that those who are associated together in times of joy as well as of distress, and who help and are expected to help each other whenever necessary, are tied together by bonds of union which cannot but be very strong in the nature of things, quite independent and irrespective of the number of degrees of relationship. I have already told you that the agnates, though distant, have bonds of closer union to be attached to each other than the cognates as a general body (*supra* p. 47). Hence, although a son's daughter's son or a brother's daughter's son may, in the estimation of Europeans and of some English-educated Hindu "lawyers without Sanskrit," be deemed, having regard to the number of degrees of distance, to be very near and dear relations, yet they are in the estimation of the Hindus very distant relations, by reason of their belonging to different families; and it cannot but be admitted that amongst the majority of the Hindus who are followers of the Mitákshará, all cognates, with the single exception of the daughter's son in case the deceased was separate, are considered to be inferior to the agnates, however distant, who are recognized as heirs in preference to all other cognates agreeably to the principle of propinquity which is the admitted criterion of the order of succession in the Mitákshará School.

The custom relating to the observance of mourning affords the strongest possible evidence of the nearness of the *Sakulyas* and the *Samánodakas*: all the *Sakulyas* have to observe mourning at the death of a Hindu for the same period as his own son, that is to say, 10, 12, 15 and 30 days respectively for the four castes in their order; it should be borne in mind that for the purpose of mourning, *sapindas* under the Dáyabhága are those relations who are *sagotra sapindas* under the Mitákshará, see D. B., xi, i, 41–42; remoter agnate relations residing in the same village do also *actually* observe mourning like the *Sakulyas*, though the period of mourning ordained in the Shasters, for them, is three days only, which is also the period for nearest cognates such as the

daughter's and sister's sons, while the brother's daughter's son and the rest whom the Full Benches have introduced before *Sakulyas* are not required to observe mourning even for a single day.

But nevertheless, one of the unnatural consequences of the principle of spiritual benefit being supposed in the manner explained by the Full Bench, to be the criterion of the order of succession, has been, that some cognates are entitled to take in preference to agnates of the same degree,—a result which is—

Opposed to every system of Jurisprudence.—A student of comparative jurisprudence will find that at first, cognates were not recognised as heirs at all, then in the course of progress they were recognised as heirs, but placed after all the agnates; then, some of them were permitted to have a position in the order of succession, in preference to more distant agnates; and the last stage of development has been, to abolish all distinctions between agnates and cognates: but it is nowhere found that cognates take in preference to agnates of the same degree with themselves.

Take for instance the Roman law: the Twelve Tables did not at all include the cognates in the category of heirs. In course of time when the family union became weaker, and importance began to be attached to the nearness of kin, irrespective of the family, the exclusion of all cognates from inheritance came to be regarded as unjust and as a survival of an archaic institution; the Prætor Urbanus recognized the heritable right of certain cognates under the pretext of giving them forms of action. And at last all distinctions between agnates and cognates were abrogated by Justinian.

The Mahomedan law also discloses similar development. The Sunni School appears to be anterior to the Mitákshará on the point of development; for, it postpones all cognates without any exception to agnates however distant. According to this school, even the daughter's son is excluded from inheritance by the remotest agnate.

The Shia School, however, has abolished this distinction between agnates and cognates as regards the right of inheritance, although the agnates still enjoy certain privileges showing their superiority to the cognates.

We find similar development in Hindu Law to a certain extent. Manu does not recognize the cognates as heirs at all; the daughter's son mentioned by Manu to be equal to a son's son, refers to the *appointed* daughter's son—a kind of adopted son who is an agnate, and not a cognate.

Cognates are, later on, recognized as heirs for the first time, by Yájnavalkya who places them after the agnates. Then the

Mitákshará made a change in the law by giving the daughter's son a very superior position in the order of succession, as has already been said; and the Dáyabhága has given to some other cognates a position in preference to many agnates.

The Hindu law, however, has not yet arrived at that stage in which the distinction between agnates and cognates is abolished, by reason of the joint family system, which is the foundation of the distinction, still prevailing in Hindu society.

But the development of law, whereby cognates are preferred to agnates of the same degree with themselves is quite unnatural and unprecedented in the history of law; for instance, son's son's daughter's son taking in preference to son's son's son's son, brother's son's daughter's son taking in preference to brother's son's son's son, and the maternal great-great-grandfather's descendants taking in preference to paternal great-great-grandfather's descendants. It appears so unreasonable that the High Court did at first refuse to sanction it, 24 W.R., 229. This decision was subsequently overruled by a Full Bench, the judges of which did not decide the question but thought themselves bound by the judgment of the first Full Bench, although the only question before the latter was, whether a brother's daughter's son and the like were heirs at all.

Case-law and altered order of succession.—In the case of *Gurugovinda*, v. *Anund Lall*, 5 B.L.R., 15,=13 W.R., F.B., 49, the uncle's daughter's son was held to be an heir, and it was admitted by Babu (subsequently Justice) Rameschandra Mitra that if he whose claim was resisted by his client be heir, he would succeed in preference to his client who was a *Sakulya*; and the reason for this admission seems to have been that if the doctrine of spiritual benefit, upon which Justice D. N. Mitter wanted to base that claimant's heritable right, be correct, then he must take to the exclusion of *Sakulyas*. It did not strike any one then, that the said claimant might be an heir, yet he might hold the same place under the Bengal School as under the Mitákshará School. It is, however, clear that technically speaking, this Full Bench did not decide the question as to the exact position of the paternal uncle's daughter's son in the order of succession.

However that may be, the result is that all the second and the third class Dáyabhága *Sapindas* (see *supra* p. 38 and the tables at pp. 40-41) may be contended, according to the reasons set forth in the judgment of Justice D. N. Mitter, to be preferable to the *Sakulyas*.

Although Full Benches are said to settle doubtful points of law, yet the effect of the above Full Bench decision has been to unsettle the whole law of inheritance.

It should be observed that eight daughter's sons were by necessary implication recognised by that Full Bench as heirs: they are, (1) son's daughter's son, (2) son's son's daughter's son, (3) brother's daughter's son, (4) brother's son's daughter's son, (5) paternal uncle's daughter's son, (6) paternal uncle's son's daughter's son, (7) paternal granduncle's daughter's son, (8) paternal granduncle's son's daughter's son.

The precise position of these in the order of succession has been the subject of dispute in many cases. The contention on behalf of them has been that the two descendants of the *propositus* should succeed in preference to the parents and their descendants, and that the two descendants of the father should take in preference to the grandfather, and so on.

But this contention could not be accepted and given effect to, except by overriding the order given in the Dáyabhága. The first case on the point was that of *Gobindprasad* v. *Moheschandra* 15 B.L.R., 35=23 W.R. 117, which was decided by two eminent Judges of the Calcutta High Court, namely, Chief Justice Sir Richard Couch and Justice Ainslie, who held that these eight daughter's sons cannot be placed before the paternal great-grandfather's descendants, including his daughter's son (No. 24 *supra* p. 217); the competition in that case was between the brother's daughter's son and the paternal grandfather's great-grandson, and the latter was held preferable.

The correctness of this decision was impeached in many subsequent cases, but it has been uniformly followed: see 4 C.S., 411 and note, 11 C.S., 343, 15 C.S., 780; besides, there are many unreported cases.

But nevertheless some judges of Mofussil courts misunderstand the effect of the above rulings of the High Court, and commit errors by following the arguments in the judgment of Justice D. N. Mitter.

The order of succession among these eight daughter's sons is the order in which they have been enumerated above: 10 C.L. R., 484.

In a case of competition between these eight daughter's sons on the one hand and the maternal relations on the other, the former are to be preferred agreeably to the exposition by the Full Bench, of the principle of spiritual benefit; accordingly it has been held that the father's brother's daughter's son is entitled to succeed in preference to the mother's brother's son: *Braja* v *Jiban* 26 C.S., 285.

The order of succession amongst the maternal relations who come within the *sapinda* relationship expounded by Justice D. N. Mitter is in the order in which I have numbered them in

the genealogical tree, *supra* p. 41. It must be exactly similar to the order amongst the three paternal ancestors and their descendants, excepting this that the three maternal female ancestors are not recognized as heirs.

The question whether the eight daughter's sons and the maternal relations other than the maternal grandfather and his three descendants, should be preferred to the *Sakulyas* has not, as I have already said, actually been judicially discussed and decided by the High Court in any case.

In the case of *Kasinath Roy*, 24 W.R., 229, in which there was a competition between the brother's son's son's son and the brother's son's daughter's son, the former who is a *sakulya*, was preferred to the latter who is a *sapinda* according to Justice D. N. Mitter's exposition of the principle and the order of succession. The learned judges could not accept the view that a cognate should take to the exclusion of an agnate of an equal degree.

The correctness of this decision was called in question in the case of *Digumber* v. *Motilal* 9 C. S., 563, in which the competition was between the brother's daughter's son and the great-great-great-grandfather's great-great-great-grandson; and the question was referred to a Full Bench for their consideration. But this Full Bench refused to judicially decide the point, as the learned judges thought themselves bound by the decision of the first Full Bench, although the judges thereof were not called upon to decide the point, as it was not at all referred to them.

Thus has arisen an unsatisfactory and abnormal state of the law, in which certain maternal relations whose very existence may be unknown to the deceased proprietor, would become his heirs in preference to the *Sakulyas* living, it may be, in the same house with him, and regarded by him as near relations.

It may be asked does a Hindu in the ordinary state of things, know even the existence of the daughter's son, of the son and the grandson of the maternal great-grandfather or great-great-grandfather, or even of the son and the grandson of the maternal grandfather? The answer is obvious. Any one acquainted with the customs, manners and habits of the Hindus, and pausing to think about the matter, cannot but wonder how these daughter's sons could be preferred to *Sakulya* relations who have to observe mourning at the death of the deceased proprietor for the same period as his own son.

The question is one which ought to be judicially considered, and the law enunciated according to the true construction of the Bengal commentaries, by a Full Court of all the judges; and there is a precedent for this course. If, however, the High Court

be not disposed to reconsider and overrule the Full Bench decisions, the Legislature ought to be moved to codify the law consistently with the feelings of the Hindus of Bengal, in consultation with the learned Pandits and some English-educated Hindu lawyers.

Some explanations.—The male issue take *per stirpes*; and as regards them, the right of representation obtains down to the third degree.

But the sons of different daughters, as well as all collateral relations of equal degree take *per capita*, nor is in their case the right of representation.

A relation claiming to be an heir must be in existence, at the time when the succession opens: subsequent birth of a nearer heir cannot have the effect of divesting the estate already vested in a more distant heir: *Kalidas* v. *Krishan*, 2 B. L. R., (F. B.), 103.

The nature and incidents of the estate taken by the female heirs in the property inherited by them from their male relations, shall be discussed in detail, later on.

The preference based upon whole blood when two relations are in other respects equal, appears to apply to all collateral relations according to the Dáyabhága. But as the doctrine of spiritual benefit is deemed in modern decisions to be the sole criterion for deciding every question relating to inheritance in the Bengal School, it has accordingly been held (11 C. S. 69) that a half-sister's son is entitled to inherit together with a full-sister's son, there being no difference in the amount of spiritual benefit conferred by them respectively. But see Srikrishna's Recapitulation *supra* p. 226-7, showing that relations of the whole-blood should be preferred—a proposition based upon express texts of the Smriti;—D.B., xi., v, 10, see *supra* p. 204, and D.T., xi, § 63. Upon the authority of this decision, the preference on this ground is to be confined to the nine collaterals among the first class Dáyabhága *sapindas*, namely, a brother, an uncle, and a granduncle and their descendants; it will not apply to any other relations.

Re-union after separation is another cause for preference. This subject has already been dealt with in Ch. vii, pp. 207-208.

The effect of the operation of these two grounds of preference in the cases of brothers, nephews and uncles is as follows:—A re-united brother or nephew or uncle, of the half-blood, respectively, succeeds together with a brother or a nephew or an uncle, of the whole-blood, if the latter is not re-united: the ground of one's being a relation of the whole-blood, is counterbalanced by that of the other's being re-united.

But the preference has been extended by the case-law to sons of re-united co-parceners, see *supra* p. 208.

The inheritance of the preceptor, a pupil and a fellow-student has under the altered state of society become almost a thing of the past. Do not, however, think that we may become heirs to each other; nor that the *Díksha Guru* can come under the term 'preceptor.'

The relation between the preceptor and a pupil was a very strong one in old times, when a pupil had to live with the preceptor as a member of his family, and to procure the maintenance of himself and his preceptor by begging alms, a practice now found in Burma, which is calculated to drive out all vanity and conceit from the minds of boys.

Examination of the Principle of Spiritual Benefit.

At one time it was thought that the doctrine of spiritual benefit is the key to the Hindu law of inheritance. It is now, however, admitted on all hands that the doctrine has nothing whatever to do with the *Mitákshará* law of inheritance. But you must not think that the *Mitákshará* is silent about the *sráddha* ceremonies forming the foundation of the doctrine. On the contrary you will find in the Áchára-kánda a minute and exhaustive description of the various matters concerning those ceremonies. But the author of that treatise does not even allude to those ceremonies while dealing with inheritance, so as to imply any sequence between the two. There are, however, a few passages in that part, implying rather the converse of what is understood by the doctrine of spiritual benefit: in other words, relations that become heirs are required to perform the exequial ceremonies of the deceased; but they are not held to become heirs because they confer spiritual benefits.

By the expression "exequial ceremonies" I mean the sixteen *sráddhas* ending with the *Sapindíkaran* ceremony. These are the most important ceremonies, but only one of them is (*supra* p. 230) regularly performed by every Hindu that has not openly renounced Hinduism. The last ceremony has, as I have already said, the effect of uniting the deceased with his departed *paternal* ancestors in the next world. But for this, his spirit would have roved over the earth, in something like solitary confinement. These ceremonies are required to be performed by relations male or female in a specified order, the next in order being competent to perform in default of the first. Some of these relations, however, are not in the category of heirs, see *supra* p. 231.

The author of the Dáyabhága deals with the order of succession in the eleventh chapter of that treatise. In laying down the order he professes to interpret certain texts of the sages, which

set forth the order to some extent by *naming* the relations, and then end with generic terms; and he refers to the capacity for conducing to the spiritual benefit of the deceased as *one* of the many reasons in support of his exposition of those texts.

The author does not, however, allude to the above-mentioned sixteen *sráddhas* or to the *ekoddista sráddha*, in considering the capacity of a relation to confer spiritual benefit. He confines his attention to the *párvana sráddhas* alone for that purpose. I have already said that these ceremonies are regularly performed by none: and although the unwillingness of the people to regularly perform the ceremonies, has given rise to the rule, that these may be performed once for a year, and a day named *mahálayá* is set apart for that purpose, still very few Hindus of the present day observe these ceremonies. This omission is rather to be regretted and is due mainly to the ignorance of the people in general as to what is meant by the ceremonial conducted in Sanskrit. They are calculated to exercise a very salutary influence on the human mind, by forcing on it the idea of the vanity of the world, like a walk in a cemetery.

You will be in a position to clearly understand the doctrine of spiritual benefit if you examine how the author of the Dáyabhága makes use of that theory. The following is a summary of the references in the Dáyabhága to this principle:—

1. A grandson by a predeceased son, and a great-grandson whose father and grandfather are both dead, inherit together with a son. The reason assigned is, that these three confer equal amount of spiritual benefits by performing the *párvana sráddha*, ch. iii, s. i., 18.

A grandson whose father is alive cannot perform the *párvana*, so he cannot take, ch. iii, s. i., 19. Potential capacity is here disregarded.

You will remark that a son offers three oblations, a grandson two, and a great-grandson one, but this difference in the number of oblations is taken to be of no effect. It is also to be noticed that when they confer equal amount of spiritual benefit, why do they not take *per capita*, if this doctrine be the sole criterion of inheritance?

2. Widow succeeds to the state of the *sonless* husband, by virtue of express texts. Conflicting texts are referred to. They are reconciled by holding that the contrary texts do not intend to lay down the order of succession but to enumerate the heirs. You will bear in mind that from these texts the author of the *Mitákshará* deduces three different modes of devolution.

The author of the Dáyabhága in ch. xi, s. i., 31—44 invokes the aid of the doctrine of spritual benefit in support of his

conclusion in favor of the widow's succession. He explains the term 'sonless' to mean, destitute of son, grandson and great-grandson, on the ground of spiritual benefit. This latter position is again supported by an exposition of the *sapinda* relationship, according to which the first class *sapindas* only may come under that term. He further states that next to the male issue the widow may confer spiritual benefits by practising austerities; and adds that she might cause her husband to fall to the lower region by leading a vicious course of life for want of wealth.

The widow cannot perform the *párvana sráddha.*

3. Daughter's succession is based upon express texts. She herself cannot confer any spiritual benefit, but her son may do so. The daughters that are sonless and not likely to have sons are excluded.

The maiden daughter is preferred to others; as her marriage is requisite for the spiritual welfare of her departed paternal ancestors, who would otherwise fall to a region of torment. But there is an express text for this preference.

If the spiritual benefit derived from *sráddhas* were the only criterion, the daughter's son ought to have been held preferable to both maiden and married daughters.

4. Daughter's son. There are express texts in favor of his succession There are also texts to the effect that he confers peculiar spiritual benefit like the son's son. These texts, however, really refer to the appointed daughter's son, *i.e.*, a kind of adopted son.

5. Father's succession is based upon express texts. He is postponed to the daughter's son, because he offers two oblations and the daughter's son three.

You will observe that in this instance the potential capacity alone is looked to. The daughter's son may not actually present any oblation at all. For if his father be alive he is not competent to perform the *párvana sráddha*, and if he predecease his father he can bestow no spiritual benefit at all by offering oblations. The daughter's son's son does not offer any oblation.

You will bear in mind that the *párvana sráddha* is not separately performed in honour of the maternal ancestors. It is a ceremony in honour of the paternal ancestors alone. When it is performed, then the maternal ancestors also are worshipped, but not in all cases.

According to the doctrine of spiritual benefit, the father and the paternal uncle ought to have succeeded together, as both of them offer two oblations.

6. Mother's right is based upon express texts. Reasons for preferring her to a brother are, gratitude in return for secular

benefits received,—a new factor, and her capacity to confer spiritual benefits by giving birth to sons.

She can inherit when a widow and, if she has no male issue, then she cannot even indirectly confer any spiritual benefit.

In strict accordance with the doctrine of spiritual benefit, as understood by the Full Bench, she ought to have been postponed to many others.

7. Brother's succession after the parents is expressly mentioned in texts. There is an express text for the preference of whole blood. An additional reason assigned is that the full brother offers oblations to the deceased's own mother to whom he was bound to present oblations in the *párvana srádha*, whereas the half brother offers to his own mother and not to the mother of the deceased.

Following the spiritual benefit theory strictly, a re-united half brother could not be held to succeed jointly with a full brother not re-united. Nor could re-union be taken to give preference in other cases.

The oblation presented to the mother is a new factor.

The full brother offers, therefore, six undivided oblations, or rather nine: three to paternal male ancestors; three to the mother, the paternal grandmother and great-grandmother; and three to the maternal ancestors. Still, he is postponed to the father who offers only four, and to the daughter's son who offers only three.

8. After the brother comes the brother's son under express texts. He offers two oblations. A full brother's son offers two more oblations to two female ancestors while a half brother's son presents only one such oblation to the deceased's paternal grandmother. This is set forth as an additional reason for the preference of the former.

Thus far, the order of succession is the same as under the Mitákshará, with the slight difference as to the order between the parents and the inheritance of barren and childless widowed daughters.

9. Then comes the brother's grandson; he is not expressly named but is included under the term *gotraja*. He offers one oblation.

The brother's son and grandson are preferred to the paternal uncle who offers two oblations in as much as they present oblations to the father who is to be principally considered.

The brother's great-grandson being the fifth in descent, offers no undivided oblation and therefore cannot take now.

10. The sister's son comes in next. He presents three oblations.

11. Then the author of the Dáyabhága lays down generally that the grandfather's and great-grandfather's descendants, inclusive of their daughter's son, will take in the same way as the father's descendants.

The reasons assigned for the succession, in the above order, of the sons of daughters of the three paternal ascendants are that, they ought to take in the proximity of offering oblations and that they are included under the term *gotraja* in the text of Yájnavalkya.

The word *gotraja* is taken in the Mitákshará in the sense of *sagotra* or agnatic relation. The author of the Dáyabhága takes it in its literal sense, namely, descended from the *gotra*. In this sense the sons of daughters born in the family may be called *gotrajas*.

12. Then the author says that, in default of the great-grandfather's descendants, including his daughter's son who offer oblations enjoyed by the deceased, the maternal uncle and the like succeed; because Yájnavalkya includes them under the term *bandhu*, and because they confer spiritual benefits upon the deceased by performing a duty which the deceased was bound to perform, namely, by presenting oblations to their own paternal ancestors who are the maternal ancestors of the deceased.

He says that the uses of wealth are two, enjoyment and charity. When it cannot conduce to the enjoyment of the deceased, it ought to be appropriated to charitable purposes such as are calculated to confer spiritual benefit upon the deceased. He adds that the taking of the wealth by the maternal uncle and the like furnishes them with the means of presenting oblations to the maternal ancestors to whom the deceased was bound to *give* oblations; and the deceased is benefitted by *gifts* of oblations to maternal ancestors by the maternal uncle and the like.

In ch. xi, s. vi, paras., 12–20 and 28–33, there is a lengthy discussion on this subject. The real difficulty of the author, and the way in which he meets the same, will be better understood, if attention be paid to the following two texts, one of Yájnavalkya and the other of Manu.

(1) The widow and the daughters also, both parents, brothers likewise, their sons, the gentiles (*gotrajas*), the cognates (*bandhus*), a pupil and a fellow-student: in default of the first among these the next in order is the heir.—*Yájnavalkya* (p. 49).

(2) To three must libations of water be made; for three is the offering of funeral cake ordained: the fourth is the giver of the same; the fifth has no concern in them. To the nearest *sapinda* the inheritance next belongs. After these the *sakulyas* or gentiles, the preceptor or the pupil.—*Manu* (p. 16).

You will see that, according to the plain meaning of the text of Yájnavalkya, the cognates or *bandhus* can be heirs only in default of the gentiles. And this is the real difficulty in the way of the introduction of the maternal uncle and the rest before the *sakulyas* or gentiles.

The expedient hit upon by the author of the Dáyabhága is this. Manu does not name the cognates in the category of heirs. But there is a maxim that no code of law can be accepted if contrary to Manu. Therefore, in order that *bandhus* who are mentioned by Yájnavalkya may become heirs, we must hold that Manu also has mentioned them by implication. And the text—"To three must libations, &c.,"—is taken by the author to include the cognates by implication. Agreeably to this view, the cognates come first in Manu's text and then the *sakulyas*. The author means to say that, neither the enumeration thus obtained nor the enumeration by Yájnavalkya of gentiles and cognates one after the other, does indicate the order of succession. But the order is to be determined by the text "To the nearest *sapinda* the inheritance next belongs." The term 'nearest *sapinda*' is interpreted by the author to mean the greatest-spiritual-benefit-giver.

According to the author of the Dáyabhága, the cognates to whom he has given a position before the *sakulyas* confer a greater amount of spiritual benefit than the latter.

They are the daughter's son, sister's son, father's sister's son and grandfather's sister's son, as well as the maternal uncle and the like.

The term 'maternal uncle and the like' has been explained by Srikrishna and Raghunandana to mean the maternal grandfather, the maternal uncle, his son and grandson. The expression *traipurushika-pinda*, used by the author of the Dáyabhága in the course of the argument and the principle of reciprocity, may have influenced this explanation.

13. The *sakulyas* come after the maternal uncle and the like. There are express texts for their succession. They also confer spiritual benefit by offering *pinda-lepas* either to the deceased himself or to those to whom the deceased was bound to offer such oblations.

The doctrine of spiritual benefit is not referred to in dealing with the succession of the *samánodakas* and the rest.

14. After having completed the order of succession, by way of explaining the texts cited, the author does, in paras. 22-33, again return to the discussion of the right of the cognates to whom he has given a preferable position in the order of succession; for therein he principally differs from the Mitákshará. He

argues that the *order* of succession laid down by him, agreeably to the theory of spiritual benefit, is the proper one : xi, 6, 30.

Then he concludes by saying that, even if the learned be not satisfied that the *doctrine* is deducible from the texts of Manu, still the *order* of succession as laid down by him is supported by them.

Srikrishna's comments on the above are that, according to the doctrine of spiritual benefit, strangers might come in as heirs; for, any person, by throwing into the waters of the Ganges the ashes of the deceased's body after cremation, may confer upon the deceased an inestimable amount of spiritual benefit. This difficulty induced the author to make the last mentioned remark.

15. I have already said that the order of succession amongst the paternal grandfather's and great-grandfather's descendants is not laid down *in extenso* by the author of the Dáyabhága. But Raghunandana and Srikrishna place them in the following order,—grandfather, grandmother, uncle, uncle's son, uncle's grandson, father's sister's son, great-grandfather, great-grandmother, granduncle, his son, grandson and grandfather's sister's son,—following the analogy of the order in which the parents and their descendants take. And this is indicated by Jímútaváhana in ch. xi, sect. iv, paras. 4–6.

This order is not consistent with the oblation theory. But nevertheless this order is laid down by the author of the Dáyabhága.

Upon a review of the above references to the capacity for conferring spiritual benefit, it is very difficult to see how a clear and consistent principle can be deduced from them; or, how it may be said that it is the key to the law of inheritance. The other heirs after the *sakulyas* do not confer any spiritual benefit. As to libations of water, they are offered by strangers as well as by relations; nor is any authority cited supporting the rendering of the term *samánodakas* into those connected by libations of water.

It has, however, been asserted that the whole of Chapter XI of the Dáyabhága is nothing but a mere elaboration of the doctrine of spiritual benefit. But with the greatest deference to those that take this view, I say that I fail to see how such a conclusion can be come to, on a perusal of that chapter. The object of the author appears, beyond the shadow of a doubt, to have been to lay down a particular *order* of succession and to invoke the aid of that doctrine merely to fortify his positions. That doctrine itself has nowhere been fully and completely explained nor independently dealt with; but it has only been, in a subordinate manner, referred to in the course of the arguments put forward in support of his positions.

And it may very fairly be doubted whether the induction of the doctrine of spiritual benefit and the generalizations made by the Full Bench in *Gurugovinda Shaha Mundul's* case are correct, when these are admittedly inconsistent with the order of succession specified by the author of the Dáyabhága. And I may repeat that I have not been able to find anything in that work from which the relative amount of spiritual benefits conferred by two relations can be ascertained in a case in which we have not the opinion of the author himself, reading, of course, the work in the way in which the Privy Council says it should be read:— "but even if the words were more open to such a construction than they appear to be, their Lordships are of opinion that what they have to consider is not so much what inference can be drawn from the words of Catyáyana's text taken by itself, as what are the conclusions which the author of the Dáyabhága has himself drawn from them." (5 C. S. 776).

The doctrine appears, as I have already said, to have been introduced by the author of the Dáyabhága as a mere pretext for assigning in the order of succession a higher position to some dear and near cognates who, under the Mitákshará, are all postponed even to the most distant agnates,—a pretext similar to that under which the Prætor Urbanus of Rome recognized the heritable rights of cognates.

Too much appears to be made of this doctrine for the sole object of recognizing the heritable right of the remaining cognates about whose position in the order the author of the Dáyabhága is silent and of giving them a position preferable to distant agnates.

As to the cognates other than those named by all the authorities of the Bengal School as heirs before the *Sakulyas*, their order is, no doubt, not mentioned in the Dáyabhága. But that does not show any intention to exclude them unless the enumeration of heirs in that treatise be held to be exhaustive.

Two questions arise with reference to this point: (1) How is their inclusion to be reconciled with their omission in the enumeration of order? (2) Where are they to be placed?

Before proceeding to consider these questions, it ought to be mentioned that by the term cognate I mean to include all those that are included under the term *bandhu* in the Mitákshará. They are divisible into those that confer spiritual benefits and those that do not.

The Full Bench decision in *Guru Govinda Shaha Mandal's* case is silent as to the second class; and the first class are held to be included in the category of heirs by the principle of spiritual benefit.

Now, the term *bandhu* occurs in the text of Yájnavalkya, laying down the order of succession. That text has been cited by the author of the Dáyabhága as an authoritative one while opening the subject of succession, ch. xi, sect. i., 4, and its authority has been invoked throughout the chapter. Maternal uncle and the like are said by the author to come under this term *bandhu*. But no explanation of the term has been given so as to enable us to understand who else are included by that term. The term *bandhu* has been explained in the Mitákshará, a work of the highest authority in all the schools not excepting Bengal where however it yields to the Dáyabhága, on points in which they differ. But, when the Dáyabhága is silent, the Mitákshará is to be consulted in the Bengal School as well. This has been laid down by the Privy Council at least in two cases; (see p. 15 and the Unchastity case). Hence all relations that are *bandhus* under the Mitákshará are also heirs in Bengal. With this difference that the sister's son, the father's sister's son and the like who are descended from agnatic relations are included, by the author of the Dáyabhága, under the term *gotraja*.

The enumeration of the distant heirs was not the object of the author of the Dáyabhága. It is rather given by way of digression from the subject he was considering. He was contending for the higher position of certain cognates; and, in doing so, he cited certain texts bearing upon the order of succession; and, as a commentator, he offered parenthetically his explanations of the same and then returned to his subject with which he concluded. It would, therefore, appear that he intended to leave the distant succession in the same state in which it was in the Mitákshará. This view is supported by Raghunandana who introduces the cognates again after the agnates.

As to the precise position, there would be no difficulty whatever if the rule contained in the Mitákshará and the Dáyatattva be followed. But this would be opposed to our present sense of natural justice. The expression natural justice means, if it means anything definite, the speaker's sense of what ought to be.

The question has, in several cases, arisen before the High Court with reference to the eight relations beginning with the son's daughter's son, four of whom may offer two oblations and the rest one oblation, to be partaken of by the deceased.

I have already told you that it is now settled by the High Court that these relations cannot be placed before the great-grandfather's daughter's son.

The contention therefore must now be confined to this position that, they are entitled to take before the relations on the maternal side and before the *sakulyas*.

Their position before the maternal side is in direct opposition to what the author of the Dáyabhága expressly says. The author has laid down that the maternal uncle and the like are to succeed after the great-grandfather's daughter's son. When the author of the Dáyabhága says so, we are bound to conclude that, after the great-grandfather's daughter's son, the maternal uncle and the like confer the greatest amount of spiritual benefit, admitting that to be the sole criterion of inheritance. Both these sets of relations confer spiritual benefit; and we have no reason to assume, in the face of what is said by the author, that the maternal uncle and the like confer a lesser amount of benefit. There is nothing in the Dáyabhága from which, directly or by implication, such a conclusion can be deduced. See ch. xi, s. vi, para. 20.

Besides, there is no other ground for preferring the brother's daughter's son or the nephew's daughter's son to the mother's brother.

A plausible argument, however, may be raised in favour of the succession of the eight relations before the *sakulyas*, but there is not an iota of reason for placing them before the maternal uncle and the like.

The competition between a maternal uncle or the like on the one hand, and any one of the above eight relations on the other, has not yet arisen in any case.

The next point for consideration is whether those eight relations and the maternal relations other than those specified above,—who are *sapindas* according to the Full Bench,—are to be preferred to *sakulyas*.

It is contended that the three classes of *sapindas* must, according to the doctrine of spiritual benefit, be held to come before the *sakulyas*. The former are assumed to confer a greater amount of spiritual benefit than the latter.

Let me once more draw your attention to the ceremony of *párvana sráddha*, the foundation of the doctrine. A person does, according to that ceremony, present three oblations to his father, paternal grandfather and great-grandfather; three to his mother, paternal grandmother and paternal great-grandmother; three to his three maternal *male* grandsires; and three *pinda-lepas* or divided oblations to his 4th, 5th and 6th paternal male ancestors in the male line. And, by so doing, he confers spiritual benefits on them. Hence a person is bound to confer spiritual benefits on his six paternal male ancestors, on his three paternal female ancestors and on his *three* maternal *male* ancestors. Those that confer spiritual benefits on these ancestors of a person are held to confer spiritual benefits upon him. A person, after his death, partakes of undivided oblations presented to those

ancestors with whom he is united by the *sapindí karana* ceremony. Such ancestors must be his three *sagotra* male ancestors *i.e.*, his father, paternal grandfather and great-grandfather. While dealing with the *sapinda* relationship, I have pointed out to you that such ancestors are not necessarily his three immediate ascendants, but may consist of his 4th and 5th ascendants, under certain circumstances. The paternal great-grandfather may be considered to offer *pindas* enjoyed by the deceased agreeably to the foregoing rule; and the deceased becomes actually the *sapinda* of the 4th and even of the 5th ancestor.

Spiritual benefit is, therefore, conferred in two ways: (1) by offering an undivided oblation to the deceased himself or to those with whom he partakes of undivided oblations; (2) by conferring spiritual benefit upon those on whom the deceased was bound to confer spiritual benefit and upon the deceased, by offering divided oblations.

A person conferring spiritual benefit in the first way is *assumed* to confer a greater amount of spiritual benefit than all relations conferring such benefits in the second way. It is further *assumed* that no *sakulyas* can confer spiritual benefit in the first way.

There is nothing in the Dáyabhága, expressly or impliedly, supporting the first assumption. On the contrary, the position assigned to the maternal uncle and the like, just after the great-grandfather's daughter's son, negatives such an idea. As to the second, suppose a man dies during the lifetime of his father, then he is united by the *sapindíkaran* ceremony with his paternal grandfather, great-grandfather and *great-great-grandfather*, and suppose the last to have a great-grandson living; then this great-grandson offers an undivided oblation to the *great-great-grandfather*, and this oblation is participated in by the deceased. The second assumption too proves to be incorrect.

The author of the Dáyabhága does nowhere lay down as a general rule that the amount of spiritual benefit varies directly as the number of oblations, or that an oblation enjoyed by him is more valuable than oblations offered to ancestors to whom he was bound to present oblations, or that undivided oblations are of greater value than divided ones.

There is, however, only one sentence, used by the author of the Dáyabhága in the course of an argument, that does apparently seem to support the last of the three propositions mentioned above: and that is the slender basis upon which an argument may be based for the exclusion of the *sakulyas* by the three classes of *sapindas*. See ch. xi, s. vi, 17. But that is not his conclusion; had it been so, it would not still have supported the above position in its entirety.

His conclusion or rather the re-statement of his position, set forth in paragraph 12, is contained in paragraph 20; paragraphs 13-19 contain his argument for that position, which is summarised in paragraph 19; and it is that, the cognates that offer *trai-purushik pinda* are to be preferred to the *sakulyas*. Everything therefore hinges on the meaning of the expression *trai-purushik pinda* or *pinda* offered to three *purushas* on the paternal or maternal side. Now, so far as I am aware of, the term *purusha* is used in Sanskrit law-books to denote an ancestor; and where a numeral is prefixed to the term, such as in the phrase 'three *purushas*' or 'seven *purushas*,' the person with reference to whom the expression is used is taken as one of the three or seven. A brother or a son cannot be deemed a *purusha* of a person. Now, if this is correct, then a person may be said to offer *trai-purushik pinda*, if he offer three *pindas* to the deceased and his two ancestors, or to his three ancestors only.

Now a brother's daughter's son can by no means be held to offer *trai-purushika pinda*. The brother's daughter's son offers one *pinda* to the brother, another to the father and a third to the grandfather; so he offers *dvai-purushik pinda* or *pindas* to two ancestors only, namely, the father and the grandfather of the deceased. Similarly, the son's daughter's son offers to the deceased and his father only. You must bear in mind that these daughter's sons offer no *pinda-lepa* or divided oblations to their remoter maternal ancestors.

It may be objected that how may then the maternal uncle's son be said to offer *trai-purushik pinda;* he offers one oblation to the maternal uncle, another to the maternal grandfather and a third to the maternal great-grandfather; so he offers to two ancestors only. This objection may be obviated by the circumstance that he offers *pinda-lepas* to his remoter ancestors, and so he may be taken to offer *trai-purushik pinda*. This view is supported by what is said by the author in another place. Besides, the maternal uncle and his two descendants confer by their very birth inestimable benefit on the three maternal ancestors of the deceased on whom he was bound to confer spiritual benefit.

But still another objection arises, namely, how can the maternal grandfather be said to present *trai-purushik pinda?* He offers *pindas* to his three ancestors who are also the ancestors of the deceased, although the deceased was not bound to confer spiritual benefit upon the third ancestor of his maternal grandfather. But it should be noticed that the author does not mention the maternal grandfather by name, the expression used by the author of the Dáyabhága is, 'maternal uncle and the like.' Raghunandana places him before the maternal uncle, following

the analogy of the father's succession before the brother. The reason seems to be that the maternal uncle and the like can confer no spiritual benefit so long as the maternal grandfather is alive; the maternal grandfather is nearer than his descendants; and the wealth taken by him will ultimately enure for the benefit of his descendants. The truth is that, capacity for spiritual benefit is only a mere pretext and has already been shown to be not consistent.

The traditional interpretation of the Dáyabhága supports the above exposition of the expression '*trai-purushik pinda.*' The only cognates, to whom the author of the Dáyabhága was all along understood to assign a higher position, were the daughter's son, the sister's son, the father's sister's son, the grandfather's sister's son, the maternal grandfather, the maternal uncle, his son, and his grandson. If the intention of the author were to include also the brother's daughter's son and the rest, he would have named at least one of them, while there were so many occasions for doing it in the course of the arguments.

As to the eight relations, namely, the sons of daughters born in the family, you will observe that their capacity for conferring spiritual benefits may be merely potential; and, even when it is actual, it ceases with their own existence: they can leave no descendant that can conduce to any kind of spiritual benefit of the deceased. There is no reason why the duration of the capacity should not be taken as a factor in calculating the amount of benefit. With respect to this point, the *sakulyas* are superior to these eight relations. With regard to the sons of the daughter of the *propositus* and of his three ascendants, there is an express text laying down that a daughter's son like a son's son confers peculiar benefit on his maternal grandfather from the moment of his birth. So, these latter are in a different position. But the above factor may have influenced the author of the Dáyabhága in laying down, as he has done in one passage, that even the daughter's son is entitled to a life-interest in the estate inherited from his maternal grandfather: ch. xi, sect. ii, para. 31. You must not, however, mistake this for the law on the subject; because, the author having laid down that, goes on to say, 'or the female heirs will take a life-interest.' Our Courts have given effect to the latter alternative only. The daughter's son is now held to acquire an absolute title.

The position of all the second and third class *sapindas* before the *sakulyas* would be most anomalous.

Suppose A and B are two brothers, B dies leaving a son's son's son *x* and a daughter's son *y* or a son's daughter's son *z*; then A dies leaving no other heir but B's descendants. If the

above order were to be accepted, then B's estate will descend to *x* to the exclusion of *y* or *z*; but the estate of his brother A will go to *y* or *z* to the exclusion of *x*.

I have explained to you how some of the *sakulyas* may come under the term *sapinda*. So, the above order would be opposed to this. Besides, the benefits conferred upon the 4th, 5th, and 6th ancestors must, at least in one case, be taken to be superior. The paternal great-grandfather is a preferable heir, but he offers oblations to those ancestors only.

The grandson's, the nephew's, the uncle's son's, and the grand-uncle's, daughter's sons are equal in degree respectively to their son's sons. But the former are *sapindas* and the latter *sakulyas*. Similarly, the maternal great-great-grandfather and his descendants are equal in degree to the paternal great-great-grandfather and his descendants. But the former are *sapindas* and the latter *sakulyas*. We shall have to prefer cognates to agnates of the same degree. It ought to be remarked that the maternal great-great-grandfather cannot confer any spiritual benefit whatever.

When there is a competition between two relations equal in degree, one of whom is a cognate and the other an agnate, to prefer the cognate to the agnate would be oppposed to every system of jurisprudence. Comparative jurisprudence tells us that the cognates were not originally recognised as heirs at all; their claims were admitted as society advanced; at first they had assigned to them the lowest position, which continued to become higher with the progress of civilization; and the last stage of development was the abolition of all distinctions between the agnates and the cognates. Look to the Roman law and its successive stages of development, to the two schools of Mahomedan law, to the Mitákshará law in force in every part of Hindustán except in Bengal proper, as well as to the Dáyabhága law so far as it appears to be settled; and you will be convinced of the truth of what is said above. According to the Sunni School of the Mahomedan law, still followed by the greater portion of the Mahomedan community, even the daughter's son is postponed to the most distant agnate. And we fail to find anything peculiar to the Hindus of Bengal to account for the abnormal preference of the above-mentioned cognates, such as would result from the view taken by some, of the oblation theory.

The Hindu law of inheritance, as it is, may not in many respects commend itself to Europeans, who are so advanced in civilization. Some of the educated natives also may feel it to be contrary to natural justice, and we too may endorse the same view. But nothing will be farther from truth than to mistake our own individual feelings for those of the Hindu

community at large. Most of what we call natural, originate in acquired habits of thought. The feelings of a people are moulded and shaped by its peculiar manners, customs and institutions. What is suited to the feelings of an imaginative people may be perfectly unsuitable to an objective race. What is suitable to an agricultural or pastoral nation may be altogether unsuited to a commercial people. What is agreeable to a community in its infancy may be quite disagreeable to it in a later stage of development. In the infancy of a society when the government could not be strong, and the protection of life and property depended more upon the exertions of the members themselves, people are observed to live in groups. Persons connected by natural ties of birth continue to live together: and we find society composed of families. Society has been continuing in this stage longer in India than in any other country. Ritual and social rules, laid down upwards of three thousand years ago, are in most respects observed strictly to the present day. They again re-act upon the feelings of the people. Look to our marriage law. In order to preserve peace in families, it was ruled that two persons of either sex, born in the same family cannot intermarry. This rule has the force of law even now, and no man of the twice-born classes can marry a girl of the same *gotra*, although their common ancestor may be distant by more than a hundred generations. The Hindus are an agricultural people adhering to their ancestral homes and fields, and guided by their ancient customs and usages. Daughters born in the family pass by marriage to strange families which, oftener than not, reside in different and distant villages. The feelings of two families allied by marriage are often very far from being amicable towards each other. Persons having grandsons by daughters are found to adopt sons. Seldom does a daughter come back to see her relations, and even when she comes, she is allowed but a few days to remain with them. She and her children, being thus out of sight, become out of mind; nor can fathers have any power over their married daughters and their children who live separate from them. While the agnate relations live together in the same village assisting and sympathizing with each other on joyous as well as on mournful occasions. How strong is the tie that binds the agnatic relations together, and how complete is the estrangement between cognates, will appear in a glaring light if you look to the rules of mourning. A man shall have to observe the same period of mourning on the death of an agnatic relation, male or female, who may be on the extreme verge of *sapinda* relationship extending to seven degrees, as he has to observe on the death of

his own father; whereas a brother's daughter's son or a son's daughter's son is not required to observe the same even for a day. There are many and various other circumstances in our society and families, to account for the preference given by Hindu Law to agnates. But things which present themselves often to us, are the very things which we least observe.

The feelings of the majority of the Hindus of Bengal seem to be against the introduction before the *sakulyas*, of the second and the third classes of *sapindas*, other than those who are admitted on all hands to have a preferable position under the Dáyabhága, and who, in a later stage, under altered circumstances, have been thought so nearer and dearer in the estimation of the Hindus of Bengal.

The law of inheritance can, by no means, be so framed as to suit the feelings of all persons of a community. It is therefore supplemented in every civilized country by the law of testamentary succession. The people of the Lower Provinces of Bengal have now the power of devising their property by will. Those who think the law of inheritance to be unsuited to their feelings, therefore, are no longer fettered by its rules.

Inheritance is so important a branch of law, that it ought to be placed beyond the possibility of any doubt or dispute. It ought to be as simple and clear as possible. Anything ought to be deprecated that is calculated to throw any cloud upon the same.

CHAPTER X.

EXCLUSION FROM INHERITANCE, AND DIVESTING.

ORIGINAL TEXTS.

१। सर्वे हि धर्म्मयुक्ता भागिनो द्रव्यम् अर्हन्ति, यस्त्वधर्म्मेण द्रव्याणि प्रतिपादयति, ज्येष्ठोऽपि तम् अभागं कुर्व्वीत। तथा अपपात्रितस्य ऋक्थपिण्डोदकानि निवर्त्तन्ते। आपस्तम्बः।

1. All co-heirs, who are endued with religion, are entitled to the property; but he, who dissipates wealth by his vices, should be debarred from participation, even though he be the first born. So of one who has been excommunicated, the heritable right and connection through oblations of food and libations of water become extinct.—Apastamba.

२। शास्त्रशौर्य्यार्थरहित-ज्ञपोविज्ञानवर्ज्जितः।

आचारहीनः पुत्रस्तु मूत्रोचार-समस्तु सः॥ बृहस्पतिः।

2. A son who is devoid of Sástras, prowess and good purposes, who is destitute of devotion and knowledge, and who is wanting in conduct, is similar to urine and excrement.—Vrihaspati.

३। सर्व्व एव विकर्म्मस्था नार्हन्ति भ्रातरो धनं। मनुः, ९, २१४।

3. All those brothers, who are addicted to vice, lose their title to the inheritance.—Manu ix, 214.

४। (अर्हति स्त्री) न दायं निरिन्द्रिया अदायाश्च स्त्रियो मता इति श्रुतेः। बौधायनः।

4. A woman is not entitled to the heritage; for, a text of the Revelation says, Females are devoid of prowess and incompetent to inherit.—Baudháyana.

५। अनंशौ क्लीवपतितौ जात्यन्धबधिरौ तथा।

उन्मत्त-जड़मूकाश्च ये च केचिन् निरिन्द्रियाः॥ मनुः,९ २०१।

5. An impotent person and an outcast are excluded from a share of the heritage, and so are those deaf-and-blind-from-birth,

as well as madmen-idiots-and-the-dumb and any others that are devoid of an organ of sense or action.—Manu, ix, 201.

The words connected by hyphens are compound words in the original. Organs of action are five, namely, organ of speech, both hands, both feet, excretory organs, and generative organs; organs of sense are also five, namely, eyes or the organ of sight, ears or the organ of hearing, nose or the organ of smell, palate or the organ of taste, and skin or the organ of touch. These are called the *external* organs of sense; for, an *internal* organ of sense is admitted, and is named *manas* (=mind) which is the necessary channel of communication between the external organs of sense and the soul, and which accounts for the absence of simultaneous perception of the sensations on the five external organs, in as much as it is supposed to be atomic in size and incapable of conveying more than one sensation at the same time.

६। पितृद्विट् पतितः षण्ढो यश्च स्याद् औपपातिकः।
औरसा अपि नैतेऽंशं लभेरन् क्षेत्रजाः कुतः॥ नारदः, १३, २१।

6. An enemy to his father, an outcast, an impotent person, and one who is addicted to vice (or excommunicated) take no shares of the inheritance even though they be legitimate: much less, if they be sons of the wife by a man appointed to raise issue on her.—Nárada, xiii, 21.

७। मृते पितरि न क्लीव-कुष्ठ्युन्मत्त-जड़ान्धकाः।
पतितः पतितापत्यं चिकित्सी दायांशभागिनः।
तेषां पतितवर्ज्येभ्यो भक्तवस्त्रं प्रदीयते।
तत्सुताः पितृदायांशं लभेरन् दोषवर्ज्जिताः॥ देवलः।

7. When the father is dead an impotent person, a leper, a madman, an idiot, a blind man, an outcast, the offspring of an outcast, and a person wearing the token of a religious order are not entitled to a share of the heritage: food and raiment should be given to them, excepting the outcast: but the sons of such persons being free from similar defects, shall obtain their father's share of the inheritance.—Devala.

८। क्लीवोऽथ पतित-स्तज्जः पङ्गु-रुन्मत्तको जड़ः।
अन्धोऽचिकित्स्य-रोगाद्याः भर्त्तव्याः स्यु-र्निरंशकाः।
औरसाः क्षेत्रजा-स्वेषां निर्दोषाः भागहारिणः।
सुतास्वेषां प्रभर्त्तव्याः यावद् वै भर्तृ-साद्-गुणाः।

अपुत्राः योषितश्चैषां भर्त्तव्याः साधुवृत्तयः ।
निर्व्वास्याः व्यभिचारिण्यः प्रतिकूलास्तथैव च ॥

याज्ञवल्क्यः २, २४१—१४३ ।

8. An impotent person, an outcast and his issue, one lame, a madman, an idiot, a blind man, and a person afflicted with an incurable disease, and the like, are excluded from participation; but are to be maintained. But their sons, whether real legitimate or born of the appointed wife, are entitled to allotments, if free from defects; and their daughters must be maintained until they are provided with husbands; and their sonless wives, conducting themselves aright, must be supported; but such as are unchaste should be expelled; and so indeed should those who are perverse. —Yájnavalkya, ii, 141–143.

EXCLUSION FROM INHERITANCE AND DIVESTING.

Exclusion not total.—From the foregoing texts it is clear that the persons that are excluded from participation of shares on partition are, with their wives and children, entitled to maintenance, save and except one who is degraded and excommunicated and his issue born after his degradation; so they cannot be said to be totally excluded from the inheritance.

Causes of exclusion.—It should be remarked that sex is a cause of exclusion; for, females are, as a general rule, excluded from inheritance, save and except such as have been expressly enumerated as heirs. The other causes of exclusion are certain moral or religious, mental, and physical defects and deformities. They may be classified thus :—

- Defects
  - 1. Moral or religious
    1. Irreligion or renunciation of religion.
    2. Sins causing excommunication or degradation.
    3. Unchastity.
    4. Addiction to vice.
    5. Enmity to father.
    6. Adoption of religious order.
  - 2. Mental ...
    1. Insanity.
    2. Idiocy.
  - 3. Physical ...
    1. Blindness.
    2. Deafness.
    3. Dumbness.
    4. Lameness.
    5. Impotency.
    6. Leprosy.
    7. Other incurable diseases.

Religious disability & excommunication, and Act XXI of 1850. The renunciation of Hindu religion, and consequent excommunication are no longer causes of exclusion from inheritance, since the passing of Act XXI of 1850 which provides:—

"1. So much of any law or usage now in force within the territories subject to the Government of the East India Company as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing, or having been excluded from the communion of any religion, or being deprived of caste, shall cease to be enforced as law in the Courts of the East India Company and in the Courts established by Royal Charter within the said territories."

The language of this section, so far as it affects the Hindu law, shows that it relates to a person who had been born a Hindu, but has renounced the Hindu religion, or has been excluded from the communion of the Hindu religion, or has been deprived of caste: but its wording cannot apply to a person who is born a non-Hindu, although his father or mother might be a Hindu by birth, but had become a pervert from Hinduism before he was born. This Act removes the disability of the person who renounces Hinduism; his non-Hindu descendants cannot claim any benefit under this Act.

A person who is from birth a non-Hindu cannot be subject to the personal law of the Hindus, and cannot therefore lay claim to a right which is conferred on Hindus by the Hindu law to which he is not amenable. Nor can a Hindu claim to inherit from a Mahomedan or a Christian; for, succession to their property is governed by the Mahomedan Law or the Succession Act respectively, neither of which applies to the Hindus.

But the Allahabad High Court has held that a person who is born a Mahomedan, his father having renounced the Hindu religion, is entitled to inherit his Hindu paternal uncle's estate, by virtue of the provision in the above Act XXI of 1850,—*Bhagwant* v. *Kallu*, 11 A.S., 100. It is difficult to follow the argument set forth in the judgment.

Section 9, Regulation vii. of 1832 provides,—"Whenever, therefore, in any civil suit, the parties to such suit may be of different persuasions, * * * the laws of those (Hindu and Mahomedan) religions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of such laws they would have been entitled. In all such cases the decision shall be governed by the principles of justice, equity and good conscience; it being clearly understood, however, that this provision shall not be considered as justifying the introduction

of the English or any foreign law, or the application to such cases of any rules not sanctioned by those principles."

This Regulation was enacted to be in force throughout the provinces subject to the Presidency of Fort William.

The preamble of Act XXI of 1850 recites this Regulation and says that "whereas it will be beneficial to extend the principle of that enactment (S. 9 of Reg. vii. of 1832) *throughout* the territories subject to the Government of the East India Company, it is enacted as follows:—"

Thus it will be seen that what was intended to be done by Act XXI of 1850, is to extend that to the whole of British India, which was in force only in the Presidency of Fort William.

Now, is it at all conformable to the principles of justice, equity, and good conscience to hold that the son born to a person after he had renounced Hinduism and become a Mahomedan or a Christian, is entitled to be heir of that person's Hindu brother or other relation, when it is a notorious fact that they become totally estranged and excommunicated, and are no longer recognized as relations by the Hindus? For, it cannot but be admitted that inheritance is founded on the principle of natural love and affection, and no court of equity can hold the principle applicable to persons who are practically perfect strangers to each other.

Deprivation of caste, and Act XXI of 1850.—According to Hindu law, persons who are guilty of certain heinous sins are considered degraded and deprived of caste, that is to say, they are deemed dead so far as their relations and caste-people are concerned, there being a complete cessation of all social intercourse as well as of the mutual right of inheritance.

Now, an important question arises for consideration, namely, whether Act XXI of 1850 was intended to remove the disqualification based upon deprivation of caste by reason only of change of religion? or irrespective of the same?

If the Act be read and construed by the light of its Preamble, there cannot be any doubt that deprivation of caste, owing only to change of religion, is what is intended by the Act to be declared as having no legal effect so as to affect the rights of a person changing his religion. The Act does not affect the principles of the Hindu moral law, and is operative only when there is a change of religion. This was the view taken by the Sudder Dewany Adawlut of Bengal, (Sudder decisions of 1858, p. 1891), differing from the contrary view taken by Sir Lawrence Peel (2 Taylor and Bell, 300); the latter view, however, is supported by the weighty opinion of Sir Barnes Peacock (14 W.R., O.J., 23).

But with the greatest deference to that eminent Chief Justice,

it may be asked, was it the intention of the Legislature to do away with disabilities imposed by Hindu Law on persons guilty of gross moral offences? Are we to understand that religion and morality are to be utterly ignored by the Indian Legislature and the Indian Courts?

If that be so, then it cannot but be held that the whole Chapter of Hindu law on Exclusion from Inheritance, has been abolished by the above Act; for, the defects or deformities causing exclusion from inheritance are supposed and believed to be the consequences of sins committed in the past forms of existence; but if heinous sins perpetrated in the present life, which cause deprivation of caste and exclusion from inheritance, be taken to have no longer any legal effect in consequence of the said Act, why then should similar sins committed in past forms of existence, and manifested and evidenced by the deformities, have the effect of excluding from inheritance the unfortunate persons affected thereby?

The Madras High Court appears to take the same view as the Bengal Sudder Dewany Court, namely, that the Act contemplates deprivation of caste by reason of change of religion. For, it has been held that as regards inheritance to the property left by dancing girls or prostitutes who are degraded from caste, their sister or adopted niece belonging to their fallen class succeed in preference to a brother remaining in caste: 12 M.S., 277; 13 M.S., 133.

It has also been held by the same court that marriage is dissolved by a Hindu husband becoming a Christian, which is tantamount according to Hindu Law, to becoming degraded and outcasted: 8 M.S., 169.

The Calcutta High Court also have followed these rulings and held that the general rule, that the tie of kindred between a woman's natural family and herself ceases when she becomes degraded and outcaste, applies with even greater force as between her and the members of her husband's family; the husband's sister's son, therefore, has no right of inheritance in property acquired by a woman who left her husband's family and became degraded by being a woman of the town: 21 C.S., 697.

It should, however, be remarked that in the case of deprivation of caste, also, the privilege conferred by this Act is only personal, as applying to the person who having been in the caste is deprived of it; it cannot apply to his descendants coming into existence after he has become an outcaste. For an outcaste is beyond the pale of Hinduism to whom the Hindu law cannot apply; and there cannot, in law, subsist any connection or relationship between the outcaste and those in caste. The outcaste is deemed dead, and funeral ceremonies are performed for him,

by his relations in caste, see Manu xi, 183 *et seq.* But see *contra*, 18 C.S., 264.

Unchastity—of women is highly condemned, and it is admitted by all the schools to exclude the widow from inheriting her husband's estate; in fact a wife's right to be her husband's heir is founded on her fidelity and loyalty to him. It is her devotion to the husband that constitutes her to be the half of her husband, in which capacity she inherits his estate, and of which estate she becomes divested by giving up that character by re-marriage. An unchaste wife may be divorced by the husband: thus, Manu cited in the Vivâda-Ratnâkara p. 426 (Calcutta Asiatic Society's Edition),—declares,—

स्वच्छन्दगा च या नारी तस्यात्यागो विधीयते।

न चैव स्त्रीवधं कुर्यात् न चैवाङ्गविकर्त्तनं॥

which means—"If a woman is licentious, her abandonment is ordained; the woman, however, should not be killed, nor should her limbs be mutilated." Although unchastity and disloyalty before the husband's death would exclude the widow, unchastity subsequent to the husband's death will not divest the estate already vested in her:—*Moniram* v. *Keri*, 5 C.S., 776, affirming 19 W.R., 367. The latter proposition, however, is true only in a qualified sense, as will presently appear.

But there is a conflict of decisions with respect to the effect of unchastity of the daughter and the mother on their right of inheritance. The Allahabad, Bombay and Madras High Courts have held that neither the daughter nor the mother is excluded by reason of unchastity which, as a cause of disinherison, applies to the widow alone: (*Ganga* v. *Ghasita*, 1 A.S., 46; *Advyapa* v. *Rudrava*, 4 B.S., 104; *Kojiyadu* v. *Lakshmi*, 5 M.S., 149). But the Calcutta High Court has held that the condition of chastity applies not only to the widow but also to the daughter (22 C.S., 347) and to the mother (4 C.S., 550).

There is nothing, however, in the Dáyabhága in support of this view taken by the Calcutta High Court; and the reasoning by which that conclusion is arrived at, appears to be, as pointed out by the Madras High Court, disapproved by the Privy Council in the Unchastity case.

The chastity of the mother and the daughter is not required by any commentary, as a condition of their succession. The reasons assigned in the Dáyabhága for the mother's succession are the secular benefits received from her by the deceased, and her capacity to confer spiritual benefit by giving birth to other sons; but the existence of the second reason is not at all

necessary,—p. 240. As regards the daughter, her capacity to be mother of sons, and her descent from the *propositus*, are set forth as the reasons for her succession. Their unchastity does not prejudicially affect the spiritual welfare of the deceased, in the same way as that of the wife or the widow. The Víramitrodaya (p. 190) appears to declare by necessary implication, that the mother's unchastity is no disqualification for inheritance,—see *supra* p. 196.

In the two cases before the Calcutta High Court, the two women concerned were not only unchaste but were also degraded and outcasted; and their exclusion could be justified on the latter ground, if Act XXI of 1850 be taken to remove the disqualification of being deprived of caste by reason only of renunciation of the Hindu religion. The Judges, however, avoided deciding that question.

Mere unchastity when not followed by conception or by loss of caste is an expiable and venial offence and cannot justify exclusion from inheritance, of female relations other than the wife whose case stands on a different footing altogether; for conjugal fidelity to the husband is of the essence of the notion of a wife and forms the foundation, and is the *sine quo non*, of her heritable right.

Parásara, who is said to ordain the law for this Kali age, declares—

रजसा शुध्यते नारी विकलं या न गच्छति ॥ ७, ४ ।

सकृद्-भुक्ता तु या नारी नेच्छन्ती पापकर्मभिः ।

प्राजापत्येन शुध्येत ऋतु-प्रस्रवणेन तु ॥ १०, २६ ।

जारेण जनयेद्भ्रूणं गतेऽव्यक्तं मृते पतौ ।

तां त्यजेद् अपरे राष्ट्रे पतितां पापकारिणीं ॥ १०, २० ।

which means,—"A woman (committing adultery) is purified by catamenia, provided she did not conceive (vii. 4). If a woman has committed adultery once, and is not desirous to commit that sinful act again, she becomes pure by *Prájápatya* rite and by the flow of the catamenia (x. 26). If a woman becomes pregnant by her paramour when her husband is dead or is missing; she being a wicked and degraded woman should be carried to the territory of a different king and be abandoned there. (x. 30)." Thus it will be seen that there are different grades of unchastity: and the offence is an expiable one in light cases. It should be noticed that a widow becoming pregnant by adultery must become deprived of her husband's estate by reason of the punishment of banishment inflicted on her.

Yájnavalkya also ordains the same rule:—

ऋताधिकारां मलिनां पिण्डमात्रोपजीविनीं।
परिभूताम् अधःशय्यां वासयेद् व्यभिचारिणीं॥
सोमः शौचं ददौ तासां गन्धर्व्वाश्च शुभां गिरं।
पावकः सर्व्वमेध्यत्वं मेध्या वै योषितो ऋतुः॥
व्यभिचारात् ऋतौ शुद्धिर् गर्भे त्यागो विधीयते।
गर्भभर्त्तृवधादौ च तथा महति पातके॥ १, ७०-७२।

which means.—"A woman guilty of unchastity shall be deprived of her position and possessions, shall wear dirty clothes, shall live upon starving maintenance, shall be humiliated and made to sleep on bare ground. The moon has given them purity, the Gandarvas have given them sweet voice, the Fire has given them permanent sanctity, women are therefore always pure. A woman guilty of adultery is purified by catamenia; but her abandonment is ordained in case of conception by adultery, and in case of causing abortion or killing the husband, as well as in case of committing heinous sins:"—i, 70-72.

The above texts were not before the courts in the Unchastity case. They show that Unchastity alone is a light offence, it becomes very grave if followed by conception, and that then a widow's right to her husband's estate must cease.

It should be remarked that unchastity of women is not expressly enumerated in the Chapter on Exclusion, as a cause of exclusion from inheritance.

Addiction to vice.—A man of vicious habits is excluded from inheritance. Under this head you may include unchaste women. But if you exclude females on that ground, you must disinherit also males who dissipate wealth in wine and women, or by gambling. There is, however, no reported case in which a male has ever been excluded on account of vice, though instances are unfortunately too frequent, of young men inheriting property, being led astray to a vicious course of life by designing and unprincipled people.

Enmity to the father.—The father is so great a benefactor of the son, that the Hindu law requires the son to respect the father the author of his being, as a God; in fact the idea of father is associated with the idea of the Creator of all beings, or God the Father. A son who does not respect his father is highly censured: and a son who is habitually inimical to his father and beats him or otherwise ill-treats him is excluded from inheritance, as being

an ungrateful wretch and heinous sinner, and as such, unworthy of having the status of son.

Adoption of religious order.—Entrance into a religious order is tantamount to civil death so as to cause a complete severance of his connection with his relations, as well as with his property inheritance to which opens on his renouncing the world by the adoption of a religious order; any property which may be subsequently acquired by persons adopting religious orders passes to their religious relations. Such persons might be of three descriptions, namely, (1) *Naishthika Brahmachárí* or life-long student, (2) *Vánaprastha* or retired to a forest, meaning one adopting the third order or stage of retired life for religious purpose, (3) *Bhikshu* or *Jati* or *Sannyásí* or one who renounces the world and becomes a religious mendicant. The adoption of the first two orders is included under practices to be avoided in this *kali* age, see *supra* p. 6; persons of the last description are still found, who renounce all worldly concerns and cut off all connection with their relations; and they are excluded from inheritance.

But the renunciation must be complete and not nominal only, as in the case of persons entering the *Vaishnana* sect in lower Bengal, called *Byragis* by name, but who do not mean thereby to renounce worldly affairs and relinquish property. Such a *Byragi* is not excluded from inheritance (*Teeluk* v. *Shamma*, I W. R., 201,) and his property passes on his death to his ordinary relations,—10 W.R., 172; I5 W.R., 197.

Idiocy.—In the Dáyabhága (V, 9) *Jada* or an idiot is defined to be a person not susceptible of instruction. It is a congenital and incurable mental infirmity arresting development of the intellectual faculties: the onus lies on the party asserting the existence of the disqualification: *Surti* v. *Narain*, 12 A. S., 530.

Insanity—is a disease of the mind, which need not be congenital nor incurable to exclude from inheritance the person affected thereby at the time the succession opens: *Woma* v. *Giris*, 10 C.S., 639; *Deo* v. *Budh*, 5 A.S., 509.

A member of a joint family governed by the Mitákshará, will be precluded from participating a share as co-parcener if at the time of partition, he is affected by insanity, although he was free from that disease before, and did acquire a right to the ancestral property from his birth: *Ram* v. *Lalla*, 8 C.S., 149; and *Ram* v. *Ram* 8 C.S., 919.

He is therefore divested of a vested right, and thus it is apparent that the strict rule of vesting and divesting does not apply to a Mitákshará joint family; and it follows therefore that if the malady is cured after partition, he would be entitled to a share by re-opening partition, like a posthumous son.

Defects of external organs of sense and of action.—Blindness and deafness must be congenital, according to Manu. And it follows *a fortiori* and by necessary implication, that the defects of other organs, namely, dumbness, lameness, impotency and the like must be of the same character, *i.e.*, congenital. If the defects of the two principal organs of seeing and hearing, cannot disinherit, when they arise subsequently to birth; then why should the defect of a minor organ, exclude from inheritance, if it be not congenital? Otherwise, the accidental loss of a limb or organ of action, as in the case of a soldier and hero, may have the effect of exclusion. It appears to be necessary that these defects must also be incurable: 23 W.R., 73; 1 B.S., 177 and 557; 6 A.S., 322; 18 C.S., 327.

Leprosy and other incurable diseases.—Leprosy may be taken as a defect of the organ of touch. It need not be congenital; but it appears that it should be incurable: *Ananta* v. *Rama*, 1 B.S., 554. It must assume a virulent and aggravated type, in order to operate as a cause of exclusion from inheritance: 19 M.S., 74. It is not easy to determine what other incurable diseases will be held to be disqualifications for inheritance, but the strictest proof of the disease must be given: 2 W.R., 125; 21 W.R., 249.

Disqualification personal.—If the person affected by a disqualification, has a son or other descendant of his body, who would by right of representation take his place and inherit in case he were dead, then such a descendant will, if he is himself free from similar defects, inherit, notwithstanding the exclusion of his father or other ancestor. Thus a son of a blind person, if not affected by any disability, is entitled to succeed to his grandfather's property, notwithstanding the exclusion of his father. This rule, however, does not apply to a son born to an outcast after his degradation; nor to a son adopted by a disqualified person; nor to a son of a disqualified brother, when there is another brother free from defects.

Cure of defect, after-born son, and divesting.—But if there be no such son or descendant in existence at the time when the succession opens, but comes into existence afterwards, then such a son is not entitled to take by divesting the heir in whom the succession has already vested. It has been so held by a Full Bench of the Calcutta High Court in the blindman's son's case of *Kalidas* v. *Krishan*, 2 B. L. R., F. B., 115, governed by the Bengal school.

Nor will the removal of the defect subsequent to the opening of the inheritance, entitle the affected person to claim the heritage by divesting the person in whom it already vested.

But this rule cannot apply to Mitkáshará joint family.—The Mitákshará deals with the subject of exclusion in connection with the partition of joint property; it does not require any defect to be congenital; if the disqualification arises before partition, it will cause exclusion of the affected person; if again the disqualification is subsequently removed, he will be entitled to take his share by re-opening the partition, like a posthumous son: Mit. 2, 10, 6–7. I have already observed that the strict rule of vesting and divesting cannot apply to a Mitákshará joint family; for, vesting and divesting continually go on in such a family by births and deaths. How else could a person becoming insane after birth but before partition, be excluded from participating a share of the ancestral property to which he had acquired an interest from his birth?

Accordingly in a case where one of two brothers died leaving a deaf and dumb son, and afterwards a son was born to the latter, it has been held by the Madras High Court that this after-born grandson is entitled to take his grandfather's undivided co-parcenary interest which may be said to have passed on his death by survivorship to his brother's descendants, subject, however, to the charge of the maintenance of the disqualified son and his family, *Krishna* v. *Sami*, 9 M.S., 64. The Madras High Court followed the principle underlying the case of *Roghunada* v. *Brojo Kisor*, 1. M. S., 69=3 I.A., 154, in which the last holder of an impartible estate died leaving a widow authorized to adopt a son, and an undivided brother in whom the estate vested by survivorship to the exclusion of the widow, who subsequently adopted a son, and it was held by the Judicial Committee that this adopted son was entitled to take the estate by divesting his uncle.

It should be borne in mind that the ancestral property of a Mitákshará joint family is really vested in the family and not in the individual members thereof, although it is possible that at a particular time one member alone possesses the right of alienation over it for family purposes. It is quite erroneous to suppose in either of the above two cases that the family property was *absolutely* vested in the surviving brother or brother's son, when the maintenance of the disqualified son and the female members is a charge upon the property.

The English lawyers create a confusion in Hindu law by introducing the distinction of legal and equitable estates and charges.

If a man may become divested of half the ancestral estate by the birth of a son to him, where is the incongruity if he be divested of the same half by the birth of a son to his disqualified nephew who also has an interest in the estate from which he gets his maintenance.

But in a case similar to the above Madras case, the Bombay High Court has taken a contrary view by holding that a grandson born after the death of the grandfather, to his deaf and dumb son is not entitled to take the undivided moiety of the grandfather, which passed by survivorship to the latter's surviving brother and his son: *Bapuji* v. *Pandurang*, 6 B.S., 616.

It should, however, be remembered that properly speaking, the undivided co-parcenary interest of a deceased member does not really pass to any body, but simply lapses; no person acquires on his death any right to the family estate, which he had not before. No question of shares arises so long as the family remains joint; in this case, there were the surviving brother and his son forming a joint family, of which the deaf and dumb person also was a member, and when a son was born to the disqualified member, he also became a member of the joint family; and there is no reason why he should not get a share on partition of the property of the family of which he is a member. The Hindu law says that "their sons if free from defects shall get their shares," of the hereditary source of their maintenance. The operation of this equitable rule cannot be restricted, unless there be equitable considerations of a different kind.

Maintenance.—Excepting the outcaste, the disqualified persons are not really excluded from inheritance, but, they do not get shares on partition of the family property, while they and their wives and children are entitled to get maintenance out of the property.

It should be observed that agriculture is the chief resource of the people of this country, and the ancestral fields form the productive property of families. But the infirmities causing the so-called exclusion from inheritance, incapacitate the persons affected thereby for carrying on the cultivation of their shares of the land. Hence what the Hindu law seems to provide is, that their shares should be in the possession of the other members who must furnish them and their family with maintenance, and defray the expenses of the marriage of their daughters. So these disqualified persons enjoy the rights of a co-sharer so far as their necessary expenses are concerned; and thus the Hindu law is not really hard on those to whom nature has been so unkind.

Of excluded females.—According to both the schools of Hindu law, a woman becomes *Sapinda* in the sense of blood relation, of her husband and of his relations, and a member of his *gotra*; accordingly, if there had not been the general rule excluding females from inheritance (Text No. 4) a woman would have been an heir of her husband's relations in the same way as in Bombay. The rule that persons who are excluded for causes

other than degradation, are nevertheless entitled to maintenance (Text Nos. 7 and 8),—applies also to women that are excluded by reason of their sex, or any other cause of disqualification other than degradation. The text of Baudháyana, ordaining the exclusion of women, is cited in the Viváda-ratnákara Ch. v, in which Exclusion from Inheritance is discussed. In that chapter are cited the texts of Manu, Vishnu, Yájnavalkya, Nárada, Devala and Baudháyana, providing maintenance for all the excluded relations. In the Víramitrodaya it is expressly declared that the daughter-in-law is excluded from inheritance of the mother-in-law's *Stridhan*, by reason of her sex, but is entitled to maintenance: (p. 244). Hence, a sonless widowed daughter, who is excluded from inheriting the father's estate, is certainly entitled to maintenance. But see *contra* 27 C.S., 555 in which all the authorities do not seem to have been placed before the court.

The onus of proving disqualification—lies on the person who seeks to exclude one who would be an heir, should no cause of exclusion be established; (*Futtick* v. *Juggut*, 22 W.R., 348), the presumption of Hindu law being against disqualification: *Chunder* v. *Kristo*, 18 W.R., 375.

CHAPTER XI.

MAINTENANCE.

ORIGINAL TEXTS.

१। मणि-मुक्ता-प्रवालानां सर्व्वस्यैव पिता प्रभुः ॥

स्थावरस्य समस्तस्य न पिता न पितामहः ॥ याज्ञवल्क्यः ।

1. The father is master of all of the gems, pearls and corals; but neither the father nor the grandfather is so, of the whole immoveable property.—Yájnavalkya.

२। ये जाता ये ऽप्यजाता वा ये च गर्भे व्यवस्थिताः ।

वृत्तिं तेऽपि हि काङ्क्षन्ति वृत्ति-लोपो विगर्हितः ॥ मनुः ।

2. They who are born, and they who are yet unbegotten, and they who are actually in the womb, all require means of support: the dissipation of their hereditary (source of) maintenance is highly censured.—Manu, D. B., i, 45.

३। भरणं पोष्यवर्गस्य प्रशस्तं स्वर्गसाधनं ।

नरकं पीड़ने चास्य तस्माद्-यत्नेन तं भरेत् ॥ मनुः ।

3. The support of the group of persons who should be maintained, is the approved means of attaining heaven; but hell is the man's portion if they suffer: therefore he should carefully maintain them.—Manu, D. B., ii, 23.

४। पिता माता गुरुर्भार्य्या प्रजा दीनाः समाश्रिताः ।

अभ्यागतोऽतिथिश्चैव पोष्यवर्ग उदाहृतः ॥ मनुः ।

4. The father, the mother, the Guru (an elderly relation worthy of respect), a wife, an offspring, poor dependants, a guest, and a religious mendicant are declared to be the group of persons who are to be maintained.—Manu, cited in Srikrishna's commentary on the Dáyabhága, ii, 23.

५। वृद्धौ च माता पितरौ साध्वी भार्य्या सुतः शिशुः ।

अप्यकार्य्य-शतं कृत्वा भर्त्तव्या मनुरब्रवीत् ॥ मनुः ।

5. It is declared by Manu that the aged mother and father, the chaste wife, and an infant child must be maintained even

by doing a hundred misdeeds.—Manu, cited in the Mitákshará while dealing with gifts.

६। स्वं कुटुम्बाविरोधेन देयं। याज्ञवल्क्यः, २, १७५।

6. Property other than what is required for the maintenance of the family, may be given.—Yájnavalkya, ii, 175.

७। पुत्रान् उत्पाद्य संस्कृत्य वृत्तिश्चेषां प्रकल्पयेत्।

7. A father shall perform the purificatory ceremonies for his sons, and provide them with a source of maintenance.—Mitakshará.

MAINTENANCE.

Two-fold liability for maintenance.—A person's liability to maintain other persons, is of two descriptions: one is limited by his inheritance of the ancestral and other property, while the other is absolute and independent of such property, and is determined by certain relationship.

Absolute liability.—A man is bound to maintain his aged parents, his virtuous wife, and his minor children, (Text No. 5) whether he inherited any property or not. He is also bound to support his infant illegitimate child, see Criminal Procedure, Section 484.

Liability limited by inherited property.—The ancestral immoveable property is the hereditary source of maintenance of the members of the family, and the same is charged with the liability of supporting its members, all of whom acquire a right to such property from the moment they become members of the family, by virtue of which they are at least entitled to maintenance out of the same: see *supra*, pp. 147 *et seq.*

The ancestral property cannot be sold or given away except for the support of the family: a small portion of the same may be alienated, if not incompatible with the support of the family: D.B., 2, 22-26.

There is no difference between the two schools as regards the view that the ancestral property is charged with the maintenance of the members of the family, and that no alienation can be made which will prejudicially affect the support of the group of persons who ought to be maintained:—Text No. 4.

Hence, although according to the Bengal School a son does not acquire a right to ancestral property, co-equal to that of the father, and is not therefore competent to enforce a partition of the same against the father, yet the father is not absolute.

master of the same, so as to be competent to alienate it and deprive the son and other members of the family, of their source of maintenance.

This is the view which is propounded in the second chapter of the Dáyabhága, but it has been departed from by our courts of justice, who hold that there is no distinction between ancestral and self-acquired property as regards the father's right of disposal over the same. But still this modern development of law cannot affect the question of the son's right of support from ancestral property so long as it has not been actually disposed of.

Persons entitled to maintenance from ancestral property.—According to the true view of Hindu law, and to the exigencies of Hindu society, as well as to Hindu feelings, the persons that are entitled to maintenance from ancestral and inherited property, are—

1. All male members of the family, including those that are excluded from inheritance.
2. Their wives or widows.
3. Their unmarried daughters.
4. Their married or widowed daughters when they cannot get maintenance from their husband's family.
5. The dependent members or the poor relations whom the deceased proprietor used to maintain, *i.e.*, helpless indigent relations who did actually depend on him for their livelihood, if sufficient property has been left by him.

As regards the Mitákshará school there is no doubt as to the right of the persons under heads 1, 2 and 3, to maintenance out of ancestral property.

In the Bengal school, however, a doubt may be raised as to the right of an adult son and consequently of his wife or widow and daughter. But it should be remembered that the Hindu law makes provision for the maintenance of even an illegitimate son.

Adult sons, daughters-in-law, and the like.—We have already seen that adult sons and their wives and children are entitled to maintenance from the ancestral property, in both the schools.

Under the Mitákshara the daughter-in-law does, in right of her husband, acquire a right to the ancestral property, since her marriage, in fact she becomes her husband's co-owner in a subordinate sense, (*Jamna* v. *Machul*, 2 A.S., 315); and the principal legal incident of this co-ownership is the right to maintenance, which cannot be defeated by gift or devise made by the holder of such property: *Becha* v. *Mothina*, 23 A.S., 86. It has already been observed that there is no valid reason for the extinction of this co-ownership on the husband's death, the subordinate character of which must then be taken to be relatively to that of the

surviving male members who stand in the husband's shoes as her legal guardian. But her right to maintenance against the surviving co-parceners is taken to depend not on her co-ownership, but on the obligation imposed on them to maintain the widow of deceased co-parcener: 22 C.S., 410.

It is to be now considered whether they are entitled to claim maintenance from the father's self-acquired property. It should be observed that the Mitákshará recognizes the right by birth, of the son and the like male descendant, to even the self-acquired property of the father and the like. This right is a subordinate right like that of the wife, and is recognised for the self-same reason, namely, enjoyment by sons, of father's property: hence sons must be held entitled to claim maintenance from such property. The Bengal school, however, does not admit right by birth. But it has been held that there is no difference between the two schools as regards the daughter-in-law's right to claim maintenance from the father-in-law who has only self-acquired property: 6 W.N. 530.

If we look to the actual usage even now prevailing in Hindu society, we find that the sons continue to live with their fathers even after attaining majority and also after marriage, and to be supported by them, when not earning anything. In fact it is the father who celebrates the son's marriage, the son being merely a passive agent in the transaction; the father decides whether the son should marry, and it is he who selects the bride, and it is he who settles the terms with the bride's father. After marriage the bride comes to her "father-in-law's house," and not to her "husband's house." A man consents to give his daughter in marriage, when he is satisfied that her *father-in-law* is possessed of means so as to be able to support her. Can there be any doubt that under the foregoing circumstances the father-in-law is bound to support her and the children born of her?

Although the general usage of the Hindu fathers' maintaining their adult sons, and the fact of a particular son's being always maintained from his birth by his father, would not create a legal liability of a father for furnishing adult sons with maintenance out of his self-acquired property, yet there are strong equitable considerations arising from his conduct, which tend to fix him with the legal liability to maintain that son's wife and children; for, there is an implied, if not an express, contract on his part, with the infant bride's guardian, that he will support her, the bridegroom being unable at the time of his marriage even to maintain himself.

But this aspect of the question, arising out of the actual usage of marriage among Hindus, appears to have been not placed

before, nor taken into consideration by the Courts, while dealing with it. It has therefore been held that there is only a moral obligation on the father-in-law to maintain his widowed daughter-in-law, out of his self acquired property, which however ripens into a legal obligation on his death, in the inheritor of his property: *Siddesury* v. *Jonardan*, 5 W.N., 549; 6 W.N., 530. But it has been held by the Bombay High Court that she cannot claim it against the universal legatee of her father-in-law's whole self-acquired property: *Bai* v. *Tarwadi*, 25 B.S., 263. The Madras High Court, however, holds that her legal right is not affected by testamentary dispositions in favour of volunteers made by the person morally bound to provide the maintenance: *Rangammal* v. *Echammal*, 22 M.S., 305.

But a widowed daughter-in-law who left her "father-in-law's house" without any just cause, has been held to be not entitled to claim separate monetary maintenance from her father-in-law, to be enjoyed by her while living in her "father's house." The "father-in-law's house" is the proper place of residence for a married or a widowed woman:—*Khetra* v. *Kasi*, 10 W. R., 89= 2 B.L.R., 15.

The debt incurred by a Hindu widow in possession of her husband's estate to celebrate the marriage of the daughter of a son who had died before his father, has been held to be a valid charge on the estate passing to the reversioner after the widow's death: *Ramcoomar* v. *Ichamayi*, 6 C.S., 36.

It follows therefore that her maintenance is also a charge on her grandfather's estate.

Wife and widowed wife.—According to both the schools, the lawfully wedded wife acquires from the moment of her marriage, a right to the property belonging to the husband at the time, and also to any property that may subsequently be acquired by him, so that she becomes a co-owner of the husband, though her right is not co-equal to that of the husband, but a subordinate one, owing to her disability founded on her status of perpetual or life-long minority or dependence: 2 A.S., 315. I have already pointed out the reason why this right is recognized, see *ante* p. 153.

This right subsists even after the husband's death, although her husband's rights may pass by survivorship or by succession to sons or even to collaterals; these simply step into the position of her husband, and she is required by Hindu law to live under their guardianship after the husband's death. The reason for recognizing this right continues even after the husband's death.

There are, however, a remark in the Dáyabhága (xi. i, 27) and another in the Víramitrodaya (p. 165), which are made for

meeting an adverse argument, and which may mislead the reader to think that the right is extinguished by the husband's death, but which are not intended to be taken as the correct doctrine. Jímútaváhana maintains that the widow is entitled to inherit her husband's estate in preference to his undivided brethren, who were according to the Mitákshará, *joint tenants* with the deceased, and are therefore entitled to take by survivorship to the exclusion of the widow. The Dáyabhága does not admit joint-tenancy of co-heirs, but maintains that they take as tenants-in-common, and that therefore survivorship does not apply (xi. i, 26). But the author of the Dáyabhága proceeds further, and controverts the Mitákshará doctrine of survivorship even assuming the joint-tenancy of co-parceners, by putting forward the argument that the wife was also a co-owner of the husband, and is therefore entitled to take by survivorship; hence, she cannot be excluded even on that ground by the husband's undivided brethren (xi. i, 27). But then an objection might arise to this argument, namely, that why should not the widow take by survivorship to the exclusion of the male issue. This is obviated by the author by saying that, in that case her right might be assumed to be extinguished by the death of the husband, because there are express texts providing the succession of the male issue to the exclusion of the widow.

But it should be noticed that the whole of this is merely an argument against the Mitákshará doctrine of survivorship excluding the widow, even assuming the correctness of the theory of joint-tenancy upon which the same is based. And therefore the last assumption of the extinction of her right is not the author's own view of the nature of the wife's co-ownership: D.B., xi. i, 26.

The Víramitrodaya again while controverting the Dáyabhága doctrine of the widow's succession in all cases, takes advantage of the last assumption made by Jímútaváhana, and maintains that the widow's right to her husband's property, accruing from marriage, must be taken to be extinguished in all cases, by the death of the husband, so as to disentitle her to take by survivorship in any case. But this assumption is not at all necessary to be made, nor is there any authority in support of it; for the continuance of the widow's subordinate right is perfectly consistent with the right of the co-parceners by survivorship, as it was with the right of the husband himself.

Besides, it is contrary to the reason for recognizing this right, and contrary to the Mitákshará itself (on Yájnavalkya, ii, 52), and to its fundamental doctrine, namely, that partition cannot create any right, but proceeds upon the footing of

pre-existing rights, and that it is by virtue of the wife's right to the husband's property, that she obtains a share even when partition is made by her sons after the husband's death, and that it is by virtue of this right that she continues to enjoy the family property so long as it remains joint after the husband's death.

Hence, according to both the schools, the right which a woman acquires to her husband's property, subsists after his death, whether his interest passes by succession or by survivorship to the male issue or any other person.

It has already been said (p. 79) that the wife is bound to reside with the husband; she cannot claim separate maintenance except for such ill-treatment as would amount to cruelty in the estimation of an English Matrimonial Court, (*Matangini* v. *Jogendra*, 19 C.S., 84). But if the husband refuses to receive the wife into his house without sufficient cause, she is entitled to separate maintenance,—*Nitye* v. *Soondar*, 9 W. R., 475.

An unchaste wife or widow is not entitled to any maintenance from the husband or his heirs respectively. That the husband's successors, taking his estate by survivorship, descent or devise, are not bound to maintain his unchaste widow, is a proposition which is, beyond all doubt, *Roma* v. *Rajani*, 17 C. S., 674.

The provision, made by Hindu law, for starving maintenance of an unchaste but penitent wife, is only a moral injunction on the husband; for, it has already been observed that the husband is competent to divorce an unchaste wife: p. 260 *supra*.

When the husband is alive, he is personally liable for the wife's maintenance, which is also a legal charge upon his property, this charge being the legal incident of her marital co-ownership in all her husband's property. But after his death, his widow's right of maintenance becomes limited to his estate, which, when it passes to any other heir, is charged with the same.

But it has been held that a widow is not bound to live in her husband's house, though undoubtedly it is the proper place for her to reside, which she cannot be permitted to leave for unchaste purposes and retain her maintenance,—*Goki* v. *Lakhmidas*, 14 B. S., 490.

A widow, however, whose husband has directed that she shall be maintained in the family house, is not entitled to maintenance if she reside elsewhere without cause, *Giriana* v. *Honama*, 15 B. S., 236; *Bhoba* v. *Peary*, 24 C. S., 646.

Stepmother.—Although a widow's maintenance is a charge on the entire estate of her husband, yet it has been held that after partition between her son and her stepsons, it will be a charge only on the share of her son and not on that of her stepsons,—*Hemangini* v. *Kedar*, 16 C. S., 758=16 I. A., 115.

Daughters.—Unmarried daughters of the deceased proprietor are to be maintained by the heir until marriage. It has already been seen that the unmarried daughters of disqualified members are to be so maintained.

A married daughter is ordinarily to be maintained in her husband's family. But if they are unable to maintain her, she is entitled to be maintained in her father's family. It has, however, been held by the Bombay High Court that an indigent widowed daughter, who fails to get maintenance from her father-in-law's family and is supported by her father, is not entitled after his death to claim her maintenance from his heirs: 23 B.S., 291. This view, however, is not approved by the Calcutta High Court which holds that she must, in the first instance, look for her maintenance to her husband's family: *Mokhada* v. *Nundo*, 28 C.S., 278=27 C.S., 555.

That a widowed daughter, who used to live and be maintained in her father's house, is not entitled to be so and that her father's heir can turn her out into the public street in a destitute condition, seem to orthodox Hindus monstrous propositions being most abhorrent to their feelings, and are due to the misapprehension of the usages and the meaning of the term "dependent member." In the Original side of the Calcutta High Court and in the Appeal Court, the question whether a sonless indigent widowed daughter, who used to live as a dependent member of her father's family, is entitled to maintenance from her father's estate in the hands of his heir, was discussed as one of first impression in the recent case of *Mokhoda Dassee*, 27 C.S., 555 and 28 C.S., 278. But the affirmative appears to have been accepted as settled law in the Appellate side. In 1796 Jagannatha (in Colebrooke's Digest Book v, verse 399) put forward *Kulinism* in Bengal as the reason in support of the proposition that a married or widowed daughter is entitled to maintenance from her father's estate. Sir William Macnaughten gives a case in which a widowed sonless daughter who was excluded from inheritance was held entitled to maintenance. Sir Thomas Strange also is of the same opinion. Babu Syamacharan Sarkar, whose Vyavastha-darpan used to be consulted as authority by the courts in Bengal until replaced by Mayne's work, is of the same opinion, (see p. 170 of the second edition). There are many unreported cases in which a widowed daughter, who used to be maintained as a dependent member of her father's family was held by our High Court to be entitled to get maintenance from her father's heirs. In one case, Justice Norris, after having referred to the Vyavastha-darpan supporting the decision of the lower appellate court, decreeing the daughter's claim, observed,—"Even if there be a

shred to hang a peg on to support this decision, we will do it." That was also the sentiment of the Vakils who appeared against the daughter, but had not the heart to argue their clients' cases, as their contention was unnatural and most repugnant to their own feelings.

Sometimes, the married daughter does not leave her father's house after marriage but continues to live with her husband as *Ghar-jámai* in her father's house: in such cases, she, her husband, and her children are entitled to maintenance from her father and his estate.

Sisters.—The maintenance of an unmarried sister and the expenses of her marriage are charges on the brother's estate, especially when it was inherited by him from an ancestor. It is most unfortunate that the sister is not recognised as heir.

Dependent members.—Poor relations and other dependent members whom a person used to maintain, as being morally bound to do so, are after his death entitled to maintenance from his heirs, provided he left sufficient property. Thus, it has been held that a person succeeding to his father's self-acquired property is bound to maintain his pre-deceased brother's widow who used to be maintained by her father-in-law,—*Janki* v. *Nanda*, 11 A. S., 194; *Kamini* v. *Chandra*, 17 C. S., 373.

There has been some misconception about the meaning of the term *dependent member*: a person is called a *dependent member*, who depends on the family for his maintenance and actually gets his or her food and raiment from the family and lives in the family dwelling-house as a member of it. The *dependent members* are, no doubt, relations near or distant; but persons are not to be deemed *dependent members* by reason of their relationship only, irrespective of actual residence and support as members, inasmuch as these appear to be the *sine qua non* of one's character of being a *dependent member*. This appears to be the true meaning of the term दीनाः समाश्रिताः (*poor dependants*) in original Sanskrit: hence the view taken by the Original Court of the term *dependent member* appears to be in accordance with the meaning of the original Sanskrit term (5 W.N., 549, 558), and that of the Appeal Court seems to be contrary to the same: 6 W.N., 530 and 28 C.S., 278. If the actually existing state of things be not the criterion or test of the *dependent* condition, it is difficult to say what kind of relationship should be taken as the test to determine the same. The daughter-in-law and the daughter in these two cases respectively had been *dependent members* of their father's family, in the sense of the original Sanskrit words, and therefore were not entitled to claim maintenance from their father-in-law's family of which they were not

dependent members; in that character they could look to their father's heir for support. But their claim *as daughter-in-law* was different and not affected by this character.

But persons in this predicament are not entitled to separate maintenance except for very special causes; they are bound to reside in the house with the heir and to perform the reciprocal duty in connection with the household affairs as is ordinarily expected of him or her in Hindu Society; otherwise the burden would be very heavy on the heir, unless the inherited property be very large. It may be observed in this connection that female members of orthodox Hindu families have the duty of preparing the food for the family: so, one claiming the right cannot justly refuse to perform the corresponding duty of such a member; and the amount must be fixed on a reduced scale, should separate maintenance be awarded:—*Bhagwan* v. *Bindoo*, 6 W. R., 286.

Under this head are included invalid adopted sons, concubines, illegitimate sons and the like.

Right to maintenance not affected by lapse of time.—The Judicial Committee observes,—"By common law the right to maintenance is one accruing from time to time according to the wants and exigencies of the widow; and a Statute of Limitation might do much harm if it should force widows to claim their strict rights, and commence litigation which, but for the purpose of keeping alive their claim, would not be necessary or desirable": *Narayan* v. *Rama*, 6 I.A., 114, 118=3 B.S. 372. The fact that a widowed daughter-in-law had not received any maintenance, nor in any way asserted her right thereto, even for a long period over twenty-five years, does not affect her right prejudicially, when it ripens into a legal one and she is obliged to demand it, from her wants and exigencies, by reason of the inability of her paternal relations to maintain her through some change of fortune: 6 W.N., 530, 542.

Amount of maintenance.—If a person be entitled to separate maintenance, then the question will arise as to its amount, the solution of which will depend upon the extent of the property, the position of the family, the nature of the claimant's right, the number of other members of the family and other peculiar facts of each case,—*Baisni* v. *Rup Sing*, 12 A. S., 558; 15 W.R., 73; *Nitya* v. *Jogendra*, 5 I.A., 55; *Devi Persad* v. *Gunwanti*, 22 C.S., 410.

Where the right to maintenance is the legal incident of a right to property, such as that of the widow of the deceased proprietor, the lowest limit is to be determined by having regard to the extent of the property and to similar right, if any, of any other person.

The widow of an undivided co-parcener has been held to be not entitled to claim from the survivor, more than the proceeds of the share which would have been allotted to the husband had there been a partition during his life-time,—*Madhav* v. *Ganga*, 2 B. S., 637, *Adihai* v. *Cursan*, 11 B. S., 199—Mitákshará case.

When, however, the property is very large, the maximum limit is to be ascertained by having regard to the expenses which the claimant will have to incur for living in the style suitable to the position of the claimant and of the family, that is to say, to the charges for establishment, food, clothing, religious ceremonies and the like, due to the claimant. The amount is not to bear any fixed ratio to the property; the sufficiency of the maintenance is the criterion,—*Tagore* v. *Tagore*, 18 W.R., 373.

As regards the amount, a distinction should be drawn between those that are entitled to maintenance as the legal incident of their right to the property and those who have no such right. The amount decreed may be reduced or increased on a change of circumstances: 24 B.S., 386; 22 M.S. 175.

Other sources of maintenance.—If the claimant for maintenance is possessed of property yielding an income, that must be taken into consideration. It is doubtful whether a person possessed of sufficient means for support, derived from a different source, can claim maintenance from another person who would otherwise be liable to maintain him or her. Take, for instance, the case of a woman who has inherited her father's estate the income of which is more than sufficient for her maintenance. If the right to maintenance depends on necessity for the same, then surely a person whose maintenance is otherwise satisfied, is not in need of it, and therefore cannot lay a claim for what is *non est*. The right however seems to remain, but the amount must be *nil* or nominal, as that must be fixed having regard to the need which does not exist.

How far a charge.—There seems to be a misconception on this subject owing to the disregard of the subordinate or imperfect rights in property, which Hindu law recognizes, and of which the right to maintenance is one of the legal incidents. The maintenance of all persons having this imperfect right in the property must be a legal charge on the same; while, that of others, having no such right, may be deemed only an equitable charge on the property.

But it should be specially noticed that the ancestral immoveable property is regarded by Hindu law as the hereditary source of maintenance of all the members of the family, dependent or independent; and no holder of it in whom it may be deemed vested, and who is described as "proprietary member"

by Mr. Justice West, is competent to alienate it except for the support of the family. This is the view propounded even by Jímútaváhana, upon the authority of the text No. 1 cited above, see D.B., ii, 23-26.

The whole spirit of Hindu law is against alienation of ancestral immoveable estate which is the only source of maintenance of the helpless females, and also of the males in this country where agriculture is the chief source of wealth and the Hindus depend solely on the produce of land for subsistence.

Thus, both law and equity are in favour of the proposition that maintenance is a legal charge on the estate, the holder of which cannot alienate it so as to defeat the right of maintenance; at any rate, of those that have an imperfect right in the property, such as the wife of an owner of the property. Besides, it is erroneous to suppose the proprietary member to be absolute owner when there exists a female member who acquired a right to it which also is proprietary though subordinate.

***Bonâ fide* purchasers for value without notice**—are great favourites of the English law recognizing legal and equitable estates, charges and liens.

Upon the analogy of English law our courts have held that *bonâ fide* purchasers for value without notice of the claim for maintenance, from the heir or other holder of the property, are not liable for the same. The learned judges proceed to discuss the question on the assumption that the widow has no lien on her husband's estate in the hands of his heir for her maintenance, and that it is only a claim against the heir personally : *Bhagabatí* v. *Kanai*, 8 B. L. R., 225=17 W. R., 433 ; *Adhirani* v. *Shona*, 1 C. S., 365 ; *Lakshman* v. *Satyabhama*, 2 B. S., 494.

The wife's subordinate proprietary right to the husband's property is not at all noticed by the judges in these cases. It is unfortunate that that part of the Mitákshará in which this right is recognised, was not translated by Colebrooke, and the consequence is that it is ignored both by lawyers and judges. The restrictions on the proprietary member's power of disposing of ancestral immoveable property, is also overlooked in this connection.

It has further been held that mere notice of the existence of her claim will not make the property in the hands of the purchaser liable, unless he had notice of the vendor's intention to defeat the claim for maintenance, or as Mr. Justice West puts it, a notice to be sufficient, must be "notice of the existence of a claim likely to be unjustly impaired by the proposed transaction,"—2 B. S., 517; 22 A.S., 326; 24 A.S., 160.

But if a decree has been made in favour of the claimant,

charging certain property with maintenance, then and then only it will be a legal charge on the property, to whosesoever person's hands it may go; a mere money-decree will not have that effect:—2 B. S., 524, 1 C. S., 365, *Muttia* v. *Virammal*, 10 M. S., 283; 20 W. R., 126, 4 A. S., 296.

It has also been held that even express notice at an execution sale will not affect the rights of the purchaser,—*Soorja* v. *Nath*, 11 C. S., 102.

This view appears to be embodied in Section 39 of the Transfer of Property Act.

Hardship on females.—The result of the above view has been disastrous on Hindu females. Our courts think themselves bound as courts of equity to protect the rights of those who are from their situation most helpless. The Hindu law assigns to females the status of perpetual dependence or minority; and having regard to their actual condition, they are regarded by both the Legislature and the Courts, to be incapacitated and incompetent to manage their estates and to protect their own interests. Accordingly it is held by our courts that a document executed by a woman in this country, cannot be binding on her and affect her interests, unless it be proved not only that its meaning and legal effect were fully explained to her, but also that she had independent and disinterested advice about the same. They are really incapable of protecting their own interests, and are no better than children. In this state of things, they are completely at the mercy of their male relations for the protection of their rights: and if they have rights against those very relations, and if these feel no compunction to deprive the women of those rights, there is none to help them.

To what miserable state ladies of respectable families are often reduced, will appear from one typical instance of a class of cases that are unfortunately rather frequent. A man of property dies leaving young sons, and his widow, mother, and the like; the sons often become very soon surrounded by bad company containing some money-lenders, and are led astray to squander property in a vicious course of life; debts have soon to be contracted, but there is no difficulty, the money-lender companion is ready to advance money on promissory notes at first, and then on mortgages: all other properties are gradually sold, sometimes in execution; and last of all comes the turn of the family dwelling-house, when, however, a difficulty presents itself in consequence of the ruling in the case of *Mangala Devi* v. *Dinanath Bose*, according to which the females residing in the house cannot be turned out by the purchaser into the public street. But the money-lender is equal to the occasion; he advances some money

to the now utterly depraved sons, to send away the women on pilgrimage, who are not aware of the actual state of things, and would gladly accept the proposal; and when they leave the house, the purchaser is put in possession of the same. On their return, the women find that their home is gone and that they have nothing to live upon. This is not an imaginary case, but an actual one that has recently happened.

These money-lenders are often mistaken for *bonâ fide* purchasers for value.

The Purdanashin ladies are completely in the dark as to what is being done by the "proprietary members" of the family, with respect to its property so long as they go on receiving their ordinary maintenance, until when the whole property has become dissipated, and it is too late for them, according to the above decisions, to get any remedy.

If the right view be adopted and acted upon, the helpless women would be saved, while *bonâ fide* purchasers would have their conveyances executed by the proprietary members as well as by these women whose rights would then be secured to some extent at least.

If, however, the property has been sold for the support of the family or for the benefit of the estate, or for like necessity, the purchaser must be safe. But if the sale is made for the proprietary member's personal purposes, the purchaser cannot claim to have more than that member's personal interest in the property.

To hold that the Hindu females must secure their right of maintenance by decrees declaring the same to be a charge on certain property, is practically the same thing as to deprive them of the right.

Besides, it is difficult to understand how a court of justice can pass a decree converting a personal right against the defendant, into a charge on his property. A court of justice can only declare the pre-existing rights of suitors, but cannot confer any new rights on them, except by importing the peculiar artificial distinctions of English law and equity, which are not necessarily founded on broad principles of justice universally applicable.

Transfer, and arrears of maintenance.—A right to maintenance being from its very nature a right restricted in its enjoyment to the claimant personally, cannot be transferred nor seized and sold in execution of decree. See Transfer of Property Act, Section 6 clause (*d*). Civil Procedure Code Section 266, and *Diwali* v. *Apaji*, 18 B. S., 342.

But although the right to future maintenance is not liable to sale, yet arrears of maintenance may be sold, *Hoymabati* v. *Karuna*, 8 W. R., 41; *Raje* v. *Nana*, 11 B. S., 528.

It is not necessary that a demand for maintenance should be made by the person having the right to it, in order to be entitled to claim arrears,—*Jivi* v. *Ramji*, 3 B. S., 207.

But in assessing the amount of arrears the court may take into consideration as to how the claimant was actually maintained. Suppose, a widow was maintained by her own father who is also morally bound to maintain his daughter, and no demand was made from the husband's relations, in such a case it is doubtful whether she can claim any arrears under such circumstances.

Decree and future maintenance.—When a decree awards future maintenance at a fixed rate, payable monthly or annually during the life of the claimant, the same when falling due can be recovered in execution of that decree without further suit,—*Asu* v. *Lakhi*, 19 C. S., 139. But a mere declaratory decree for maintenance cannot be so enforced,—12 M. S., 183.

A widow in possession of her husband's estate—appears to be bound to maintain her husband's poor relations, in addition to those already mentioned, and especially the presumptive reversioner, when he is in need of it,—D. B., 11, 1, 63. Here, gifts to husband's relations are declared to be conducive to the spiritual benefit of the husband.

Impartible estate and junior members.—When the family property is held by a single member by primogeniture prevailing in certain cases according to custom, the junior members are entitled to a provision for maintenance out of the property. Usually some property is assigned to them in lieu of maintenance, the nature and character of the tenure of which are also determined by custom. Usually the *khorposh* grants in Chhota Nagpore where many impartible estates are found, are like *estates tail-male*, held by the grantee and the heirs male of their body in succession to each other, and on failure of such heirs at any future time they revert to holders of the estate for the time being; in some cases these maintenance grants are resumable on the death of the grantees; it depends entirely on custom in each case: see Section 124 of Act 1 of 1879, Bengal Council.

CHAPTER XII.

FEMALE HEIRS AND STRÍDHANA.

ORIGINAL TEXTS.

१। भार्य्या पुत्रश्च दासश्च त्रय एवाधनाः स्मृताः।

यत् ते समधिगच्छन्ति यस्यैते तस्य तद्धनं॥ मनुः।

1. A wife, a son, and a slave, these three even are ordained destitute of property: whatever they acquire becomes his property, whose they are.—Manu.

२। पिता रक्षति कौमारे भर्त्ता रक्षति यौवने।

पुत्रो रक्षति वार्द्धक्ये न स्त्री स्वातन्त्र्यम् अर्हति॥ मनुः।

2. The father protects in maidenhood, the husband protects in youth, the son protects in old age,—a woman is not entitled to independence.—Manu.

३। अध्यग्न्यध्यावाहनिकं दत्तञ्च प्रीतितः स्त्रियै।

भ्रातृ-मातृ-पितृ-प्राप्तं षड्-विधं स्त्रीधनं स्मृतं॥ मनुकात्यायनौ।

3. What was given before the nuptial fire, what was presented in the bridal procession, what has been conferred on the wife through affection, and what has been received by her from her brother, her mother, or her father, are ordained the sixfold *Stridhanam* or woman's property.—Manu and Kátyáyana, D. B., 4, 1, 4.

४। अध्यग्न्यध्यावाहनिकं भर्त्तृदायस्तथैव च।

भ्रातृदत्तं पितृभ्याञ्च षड्विधं स्त्रीधनं स्मृतं॥ नारदः।

4. What is given before the nuptial fire, what is presented in the bridal procession, likewise her husband's donation (*dáya*), and what is given by her brother or by her parents, are ordained the sixfold *Stridhanam*.—Nárada.

५। भर्त्रा प्रीतेन यद्-दत्तं स्त्रियै तस्मिन् मृतेऽपि तत्।

सा यथाकामम् अश्नीयाद्-दद्याद्-वा स्थावराद्-ऋते॥ नारदः।

5. What is given to the wife by the husband through affection, she may, even when he is dead, consume as she pleases, or may give it away, excepting immoveable property.—Nárada.

६। पितृ-भ्रातृ-सुत-भ्रातृ-दत्तम् अध्यग्न्युपागतं

आधिवेदनिकं बन्धुदत्तं शुल्काध्यधेयकम् इति स्त्रीधनं ॥ विष्णुः।

6. What is given by her father, or mother, or a son, or a brother, what is received before the nuptial fire, what is presented to her on her husband's marriage to another wife, what is given by a relation, her *sulka* or bride's price, and gift subsequent are *Stridhanam*.—Vishnu.

७। पितृ-मातृ-पति-भ्रातृ-दत्तम् अध्यग्न्युपागतं।

अधिवेदनिकाद्यञ्च स्त्रीधनं परिकीर्त्तितं ॥ याज्ञवल्क्यः।

7. What is given by her father, mother, husband, or brother, or what is received before the nuptial fire, or what is presented to her on her husband's marriage to another wife, or the like (*ádya*), is denominated *Stridhanam* or woman's property.—Yájnavalkya.

८। रक्षेत् कन्यां पिता विन्नां पतिः पुत्रश्च वार्द्धके।

अभावे ज्ञातयस्तेषां न स्वातन्त्र्यं स्त्रियाः क्वचित् ॥ याज्ञवल्क्यः।

8. A woman is not entitled to independence in any period of her life; her father shall protect her when she is maiden, her husband when she is married, her son when she is old; and in their default their kinsmen shall protect her.—Yáynavalkya.

९। वृत्ति-राभरणं शुल्कं लाभश्च स्त्रीधनं भवेत्।

भोक्तृ तत् स्वयमेवेदं पतिर्नार्हत्यनापदि ॥ देवलः।

9. Her subsistence, ornaments, bride's price, and her gains (or profits of her *Stridhan*) are *Stridhana*, she herself exclusively enjoys it, her husband has no right to use it except in distress.—Devala.

१०। विवाहकाले यत् किञ्चित् वरायोद्दिश्य दीयते।

कन्यायास्तद्-धनं सर्व्वम् अविभाज्यञ्च बन्धुभिः ॥ व्यासः।

10. Whatever is (formally) given at the time of the marriage to the bridegroom intending to benefit the bride, belongs entirely to the bride, and is not to be shared by kinsmen.—Vyása.

११। यद्-दत्तं दुहितुः पत्ये स्त्रियम् एव तद्-अन्वियात्।

मृते जीवति वा पत्यौ तदपत्यम् ऋते स्त्रिया ॥

11. What is presented to the husband of a daughter, goes to the woman, whether her husband live or die; and after her death, goes to her offspring.—Text cited in D.B., 4, 1, 17.

१२। प्राप्तं शिल्पैस्तु यद्-वित्तं प्रीत्या चैव यद्-अन्यतः।
भर्तुः स्वाम्यं भवेत् तत्र शेषन्तु स्त्रीधनं स्मृतं॥ कात्यायनः।

12. The wealth which is earned by mechanical arts, or which is received through affection from any other than a relation, becomes the subject of the husband's ownership: but the rest is ordained *Stridhana*.—Kátyáyana.

१३। यत्पुनर्लभते नारी नीयमाना हि पैटकात्।
अध्यावाहनिकं नाम तत् स्त्रीधनम् उदाहृतं॥

13. Whatever again, a woman receives at the time she is taken away from her father's house (to her father-in-law's house), is denominated her *Stridhan* under the name *adhyávahanika* or presented in the bridal procession.

१४। विवाहात् परतो यत् तु लब्धं भर्तृकुलात् स्त्रिया।
अन्वाधेयं तद्-उक्तन्तु लब्धं बन्धुकुलात् तथा।
ऊर्द्धं लब्धन्तु यत् किञ्चित् संस्कारात् प्रीतितः स्त्रिया।
भर्तुः पित्रोः सकाशाद्-वा अन्वाधेयन्तु तद्-भृगुः॥ कात्यायनः।

14. But whatever is, after marriage, received by a woman from her husband's family is called gift subsequent, and likewise what is received from the family of her relations: whatever is received by a woman through affection after marriage, from her husband or her parents is gift subsequent according to Bhrigu.—Kátyáyana, D.B., 4, 3, 16 and 18.

१५। ऊढ़या कन्यया वापि पत्युः पितृगृहेऽथवा।
भर्तुः सकाशात् पित्रोर्वा लब्धं सौदायिकं स्मृतं॥ १।
सौदायिकं धनं प्राप्य स्त्रीणां स्वातन्त्र्यमिष्यते।
यस्मात् तदाद्यशंस्यार्थं तैर्दत्तं तत्प्रजीवनं॥ २।
सौदायिके सदा स्त्रीणां स्वातन्त्र्यं परिकीर्त्तितं।
विक्रये चैव दाने च यथेष्टं स्थावरेष्वपि॥ ३।
भर्तृदायं मृते पत्यौ विन्यसेत् स्त्री यथेष्टतः।
विद्यमाने तु संरक्षेत् क्षपयेत् तत्कुलेऽन्यथा॥ ४।
अपुत्रा शुश्रूषं भर्तुः पालयन्ती गुरौ स्थिता।
भुञ्जीतामरणात् क्षान्ता दायादा ऊर्द्धम् आप्नुयुः॥ ५। कात्यायनः।

15. (1) That which is received by a married woman or a maiden, in the house of her husband or of her father, from her husband or from her parents, is termed the gift of affectionate kindred. (2) The independence of women who have received such gifts, is recognized in regard to that property; for it is given by their kindred for their maintenance out of kindness to them. (3) The power of women over the gifts of their affectionate kindred is ever celebrated, both in respect of donation and of sale according to their pleasure, even in the case of immoveables. (4) The husband's (*dáya*) gift (or heritage), a woman may deal with according to her pleasure when the husband is dead; but when he is alive, she shall carefully preserve it, or if she is unable to do the same, she shall commit it to the care of his kindred. (5) A sonless (widow) keeping unsullied the bed of her lord and abiding by her venerable protector, shall, being moderate, enjoy until death, afterwards the heirs shall take.—Kátyáyana.

[This last sloka which is cited in the Dáyabhága Ch. XI, Sect. I, paragraph 56 as the only authority for restricting the widow's rights in her husband's estate inherited by her, relates really to Stridhan consisting of immoveable property given by the husband. And the sloka immediately preceding it is cited in D.B., 4, 1, 8.]

१६। न भर्त्ता नैव च सुतो न पिता भ्रातरो न च।

आदाने वा विसर्गे वा स्त्रीधने प्रभविष्णवः॥

यदि ह्येकतरस्तेषां स्त्रीधनं भक्षयेत् बलात्।

स वृद्धिं प्रतिदाप्यः स्यात् दण्डश्चैव समाप्नुयात्॥ कात्यायनः।

16. Neither the husband, nor the son, nor the father, nor the brothers, can assume power over a woman's property, to take it or to bestow it. If any of these persons by force consume the woman's property, he shall be compelled to make it good with interest, and shall incur punishment.—Kátyáyana, D. B., IV. I, 24.

१७। जीवन्तीनान्तु तासां ये तद्धरेयुः स्वबान्धवाः।

तान् शिष्यात् चौरदण्डेन धार्म्मिकः पृथिवी-पतिः॥ मनुः।

17. Those relations of women who take their Stridhana during their life without their consent, shall be punished by a virtuous king by inflicting the punishment of a thief—Manu cited in the Vivádа-Ratnákara.

१८। दुर्भिक्षे धर्म-कार्ये च व्याधौ सम्प्रतिरोधके।
गृहीतं स्त्रीधनं भर्त्ता न स्त्रियै दातुम् अर्हति। याज्ञवल्क्यः।

18. A husband (may take and) is not liable to make good the property of his wife (so) taken by him, in a famine, or for the performance of an imperative religious duty, or during illness, or under restraint.—Yájnavalkya.

१९। (अर्हति) न दायं, निरिन्द्रिया ह्यदायादाः स्त्रियोऽनृतम् इति श्रुतेः।
बौधायनः।

19. A woman is not entitled to inherit; for, a text of revelation says,—"Devoid of prowess and incompetent to inherit, women are useless."—Baudháyana, D. B., XI, 6, 11.

FEMALE HEIRS AND STRÍDHANA.

Women in ancient law.—Lifelong subjection was the condition of women according to ancient law. This appears to have been due to the physical weakness of the fair sex, as well as to two peculiar institutions common to most systems of archaic jurisprudence, namely, *patria potestas* and slavery, the latter of which appears to have owed its origin to the former.

Patria potestas—is the father's absolute and unlimited power over his children, in the exercise of which he could sell, give, abandon or even kill a child of his. The reason assigned by Vasishtha (*ante*, p. 83) to explain this power is, that the father and the mother are the cause of a child's existence, and so they are entitled to full authority over him, extending even to the undoing of it. This natural reason, though equally applicable to the mother, is qualified by her own personal disability.

Slavery consisted in the proprietary right of man over man; one man might own and have dominion over another man, in the same manner as he can own a cow or a dog. A slave is contemptuously termed a *biped* in Sanskrit, to indicate his similarity to a quadruped.

Marriage in ancient law consisted in the transfer of dominion or *patria potestas* from the father to the husband, (*ante*, p. 56), so that in Roman law a wife was deemed to be a *daughter* of the husband for the purposes of the *patria potestas*.

Hence it is clear that during the life of the *pater familias* the condition of a son, a daughter, a wife, and a slave was exactly similar, as regarded the power of the former over these latter, who could not hold any property, being themselves in the

category of property belonging to the *pater familias* who therefore, became entitled to their earnings (Text No. 1). On his death, however, a change took place in the condition of the son, who became emancipated and *sui juris*, and succeeded to the deceased's position as regards his property. But the condition of the women at first, and of the slaves, seems to have remained unchanged, there being only a change of masters.

But the women appear to have very soon acquired a higher status than that of the slaves, so far as regarded their relation to the husband's heir, who became their guardian by ceasing to be their master.

As incidents of their status, women could not, according to early law, hold any property, and consequently they could not become heirs to their relations (Text No. 19).

Women's property and heritable right under the Codes.— To the general rule of woman's incapacity to hold property, exceptions appear to have been gradually introduced, similar to the son's *peculium* in Roman law, according to which a son in the power of his father could not acquire property for himself, all his acquisitions, like those of a slave, belonged to his father.

At first six descriptions of property were recognised as woman's property; and these consisted of gifts received by a woman from four relations, namely, the father, the mother, the brother, and the husband, as well as of gifts received at the time of marriage, either when the ceremony was actually performed before the nuptial fire, or when the bride was taken to her father-in-law's house (Text Nos. 3 and 4).

To this list, other items *ejusdem generis* appear to have been added, as will appear from a perusal of the above texts: gifts from all other relations, and certain other descriptions of property are included as falling within the category of woman's peculiar property. Upon a consideration of all the items described as *Stridhan*, it appears that woman's property under the Codes consisted only of gifts or grants by her relations; and some of them are separately enumerated either to remove some doubt, or to mark the occasions of the gift.

It would be better to enumerate and explain the different items of *Stridhanam* mentioned in the Codes:—

I. Gifts at the time of marriage or *yautaka*; they are—

(1) Gifts before the nuptial fire, or at the actual ceremony of marriage.

(2) Gifts received in her father's or father-in-law's house, either before or after the actual ceremony, but at a time when various other rites appurtenant to marriage are performed,

commencing from several days before, and continuing several days after, the principal nuptial ceremony. *Adhyávâhanika* or gifts in the bridal procession come under it; some explain this term to mean gifts made at the time of the *Dvir-ágamana* ceremony.

(3) *Sulka* or the bride's price.

(4) To these must now be added the bridegroom's price.

Gifts at the time of marriage are the most important, because all women get some property at that time. It should be observed that what is given before the nuptial fire by the bride's father intending to benefit her, is formally given to the bridegroom. It should be borne in mind that the bride herself is the subject of gift to the bridegroom; and the dress, the ornaments and the household furniture, &c., which are intended for her, are all given together with her to the bridegroom. Hence Vyása ordains (Text No. 10) that all these belong to the bride; and besides, these are separately enumerated as *Stridhan* under the name of gifts before the nuptial fire.

Sulka or the Bride's price was originally appropriated by the bride's father; but Vishnu (Text No. 6) and Devala (Text No. 9) enumerate it as *Stridhan*, and therefore the father or other guardian taking it, must hold it as trustee for the bride.

The bridegroom's price also, which according to a recent practice originating in the moral and religious degradation of the so-called educated men, is extorted by the bridegroom's party from the bride's father, must on similar and stronger grounds of equity, be considered to be the bride's *Stridhan*, and the recipient must be held to be a trustee for her.

II. *Adhivedanika* or the gift which a husband is to make to a wife on the occasion of marrying another wife.

III. *Anvádheyaka* or "gift subsequent" is a term used in contra-distinction to *Yautaka* or gift at the time of marriage; it means and includes all gifts made subsequently to the marriage. In the Bengal school the courses of descent of these two descriptions of *Stridhan* are different.

IV. *Vritti* or subsistence or property given for, or allotted in lieu of, maintenance, is *Stridhan*, such as the mother's share on partition.

V. Ornaments form the kind of *Stridhan*, which is possessed by every woman. These are *Stridhan* when they have been the subject of gift to her. There may be family jewels, which any woman of the family is allowed to put on on particular occasions, but which may not be given to any one of them; these cannot be regarded as *Stridhan*. Many Hindus are found to convert all

their savings into gold ornaments worn by themselves or by their wives; these also cannot be regarded as the wife's *Stridhan*; for, these cannot be presumed to be subject of absolute gift by the husband to the wife; if that were so, a man might be deprived of the savings of his whole life by the death of his wife before him.

VI. Acquisitions made by a woman by the practice of a mechanical art, are subject to the control of the husband who appears to be entitled to the fruits of the wife's bodily labour.

VII. So also a present made to a woman by a stranger, *i.e.*, by one who is not a relation, belongs to her husband and cannot become her *Stridhan*. Hindu law is jealous of women's connection with strangers; the present is really made to please the husband by a friend or a subordinate of his, consisting, however, of a thing that may be used by a woman only, such as an ornament or a female dress, and so intended for the wife.

VIII. Gifts by affectionate kindred or near relations constituted, as has already been said, the peculiar property of women, under the Codes, though there are some vague terms used in a few texts, which may be construed to include other descriptions of property.

IX. The husband's gifts require special notice. From the peculiar character of the relationship, a gift by the husband to the wife should not be taken as absolute, so as to extinguish completely the husband's right to the thing given. As regards even the moveable property given by the husband she cannot deal with it according to her pleasure during his life-time, but may do so after his death (Text No. 15—4); and when the subject of gift is immoveable property, she has no right to dispose of it even after the husband's death, Texts Nos. 5 and 15 (5).

The original general rule that women are incompetent to inherit, was departed from by the Codes, to a limited extent; and the lawfully wedded wife, the daughter, the mother and the paternal grandmother, are declared entitled to inherit the property of males; and certain females are declared heirs to *Stridhan* property.

According to the Codes, the property inherited by women became their *Stridhan*; because the very fact of one's becoming heir to another's estate, means that the former acquires the rights of the deceased over his property, and because there is no express text restricting women's heritable right.

There is, however, one rule relating to *Stridhan* property which may be extended by analogy to the husband's immoveable estate inherited by the wife, namely the rule, which restricts the

wife's right over the husband's *gift* of immoveable property to her, may be deemed to restrict by necessary implication her heritable right over his immoveable estate.

But there is nothing in the Codes to curtail the rights of the other female heirs over property inherited by them either from males or from females.

Women's property and heritable right under Commentaries.—A great deal of injustice has been done to women by not keeping in view the great distinction between the early law contained in the Codes, and its later development by Commentators, regarding their disabilities and rights. There cannot be any doubt that women were originally disqualified for owning and holding property, and that under the Codes that disability continued as a general rule, but certain exceptions to it were introduced, and women were declared competent to hold as owner only certain specified descriptions of property, the peculiar character of which was expressed by the technical term *Stridhan* or woman's property. On a consideration of the enumeration of *Stridhana* given by the different Codes, a development of law in favour of women is found; for, while the earlier Codes lay a stress on the number six in enumerating *Stridhan*, the later ones either add fresh items, or describe woman's property in a mode indicating the enumeration to be only illustrative, and not exhaustive; still the impression left on the mind of the reader on a perusal of the passages of the Codes is, that *Stridhana* or woman's property had but a technical and limited meaning.

But when we come to the Commentaries, we find higher rights conferred by them on women who are placed almost on a par with men, as regards the capacity to hold property. *Stridhana* or woman's property ceases to have any technical meaning, and women may acquire property in the same modes as men may do, subject to one or two exceptions. The general rule and exception are now reversed; for, under the Commentaries, as a general rule, all kinds of property may be *Stridhan*, while the exception relates to a few items that do not come under that category. Let us examine what is said by the leading Commentaries on the present subject.

The Mitáksharà—which is, as we have already seen, a work of paramount authority, and universally respected, says while commenting on the Text No. 7 of Yájnavalkya,—that the term *Stridhana* as used in that text, bears no technical meaning, but it signifies "woman's property" or property belonging to a woman, which is its etymological meaning, (2, 11, 3); that the term "or the like" in that text, includes property that may be acquired by a woman, by inheritance, purchase, partition, seizure

or finding, *i.e.*, by the same modes in which a man may acquire property and which are set forth in Ch. 1, Sect. I, paras. 8 and 13; and that Manu and the like also intended to lay down the same rule, the enumeration by them of six-fold *Stridhan* being illustrative and not intended to be restrictive:—Mit. 2, 11, 2 and 4.

Here the Commentator changes the law by the fiction of interpretation. He ignores the existence of any disability or incapacity in women with respect to the ownership of property, such as may appear from a perusal of the texts of the Codes. But we have nothing whatever to do with what Manu and Yájnavalkya really intended to ordain; what we have to see is, what construction has been put on them by the Commentators respected by the different schools: (See *ante*, pp. 12 and 15). The Mitákshará is clear and unambiguous that *Stridhan* has no technical meaning, and women may hold property like men, and that property inherited by a woman is her *Stridhanam*; and according to the Privy Council (*ante*, p. 16), the courts are bound to follow and act upon it, without stopping to enquire whether this doctrine is fairly deducible from the earliest authorities. But on the present question, the Privy Council have acted contrary to their own direction, as we shall presently see.

Kátyáyana's text and Mithila School.—The Viváda-Ratnákara and the Viváda-Chintámani are the principal commentaries of the Mithila sub-division of the Mitákshará school. They do not enter into any discussion as to the term *Stridhana* being technical or limited in its meaning; but they seem to accept the view propounded by the Mitákshará, while they go on citing and explaining the diverse texts of the Codes on the subject of *Stridhana*.

The Viváda-Ratnákara while dealing with *Stridhana* cites the text of Nárada (Text No. 5), recognizing the full power of a wife over the husband's gifts excepting immoveable property; it then cites the first three out of the five slokas of Kátyáyana, set forth above as Text No. 15, and after making a few comments on them concludes by saying that it is established on the authority of all the texts cited, that women are independent in dealing with property inclusive of immoveables given by the affectionate relations, excepting, however, immoveable property given by the husband; it then cites the 4th and the 5th slokas of Kátyáyana's text No. 15, which have a very important bearing on women's right in property given by, or inherited from, their husbands. According to the explanation given in the two commentaries of the Mithila School, the English translation of the 4th sloka is slightly different from what is given above, and should be as follows:—

(4) "The husband's *dáya* gift (or heritage,) a woman may

deal with according to her pleasure when the 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." The fifth sloka may also be given here for the sake of convenience in understanding the explanation.

(5) "A sonless (widow) keeping unsullied the bed of her lord, and abiding by her venerable protector, shall, being moderate, enjoy until death; afterwards the heirs shall take."

Both the commentators of the Mithila School admit, that having regard to the context, both these texts relate to the husband's gifts to the wife, and that they lay down that a woman is perfectly independent after the husband's death in dealing with moveables *given* by the husband, and as regards immoveable property *given* by the husband, she shall enjoy it during her life, and afterwards the husband's heirs shall take the same.

But they maintain that these two slokas must apply also to the moveables and immoveables *inherited* by the widow from the husband, because the term *Dáya* in these texts means both heritage and gift, and these two meanings are equally capable of being construed with the other words of the texts, and there is no text opposed to such a construction; and that hence, notwithstanding the context shows that these slokas relate to gifts, yet by reason of the two-fold meaning of the term *Dáya* they furnish us with a rule that may be applied to the husband's inheritance.

The result is that according to the Mithila School, the wife's right to the moveable and immoveable properties *inherited* from the husband is similar to her right to similar properties *given* by the husband; that is to say, the wife's right to the moveables *inherited* from the husband is absolute, *i.e.*, *Stridhan* in the technical sense; but her right to immoveables is limited, and she must have in all cases what is technically called a life-interest in such property which will after her death pass to her husband's heirs.

The Vivada-Chintámani, however, goes further and says that these texts apply also to the husband's immoveable property which the wife *inherits* not directly from the husband but mediately *through her son* who inherited it and died, leaving his mother as his heir,—in the following passage,—

एवञ्च मृतस्य पत्युः स्थावरे भार्य्यासंक्रान्तेऽपि न तस्या दानादौ स्वातन्त्र्यं आकाङ्क्षा-तौल्यात्। अन्यथा तत्र कीदृशी व्यवस्था स्यात् इत्याकाङ्क्षा अपूर्यैव तिष्ठेत्। अतएवास्य वचनस्य सौदायिक-प्रकरणाज्ञान-विरोधोऽपि अपास्तः प्रकरणापेक्षया आकाङ्क्षायाः बलवत्तात्। यथा पतिदत्ते स्थावरे वचनात् दानादौ

स्त्रीणाम् अनधिकारः तथा पत्युः स्थावरेऽपि स्त्रीसंक्रान्ते। एवमेव प्रकाश-रत्नाकरौ। एवं पुत्रद्वारा स्त्रीसंक्रान्तेऽपि (पत्युः) स्थावरे,। अत्रापि आकाङ्क्षा-सत्त्वात् साक्षाद्-वचनस्य चामृतेः।

The following is a literal translation of this passage:—

"And thus also in the deceased husband's immoveable property devolved by inheritance on the wife, her independence does not exist in making gift and the like, by reason of the Equality of Expectancy. Otherwise, the Expectancy as to what is the rule about it, would remain unsatisfied. Hence also the inconsistency of the recital of this text in the chapter on Saudáyika (*Stridhan*) or '*Gifts from the affectionate kindred*' with its application (to property *inherited* from the husband) is removed. Because Expectancy is of greater force than the context. Just as in immoveable property *given* by the husband, there is incompetency of women in making gift and the like by reason of this text, so also in the husband's immoveable property *devolved by inheritance* on the wife. The (authors of the) Prakása and the (Viváda)-Ratnákara are of the same opinion. Thus also in the (husband's) immoveable property *devolved by inheritance* on the wife *through the son*. Herein also, the Expectancy exists, and there is not found any express text on the subject."

In some manuscript copies of the original Sanskrit Viváda-Chintámoni there is the word पत्युः before the word स्थावरे thus,—एवं पुत्र-द्वारा स्त्रीसंक्रान्तेऽपि पत्युः स्थावरे="Thus also in the *husband's* immoveable property devolved on the wife by inheritance *through the son*." The meaning, however, is the same, whether there be that word or not, since the other words suggest it by necessary implication.

The term Expectancy=आकाङ्क्षा is a technical word meaning one of the three requisites of a collection of words constituting a Sentence. In the Sáhitya-Darpana a well-known treatise on Sanskrit Rhetoric, a Sentence is thus defined:—

वाक्यं स्याद्-योग्यताकाङ्क्षाऽऽसत्तियुक्तः पदोच्चयः।

which means,—"A Sentence is a collection of words possessing Compatibility, Expectancy, and Proximity;" and the following is the literal translation of the explanation of this definition given by the author himself,—

"*Compatibility* means absence of unreasonableness in the mutual relation of the meanings of the words: if a collection of words could be a Sentence without this (Compatibility) then even the words—'He irrigates with fire' would be a Sentence.

"*Expectancy* (=interdependence of words) means absence of completion of sense (without construing one word with others); and this (absence of complete sense) consists in the listener's (or reader's) desire (on hearing or reading a word) to know (something conveyed by the other words of the collection, if the same is a Sentence). If a collection of words without Expectancy could have been a Sentence, then a collection of words, such as 'A cow, a horse, a man, an elephant' would have become a Sentence.

"*Proximity* is absence of interruption in the knowledge (of the words). If there could be a Sentence even when there is interruption in knowledge, then there would be a coalescence (into one Sentence) of the word 'Devadatta' pronounced just now, with the word 'goes' pronounced the day after.

"Since Expectancy and Compatibility are properties, the one of the mind of the reader, and the other of things (signified by the words), it is by a figure of speech, that they are here represented as properties of words."

We are now in a position to understand the meaning of the technical term "Expectancy" and "Equality of Expectancy." The word *Dáya* in the above text suggests to the mind of the reader or listener of that text, both its meanings, namely "gift," and "heritage," and his Expectancy or desire to know the connection of the other words of the text with the word *Dáya*, is Equal as regards both its meanings, being equally compatible with either.

The fact that these two slokas are found in that part of Kátyáyana's Code, where *Saudáyika Stridhan* is dealt with, does not prevent their application to the husband's heritage; for, according to a well-known rule of interpretation the *Expectancy* or the force of words prevails over the context, or in other words, the context cannot control or restrict the meaning conveyed by the slokas, in the absence of any text to the contrary: see Jaimini's Mímánsá, the Topic called वाक्यस्य प्रकरणाद्यपेक्षया प्राबल्याधिकरणं। or the superiority of a Sentence over the context &c.—3, 3, 9.

The Viváda-Chintámani maintains that on the same principle, these texts apply also to immoveable property which was husband's heritage, though the same comes to the wife by inheritance from her son on whom it had devolved directly from the husband.

Hence by reason of the application of these slokas to the husband's immoveable property inherited by a woman from her son, the two rules therein laid down must apply, namely (1) her power of alienation is restricted, (2) her husband's heirs inherit the same after her death.

This peculiar doctrine arising from the construction of these slokas of Kátyáyana, by the author of the Viváda-Chintámani which is respected as a work of paramount authority in Mithila, was brought to the notice of the Sudder Dewani Court of the North-West Provinces in the fifties, by the Pundit who was the Hindu law officer of that court, and judgment was delivered by that court according to the Pundit's opinion, in which a person's sister's son was held heir on the death of his mother, to the estate which had devolved on that person from his father, and which on his death went to his mother, as his heiress; the person's sister's son as *his heir* could not be preferred to his agnates, but as *heir of his father* could be so preferred, according to the said construction of that text of Kátyáyana: *Thakoorain Saheba* v. *Mohun Lall*, 11 M.I.A., 386.

When this case was heard on appeal by the Privy Council, the English translation by P. C. Tagore, of the Viváda-Chintámani had been published; but as the above passage was mistranslated, the Pundit's opinion seemed to be contrary to it, and it was not explained to their Lordships how the Pundit arrived at that conclusion, it was therefore rejected by the Judicial Committee, who held that the sister's son was not an heir at all.

My attention was drawn to this passage of the Viváda-Chintamani in 1893, by the client in the case of *Mohun Persad* v. *Kishen Kishore*, 21 C. S., 344, who had consulted a Benares Pundit and brought an original Sanskrit copy of that work, but it was not necessary to refer to it in that case, in which the *Stridhan* property only was in dispute.

It should be observed that according to the Mithila school, a woman's right is restricted only in the husband's immoveable property inherited by her whether from him, or from his and her son. But as regards moveable property and the son's self-acquired property inherited by her, the same must become her *Stridhan*. Subject to the above exception, a woman's right in inherited property must be absolute, in the same way as the right of a male heir.

Accordingly in the first edition of his translation of the Viváda-Chintámani, the rule XIII of the Table of Succession given by Babu P. C. Tagore was as follows:—"If the mother die after inheriting her son's property, such property becomes her *Stridhan*. Hence the heirs of her peculiar property get it." But this was contrary to his mistranslation of the above passage "एवं पुत्रदाराधीनस्थावरेऽपि (पत्युः) स्थावरे" into—"If the *mother*, on the death of her son, get *his* immoveable property, she cannot make a gift of it or dispose of it;"—the correct translation being,—"Thus also in the (husband's) immoveable property *devolved by inheritance* on the *wife through the son*."

Owing to the said inconsistency, the Calcutta High Court rejected the said rule XIII and held that immoveable property inherited by a mother from her son goes on her death to the son's heirs and not to her heirs : *Punchanund* v. *Lalshan*, 3 W. R., 140. This view is supported by the said mistranslation. And it is curious that Babu P. C. Tagore in the second Edition of his translation changed the rule XIII so as to make it quite contrary to what it was in the first Edition.

But, according to the correct doctrine of the Mithila school, if the immoveable property was the son's self-acquired property, the same was to descend to the mother's heirs, and if the same was inherited from the father, then it was to descend to the father's heirs ; but in no case could it descend to the son's heirs. But unfortunately the Vivâda-Ratnâkara was not then translated, and the error in the rendering of the above passage was not pointed out to the court.

It should specially be noticed that the effect of the correct doctrine is to bring in two near and dear relations, namely, the son's sister and her son who are the original proprietor's daughter and daughter's son, in preference to the comparatively more distant agnates. And this is but the ordinary course of development of law according to natural justice, in every system of Jurisprudence.

Kâtyâyana's text and the Dâyabhâga.—It should be borne in mind that according to the Mitâkshará school the widow is entitled to inherit only in the exceptional circumstance of the husband being separate, *i.e.*, when he was neither joint nor re-united with any co-heir. The widow's succession therefore must be rare, having regard to the fact that the joint family system is the normal condition of Hindu society, and it takes place when there is no other dear and near relation who may be the object of the deceased proprietor's affection along with his wife. Hence there is no reason why the widow who has been the partner of the deceased during his life, and who is believed to become his partner in the next world, should not be absolutely entitled to his estate, when the most distant male heir, whose very existence might not be known to him, would take an unlimited and absolute interest.

The author of the Dâyabhâga introduced a complete change in the law by recognizing the heritable right of the widow in default of male issue, in all cases, *i.e.*, even when the husband was joint or re-united with his co-parceners, that is to say, in preference to and to the exclusion of, his father, mother, brother, and the like near and dear relations with whom he was associated from birth, and lived in harmony during his whole life.

Such a radical change in the law of succession could not be acceptable to the people unless the widow's rights were curtailed and limited in the manner adopted by the Dáyabhága.

The acute founder of the Bengal school conferred higher rights on females in one respect, by curtailing their rights in other respects, and thus he improved the condition of women, on the principle of give-and-take, in such a manner as to secure the approbation of the people of Bengal, for the change in law, which was suited to their feelings and so became adopted by them.

Let us now see how the author of the Dáyabhága shows that his foregone conclusion is supported by the earliest authorities.

He cites the five slokas of Kátyáyana in different parts of his work: the slokas 1—3 are cited in paragraph 21, and sloka 4 in paragraph 8, of Section 1 of Chapter iv, in which *Stridhan* is explained; but the sloka 5 is cited in paragraph 56, Section i, Chapter xi, where the widow's succession is discussed, for supporting his position with respect to the restrictions on the widow's power of alienation.

He maintains that the widow inheriting her husband's estate is entitled only to enjoy it with moderation, but not to alienate the same by gift, sale or mortgage, &c., and in support of this he cites Kátyáyana's text (sloka 5) as if it related to property inherited by a woman from her husband, without any allusion to its meaning according to the context, and without feeling any hesitation or difficulty in relying on a text the primary meaning of which is not what he puts upon it.

We are in a position now to appreciate the great importance of the remark made by the Privy Council, namely, that the Courts of Justice must not trouble themselves with the question whether a doctrine maintained by a school is fairly deducible from the earliest authorities.

The language of this text of Kátyáyana applies to the widow only. But the change of the law of inheritance, introduced by the Dáyabhága, was also in favour of the daughter and the daughter's son, as well as of the mother and the paternal grandmother. And it was felt by the author to be necessary to curtail their rights also.

So he at first extends the operation of his interpretation of Kátyáyana's text to the daughter (xi, i, 65) and then to the daughter and to the daughter's son, upon the ground that they being inferior to the widow with respect to inheritance, the restrictions imposed by that text on the widow's estate should *a fortiori* apply to them also,—Chapter xi, Section ii, paragraph 30.

And lastly he puts it artfully as an alternative, that the text must be understood as applicable to female heirs only, the term

widow being merely illustrative; and he thereby implies that it does not apply to the daughter's son, xi, i, 31. And this alternative is now accepted as the doctrine of the Bengal school.

Here we have an extension of meaning based on the sex, hence the meaning must be that the *female* heirs of a *male*, take a limited interest, having regard to the context of the Chapter which deals with succession to the property of a *male*. That is to say, it can by no means apply to a female heir of a *female's Stridhan*.

Woman's estate in property inherited from males under Dáyabhága.

1. She has merely the right of enjoyment with moderation, D.B., 11, 1, 56 and 61. So she has not even a life-interest.

2. If the estate falls short of what is sufficient for her legal enjoyment, she may alienate a part or even the whole of it, if necessary,—D.B., 11, 1, 62.

3. Save as aforesaid, her rights in both moveable and immoveable property is limited, and she cannot alienate them, D.B., 11, 1, 56.

4. Her management of the estate is subject to the control of the husband's kinsmen who are her legal guardians; in other words, subject to the control of the reversioners, D.B., 11, 1, 64.

5. She may dispose of the property with the consent of the reversioners, D.B., 11, 1, 64.

6. She is enjoined to maintain, and to make gifts to, poor relations of the husband's, D.B., 11, 1, 63.

7. The reversioners are entitled to the residue of the estate and of its accretions, left after her lawful enjoyment, D.B., 11, 1, 59.

***Stridhana* according to Dáyabhága.**—The Dáyabhága appears to follow the Mitákshará, and to hold that *Stridhana* or woman's property has no technical meaning. After citing many texts describing different kinds of woman's property, the author observes that the texts do not intend to exhaustively enumerate woman's property, but they intend to explain by illustrations the nature of woman's property; and then concludes by saying, "That alone is a woman's property, which she has power to give, sell, or use, independently of her husband's control," D.B., iv, i, 18.

And he then goes on to show that the husband's control is confined to the wife's earnings by the practice of mechanical arts and to presents made by strangers. To these two must be added the gifts by the husband, especially immoveable property, D.B., iv, i, 19-23.

Víramitrodaya and Smriti-chandriká on Kátyáyana's text.—The Víramitrodaya repeats the view propounded by the Mitákshará, with respect to *Stridhana*.

This work is regarded by the Privy Council to be a treatise of high authority at Benares and to be properly receiveable as an exposition of what may have been left doubtful by the Mitákshará, and to be declaratory of the law of the Benares school,—*Giridhari Lal Roy* v. *Bengal Government*, 12 M.I.A., 448=10 W.R., 31.

The author of this work notices the text of Kátyáyana (sloka 5), and maintains that it refers to the property assigned to the widow of a deceased undivided co-parcener, for maintaining herself from its profits,—Vir., p. 136.

He then notices the construction put on it in the Dáyabhága, and disapproves of the same. He maintains that the widow as heir must necessarily be absolute master of the inherited property, and texts like this must be taken to be of moral obligation only, such as those with respect to which the doctrine of *factum valet* is propounded by the author of the Dáyabhága. And he concludes by saying that the utmost that can be said is, that gift and the like alienation made by a widow for immoral purposes or without any necessity, may be held improper; otherwise, she has full power to dispose of property for religious and other lawful purposes,—Vír., pp. 137–141.

The Smriti-chandriká notices the text of Kátyáyana, and explains it to refer to the widow of a member of a joint undivided family, who has received from her husband's surviving co-parceners an assignment of landed property for getting her maintenance from the income thereof. In fact, the Víramitrodaya has borrowed the explanation of Kátyáyana's text from this work which is frequently cited and referred to by it under the name of the Chandriká.

Judicial Committee on Kátyáyana's text.—It should be observed that heritage means property in which the heir acquires *ownership* by reason of relationship to the late owner; therefore when a woman becomes the heir, she must acquire an absolute right to the inherited property, unless there be an inherent disability on her part, or there be an express text curtailing her rights.

There would have been an inherent disability, if *Stridhana* had still been held to have a technical meaning, or if the original incapacity of women to hold property had been admitted even now to continue; or in other words, if women could not have absolute right in any kind of property, which is not *expressly* enumerated as *Stridhana*. But the paramount authorities of both the schools hold that women do not, as a general rule, labour under any such disability or incapacity, whatever might have been their condition in early law.

Therefore their rights in inherited property cannot be curtailed, unless there be an express provision of law to that effect. And Kátyáyana's text (sloka 5) is the only passage of law by which the women's rights are curtailed according to the Dáyabhága and to the commentaries of the Mithíla School.

Kátyáyana's complete Code is not extant. It is, however, admitted by the writers of the Mithila School, that the text of Kátyáyana relates actually to the immoveable property *given* by the husband.

So there is really no authority in Hindu Law, against the doctrine maintained by the Mitákshará, that property inherited by a woman becomes her *Stridhana*.

But the Privy Council held this doctrine to be erroneous by reason of its being in conflict with the text of Kátyáyana who is recognised by the Mitákshará as a lawgiver,—*Supra* pp. 2 & 3—though the text is not cited in the Mitákshará; *Bhagwandeen* v. *Myna Bai*, 11 M.I.A., 487=9 W.R., P.C., 23. The Lords of the Judicial Committee were betrayed into this position by assuming the interpretation put on it by the Dáyabhága to be its only real meaning. And herein their Lordships departed from their own view of the duty of an European judge in dealing with Hindu law,—*supra*, p. 23.

What really happened was that the Dáyabhága rule had been erroneously applied to some small cases governed by the Benares school; and when at last the question arose in a big case going up to the Privy Council, the view already acted on in the previous cases and seeming to be sanctioned by usage, was maintained intact, as the materials necessary for arriving at the correct view of the law were not placed before their Lordships.

And their Lordships have proceeded further: not only the rule extracted by the author of the Dáyabhága from his peculiar interpretation of Kátyáyana's text, but also his extension of that rule to cases not covered by the language of that text, have been applied by the Privy Council to cases governed by the Benares school. Accordingly the daughter has been held to take the widow's estate in her father's property (*Chotay Lal* v. *Chunnoo Lal* 4 C.S., 744); and the same rule has been applied by the Calcutta High Court to the mother's inheritance,—*Julleswar* v. *Uggar*, 9 C.S., 725.

Thus the females governed by the Benares school have been subjected to the restrictions and limitations of the Bengal school, while the privilege enjoyed by the Bengal females, of inheriting from their male relations even when these were joint or re-united, could not be granted to them. They have been deprived of their substantial rights without any compensation whatever.

It should be remarked here, that the text of Kátyáyana lays down two continuing conditions for the enjoyment by the widow, of her husband's estate, namely, (1) chastity and (2) residence with the husband's relations. It has, however, been held that these are not to be taken as conditions subsequent; inasmuch, as the author of the Dáyabhága has not himself drawn any such conclusion from that text. Hence it has been held in *Cossinath Bysack's* case that the widow inheriting her husband's estate is not bound to live with her husband's kinsmen; and in the Unchastity case, that subsequent unchastity will not divest.

Privy Council on *Stridhana*.—In the case of *Brij Indar Bahadur Sing* v. *Ranee Janki Koer*, 5 I.A., 1, the Judicial Committee, took into their consideration all the passages of the Mitákshará and the Dáyabhága, in which the character of *Stridhana* is discussed, and came to the only conclusion that may properly be deduced from them, namely, that *Stridhana* has no technical or restricted meaning; and their Lordships laid special stress on the conclusion arrived at by Jímútaváhana, namely, "That alone is (*Stridhana*) her peculiar property, which she has power to give, sell, or use, independently of her husband's control." The words "her peculiar property" in this passage are misleading, the correct rendering should be, "That alone is *woman's property*, which &c.;" so there is no peculiarity about woman's property.

The facts of this case were as follows:—A *Taluk* in Oudh, in possession of a Hindu widow to whom it had descended as the heir of her husband, was confiscated by the Government, and was subsequently granted to her by a *Sunnud*, with right of alienation, and with right of succession to her heirs.

The *Taluk* was held by the Privy Council to have become the *Stridhana* of the widow, by the grant to her, and to pass on her death, to her heirs and not to her husband's heirs. The grant was made by a stranger, to a Hindu lady, and therefore if made during her husband's lifetime, it is doubtful whether it could become her *Stridhana*. But as it was made to a widow, there was nothing to prevent it from being her *Stridhana*. If *Stridhana* had been technical and restricted in its meaning, and if nothing could have been *Stridhana* unless expressly ordained to be so, then it could not have been held that the *Taluk* had become the grantee's *Stridhana*. See *Bachha Jha* v. *Jugmohan Jha*, 12 C. S., 348.

The principle enunciated in this case represents the true view of Hindu law, though it is in conflict with the opinion expressed by the Privy Council in some earlier cases,—*Mt. Thakur Deyhee* v. *Rai Baluk Ram*, 11 M.I.A., 139=10 W.R. P.C., 3.

Case law on *Stridhana* and inherited property.—It should be noticed that,—

(1) According to the Bengal school a woman inheriting the estate of a male, has a limited interest or what is called the *widow's estate* in both moveable and immoveable property:

(2) That this Bengal doctrine has been (though improperly) extended to cases governed by the Benares school: and

(3) That according to the Mithila school the widow inheriting her husband's estate, either directly from him, or mediately through her son, takes an absolute estate in the moveables, and a life-interest in the immoveables in all cases; for her interest in such property is the same as in property given by the husband.

She is therefore competent in Mithila, to alienate the moveables according to her pleasure, *Doorga* v. *Pooran*, 5 W.R., 141, *Birajan* v. *Luchmi*, 10 C.S., 392 ; 11 M.I.A., 487.

The moveable property becomes her *Stridhan*, and must therefore pass to her heirs on her death.

The widow is likewise absolutely entitled to the proceeds of the immoveables : for, her interest therein is the same as in immoveable property given by the husband.

Hence the savings of the income of the inherited immoveable property, as well as any immoveable property purchased therewith, must be her *Stridhana*, and pass on her death to her heirs, and not to her husband's heirs. This great distinction between the Bengal school and the Mithila school should be kept in view.

The question of succession to the moveables and the savings, &c., under the Mithila law, is an open one, and has not yet been decided,—2 M.I.A., 181 (251).

It should be observed that the daughter takes an absolute estate in property inherited from her father, according to the Mithila school ; and so also the mother as regards the son's self-acquired property. But owing to the mistranslation of the exposition of Kátyáyana's text, as given in the Viváda-Chintámani, the Mithila law has been misunderstood, and the Bengal doctrine applied to Mithila cases: 3 W.R., 140.

In Bombay the Mithila rule seems to be followed to some extent, subject, however, to an extension in consequence of all the *sapinda* females being recognised as heirs.

There the widow, the mother and the like relations, becoming members of the family by marriage, are held to take a limited interest.

While the daughter, the sister, the brother's daughter and the like, who are born in the family, are held to take the estate absolutely.

In Bombay the widow and the like appear to have an absolute power of disposal over the moveables; but yet it has been held that the moveables must pass, on the widow's death, to her husband's heirs, 16 B.S., 229 and 233.

In Madras also it has recently been held that the widow's power over the moveables is not larger than over immoveables, 8 M.S., 290 and 305.

The perusal of most of the Mitákshará cases will show that the Bengal doctrine has been permitted to make considerable inroad on the Mitákshará schools; the judges' attention was not attracted by the great distinction between the two schools as regards the inheritance of women. And the learned judges appear to labour under the misconception that *Stridhana* is even now technical and limited in meaning.

***Stridhana* inherited by woman.**—The Bengal High Court has gone further and held that even *Stridhana* inherited by female heirs, does not become the latter's *Stridhana*, 5 C.S., 222; 17 C.S., 911.

The only authority on which this view is based is the opinion expressed by Srikrishna in his Dáyakrama-Sangraha, namely, that inherited property does not become *Stridhana*. There is no authority in support of this broad position, and there is no reason why this writer should be raised to the position of a lawgiver. This writer was neither a judge nor a lawyer but a mere Sanskritist without law, who appears to have lived in the beginning of the seventeenth century. He is not regarded by the people of Bengal as any authority. He has, however, been thrust into prominence by the adventitious circumstance of his work being translated into English.

Ask any Bengali as to the law by which he is governed, and the answer you will invariably receive is, that he is governed by the Dáyabhága; nobody will name Srikrishna or Daya-krama-sangraha.

Now, not only there is nothing in the Dáyabhága in support of the above view; on the contrary, a perusal of the chapter IV of the Dáyabhága wherein *Stridhana* and its devolution are discussed, will convince the reader that the daughters take the same interest in their mother's *Stridhan* as sons.

Because, it is a peculiar doctrine of the founder of the Bengal school, that sons and daughters *equally* inherit their mother's non-*Jautaka Stridhan*; and in arguing out this position, he refers to the well-known maxim that "Equality is the rule where no distinction is expressed,"—D.B., iv, ii, 1-8. It is difficult to understand, how in the face of what the founder maintains, namely, that the heritable right of the son and the daughter is equal, can it be contended that they take different estates. This would be over-ruling Jímútaváhana by Srikrishna.

Besides in nine hundred and ninety-nine cases out of every thousand, *Stridhan* consists of moveables only ; and the heir male or female takes it absolutely according to the popular belief and usage. That the female heir takes only a limited interest, and is not absolutely entitled, is an idea which is not known to the people, nor even to the persons likely to become reversioners. If that were the law, how is it that there is no provision made for the protection of the future interest of reversioners ?

In the case of property inherited from males there is such a provision ; for, the widow is directed to reside with the persons likely to be reversioners, and to manage the estate subject to their control,—D.B., 11, 1, 56-64.

It should be noticed in this connection, that there is no commentator of the Mitákshará school maintaining the view propounded by Srikrishna. Hence that doctrine cannot be extended to cases governed by the Mitákshará. Accordingly the Allahabad and the Bombay High Courts have recently held that a woman's *Stridhan* inherited by a female becomes the latter's *Stridhan*: *Devi* v. *Sheo*, 22 A.S., 353 and *Gandhi* v. *Bai*, 24 B.S., 192.

Mother's share.—It has already been shown that the mother is entitled to a share on partition. And it has been held that a purchaser from a son takes, subject to the mother's right, and stands in his vendor's shoes; at a partition by him the mother is entitled to a share: *Amrita* v. *Manick*, 4 W.N., 764. It has also been held that she has an inchoate or *quasi*-contingent right to a share, on a suit for partition being instituted by a son, and a purchaser after the suit is affected by *lis pendens*: *Jogendra* v. *Fulkumari*, 27 C.S., 77.

The share to which the mother in both the schools, and the stepmother under the Mitákshará, are entitled to get on a partition of the property by the sons, is intended to become their *Stridhana* or absolute property. That it is *Stridhana* according to the Mitákshará is beyond all doubt. Because the Mitákshará says that on the mother's death, this share devolves on her daughters, and in default of the daughters, on her sons.

Besides there are two strong reasons for considering this share to be the recipient's *Stridhana*: (1) if the mother has got *Stridhana* from the husband or the father-in-law, then so much only is to be allotted to her, as together with what has been so received, would be equal to the share of a son; hence when a share is so constituted, her right to its different component parts ought to be the same ; (2) when on a partition shares are allotted to different persons, the right of each to his or her share must *primâ facie* be of the same character, in the absence of any express distinction ; hence the right of the mother to her share must

be of the same character as that of a son to his share, since no distinction is anywhere expressed. These arguments apply to the Bengal school as well.

But as a great deal of misconception prevails about the character of *Stridhana*, it has been held that this does not become *Stridhana* according to the Bengal school (*ante*, p. 215); and there is an *obitur dictum* to the same effect, with respect to cases governed by the Mitákshará school (*ante*, p. 184). But the correct view has recently been adopted by the Allahabad High Court: 24 A.S., 67 and 82.

It is taken for granted that this share is given for the purpose of maintenance only; if that were the object, why should a share be given at all, when the property is very large, and how again the share can be sufficient for maintenance, when the property is very small? Hence the assumption is groundless and unsupported by authority or reason.

Contemplate the condition of a Hindu mother when her sons separate from each other during her life, and there is a general disruption of the family. How is she to live if all the sons separate from her? Is the Pardanashin lady to live alone under the zenana system in solitary confinement? That might have been her lot, but for the share allotted to her by the Hindu law, and intended by it to be her absolute property. If not for her sake, at least for the sake of her property, some one of her sons or some other relation of hers, would consent to live with her. And this is the real reason why a share is assigned to her, instead of maintenance only. It is also intended to act as a deterrent on sons, for dissuading them from violating the religious injunction which requires brothers to live together so long as the parents are alive.

Thus we see that the Hindu females have been deprived of many rights, by reason of the materials in their favour not being properly placed before the Courts. The Pardanashin ladies could not personally look after their own cases, and thus they were in a disadvantageous position in the unequal contests with their male adversaries, and so there is no wonder that they have been improperly cast even in British Indian Courts, the European Judges whereof cannot but be naturally disposed to protect their rights.

Let us now proceed to discuss the widow's estate and its incidents.

Widow's estate.

Anomalous.—The nature of the widow's estate under the Dáyabhága has already been mentioned (*supra* p. 260). But

the Courts of Justice felt considerable difficulty in giving full effect to all its incidents; and so the law on the subject has been altered to some extent in favour of the widow.

(1) The widow is required to enjoy with moderation: she is enjoined to lead a life of austerity, and is forbidden to wear delicate apparel or to eat rich food. Compliance with this requirement was considered difficult to enforce, and so it has been held that the widow may, if she chooses, spend the whole income arising out of her husband's estate, and she is not bound to save a single farthing.

(2) But if she does not spend the whole income, but saves and accumulates any portion, and invests these in the purchase of property, and dies without making a valid disposition, the same shall pass to her husband's heirs who are entitled to everything that has not actually been enjoyed or consumed by her.

(3) Although the widow has not even a life-interest when the property is large, still as a corollary of the position that she is not bound to be moderate as regards the expenditure of the income, it has been held that even without any necessity the widow may sell her husband's estate so as to pass to the vendee an interest in it for her life.

(4) The restriction imposed on the widow that in her management of the estate, she shall be subject to the control of her husband's kinsmen, has been set aside, perhaps on the ground of its being a moral injunction only, the estate being completely vested in her, and no part of it being vested in the husbands's next heir during her life. But it has been overlooked that this was intended for the protection of their future interest.

(5) But yet a partial effect has been given to the said restriction, by holding that the widow can, with the consent of the husband's next male heir for the time being, transfer without any legal necessity, any property appertaining to her husband's estate, so as to give an absolute title to the transferee even against the actual reversioner who may be a different person.

(6) When the property is small, and not sufficient for her lawful expenses, she may sell the whole of it, so that the widow's interest varies from an absolute estate when it is small, to less than a life-interest when it is very large, although she is permitted, if she chooses, to convert it into a life-interest in the latter case.

(7) Although the widow's estate in both *moveable* and immoveable property, is a limited one, yet the only mode of preserving the future interest of the husband's heirs, provided by Hindu law, namely, the control of the husband's kinsmen over her management of the estate, is not ordinarily given effect to.

Thus the Hindu widow's estate has become an anomalous and peculiar one. It is thus described by the Privy Council in the Unchastity case, 5 C.S., 776:—

"According to the Hindu law, a widow who succeeds to the estate of her husband in default of male issue, whether she succeeds by inheritance or survivorship—as to which see the *Shivaganga* case—does not take a mere life-estate in the property. The whole estate is for the time vested in her absolutely for some purposes, though in some respects for only a qualified interest. Her estate is an anomalous one, and has been compared to that of a tenant-in-tail. It would perhaps be more correct to say that she holds an estate of inheritance to herself and the heirs of her husband. But whatever her estate is, it is clear that, until the termination of it, it is impossible to say who are the persons who will be entitled to succeed as heirs to her husband. The succession does not open to the heirs of the husband until the termination of the widow's estate. Upon the termination of that estate the property descends to those who would have been the heirs of the husband if he had lived up to and died at the moment of her death."

This anomalous *widow's estate* is what is taken by the female heirs in the estate of males according to the Bengal School. But that is not the view of the Mitákshará School, although the Bengal doctrine has improperly been extended to cases governed by the Benares School, and also by the Southern Schools to some extent.

It may be noticed in this connection, that according to the Mitákshará, the heirs to the *Stridhana* of a woman married in the approved forms, and dying without leaving any heir of her body, are the same persons who are her husband's heirs and they take in the same order. So the succession of the husband's heirs to his estate inherited by his widow after her death might have contributed to the false view that such property is not her *Stridhan*, although they succeeded as *her* and not as the *husband's* heirs.

As regards the Mithila School, its peculiar doctrines have not been overlooked; and accordingly the widow's estate there, is such as has already been pointed out, (p. 292) and differs materially from what is technically called the *widow's estate*.

Lapse of widow's estate.—It should be observed that the widow inherits her husband's estate, in the character of being the surviving half of the husband; all wives are not entitled to inherit (D.B. 11, 1, 48), those only who are *Patnis*, *i.e.*, who are lawfully wedded, and with whom the connection is religious and permanent so as to subsist even in the next world, are recognised as heirs. When therefore the widow gives up this character

and connection by re-marriage, her right to the deceased husband's estate ceases,—*Matangini* v. *Ram*, 19 C.S., 289; Act XV of 1856, Section 2. Mere unchastity has not the effect of putting an end to the connection.

When a widow adopts a son in the exercise of a power of adoption which may be deemed constructive pregnancy in such a case, then also her interest in her husband's estate ceases.

Two or more widows or other female heirs.—There seems to be some misconception about the nature of the estate taken by two or more female heirs in property jointly inherited by them.

According to the Bengal School, two or more persons succeeding together take as tenants-in-common, and not as joint-tenants in any case.

According to the Mitákshará School also, two or more persons jointly inheriting property by the rule of inheritance, and not by birth, take it as tenants-in-common, to which survivorship does not apply.

The Mitákshará has expressly laid down that two or more co-widows jointly inheriting their husband's estate shall take the same by *dividing* it,—in the following passage accidently omitted by Colebrooke in his translation of the work:—

एकवचनञ्च जात्वभिप्रायेण, अतश्च बह्वयश्चेत् सजातीया विजातीयाश्च, यथांश विभज्य धनं गृह्णन्ति ।

which means,—"The singular number (of the term lawfully wedded wife in the text of Yájnavalkya on succession, Text No. I *supra*, p. 191) has been used to imply the class, hence if there be more wives than one, whether of the same caste or of different castes, they shall take the property dividing the same according to their shares."

This is in conformity with the Mitákshará doctrine that the inherited property is the *Stridhan* of the female heirs.

Partition is an incident of joint heritage; in fact, *partition of heritage* is the name given by Hindu lawyers, to the law of inheritance.

Partition by two or more joint female heirs is expressly laid down by the commentators.

It is no doubt true, that when the female heirs take the Hindu widow's estate, the share which may, on partition, be allotted to any one of them, will, on her death during the life-time of the others, pass to the latter as being the then next taker or reversionary heir of the last male owner.

But this devolution is mistaken for passing by *survivorship*; and consequently the tenancy of the female heirs is deemed to

be an unseparable joint-tenancy in those cases in which they take the *widow's estate* according to the Dáyabhága.

And as a consequence of this doctrine, an opinion has been expressed that although the joint female heirs may come to an arrangement whereby they may separately hold and possess portions of the property in proportion to their shares, for convenience of enjoyment, yet there cannot be between them a legal partition or division of title, so as to defeat their survivorship; 11 M.I.A., 487. Hence, although there cannot be an absolute partition, yet an order for separate possession may be made, when that is the only likely means to secure peaceful enjoyment, *Gajapathi* v. *Gajapathi* 1 M.S., 290=4 I.A., 212.

In the case of *Amritalal* v. *Rajanikanta*, 2 I.A., 113, the same principle has been asserted though it was a case governed by the Dáyabhága, one of the fundamental doctrines of which is, that co-heirs cannot but take as tenants-in-common.

The facts of this case were as follows:—Two married daughters jointly inherited their father's property, then one of them became widowed and she was also sonless, subsequently the other died. The question was whether the surviving daughter who was a childless widow, could take her deceased sister's share in the father's estate. It was held that she could. And this conclusion was based on the principle of joint-tenancy and survivorship.

But the conclusion may without involving the above principle, be justified on the ground that the question whether the surviving daughter was competent to become the heir to her father was determined when the succession opened to her at first, and the character of heirship having been once impressed on her, it could not be taken away by any subsequent event, and therefore she as her father's heir could not be prevented from taking her sister's share, any more than be divested of her own share.

Nor does the principle of survivorship seem to be equitable in all cases. Take for instance a case in which a man dies leaving two maiden daughters and one married daughter having sons; the maiden daughters inherit to the exclusion of the married one, then one of them is married and subsequently becomes a widow without sons, and afterwards the other maiden daughter dies leaving the two sisters, one of whom is a childless widow, and the other having sons. According to survivorship the former alone would take the deceased sister's share, but according to the rule of inheritance both would take it: and the latter alternative appears to be acceptable for several good reasons.

Another consequence which is sought to be deduced from the doctrine of co-widows' inseparable joint-tenancy, is the incapacity

of either to alienate her share without the consent of the other, (*Kathaperúmol* v. *Venkabai* 2 M. S., 194). A compulsory sale in execution of a decree personally against one of the co-widows, of her share, however, has been held valid during her life, *Ariyaputri* v. *Alamelu*, 11 M.S., 304.

A co-widow's power of alienation over her undivided interest in a particular property appertaining to her husband's estate, came to be considered by a Full Bench of the Calcutta High Court in the case of *Janakinath Mukhopadhya* v. *Mothuranath Mukhopadhya*, 9 C.S., 580, and it has been held that the purchaser is entitled to enforce a partition as against the other widow, which should be carried out in such a way as not to be detrimental to the future interests of the reversioners. The tenure of co-heirship was held to be the same between the female co-heirs as between male heirs.

In the case of *Sri Gajapati* v. *Maharani*, 16 M.S. 1 = 19 I.A., 184, governed by the Mitákshará, it has been held by the Privy Council that a mortgage by one of two co-widows, of part of the husband's estate jointly inherited by them, is not binding on the estate in the possession of the surviving widow after the death of the mortgagor, inasmuch as the mortgage was not so framed as to bind the same. And an opinion is also expressed that such a mortgage even for legal necessity, will not be binding on the estate, so as to affect the interest of the surviving widow.

Equity appears to require that a female co-heir should be held to have the same rights over her share, as if she had been the sole heir, and her share the only property, of the last full owner, and that the succession of the surviving co-heir to her share does not differ in any respect from the succession of a remoter female heir such as that of the daughter or the mother, after the widow and the like.

Alienation.

The entire estate is vested in the widow; she is competent to deal with the same as a prudent owner would do. A lease granted by her is not *ipso facto* void but only voidable; 21 B.S., 749. She may work mines and quarries and fell timber, unless her acts amount to destruction of property: 22 M.S., 126. One of two widows may give up her right of survivorship to the share allotted to the other on a partition between them: 22 M.S., 523.

A widow may sell her life-interest without any legal necessity, and she is competent to transfer, with the consent of the presumptive reversioner, her husband's estate, either in whole or in part, without any cause justifying the transfer.

The widow alone is also competent to absolutely alienate the property for certain religious purposes and for necessity. These are as follows :—

1. Payment of the husband's debts; it being conducive to his spiritual benefit, she is justified in alienating for the purpose of paying even debts barred by limitation; *Udai* v. *Ashu*, 21 C.S. 190.

2. The performance of his exequial rite as well as that of his mother and the like,—5 B.S. 450; 22 B.S. 818.

3. Religious purposes, especially pilgrimage to Gya for performing his *Sraddha* there; *Collector* v. *Cavaly*, 8 M.I.A., 529 (550)=2 W.R., 59; 20 W.R., 287. The *bonâ fide* lender is not affected by subsequent non-application of the money to the purpose for which it is taken: 2 C.L.R., 474; 21 C.S., 190. Only a small portion of the property may be alienated for a pious purpose of her own,—*Ram* v. *Ram*, 22 C.S., 506.

4. Maintenance of herself and of those who are entitled to it out of the estate, such as his mother, paternal grandmother, maiden sister and daughter, and the like.

5. Marriage of his maiden sister, daughter, son's daughter, grandson's daughter and the like; the marriage of relations such as these is conducive to the husband's spiritual benefit: see texts Nos. 12 and 14-16 in Chapter on Marriage, pp. 53 and 54, and 6 C.S., 36; 16 W.R., 52: gift to a son-in-law on the occasion of the daughter's marriage, of a portion of property, reasonable in extent, is held valid: *Rama* v *Vengidu*, 22 M.S., 113.

A daughter inheriting her father's estate is competent to alienate the same for the purpose of raising money to meet the expenses of her daughter's marriage, when her husband is not possessed of sufficient means to do so: *Rustam* v *Moti* 18 A.S., 474.

6. Preservation of the estate by payment of Government Revenue and the like. And

7. Costs of any litigation respecting the estate, such as are incurred for defending her title to it, 12 C. S., 52; or defending herself in a criminal case with respect to a Kabuliyat taken from a tenant in the course of management of the estate by herself and co-sharers, but charged by the tenant to be a forgery: *Nobin* v *Kherode*, 6 W.N., 648.

There is a distinction between a mortgage and a sale; for while the exact amount actually necessary may be borrowed; there may not be any property the value of which is equal to the amount necessary to be raised, so that a sale often covers property of larger value, and is valid if the difference be not disproportionate,—*Lulleet* v. *Sreedhur*, 13 W.R., 457.

The reversioner cannot recover the property sold for legal necessity, even by offering to pay to the purchaser the amount raised, 9 W.R., 284; 4 W.N., cciv. But in a case of excessive sale, he can set it aside by paying the amount which the widow was entitled to raise,—*Phool* v. *Rughoo*, 9 W.R., 108; *Muttee* v. *Gopaul*, 20 W.R., 187; *Shumsood* v. *Shewukram*, 2 I.A., 7=22 W.R., 409; *Sadashiv* v. *Dhakubai*, 5. B.S., 450.

A lender or a purchaser dealing with a Hindu widow, is, like one dealing with a manager, bound to enquire into the necessities for the loan or the sale, *ante* p. 165. The onus lies on him to prove justifying necessity,—B. *Kameswar* v. *Run Bahadur*, 8 I.A., 8=6 C.S., 843. But her case differs from that of the manager or head of an undivided family who manages an ancestral trade and has a certain power to pledge for the requirements of the business: restriction on her power of alienation is not relaxed on account of the trade, the validity of the charge must be proved. Absence of necessity need not be pleaded: 25 I.A., 183=21 A.S., 71.

Besides, a person dealing with a Purdanashin lady, must take care to see that the transaction is honest and *bonâ fide*, that the deed, and the power (should there be one), were fully explained to, and understood by her before execution, and that she had disinterested and independent advice, and was free from undue influence,—*Tacoordeen* v. *Nawab*, 1 I.A., 192=21 W.R., 340, *Sudisht* v. *Mt. Sheobarat*, 8 I.A., 39=7 C.S., 245, *Wajid* v. *Raja*, *Ewaz*. 18 I.A., 144=18 C.S., 545.

Accordingly, where a widow borrowed on mortgage, under necessity, the stipulated interest which was found to be exorbitant and unreasonable, was reduced, *Hurronath* v. *Rundhir*, 18 I.A., 1=18 C.S., 311.

Accumulations and Acquisitions.

According to the Dayabhaya, the widow is to live a life of austerity, she must not partake of rich food or wear delicate apparel, and enjoy with moderation the husband's estate inherited by her; it follows therefore by necessary implication that she must accumulate the surplus income for the benefit of the husband's next heirs. But our Courts felt a difficulty in determining what is intended by moderate enjoyment as there is no restriction on her liberty to expend for religious and charitable purposes the whole of the balance of the income left after her moderate *personal* enjoyment. So they left it to the discretion of the widow herself; and accordingly it was held that when the estate is large and the income thereof is more than sufficient for meeting all the legal expenses, the widow is at

perfect liberty to dispose of the surplus income in any way she pleases; she is not bound to save. But if she saves and makes no attempt to dispose of the savings or accumulations in her life-time, they will follow the estate and go to her husband's heirs.

As regards her competency during her life to deal with accumulations, a difficulty has arisen in consequence of the conflict between the original view of the widow's restricted right of enjoyment, according to which she was considered incompetent to alienate without legal necessity what had already been accumulated by her moderate enjoyment of the income, and the modern view of the widow's power of alienating even the whole of the the husband's estate, such alienation being valid and operative during her life, even when made without any legal necessity. Hence has arisen a distinction between an accumulation amounting to an accretion to the estate, and an accumulation being simply income held in suspense for expenditure: 25 W.R., 335. It is difficult to fix the line which distinguishes accretions to the husband's estate from income held in suspense in the widow's hands, as to which she has not determined whether or not she will spend it. If the widow acquires immoveable property with the savings of the surplus income, and makes in no way any distinction between the original estate and the acquisitions, and treats such after-purchases as accretions to the original estate, she will be afterwards precluded from alienating the acquisitions except for legal necessity. In the cases of *Isri Dutt Koer* (10 C.S. 324) and *Sheolochan Sing* (14 C.S. 387) the rule laid down by the Privy Council is, that when a widow not spending the income of her husband's estate, acquires immoveable property with her savings, and makes no distinction between the original estate and the after-purchases, the *primâ facie* presumption is that it has been her intention to keep the estate one and entire, and that the after-purchases are an increment to the original estate. In both these cases the widow attempted to alienate both descriptions of property by one transaction, and had not previously dealt with the after-purchases in any way.

So the original view is now confined to the acquisition of immoveable property when there is nothing to show her intention to keep it separate.

The Bengal doctrine is not applicable to cases under the Mithíla School, where the widow is entitled to a life-interest in immoveable property.

Waste.

If the widow commits any waste in respect of her husband's estate, she may be restrained by the presumptive reversionary

heir by a suit. But the principles which are applied in Courts of Equity in England for securing in the public funds any property to which one person is entitled in possession, and another is entitled in remainder, are not applicable to the property in possession of a Hindu widow : in order to induce the Court to interfere, it is necessary to show that there is danger to the property from the mode in which the widow is dealing with it : (6 Moore, 433). And when she alienates any property belonging to her husband in excess of her power, the then next heir of the husband may during her life bring a suit for a declaration that the alienation, either in whole or in part, is invalid after her life.

Thus the reversioner's interest is not so fully protected, as it is under the provision made by the Dáyabhága for the control by the husband's kinsmen over the widow's management.

Judicial Proceedings.

It has already been said that the widow represents the whole estate of her husband, which is entirely vested in her, no one else having any present interest in the estate before the termination of her interest. It is only after the termination of her estate that the actual reversioner or the next heir can be ascertained. To a suit respecting the husband's estate she alone is entitled to be a party as representing the estate ; and a decree fairly and properly obtained against her will bind the reversioners. The following observation of the Privy Council in the *Shivaganga* case lays down the rule on the subject :—" The same principle which has prevailed in the Courts of this country as to tenants-in-tail representing the inheritance, would seem to apply to the case of a Hindu widow ; and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow." See also the case of *Protabnarayan Sing* (II C.S. 186) in which, following the above principle, the Privy Council held that a decree properly obtained against the widow operates as *res judicata* against the reversioners.

There is, however, no presumption that a property found to be in possession of a Hindu widow who inherited considerable property left by her husband, belonged to the husband : *Diwan* v. *Indar*, 26 C.S., 871.

It was formerly held under the old Limitation Act that possession adverse to the widow was also adverse to the reversioner. But it has been held that the law has been changed since the passing of the Limitation Act of 1871, and the reversioner is entitled to twelve years from the death of the widow,—9 C.S.,

934. This ruling, however, seems to be inconsistent with the decision of the Privy Council in the case of *Hurrinath Chatterjee* v. *Mohunt Mothur*, 20 I.A., 183=21 C.S., 8, in which a suit by a daughter to recover her share of her father's estate had been dismissed only on the ground of limitation, and a subsequent suit by her son after her death was held to be barred by the principle of *res judicata*. But the doubt created by this case is removed by the decision of the Judicial Committee in the case of *Runchordas* v. *Parbati*, in which the reversioner was the plaintiff, and their Lordships held that Articles 141 and 120 of the present Limitation Act applied respectively to immoveable and moveable properties, and with respect to the argument based on Section 28 of the Act their Lordships observed—"The obvious answer to this argument is that in this case the period limited is not determined. It is not necessary to consider what might be the case if the widows or the survivor of them were suing, as the plaintiff does not derive his right from or through them, and the extinguishment of their right would not extinguish his:" 26 I.A., 71, 82.

Here again the same difficulty may arise as in a suit against the Mitákshará father alone, for a debt due by the whole family,—the difficulty in fact of distinguishing between proceedings against the widow personally, and those against her as representing the whole estate. In execution of a decree against the widow for a debt contracted for legal necessity, the right, title and interest of the widow may be sold according to our Civil Procedure, and the question may arise what was purchased, the whole estate, or the life-interest of the widow; and it will have to be decided by the application of substantially the same principles as have been laid down in the case of a Mitákshará father.

Thus, where a widow's estate was sold in execution of a decree against her personally, for arrears of maintenance payable by her, which was a charge on the estate, it has been held that only the widow's interest passed to the purchaser,—*Baijun Doobey* v. *Brij Bhookhun*, 2 I.A., 275=1 C. S., 133=24 W.R., 306.

But in another case in which the widow's right, title, and interest, only was sold in execution of a decree, it has been held that the court is at liberty to look to the judgment to ascertain what was sold thereunder, and that as it appeared from the judgment that the decree against the widow was in respect of the husband's estate and bound the reversionary heir, the purchaser took the estate absolutely:—*Jugalkisor* v. *J. M. Tagore*, 11 I.A., 59=10 C. S., 985.

In ascertaining what was purchased at a sale in execution against the widow, the real question is what was liable to be sold

under the decree and what in fact was sold; and for the purpose of ascertaining what estate was intended to be affected by the decree the pleadings may be looked at by the Court, to see the nature of the suit and the character of the relief actually claimed: *Srinath* v. *Hari*, 3 W.N., 637.

Reversioner.

Reversioner.—You will bear in mind that the term reversioner as used in Hindu law, bears a sense different from its ordinary meaning, for a Hindu reversioner has no present interest in the property, the actual reversioner may be a different person from the presumptive reversioner and his heirs: the terms 'the next heir of the last full owner,' or 'the then next heir' may be used instead of the above expression. A female heir may be a reversioner or the next heir, having a qualified estate. There appears to have been some misconception about the matter. It had to be settled by a Full Bench that when a maiden daughter succeeds in preference to her married sisters, and after marriage dies leaving a son, the estate will go to her qualified sister as the next reversioner in preference to her son: (9 C.S. 154).

Surrender.—A female heir may surrender or, properly speaking, relinquish her rights so as to accelerate succession and vest the property in the then next heir, in the same way as if she had died at that time:—(5 C.S. 732). This is *bonâ fide* done when the person in whose favour the relinquishment is made is also her own relation, for instance, when the surrender is made by the mother in favour of her son or daughter or grandson. In all other cases it is a mere pretext for an arrangement whereby the property is divided between the last owner's relations and the widow herself, the latter getting her share absolutely so that she might give them to her own relations.

The rule originated from the doctrine that the retirement from the world or the extinction of one's desire for property, is, according to Hindu law, civil death, and causes, in the same way as natural death, the extinction of his rights in property, and has the effect of accelerating inheritance. And because retirement from the world depends upon the will of the person, therefore it has been held that without the remotest idea of retiring from the world, she may do that which would follow from her actual retirement.

But in order to accelerate the inheritance of the reversioner, the widow must convey her estate absolutely; hence where a widow executed a deed in favour of a daughter's son, reserving her life-interest and declaring him to be entitled to the estate

after her death, it has been held that there was no surrender at all, and therefore no title in him to exclude another daughter's son,—*Behari* v. *Madho*, 19 I.A., 30=19 C.S., 236.

Alienation with reversioner's consent.—It is laid down in the Dáyabhága itself (D.B., 11, 1, 64,) that the widow may, with the consent of the husband's kinsmen, deal with his estate in any way; and the reason is, that they are her lawful guardians in default of the husband and the male issue. This follows from her status of perpetual minority under the Hindu law (Texts Nos. 2 and 3), her supposed want of discretion being supplied by their *auctoritas*. It is only with their permission, that she may make any gift to her relations on her father's and mother's side. This rule is supported by the authority of the following text of Nárada,—

मृते भर्त्तर्यपुत्रायाः पतिपक्षः प्रभुः स्त्रियाः ।
विनियोगेऽर्थरक्षासु भरणे च स ईश्वरः ॥
परिक्षीणे पतिकुले निर्मनुष्ये निराश्रये ।
तत्-सपिण्डेषु चासत्सु पितृपक्षः प्रभुः स्त्रियाः ॥ नारदः ।

which means,—"When the husband is deceased, the husband's kin are the guardians of his sonless wife: in the disposal and care of property, as well as in (the matter of) maintenance, they have full power. But, if the husband's family be extinct, or contain no male, or be helpless, or there be no Sapinda of his, then the kin of her own father are the guardians of the widow."

While commenting on this text the author of the Dáyabhága says, that "the disposal" means "gift and the like" which implies "gift, sale and mortgage," *i.e.*, any disposition of property.

This doctrine that the widow may with the consent of the husband's kinsmen deal with her husband's property, was acted upon by our Courts of Justice from the earliest times. But the difficulty which was felt for a long time, was, as to whether by "the consent of husband's kinsmen" is intended, the consent of all persons who may possibly be heirs of the husband, or the consent of the nearest or the presumptive reversionary heir.

This difficulty has now been removed by a Full Bench of the Calcutta High Court, who have held that the presumptive reversionary heir's consent is sufficient, because the widow may by retirement or by surrender, cause the estate to be vested in the reversioner, and so he is the person to be principally regarded in this connection:—*Nabakisor* v. *Hari Nath*, 10 C.S., 1102.

So it appears that the widow and the presumptive reversioner

are together competent to deal with the property in any way they please. But when there are more reversioners than one, the consent of *all* is necessary, the consent of only one or some being of no legal effect: the alienation in such a case is absolutely void: *Radha* v. *Joy*, 17 C.S., 896, and note 900.

Where, however, a widow relinquished the whole estate in favour of the then reversioner, and the latter made an absolute gift of half the estate to the widow to enable her to make a provision for maintenance of a son adopted by her, whose adoption had been declared invalid in a suit by the reversioner, it has been held that the relinquishment is valid as to one-half of the estate, and invalid as to the other half re-granted to the widow. It is difficult to follow the principle of the distinction; for the widow intended really to relinquish one-half *in consideration* of getting an absolute title to the other half,—*Hemchunder* v. *Sarnamoyi*, 22 C.S., 354.

The Bombay High Court (25 B.S., 129,) does not go so far as to accept the view that finds favour in Calcutta, as observed by the Chief Justice Sir Lawrence Jenkins, but appears to adopt a qualified view having regard to the following observation of the Judicial Committee, namely,—"Their Lordships do not mean to impugn the authorities, etc., which lay down that a transaction of this kind may become valid by the consent of the husband's kindred, but the kindred in such cases must be generally understood to be all those who are likely to be interested in disputing the transaction:"—*Raj Lukhee* v. *Gokool Chunder*, 13 M.I.A., 209, 228=12 W.R., 47; and accordingly it is held that a sale was validated by the consent of a person who was at the time the only male reversioner in existence.

The Allahabad High Court, however, does not recognise the validity of surrenders in favour, or alienations with the consent, of presumptive reversioners, so as to defeat the title of the actual reversioner,—6 A.S., 116, and 288. Thus, the position of the Benares female heirs has been reduced from absolute ownership, to one even inferior to that of the Bengal females.

It has been held by a Full Bench of the Madras High Court that according to the Judicial Committee a widow may surrender the entire estate so as to accelerate the succession: *Behari* v *Madho* 19 C.S., 236, 241); but a sale of a part of the property with the consent of the then reversioner is not binding on the actual reversioner, other than the consenting person, there being no current of decisions to that effect, in Madras as in Bengal: 21 M.S., 128.

Deceased widow's debts.—The actual reversioner succeeding to the possession of the estate after the death of the widow is

bound to pay off the debts contracted by the widow for a valid purpose for which she might have alienated any portion of the estate, although the debts were not charged upon the estate. It was so held by the Calcutta High Court in the case of *Ramcoomar Mitter* (6 C.S. 36) in which a widow had borrowed money for the purpose of defraying the marriage expenses of the daughter of a son who had pre-deceased his father, and died without repaying the debt. But the Allahabad High Court dissents from this view: 19 A.S., 300.

In the case of *Hurrymohun Roy* (10 C.S. 823) it has also been laid down by a Full Bench of the Calcutta High Court that if a female heir, who represents the entire estate, enters into a contract with a tradesman, which has conferred a benefit upon the estate, and is such as a prudent owner would make for the preservation of the estate, the obligation arising out of it will be annexed to the estate in the hands of the reversioner, if she dies before discharging the same. The facts of the case were as follows:—A daughter inheriting a large estate belonging to her father, ordered a quantity of lime for the purpose of making repairs to certain houses on the estate; the repairs were completed, but she died without paying the price of the lime supplied on credit. The lime-merchant was declared entitled to recover from the estate in possession of the reversioner.

It should be borne in mind that the widow takes the estate as the surviving half of her husband, her life is deemed as the continuation of her husband's life, for the purpose of ascertaining the reversionary heir. The estate is fully vested in her in the same way as if the husband lived in her, the only distinction being that her power of alienation and of charging the estate for debts is qualified. If the debts contracted by her are lawful, then the same consequences should follow as if the same were the husband's debts, that is to say, the debts should be a charge on the estate in the hands of the reversioner who must be deemed to be the heir of the widow representing the husband, and as such, liable to pay her lawful debts. The reversioner cannot succeed in most cases except upon the theory that the husband lives in the widow, and dies when she dies. It appears to be perfectly reasonable and equitable that his liability should be determined by the same theory which forms the foundation of his right, he being entitled to the residue left after meeting the widow's lawful expenses. When the reversioner is entitled to the rents that accrued and became due to, but were unrealized by, the widow, then on the same principle he should be held liable to pay the debts which could be realized from the estate, were the widow alive.

CHAPTER XIII.

SUCCESSION TO STRÍDHANA.

ORIGINAL TEXTS.

१। ऋक्थं मृतायाः कन्याया गृह्णीयुः सोदराः स्वयं।

तदभावे भवेन्-मातु-स्तदभावे भवेत् पितुः॥ बौधायनः।

1. The wealth of a deceased maiden, let the uterine brothers themselves take; on failure of them, it shall belong to the mother; in her default, it shall belong to the father. Baudháyana, cited in Mit. 2, 11, 30 and in D.B., 4, 3, 7.

२। दत्वा कन्यां हरन् दण्ड्यो व्ययं दद्याच्च सोदयं।

मृतायां दत्तम् आदद्यात् परिशोध्योभय-व्ययं॥ याज्ञवल्क्यः।

2. For detaining a maiden after betrothing her, the offender shall be punished, and shall also make good the expenditure (incurred by the bridegroom's side) together with interest; if she die (after troth plighted) let the bridegroom take back the gifts he had presented, meeting however the expenditure on both sides.—Yájnavalkya.

३। अनपत्यां संस्थितायान्तु समं सर्व्वे सहोदराः।

भजेरन् मातृकं ऋक्थं भगिन्यश्च सनाभयः॥

मातुश्च यौतुकं यत् स्यात् कुमारीभाग एव सः॥

स्त्रियास्तु यद्-भवेद्-वित्तं पित्रा दत्तं कथञ्चन।

ब्राह्मणी तद्-हरेत् कन्या तदपत्यस्य वा भवेत्॥

ब्राह्म-दैवार्ष-गान्धर्व्व-प्राजापत्येषु यद्-धनं।

अप्रजायाम् अतीतायां भर्त्तुरेव तद्-इष्यते॥

यत् त्वस्याः स्याद्-धनं दत्तं विवाहेष्वासुरादिषु।

अतीतायाम् अप्रजायाम् मातापित्रोस्तदिष्यते॥ मनुः।

3. When the mother is dead, let all the uterine brothers and uterine sisters equally divide the maternal estate. But

whatever property is the mother's *Yautaka* (gift at the time of marriage), that is the share only of her maiden daughter. The wealth of a woman, which has been in any manner given to her by her father, let the *Bráhmaní* daughter take; or let it belong to her offspring. It is admitted, that the property of a woman (married) in the forms called *Bráhma, Daiva, Ársha, Gándharva, and Prájápatya,* shall go to her husband, if she die without issue. But the wealth given to a woman (married) in the forms of marriage called, *Ásura* and the like (i.e., *Rákshasa* and *Paisácha*) is ordained, on her death without issue, to become the property of her mother and father.—Manu.

४। मातु-र्दुहितरः, शेषम् ऋणात्, ताभ्यऋतेऽन्वयः।

अप्रज-स्त्रीधनं भर्तृ-ब्राह्मादिषु चतुर्ष्वपि।

दुहितॄणां, प्रसूता चेत्, शेषेषु-पितृगामि तत्॥ याज्ञवल्क्यः।

4. The daughters share the residue of their mother's property after payment of her debts; in their default the (male) issue. The property of a childless woman (married) in the four forms beginning with the *Bráhma,* belongs to her husband; but if she leaves progeny, it belongs to daughters: and in other forms of marriage, it goes to her parents (on failure of her issue).—Yájnavalkya.

५। समं सर्वे सोदर्या द्रव्यम् अर्हन्ति कुमार्यश्च॥ शङ्खलिखितौ।

5. All the uterine brothers and maiden sisters are equally entitled to the property.—Sankha and Likhita.

६। सामान्यं पुत्र-कन्यानां मृतायां स्त्रीधनं स्त्रियां।

अप्रजायां हरेद्-भर्त्ता माता भ्राता पितापि वा॥ देवलः।

6. A woman's property is common to her sons and daughters, when she is dead; but if she leaves no issue, her husband shall take it, or her mother, brother or father.—Devala.

७। मातु-र्दुहितरोऽभावे दुहितॄणां तदन्वयः॥ नारदः।

7. Daughters take their mother's property; on failure of daughters, their (or her) issue.—Nárada.

८। स्त्रीधनं दुहितॄणाम् अप्रत्तानाम् अप्रतिष्ठितानाञ्च॥ गौतमः।

8. A woman's property belongs to her daughters unaffianced and to those not actually married.—Gautama.

९। पितृव्याद्येव यद्-दत्तं दुहितुः स्थावरं धनं।

अप्रजायाम् अतीतायाम् भ्रातृगामि तु सर्व्वदा ॥ वृद्धकात्यायनः।

9. But whatever immoveable property is given by the parents to their daughter, goes to her brother, on her dying without leaving issue.—Senior Kátyáyana.

१०। बन्धुदत्तन्तु बन्धूनाम्, अभावे भर्तृगामि तत् ॥ कात्यायनः।

10. But what is given by her kindred, belongs to her kindred; in their default, it goes to her husband.—Kátyáyana.

११। स्त्रीधनं तदपत्यानां दुहिता च तदग्रिनी।

अप्रत्ता चेत्, समूढ़ा तु न लभेत्-मातृकं धनं ॥ वृहस्पतिः।

11. A woman's property belongs to her children; and the daughter is a sharer of it; but if there be an unmarried daughter, the married daughter does not get the maternal property.—Vrihaspati.

१२। मातुः स्वसा मातुलानी पितृष्य-स्त्री पितृस्वसा।

श्वश्रूः पूर्व्वज-पत्नी च मातृतुल्याः प्रकीर्त्तिताः ॥

यदासाम् औरसो न स्यात् सुतो दौहित्र एव वा।

तत् सुतो वा, धनं तासां सबीजाद्याः समाप्नुयुः ॥ वृहस्पतिः।

12. The mother's sister, the maternal uncle's wife, the paternal uncle's wife, the father's sister, the mother-in-law, and the wife of an elder brother, are pronounced equal to the mother: if they leave no issue of the body, nor son, nor daughter's son, nor their son, the sister's son and the like shall take their property.—Vrihaspati.

The term "the sister's son, and the like" in this text means the male correlations of the six female relations declared equal to the mother, namely, the sister's son, the husband's sister's son, the husband's brother's son, the brother's son, the son-in-law and the husband's younger brother, respectively.

१३। सर्व्वासाम् एक-पत्नीनाम् एका चेत्|पुत्रिणी भवेत्।

सर्व्वास्ता तेन पुत्रेण पुत्रिणी-मनुरब्रवीत् ॥ मनुः।

13. If among all the wives of|the same man, one becomes mother of a son, Manu says that by that son all of them become mothers of male issue.—Manu.

Husband's gift to wife.—Gift of property by a Hindu husband to his wife is not deemed to create such an absolute right of the wife over it during the husband's life-time, as to entitle her to dispose of it according to her pleasure, (D.B., 4,1,8) and it is doubtful whether such property would go to her heir if she dies during the husband's life, having regard to the peculiar relation between them, and to the difficulty of ascertaining whether any moveable property was intended to be absolutely given to her by the husband.

Husband's gift of immoveable property.—It has already been seen that according to Hindu law, the wife takes only a life-estate in the immoveable property given by the husband, and she has no power of absolute alienation over it, whether it be a gift *inter vivos* or a bequest,—5 C.S., 684; and it appears to pass to the husband's heirs after her death. The Hindu law raises a conclusive presumption against the gift, by a husband to his wife, of a higher than life interest in immoveable property. The term दान gift is thus defined by Hindu lawyers, स्वस्वनिवृत्तिपूर्वक परस्वापत्तिफलको दानपदार्थः,—"The meaning of the term gift is that it is that of which the effect is the generation of another's proprietary right after the extinction of one's own proprietary right." Hence the words "I give this property to you" are sufficient according to Hindu law, to pass to the donee whatever interest the donor has in the property at the time; and the addition of any other words expressing that the gift is intended to be absolute is superfluous and unnecessary. Hence the position that if there are words in the deed of gift, showing the intention of granting an absolute estate to the wife, then she is entitled to such estate,—is contrary to the rule of Hindu law.

The principle upon which this rule of Hindu law is founded appears to be similar to that which underlies the Restraint on Anticipation in English law, the present case being the converse of that instance in English law. There is no reason why a Hindu husband should give immoveable property to the wife in such a manner that the same may ultimately go to her parents or their relations. A Hindu husband feels himself bound to make such provision as will enable the wife to get maintenance for her life, should she retain the character of being his wife or widowed wife. If a Hindu husband is found to execute a deed of gift purporting to make an absolute gift of immoveable property to his wife, it must be presumed to have been made to purchase peace, that is to say, the making of the deed was caused by such importunity as took away the free agency of the donor,

it must be presumed that the husband was weak-minded and ıe wife was of a commanding disposition and acquired great scendancy over the husband, so as to exercise undue influence to such an extent as to compel him to execute the deed according to her wishes. Hence Hindu law says that a Hindu husband's gift of immoveable property to his wife can never be operative and effectual after her death. Sometimes such a document is found to be drawn up by the wife's relations and executed by the man while lying on his death-bed in his father-in-law's house in the absence of his own relations.

It has, however, been held that a Hindu husband is not legally incompetent to make an absolute gift of immoveable property to his wife. Hence this rule of Hindu law does not apply when the deed of gift shows a clear intention of giving an absolute estate: it is, however, not necessary that there should be such words as are ordinarily used to pass an absolute estate; the intention is a matter of construction and may be expressed in other ways, 9 C.S., 830; 11 B.S., 573; 27 C.S., 44 and 649; 19 A.S., 133. In such a case the property will pass to her heirs.

But the view expressed by Chief Justice Farran of the Bombay High Court in the following passage, appears to be consistent with the original principle of Hindu law, namely,—"His wife is *to take possession and enjoy* the property, but he adds to this no words of inheritance, nor does he directly give her any power of disposition over it. The Courts have always leaned against such a construction of the will of a Hindu testator as would give to his widow unqualified control over his property. By the use of such expression as, 'my wife is the owner after me,' or 'my wife is the heir' it is usually understood that the testator is providing for the succession during the life-time of the widow and not altering the line of inheritance after her death."—*Harilal* v. *Bai*, 21 B.S., 376, 380; see also 22 M.S., 357 and 431.

This rule of Hindu law appears to be an exception to the rule of construction embodied in Section 82 of the Succession Act and in Section 8 of the Transfer of Property Act, namely, that in the absence of *express* reservation, the entire interest of the testator or transferrer respectively will pass to the legatee or transferee.

A maiden's property goes in the following order according to both the Mitákshará and the Dáyabhága:—

(1) Full brother, (2) mother, (3) father.

Property given to a damsel by an intending bridegroom must be returned to him, on her death before marriage.

A married woman's property according to the Mitákshará passes in the following order:—

(1) Maiden daughter, (2) married but unprovided or indigent

daughter, (*Uma* v. *Gokool*, 5 I.A., 40=3 C.S., 587), there must be marked difference in wealth, in order to give preference to the poorer daughter, (23 B.S., 229), (3) married provided daughter, (4) daughter's daughter (5) daughter's son, (6) son (including adopted son), (7) son's son (including son's adopted son), (8) husband and his heirs in the same order in which they take his property, if the marriage took place in the approved forms; but if the marriage took place in any of the disapproved forms, then instead of the husband and his heirs, the mother, the father and the father's heirs take.

It should be observed that generally marriages now take place in the approved form called *Bráhma* among the superior castes. But even among some sections of the higher castes, and among the lower orders who form the majority of the Hindus, the *Ásura* form prevails. It has, however, been held that under the law of the Benares School, marriage must be presumed to to have taken place in one of the approved forms: 25 C.S., 354.

You will note how completely a Hindu female becomes identified with her husband's family; her own relations are excluded by those of her husband, just as she is excluded by her father's relations living jointly with him.

The above text (No. 12) of Vrihaspati, enumerating the sister's son and the like as heirs to *Stridhana*, is not cited in the Mitákshará; but it is cited in the Víramitrodaya and the Viváda-Ratnákara, and these commentaries appear to lay down that these six relations are to take before the relations included under the general rules, that is, before the husband's heirs in cases of approved forms of marriage of the deceased woman, and before the father's heirs in the disapproved forms of marriage, respectively.

The authority of this text has been recognized in Mithilá cases,—*Mohun* v. *Kishen*, 21 C.S., 344, and also in a case governed by the Benares School,—*Ranjit* v. *Jagannath* 12 C.S., 375.

It would seem that the rival wife's son and daughter should come in before these six relations, for the same reason.

The order of succession among the six relations in the cases of approved marriage, appears to be as follows:—(1) the husband's younger brother, (2) the husband's brother's son, (3) the husband's sister's son, (4) her own brother's son, (5) her own sister's son, (6) and the son-in-law,—*Bachha* v. *Jugmon*, 12 C.S., 348.

The Judicial Committee have held that the Víramitrodaya is declaratory of the law of the Benares school, (12 M.I.S., 448). But the Calcutta High Court have held that that treatise cannot be referred to when the Mitákshará is clear, and that as the Mitákshará gives completely and exhaustively the order of succession to *Stridhan* property, no effect can be given to the text of

Vrihaspati and to what is laid down in the Víramitrodaya on the strength of that text: *Jagannath* v. *Runjit*, 25 C.S., 354.

The Sulka or bride's price, however, goes to a woman's uterine brother in preference to her own issue; but if there be the mother she is to be preferred to the brother. The reason is that originally it belonged to the parents; but later on it was declared to become the bride's *Stridhan*; and this rule of succession appears to be a compromise between the original and the later views.

Dáyabhága rules on the subject are not so simple as the above. The author divides *Stridhan* property into two classes, namely, *yautuka* and *ayautuka* or non-*yautuka*; the latter including property gained previously or subsequently to marriage.

Distant succession to both the above descriptions of *Stridhan* is the same. The courses of descent in the earlier stage are different.

There is a doubt about the authenticity of a particular passage of the Dáyabhága (4, 3, 33,) which affects the position of the rival wife's son, daughter and grandson, so the following orders of succession should be taken as provisional only being not settled yet in that respect, as well as in other respects.

Succession to yautuka, (and to father's gifts other than nuptial presents,) is in the following order:—

(1) Maiden daughter, (2) betrothed daughter, (3) married daughter,—1st, one having or likely to have a son, 2nd, one that is not so,—(4) son (including adopted son), (5) daughter's son, (6) son's son, (7) son's grandson, (8) husband, (9) brother, (10) mother, (11) father, (12) rival wife's son, daughter, and grand-son.

Succession to ayautuka, (other than father's gifts):—

(1) Son and maiden daughter, (2) married daughters having or likely to have sons, (3) son's son, [(4) rival wife's son and daughter,] (5) daughter's son, (6) barren and childless widowed daughters, (7) son's grandson, (8) whole-brother, half-brother, (9) mother, (10) father, (11) husband, (12) rival wife's son, daughter, and son's son.

Succession to all classes of Stridhan after the above relations, is in the following order:—

(1) Husband's younger brother, (2) husband's brother's son, (3) sister's son, (4) husband's sister's son, (5) brother's son, (6) son-in-law, (7) husband's *sapindas*, &c. (8) father's kinsmen.

The Bengal authorities are in conflict with each other with reference to succession to *Stridhan*.

It should be observed that as regards non-*yautuka* property, the husband is postponed to the woman's parents and brothers according to the Dáyabhága, so that property given by the husband's relations, will go to her parents and brother, in preference

to the husband,—*Judoo* v. *Bussunt*, 19 W.R., 264, *Hurrymohun* v. *Shonatun*, 1 C.S., 275.

Father's gifts other than nuptial presents.—are stated above to descend in the same way as *Yautuka*, on the authority of Srikrishna's synopsis of heirs to *Stridhan* given at the end of his commentary on the 4th Chapter of the Dáyabhága, as well as of his Dáyakrama-Sangraha. This view of Srikrishna's is founded on the first interpretation put by Jímútaváhana on Manu's text (3rd Sloka of Text No. 3) in the Dáyabhága, Ch. 4, Sect. 2, para. 16, according to which the daughter, and not the son, is entitled to succeed first, to a father's gift whenever made, in the same manner as to *Yautuka*. Srikrishna appears to apply to this kind of *Stridhan* the entire order of succession applicable to *Yautuka* or nuptial presents. It is extremely to be regretted that the attention of the Court was not invited to these authorities in the case of *Gopalchandra Pal* v. *Ramchandra Pramanik*, 28 C.S., 311, in which therefore the order given above is dissented from, and the brother is held preferential heir to the husband. It may be that the result would have been the same, but still the doubt would have been set at rest.

Joint family system and succession to *Stridhan*.—The order of succession to *Stridhan* property, in some respects, may seem to be arbitrary, unnatural and inexplicable unless we take into consideration, the joint family system, which is the real key to many rules of Hindu law, and the nature of a woman's connection with the different members thereof, and with her own relations. If not after marriage, after the *Dvirágamana* ceremony, a woman does seldom, if ever, goes to her father's house; her father, brother, brother's son, and sister's son may come to her father-in-law's house to see her; but their visits are few and far between. Seldom if ever do sisters meet each other. As regards her husband's relations, she does not appear before, nor speak with her father-in-law or his brother, or husband's elder brother or cousin, or any other male relation of higher degree or rank. She appears before, and speaks with, the husband's younger brothers and cousins, his nephews and other relations of inferior rank; and with these she comes into contact continuously. The husband's younger brother is called in Sanskrit, *Devara*, meaning a *playmate*; in fact, a woman is very intimate with him, to whom she may speak in the presence of all female relations and males of inferior rank, and from whom she gets great help; inasmuch as she cannot speak to her husband in the presence of any male or female relation of higher rank. This is the usage in most places and among most castes.

We may now understand why the husband's younger brother

and the husband's brother's sons are preferred to her own nephews, and why the father-in-law and the husband's elder brother are placed lower in the order of succession.

There is very little distinction between the husband's younger brother of the whole-blood and one of half-blood, as regards a woman's connection with them in a joint-family; their equality appears from a rule in the Dáyabhága that both kinds of brothers jointly succeed to undivided immoveable property of a deceased brother if succession opens to the brothers, although it is not followed by the Calcutta High Court.

In a case of competition between them, the husband's uterine brother is entitled to preference; in his default the husband's half-brother is entitled to inherit a woman's *Stridhan* in the same circumstances, in which the husband's full-brother would have succeeded, had he been in existence. There is no valid reason for restricting the term—"the husband's younger brother," as used in the Dáyabhága, Ch. iv, Sect. iii. paras. 36 and 37, to the husband's *full*-brother. But it appears to be so restricted in a case in which it has been held that a woman's brother's son is entitled to succeed in preference to her husband's younger brother of the half-blood: 4 W.N., 743. This view is, however, contrary to the Dáyabhága and other commentaries of the Bengal school.

The husband's male issue by another wife is treated by a childless woman as if sprung from her own body, he addresses her as mother, and the mutual attachment is, oftener than not, very strong.

The faculty of feeling is stronger in women than in men; and a woman retains her affection for her parents and other relations though they are out of sight. When a daughter leaves her father's house and lives with her husband in her father-in-law's house, it is the mother who anxiously enquires about and looks after her; and the son-in-law also is an object of her love and affection, so as to be recognized as her heir in certain circumstances.

Woman of the town.—Should a female become degraded by becoming a woman of the town, then according to the Calcutta High Court, her connection with her undegraded relations ceases, so that the latter cannot be her heirs; 21 C.S., 697. But the Madras High Court have held that prostitution does not sever her legal relation, and the consequent degradation does not entail a cessation of the tie of kindred, and that therefore such a woman's stepson is entitled to inherit her property; 23 M.S., 171.

But degradation appears to operate as civil death; see Manu xi, 183, 184.

It has been held that a Hindu woman does not cease to be a Hindu by reason of her degradation on becoming a woman of the town, and succession to her property is governed by Hindu law: 25 C.S., 254. It is very difficult to say what relations would be heirs to these fallen women; for, while the Madras High Court held that a degraded sister was entitled to inherit the property of a prostitute (12 M.S., 277) the Calcutta High Court held in the above case, that she is not entitled.

It should be observed that relationship is the foundation of heirship; it has been held by the Bombay High Court and recently by the Madras and Allahabad High Courts that female relations are entitled to become heirs to a male's estate in preference to strangers such as a pupil, notwithstanding the general rule excluding women from inheritance: see *Supra* pp. 202 and 203.

CHAPTER XIV.

ENDOWMENT

AND

SUCCESSION TO PROPERTY OF PERSONS OF HOLY ORDERS.

वानप्रस्थ-यति-ब्रह्मचारिणां रिक्थभागिनः ।

क्रमेणाचार्य्य-सच्छिष्य-धर्म्मभ्राचेकतीर्थिनः ॥ याज्ञवल्क्यः ।

The life of a Hindu of the Bráhmana and the other twice-born classes, was divided into four stages. He had to pass the first stage of his life as a *Brahmachárí* or student, living with the *Guru* or preceptor of the sacred literature as a member of his family, and supporting himself by begging; the second, as a *Grihastha* or house-holder, being married when his studentship was over; the third, as a *Vánáprastha* or one retired from the world, residing in some solitary place with persons of the same order, engaged in religious practices and contemplation of the deity, being free from all worldly cares, and living on the vegetables growing in forests, or on alms,—the retirement having the effect of extinguishing his rights to the property he had at the time of retiring, and vesting them in his sons or other heirs; and the fourth, as a *Yati* or itinerant contemplative ascetic, supported by what is voluntarily given by people, or by begging in the evening and taking no more than what is sufficient for the day, and living under a tree or the like shelter.

A *Brahmachárí* or student was of two descriptions, *viz.*, *Upakurvána* or an ordinary student and *Naishthika* or a life-long student. The former became a house-holder in due course, while the latter was a student for life, devoted to the study of science and theology, felt no inclination for marriage, did not like to become a house-holder, and chose to live the austere life of a perpetual student.

The ideal of life which the sages contemplated by the different modes prescribed for adoption by persons of higher castes in the different stages of life, was intended to cause actual practice to accord with theory, by giving practical effect to the religious doctrines of *Karma* or *Adrishta*, and Metempsychosis or transmigration and Moksha or liberation. *Adrishta* is the invisible dual force being

the effect of *Karma* or good and bad deeds done by a person in past time, determining respectively happiness and misery at the present and the future; Metempsychosis is the assumption by the soul of different material bodies determined by its *Karma* or *Adrishta*; and the *Moksha* or liberation is the release of the soul from the necessity of being confined to some material body. The pleasures and pains of the body are not the pleasures and pains of the soul in reality. It is through *máyá* or illusion that the soul identifies itself with the body. This illusion is dispelled by true knowledge which is the only means of attaining *moksha* or liberation, or communion with the Supreme Soul. It is doubtful whether this ideal was actually followed in practice except by a few only.

The law of succession that has already been explained, applies to the property left by a house-holder or an ordinary student.

The above text of Yájnavalkya lays down succession to the property which the persons of these holy orders may have while in such orders, and leave behind on their death.

The property of a life-long student goes to his preceptor; of one retired, to a religious brother; and of an itinerant ascetic, to a virtuous pupil: in their default to one of the same order (or hermitage) or to a fellow-student.

The Hindus of the present day rarely adopt the third and the fourth stages of life. A life-long student, such as is contemplated by the sages, is also rare now. Nor do the ordinary students observe the rules of the Shástras relating to their mode of life and the study of the sacred literature.

But there are now persons belonging to certain religious sects of modern origin, such as *Vaishnavism*, that do in some respects resemble the life-long students and itinerant ascetics. They are connected with the well-known *maths* or *mohuntis*. A *math* (मठ) means a place for the residence of students. The founders of these *maths* were learned Bráhmans of the *Vaishnava*, *Saiva* or *Sákta* sect, who, observing celibacy and leading a pious life of austerity, wandered from one place to another carrying with him an image of the Deity, representing a certain attribute of Him, and teaching the truths of religion to those that attracted by the sanctity of his life, flocked to him. They were prevailed upon by the piety of some Rajas or influential men that became their disciples to settle in particular localities, receiving grants of land from them, for the maintenance of themselves and their pupils, called *chelas*, that accompanied them, lived with them and observed celibacy.

These *maths* are found in many parts of Bengal. It is worthy of remark that almost all the *maths* in Bengal were founded by

Bráhmanas come from the North-West Provinces, and not by Bráhmanas domiciled in Bengal. And the persons that are now connected with these *maths* either as the *mohunta* or *chelas* are fresh arrivals from the North-West. But these have lost their original character of being schools of religious teaching and have now become rather secular. The heads of these institutions are not pious teachers of religion, such as their founders had been; and all the religious teaching they impart to their disciples is an aphoristic prayer secretly communicated to each of them. The *mohuntas* and the *chelas* are generally ignorant and illiterate persons having no access to their religious books. They observe celibacy in so far that they have no wives with them, for as their early life is not known it cannot be said that all of them are unmarried. Some leave their homes in disgust, while others appear to have fled from their country after having committed heinous crimes. Religion, however, is not the object for which people resort to these places. Those that hope to be maintained by the *mohunta* and especially his own relations become his *chelas*. Acquisition of property by fair means or foul, appears to be the principal object of their care. And the endowed property is generally misappropriated. The intention of the donors may be more usefully carried out by appropriating the large property so endowed, to the dissemination of knowledge of the Sanskrit language and Hindu theology.

The property belonging to these *maths* is regarded as *Debutter* belonging to the deity established by the founder. The manager is called the *mohunt*. The succession to the office is regulated by the usage of the *math*. In some cases the present *mohunt* is considered to have the power of nominating one of his *chelas* or of his fellow-disciples or *guru-bhais* as his successor, the choice often falls on his own relation, if any, amongst them. In others, the successor is elected by the neighbouring *mohunts* or selected by the ruling power from amongst the *chelas* of the deceased *mohunt*. In some, again, the office devolves on the senior *chela* of the last *mohunt*. The particular usage is to be proved in each case; (11 Moore 405.)

The succession of a *chela* or a *guru-bhai* resembles the succession of a pupil or religious brother to the property of an itinerant ascetic. If any other person belonging to a *math* dies leaving property, it goes to his preceptor, or fellow-disciple, in the same way as the property left by a life-long student.

It has been held by the Madras High Court that a Súdra cannot become a *Sannyási* or ascetic: 22 M.S., 302. This is undoubtedly the doctrine propounded in the Smritis. But the learned Judges have not taken into consideration the modern usage

introduced by the Vaishnabism and the Tantrik and other systems according to which a Sudra also may become a *Sannyási*. There are many religious sects of ascetics among whom caste distinction is unknown, who accordingly initiate and admit Súdras into their brotherhood, if otherwise qualified. In esoteric Hinduism also, caste is individualistic not hereditary, it being determined by qualification and not by birth. There is ample and abundant authority in the Shastras in support of this view of caste. The highest virtue taught by the Hindu religion is that a man should regard other persons and beings as his own self reproduced in them, as the same soul pervades them all. Thus in Bhagabat-Gitá it is enjoined :—विद्या-विनय-सम्पन्ने ब्राह्मणे गवि हस्तिनि ।

शुनि चैव श्वपाके च पण्डिताः सम-दर्शिनः ॥

Endowments.

Endowments are either public or private. In the former the public is interested, and in the latter certain definite persons only are interested. When property is dedicated to charitable, educational or religious uses, for the benefit of an indeterminate body of persons, the endowment is a public one; and when property is set apart for the worship of a deity of a particular family, in which no outsider is interested, the endowment is a private one. A *math* or *mohunti* is a public endowment.

The distinction between private and public endowments is an important one; for "in the case of a family idol, the consensus of the whole family might give the estate another direction" (*Konwar Doorya* v. *Ram*, 2 C.S., 341); in fact, if the members of the family choose to throw the family god into the waters of the Ganges, and themselves enjoy its property, no outsider can raise any objection, the endowment being a private one, the public is not interested. The gift of such a god and its property, has been held valid, 17 C.S., 557.

The Hindu endowments consist of very extensive property, called *Debutter*. But although the object of the grants in many cases, may in terms, be a deity, the intention is to dedicate the property for charitable purposes.

For, परोपकारोहि परमो धर्म्मः—'Doing good to others is the supreme *dharma* or religious duty." A gift for *Dharam* or *Dharma* is therefore intended for charitable or other purposes beneficial to man. It has been held that such a gift is void for vagueness and uncertainty: 21 B.S., 646-23 B.S., 725. It is submitted that in a country so poor as India, the donor's intention would seem to be perfectly satisfied, if our Courts had given effect to such gifts in the same way as if the object were distinctly charitable, as is

done by the Court of Chancery by supplying the defect as to the particular mode, in which the property should be applied.

The images worshipped by the Hindus are visible symbols representing some form of the attribute of God contemplated as having one only of His threefold attributes, upon which is based the Hindu idea of Trinity, namely, God the Creator, God the Preserver, and God the Destroyer, the same perhaps, as God the Father, God the Son, and God the Holy Ghost.

When an image has once been consecrated with appropriate ceremony, the deity of which the image is the visible symbol resides in it (7 C.L.R., 278). If the image is cracked, broken or mutilated it may be substituted by a new one duly consecrated. Fresh consecration or substitution is necessary should the image be polluted in any way. Removal from the temple, amounts to pollution in the case of the image of Siva only. A new image cannot be substituted when the original one is free from any defect of the kind mentioned.

In consequence of the doctrine that the consecrated image is the deity and juridical person capable of holding property, it has been held that a bequest to a god to be established and consecrated by the executor after the testator's death is void, as being a gift to a person not in existence at the testator's death, according to the Tagore case: 25 C.S., 405. It is submitted that as a gift to a god is really a gift to charity, effect might be given to such gift by our Courts upon that ground, also as made to one *in embryo*.

Every respectable Hindu family has its family god. In most cases there is no property dedicated to it; the worship is voluntarily conducted by the descendants of the founder. If any member refuses to bear the expenses of his *pálá* or turn of worship, in such a case it has been held that he cannot be compelled to do so, the obligation being a moral one.

In some cases, the worship of an idol is made a charge upon certain property that is not entirely dedicated. Such property is heritable and transferable, subject to the charge (5 C.S., 438). But the mere fact that the rents of a property have been applied for a considerable period to the worship of a god, is not sufficient proof of dedication (2 C.S., 341).

When any property is entirely dedicated for the worship of a deity and no person has any beneficial interest in the property, it becomes absolutely *Debutter*. It has been held that the mere execution of a document dedicating property to a family god, is not dedication in the absence of any act following it, showing that the executant did divest himself of the property:—*Watson* v. *Ram.*, 18 C.S., 10.

It should be observed that in order to constitute any property

Debutter, it is necessary to prove that the property was dedicated and that the rents and profits of the same have all along been appropriated to the worship: 8 W.R., 43; 2 Hay 490. The treatment of the property by the donor and his successor is the test whether the endowment is real and *bonâ fide* or nominal and colourable made for defrauding creditors: 3 W.R., 142; 4 W.N., 405. In the absence of proof of dedication or other circumstance, mere appropriation of a portion of the profits to the worship (18 W.R., 399), or the release of the land by Government on the ground of such appropriation (21 W.R., 365), or mere purchase of the property in the name of the God (11 W.R., 13 affirmed, 20 W.R., 95), or the mere execution of a deed of dedication, is not sufficient proof of dedication.

A deity has for some purposes, been held to be a property. The *Debutter* estate belongs to the god, but the management is vested in a trustee called *sebait, sevak* or *parichárak*. The powers of a *sebait* in respect of *Debutter* property are the same as those of a manager of an infant's estate, a deity being a perpetual minor with regard to its property: 2 I.A., 145. The principles of *Hunnooman Parsad's* case apply to the alienation by a *de facto* trustee: 24 C.S., 77. The trustee may alienate the property for legal necessity, which in this connection, means the preservation of the estate, keeping up worship, defending litigation, the repairs of the temple, the restoration of the image, and so forth: 22 C.S., 989; 23 W.R., 353.

If a *sebait* or trustee of a *public* endowment becomes guilty of a breach of trust, the Advocate-General or with his written consent *two* or more persons directly interested in such trust, may institute a suit in the High Court or the District Court for the removal of the trustee according to Section 539 of the Civil Procedure Code.

Section 14 of Act XX of 1863, however, provides that any interested person may bring a suit in the District Court against a trustee guilty of misfeasance or neglect of duty or breach of trust, for the specific performance of any act, or for damage, or for the removal of the trustee. But it is necessary that the plaintiff, before he brings such a suit, should obtain the leave of the District Judge, by presenting a preliminary application.

But section 14 does not apply to a Committee appointed under Act XX of 1863, who may, therefore sue without previous leave, their manager or superintendent for damages for misappropriation, and for injunction, (9 C.S., 133); they may dismiss or suspend the superintendent for good and sufficient cause; (3 M.H.C., 334; 21 M.S., 179); or join any other person with the manager who must obey: 6 M.S., 58; 17 M.S., 212. Nor does

that Section apply to a suit by a trustee against an ex-trustee: 6 M.S., 54.

It has been held that Act XX of 1863 applies to endowments to which the provisions of Reg. XIX of 1810 were applicable. All religious establishments for the maintenance of which land had been granted either by the Government or by individuals were subject to that Regulation, whether or not the Board of Revenue took them under its management: (9 C.L.R., 433). In this case the endowment was created subsequently to 1810 A.D.

Act XX of 1863 does not apply to private deities: *Protap* v. *Brojo*, 19 C.S., 275; 14 M.S., 1.

The donor has the right to direct the mode of succession to the office of the *Sebait*. If the deed of endowment is not forthcoming, or contains no such direction, the devolution of the trust depends upon the usage of each institution, if any, *Bhagaban* v. *Ram*, 22 C.S., 843; or passes to the heirs of the original trustee, or of the donor himself where the Sebayetship has not been otherwise disposed of: 16 I.A., 137. And it reverts to the donor or his heirs when the succession directed by him fails: 17 C.S., 3; 25 C.S., 354.

The office is not saleable, 4 M.S., 391; 16 M.S., 146. It has been held by the Judicial Committee that an assignment of the right of management is beyond the legal competence of a trustee under the common law of India, and that the assignment being of a trusteeship for the pecuniary advantage of the trustee, cannot be validated by any proof of custom: 4 I.A., 76. In another case it was held that the sale of the right of management and of the endowed property was null and void, in the absence of a custom allowing them: 27 I.A., 69, nor is it divisible where there are more trustees than one, inasmuch as they hold as joint tenants: 19 A.S., 428. But if they have a pecuniary interest such as a right to the votive offerings, then they may come to a *quasi*-partition, *i.e.*, to an arrangement whereby each of the *Sebayets* may, by turns, become the sole manager for a definite term; 19 W.R., 28; 13 B.S., 548; 22 W.R., 437.

Although the *Sebayet's* right to worship or to surplus profits is not transferable to a stranger (3 W.R., 152), nor in execution of a decree against him, (7 W.R., 266; 15 W.R., 389), still the same may be transferred to a co-*Sebayet* or to one who is the next in the line of succession (6 B.S., 298), so that the succession may by deemed to be accelerated; hence it has been held that a transfer to one only of three persons entitled to become the next *Sebayets* is not valid: 15 M.S., 183.

When an alienation of the office or of the endowed property has been illegally made, it may be set aside by a co-*Sebayet* or by

one entitled to become the *Sebayet* after the present trustee. The successive trustees have not successive life estates, so that no new cause of action can arise after the death of the vendor. Article 124 of the Limitation Act applies; there is no distinction between the office and the property: 27 I.A., 69. Nor is a person precluded from raising the question that the priestly office and its emoluments are inalienable, because he had transferred the same: 1 W.N., 493.

As regards limitation, it should be considered whether Section 7 of the Limitation Act is not applicable to a suit to set aside an improper alienation, by a *Sebayet*, of the property belonging to a Hindu God. A Deity is regarded as a juridical person for the purpose of holding property of which the *Sebayet* is only a manager; the relation between him and the God is not that of trustee and beneficiary. As the God is incapable of managing his property, he should be deemed a perpetual minor for the purpose of limitation.

When the donor of an endowment has completely divested himself of the property dedicated, he cannot revoke the trust or derive any benefit therefrom, except what has been reserved: 18 W.R., 472; 23 W.R., 76.

If the object of an endowment fails, and the funds cannot be applied to the original purpose, then according to the doctrine of *cy pres*, they are to be appropriated to an object of a similiar character.

CHAPTER XV.

IMPARTIBLE ESTATES.

१। ज्येष्ठ एव तु गृह्णीयात् पित्र्यं धनम् अशेषतः।
शेषास्तम् उपजीवेयु-र्यथैव पितरं तथा॥ मनुः, ९, १०५।

1. Or the eldest brother alone may take the paternal wealth in its entirety; and the others may live under him, as they lived under their father.—Manu, 9, 105.

२। सदृशस्त्रीषु जातानां पुत्राणाम् अविशेषतः।
न माढतो ज्यैष्ठ्यम् अस्ति जन्मतो ज्यैष्ठ्यम् उच्यते॥ मनुः ९, १२५।

2. As between sons, born of wives equal in class, there being no ground for distinction, there can be no seniority in right of the mother; but the seniority is ordained to be according to the birth.—Manu, 9, 125.

Origin of impartible estates.—There are many valuable estates consisting of large tracts of land, the succession to which is not governed by the ordinary law of inheritance, prevalent in the locality, but is regulated by the custom of primogeniture, according to which they are descendible to, and held by, a single member of the family at a time, the other members being entitled to maintenance only.

These impartible estates appear to have originated in three different ways, namely:—

(1) Most of them appear to have originally been *Rajes* or principalities, or territories of independent chiefs or feudatories exercising powers of an autocrat, who have gradually been, in course of time, reduced by the paramount power, to the position of ordinary Zemindars.

(2) In some of them, the rents and profits of the landed property formed the emoluments of public hereditary offices which could be held by only a single member of the family, and so was descendible to a single heir by primogeniture.

(3) While the rest appear to have owed their origin to family arrangements followed up in practice for many generations, whereby it was originally agreed that the family property should be impartible and be held and managed for the benefit of

the family, by a single member at a time, in a certain order of succession, the other members being entitled to maintenance only without any power of interference with the management.

According to the ancient law of the country, the ruling power was entitled to a certain share of the produce yielded by every bigha of cultivated land; for the purpose of convenience in collecting the same, the country was divided into a large number of fiscal districts, each of which was under the charge of an officer of government, whose principal duty was, to collect the king's share of the produce or the land-revenue or the land-tax, as well as other taxes levied on tradesmen and the like. Like other occupations in India, the office of the tax-collectors became hereditary, and their remuneration consisted of a certain percentage of the net collections made by them. In course of time, the value of the king's share of the produce collected in each of the fiscal districts became well-known, and these revenue-officers were required to pay a certain amount of money, being the approximate value of the king's share after deducting therefrom the collection charges and their own remuneration; which amount was liable to variation owing to circumstances justifying an increase or diminution thereof.

By the Permanent Settlement of 1793, these hereditary tax-collectors in Bengal, Behar, and Orissa or Midnapur, were converted into proprietors of the fiscal districts or Purgunnahs; in other words, the British Administration transferred its right to the king's share of the produce of the lands in the fiscal districts, to the hereditary tax-collectors generally known by the name of Zemindars in Bengal, subject to the condition of paying a certain fixed amount of annual land-revenue to the Government.

According to a custom originating in considerations of financial convenience, these hereditary offices were impartible and descendible by primogeniture to the eldest sons of the holders thereof after their death. But their character was changed by the Permanent Settlement, and they were converted from offices, into tenures in land.

While concluding the Permanent Settlement with the Zemindars, and thereby conferring proprietory right on them in respect of lands settled with them in perpetuity, the British Administration thought it desirable to take away the character of impartibility of their original status in relation to the lands, of which they had been the tax-gatherers only, and not proprietors.

In order that there might not be any doubt on the subject, Regulation XI of 1793 A.D. was passed, which refers to the previous custom of impartibility, and declares that, notwithstanding the same, these newly formed estates shall be descendible like

other descriptions of property, to all the heirs of the deceased proprietor, according to the Hindu or Mahomedan law of inheritance, and shall be liable to partition when devolving on two or more heirs.

Subsequently in the year 1800 A.D., an exception to the above rule was declared by Regulation X of that year, the Preamble of which runs as follows,—"By Regulation XI of 1793, the estates of proprietors of land dying intestate are declared liable to be divided among heirs of the deceased, agreeably to the Hindu or Mahomedan laws. A custom, however, having been found to prevail in the jungle mehals of Midnapur and other districts, by which the succession to landed estates invariably devolves to a single heir without the division of the property, and this custom having been long established, and being founded in certain circumstances of local convenience which still exist, the Governor General in Council has enacted the following rule."

The rule enacted is that, the Regulation XI of 1793 shall not be considered to supersede or affect any such local custom, which shall continue in full force, and the landed estates shall devolve to a single heir, to the exclusion of the other heirs of the deceased.

Similar in effect is Regulation XI of 1816, which declared that certain tributary estates in the district of Cuttack shall not be subject to partition, but shall descend entire and undivided to a single heir according to local and family usage.

It should be observed that it is difficult now to distinguish between the different kinds of impartible estates as described above, more especially between the principalities and the Zemindaries, by reason of the holders of the latter, who are titular Rajas or Mahárájás having assumed the insignia of royalty.

But still there are good grounds for considering that the impartible estates in the Jharkhand or jungle mehals of Chota-Nagpur and the neighbouring districts, and the Gurjat states of Orissa, were originally principalities or small states or territories of independent chiefs and feudatories, who were real Rajas, and at one time used to exercise the powers of an autocrat within their respective dominions; some of them are still permitted to enjoy their former powers in certain matters, such as the Raja of Singhbhum.

In the jungle mehals there is a custom, according to which the Raja's sons have different titles in the order of their seniority; the eldest son is called the Jubaraj, the second Hekim, the third Bara-Thakur, the fourth Kumar or Cowar, the fifth Musib and the rest Babu,—a term which is now the usual compellation in Bengali for respectable men.

The holders of these estates follow the practice of real Rájás

or Kings in a few matters ; for instance, the Raja is not subject to the rule of impurity or mourning even on the death of his parents (Manu V, 96-97), nor has he to perform the *sráddha* and the like religious ceremony, which it is the duty of the Hekim to do.

Onus as to impartibility.—When there is a dispute with respect to an estate being impartible or otherwise, the onus lies on the party who alleges the existence of a custom different from the ordinary law of inheritance, according to which the estate is to be held by a single member, and, as such, is not liable to partition : *Zemindar of Merangi* v. *Sri Raja*, 18 I.A., 45,=14 M.S., 237 ; *Srimantu* v. *Srimantu* 17 I.A., 134=18, M.S., 406.

The Zemindari of *Hunsapur* or the *Hutwa Raj* was, like similar extensive zemindaries, impartible and descendible to the eldest male heir, for many generations before the Company's accession to the Dewany, when in consequence of the refusal of the holder thereof, to acknowledge the *quasi*-sovereign rights of the Company, he was driven to the jungles, and the Zemindari was confiscated in 1770, but subsequently at the time of the Decennial Settlement in 1790, the Zemindari was granted to a member of the junior branch of the same family, as a matter of favour : it was held that in the absence of any express intention of the grantor to alter the nature of the tenure, it must be presumed, according to the policy of the Decennial Settlement, that the subject of the grant was the old Zemindari with all its incidents including impartibility, and that the transaction was not so much the creation of a new tenure, as the change of the tenant by the exercise of a *vis major*:—*Babu Beer Pertab Sahee* v. *Maharaja Rajender Pertab Sahee*, 12 M.I.A., 1.

It was further held in this case that Regulation X of 1793 does not affect the descent of the large Zemindaries held as *Raj*, or subject to *Kulachár* or family custom.

It was also held that the title of *Rájah* is not absolutely essential to the tenure of an estate as a *Raj*.

In some other cases, however, it has been held that there was nothing in the grant made by Government or in the circumstances attending it, showing that it was intended to create an impartible Zemindary or to restore an old tenure with impartibility attached : *Raja Venkata* v. *Court of Wards*, 7 I.A., 38 ; *Zemindar of Merangi* v. *Sri Raja*, 18 I.A., 45=14 M.S., 237.

Evidence of family usage, by which the eldest son, successively for eight generations, succeeded to a Zemindari to the exclusion of other sons, was held to be sufficient to establish it to be impartible :—*Rawut Urjun Sing* v. *Rawut Ghunsim Sing*, 5 M.I.A., 169.

But the mere fact that an estate has not been partitioned for

six or seven generations, will not make it impartible when previous partition is proved: *Thakur Durriao Sing* v. *Thakur Davi Sing*, 1 I.A., 1=13 B.L.R., 165.

A special usage modifying the ordinary law of succession must be ancient and invariable, and must be established to be so by clear and unambiguous evidence:—*Rama* v. *Siva*, 14 M.I.A., 570=17 W.R., 553; see also 15 W.R., P.C., 47; 16 W.R., 179; *Hur* v. *Sheo*, 3 I.A., 259=26 W.R., 55.

Impartibility and Jointness.—Although the impartible estates cannot be held by more than one person, and is possessed exclusively by one member at a time, yet they may be the joint property of the members of a joint family governed by the Mitákshará, so as to pass by survivorship.

Thus, it is observed by the Judicial Committee.—"A *Polliam* is in the nature of a *Raj*; it may belong to an undivided family, but it is not the subject of partition; it can be held by only one member of the family at a time, who is styled the *Polligar*, the other members of the family being entitled to a maintenance or allowance out of the estate:" (*Naragunty* v. *Vengama*, 9 M.I.A., 66, 86). Similarly it is observed by their Lordships in the *Shivagunga* case,—"Hence if the *Zemindar*, at the time of his death and his nephews were members of an undivided Hindu family, and the *Zemindari*, though impartible, was part of the common family property, one of the nephews was entitled to succeed to it on the death of his uncle. If, on the other hand, the *Zemindar* at the time of his death, was separate in estate from his brother's family, the *Zemindari* ought to have passed to one of his widows, and failing his widows to a daughter, or descendant of a daughter, preferably to his nephew, following the course of succession which the law prescribes for separate estates. These propositions are incontestable:" 9 M.I.A., 539,589.

It should be observed that where property is held in co-parcenary, by a joint family under the Mitákshará, there are ordinarily three rights vested in the co-parceners, namely, the right of joint enjoyment, the right to call for partition, and the right to survivorship. Where impartible property is the subject of such ownership, the right of joint enjoyment of the members other than the holder thereof, is reduced to the right of maintenance receivable from the estate by virtue of the co-ownership, and the right of partition is, from the nature of the property, incapable of existence. But the right of survivorship founded on co-ownership, is not inconsistent with the nature of the property, and therefore remains unaffected.

The holder of a joint but impartible estate, is a co owner though entitled to the exclusive possession, and as such he appears:

to be under two duties to his co-parceners in virtue of their co-ownership, namely, the duty to provide them with maintenance, and the duty to preserve the *corpus* of the estate, which he alone, being one of several joint-tenants, is incompetent to alienate except for justifiable causes:—*Naraganti* v. *Venkata*, 4 M.S., 250.

In this respect there appears to be a conflict between the different decisions of the Judicial Committee.

In the Tipperah case of *Neel Kisto Deb* v. *Beer Chunder Thakur*, 12 M.I.A., 540, the Lords of the Judicial Committee observe as follows:—"Still when a *Raj* is enjoyed and inherited by one sole member of a family, it would be to introduce into the law, by judicial construction, a fiction, involving also a contradiction, to call this separate ownership, though coming by inheritance, at once sole and joint ownership, and so to constitute a joint ownership without the common incidents of co-parcenership. The truth is the title to the Throne and the Royal-lands is, as in this case, one and the same title; survivorship cannot obtain in such a possession from its very nature, and there can be no community of interest; for claims to an estate in lands, and to rights in others over it, as to maintenance, for instance, are distinct and inconsistent claims. As there can be no such survivorship, title by survivorship, where it varies from the ordinary title by heirship, cannot, in the absence of custom, furnish the rule to ascertain the heir to a property which is solely owned and enjoyed, and which passes by inheritance to a sole heir."

This was a Bengal case governed by the Dáyabhága, and so it is no authority in a case governed by the Mitákshará, according to which a son living jointly with his father, inherits even the latter's self-acquired property by survivorship and not by inheritance. It would, no doubt, be a contradiction in terms, to call a separate ownership, at once sole and joint ownership; but it would be begging the question to call the right of a single person to hold an impartible estate, a separate ownership.

Then again, why should not the right of the other members to maintenance out of the estate, be referred to their joint ownership in the impartible estate; the inequality and disproportion between what is received by the holder of the estate, and what is paid to each of the other members for his maintenance, cannot and does not affect their co-ownership, as similar inequality obtains even in other circumstances. For instance, take the case of a joint family consisting of eleven first cousins, of whom one is the son of one brother, and ten are the sons of another brother; here, on partition, the former would be entitled to half the estate, and each of the others to one-twentieth, yet there are co-ownership and survivorship among them. The excess of what the holder of

the estate gets over what any other member receives, is designed for the preservation of the dignity of the family and the improvement of the estate.

The argument that a son does not acquire a right by birth to an impartible estate in the possession of the father, because the former cannot demand partition, is contrary to Hindu law, which recognizes ownership in property, the only ordinary legal consequence of which, is, the right to receive maintenance from that property. And this co-ownership, which may be called imperfect or subordinate, is recognized to account for the right of maintenance, which the wife and a son enjoy in the property of the husband and the father respectively. The ignoring of this doctrine of Hindu law, has led to the serious misconception, namely, the denial of proprietary right by reason of the want of power to demand partition. See *ante* p. 239.

Accordingly in other cases the Privy Council have given effect to survivorship :—*Naragunty* v. *Vengama*, 9 M.I.A., 66 ; *Chintamun Sing* v. *Mt. Nowlukho Konwari*, 2 I.A., 263=1 C.S., 153; *Raja Rup Sing* v. *Rani Baisni*, 11 I.A., 149=7 A.S., 1 ; *Maharani Hira Nath Koer* v. *Baboo Ram Narayan Sing*, 9 B.L.R., 274=17 W.R., 316 ; *Raja Jogendra Bhupati* v. *Nityanand*, 17 I.A., 128=18 C.S., 151.

When a member of the family gets maintenance from the holder of an impartible estate, or enjoys the rents and profits of land granted in lieu of maintenance, he is deemed to be constructively joint in estate with the holder, so as to be entitled to get the estate by survivorship.

But, apparently inconsistent with, and subversive of, the above principle, is the doctrine enunciated by the Privy Council, namely, that a son does not acquire by birth any right to an impartible ancestral estate in possession of the father, so as to become his co-owner and to prevent an alienation by the latter, of an important and valuable portion of the estate :—*Sartaj Kuari* v. *Deoraj Kuari*, 10 A.S., 272=15 I.A., 51 ; 26 I.A., 83=22 M.S., 383.

The effect of these decisions is that when an estate is impartible, the sons of the present holder have no *locus standi* to question the father's dispositions of the estate : 22 M.S., 538.

But it should be observed that there cannot be survivorship without co-ownership and joint tenancy; and one co-owner alone is not competent to alienate that which is the subject of joint tenancy and co-ownership. The correct view seems to be, that the holder of the estate has no more interest in the estate than the other members, but by virtue of his position as the holder of the estate, he has full control over the surplus income for his life.

It should, however be specially noticed that the view that the members of a Mitákshará joint-family, other than the holder of an impartible estate, are co-owners with him of that estate,—seems to be greatly modified if not exploded by the recent decisions of the Privy council, unless special family custom to that effect can be proved.

Holder's rights and alienability.—The alienation of a portion of an impartible estate, by the holder thereof, would be contrary to the very nature and character of the tenure of such property; for, if such transfer were allowed, it could not be effectuated except by partitioning that which is *ex hypothesi* impartible. If therefore it cannot be alienated in part, it would follow *a fortiori* that it cannot be alienated in its entirety. Inalienability, therefore, appears to follow as the necessary logical consequence of impartibility. The policy of the law, or of the grant, or of the family arrangement, by which an estate was originally made impartible, cannot but be taken to intend the continuance of the *corpus* of the property intact, in the hands of the successive holders thereof. The object of excluding all the other members of the family from participation in the estate, cannot reasonably be taken to be any other than its preservation in entirety without diminution. To prevent the ordinary law of inheritance to take its course, by depriving all the other heirs of equal enjoyment, for the purpose of making the estate indivisible, and at the same time to allow the holder, to destroy or divide the property according to his pleasure, and so to undo the whole scheme, would be two most incongruous and inconsistent things, that cannot reasonably be reconciled. The absolute power of alienation in the holder of such property, is not only contrary to the spirit of Hindu law, according to which immoveable property cannot, as a general rule, be alienated except for justifiable especial causes, but is also opposed to the doctrine of survivorship held to be applicable to these estates, in certain circumstances.

Hence the view taken by the Madras High Court with respect to the position of the holder of the estate, in relation to it, appears to be in accordance with the Mitákshará law, namely, that an ancestral impartible estate is the subject of co-ownership of all the brethren like ordinary property, and the holder is bound to preserve the *corpus* of the estate; and that the position of the holder of an impartible *Raj* is similar to that of a father with respect to ancestral property under the Mitákshará;—*Naraganti* v. *Venkata*, 4 M.S., 250; *Gavuri* v. *Raman*, 6 M.H.C., 93. The Bengal High Court also took the same view in the case of *Rajah Ram Narain* v. *Pertum*, 20 W.R., 189, and held that all the incidents of joint property under the general Mitákshará law

must still remain, except in so far as the same is controlled by the special custom, which went to show only that the property was not partible.

The utmost right therefore, which the holder may be said to enjoy over the impartible estate, is the privilege of appropriating its income during his life, after meeting all the legal liabilities attached to the same; the savings, and any property which he may acquire therewith, may be said to become his self-acquired and separate property, over which he may exercise absolute right, and which will pass on his death to his heirs under the ordinary law; *Kotta* v. *Bangari*, 3 M.S., 145. Although the same may also be fairly contended to become accretions to the estate as in the case of accumulations and acquisitions made by a Hindu widow in Bengal,—and has been held to be so, in *Lakshmipathi* v. *Kandasami*, 16 M.S., 54, and *Ramasami* v. *Sundara*, 17 M.S., 422.

The principle enunciated in these cases, with respect to acquisitions of immoveable property, made by the holder with the savings of the income, is analogous to that relating to similar purchases by a widow. It has been held to be a question of intention on the part of the Zemindar, whether he treated the accessions as his private property, or as an increment to the estate. A distinction, however, is drawn between lands situated within the estate, and those that are not so; the former are presumed to be intended to be appurtenant to the estate, in the absence of any disposition *inter vivos* or testamentary.

But it is asserted, as I have already told you, that a son does not acquire a right by birth to an ancestral impartible estate held by the father, because he cannot demand its partition; and from this it is concluded that the holder of the estate is competent to alienate it, unless there be a custom against alienation, proved to exist:—*Sartaj Kuari* v. *Deoraj Kuari*, 10 A.S., 272; *Raja Udaya* v. *Jadab Lal*, 8 C.S., 199; *Thakur Kapil* v. *Govt. of Bengal*, 22 W.R., 17; *Beresford* v. *Ramasubba*, 13 M.S., 197; *Narain* v. *Lokenath*, 7 C.S., 461.

It is worthy of special remark, that the question relating to the holder's power of alienation arose, in most cases, in connection with permanent grants of portions of the estate, made either to the junior members for maintenance, or to the servants holding a hereditary office under the *Raj*, in lieu of salary:—5 M.I.A., 82; 22 W.R., 17; 8 C.S., 199; 7 C.S., 461. These grants appear to be resumable in default of the grantee's male descendants in the male line, who are entitled to maintenance, or competent to perform the duties of the office, respectively; so these are never intended to be absolute alienations. Such grants are within the competency of the holder with restricted power of alienation.

These, however, are sought to be justified by the assumption of unlimited power.

But it should be observed that the right to call for partition, is only one of the incidents of joint ownership; hence the inference of absence of co-ownership, from the absence of the right of partition, does not appear to be logically correct. Besides, this is contrary to Hindu law which recognises co-ownership of persons who are not, however, on that account, entitled to call for partition; for instance, take the case of the father's wife who is a co-owner, but who is not entitled to demand partition, but who is nevertheless entitled to maintenance by reason of her co-ownership, and is also entitled to a share when partition does, at the instance of a male co-parcener, actually take place, by reason of her co-ownership; for, partition cannot create any new right, it is merely an adjustment, into specific portions of the joint property, of divers existing rights over the whole thereof. It should moreover be remarked, that unless the right of sons by birth be recognised, there cannot be survivorship which has been held to apply to impartible estates. I have already told you that the two doctrines are irreconcilable. The difficulty must continue until it is set at rest by the Judicial Committee.

Recent pronouncement by the Judicial Committee.—In many earlier cases it had been declared by the Privy Council, in language as clear as possible that an impartible estate "*may belong to an undivided family*" and may be "*part of the common family property,*" and accordingly it was believed not only by laymen but also by judges and lawyers in this country that the position of the holder of an impartible estate, was the same as that of the manager of joint family property, and that impartibility and inalienability were incidents of the tenure of the property. But it has now been held by the Judicial Committee in recent cases that an impartible estate is not really the joint property of the family, but that the same is to be deemed joint only for the purpose of ascertaining the heir and successor of the last holder, and that impartibility does not mean that the property is to be preserved entire and undiminished, but it merely means that the estate is not divisible among the heirs of the holder who is absolute owner of the estate, and as such is competent to alienate it by deed or will in any manner he pleases, unless the estate be proved to be inalienable by special family custom: 15 I.A., 54; 26 I.A., 83. The last case in which a devise by the holder of impartible estate to his illegetimate son, was upheld, seems to have come as a surprise on the people of Madras, and a temporary local Act has been passed declaring all impartible estates to be inalienable. It is difficult to say what evidence would amount to sufficient proof of

such family custom. If tradition and popular belief be accepted as such proof, there is superabundance of the same against alienability of impartible estates.

Maintenance of Junior Members and Grants.—An impartible estate appears to be the hereditary source of maintenance of all the members of the family to which it belongs, though it is exclusively held by a single member at a time.

I have already said that an impartible estate is the subject of joint ownership and survivorship under the Mitákshará law, and that the right of sons does accrue to such an estate in the hands of the father in the same manner as to his self acquired property, from the moment of their birth, although it does not entitle them to call for its partition.

The right of maintenance is, therefore, claimable by the junior members and their descendants in the male line, by virtue of their co-ownership in the estate.

The right of maintenance must according to Hindu law be referred to this co-ownership, of which this right and survivorship are the legal incidents. The Judicial Committee observes,—"These grants by way of maintenance are in the ordinary course of what is done by a person in the enjoyment of a *Raj*, or impartible estate, in favour of the junior members of the family; who, but for the impartibility of the estate would be co-parceners with him": 13 M.I.A., 333, 340.

Maintenance may be given in cash; or grants of land appertaining to the estate may be made in lieu of maintenance, the rents and profits of which, are enjoyed by the grantee and his heirs male in the male line: *Lakshmi* v. *Durga*, 20 I.A. 9=16 M.S., 268; 16 M.S., 54.

In determining the amount of maintenance to be awarded to a junior member, the principle upon which maintenance is allowed to a Hindu widow should be applied: regard should be had to the income of the *Raj* and other sources of income if any, and to the claims of other members of the family, as well as to the expenditure necessary for maintaining the position and dignity as a *Raja*: 21 A.S., 232.

Wrongful withholding of maintenance and unwillingness to pay the same will entitle the claimant to a decree for the arrears within the period of limitation: 24 M.S., 147=27 I.A., 157.

The *putra-pautradik* grants in Chota-Nagpur appear to have originated in maintenance grants to junior members; they are enjoyed by the grantees and their male descendants in the male line, and their widows. They do not pass by inheritance to daughters or any heir belonging to a different *gotra* or family:—*Narain* v. *Lokenath*, 7 C.S., 461. But these become resumable by

the *Raja* or holder of the estate, on failure of heirs male and their widows; the lands that are subjects of these grants, are not absolutely severed from the estate, there being the reversion in favour of the holder.

This view is in accordance with the Mitákshará law which recognizes acquisition of ownership by birth, in the property of the father and other paternal ancestors, the lowest but invariable incident of which is the right to maintenance.

But these grants, providing as they do for the defeasance of the interest and its reversion, in the event of indefinite failure of male issue, contravene the Rule against Perpetuity as enunciated in the *Tagore* case, and would therefore be inoperative (*Sri Raja* v. *Sri Raja*, 17 M.S., 150), unless their validity can be maintained on the strength of custom.

According to the Bengal School, however, ownership is not acquired by birth; sons are not therefore co-owners of their father in respect of the paternal or ancestral property; but their right to maintenance out of such property is expressly declared, not as an incident of co-ownership, but as an incident of their status of being male issue of the paternal ancestors. There cannot be joint ownership and survivorship under the Dáyabhága; hence the question as to the right of remoter descendants in the junior lines must depend on custom.

In a case of Pachete *Raj* which appears to be governed by the Dáyabhága, it has been held that there is no law or custom, which entitles any member of the family, other than the son or daughter of a holder of the estate to receive maintenance: *Nilmony* v. *Hingoo*, 5 C.S., 256. It was, however, in evidence in this case, that the other members did, as a matter of fact, receive maintenance allowances, but this was held referable rather to the favour of the Raja, than to any right in the recipients.

In the case of Patkum *Raj*, it has been held that maintenance grants are resumable by the *Raja* on the death of the grantees:—*Rajah Wooday* v. *Mukund*, 22 W.R., 225. There was an admission on the part of the defendant as to the grant being resumable. The learned judges seem to have been influenced by what they observe in the following passage,—"The nature of a maintenance grant is obviously that whilst it makes for the immediate members of the family a suitable provision, it prevents by means of the exercise of the right of resumption the *Zemindari* from being completely swallowed up by the continual demand upon it."

But it should at the same time be borne in mind that the descendants of the original grantees also require maintenance; and there is no reasonable legal ground for drawing any distinc-

tion between the original grantees and their descendants with respect to their right to maintenance. As regards the apprehension of the estate being swallowed up, it may be remarked, that it is not unreasonable to expect that the holder should make provisions for the maintenance of all the members, out of the large income of the estate. It seems to be contrary to the spirit of Hindu law as well as to Hindu feelings, that the remoter descendants of the junior branches should be deprived of this source of their maintenance, whilst the holder of the estate should be permitted to waste its income and even to dissipate the estate itself by alienations for satisfying his personal wants of an extravagant character.

It has, however, been held that the holder of the estate is competent to make permanent hereditary grants for the maintenance of the junior members and their descendants: *Uday* v. *Jadub*, 5 C.S., 113=8 C.S., 199 (P.C.)

The validity of these permanent grants, is maintained on the ground, that the holder has the power to alienate the impartible estate according to his pleasure, and not on the ground that the grantee's descendants are entitled to have maintenance out of the estate; as they undoubtedly would have according to the Mitákshará. There cannot be any doubt that the holders of impartible estates, while making provision for the maintenance of their younger sons, will make the grants in perpetuity, when the view taken by our Courts is known to them, namely, (1) that mere maintenance grants may be resumed by his successor, but (2) that he is competent to make the grants permanent and heritable in perpetuity.

It should, however, be observed that in those estates to which the right of junior members to succeed by survivorship is admitted to apply, the right of a junior member's descendants to maintenance, must follow as a necessary logical consequence from the doctrine of the Mitákshará, on which survivorship is based.

Primogeniture lineal and ordinary.—The succession to an impartible estate is regulated by the custom of primogeniture, or more properly speaking, the holder of the estate is to be selected according to the particular custom of primogeniture, obtaining in the same. In the majority of cases the lineal primogeniture appears to govern the succession to these estates, or to the office of the holder thereof, according as the holder is deemed to be the absolute master of the estate, or to be its sole manager.

By lineal primogeniture the succession goes to the eldest in the eldest line, and to the eldest in the next eldest line in default of the former line.

By ordinary primogeniture the succession goes to the nearest, or to the eldest among the nearest if there be more than one, from the common ancestor or the stock of descent, to whichever line he may belong.

All estates to which survivorship applies, and in which the son of the last holder succeeds in preference to his younger brother and the like, must be taken to be governed by the rule of succession by *lineal* primogeniture.

In order to understand this position, let us take a case governed by the Mitákshará : suppose, *A* the holder of the estate dies leaving two sons *B* and *C*, *B* the senior son holds the estate, and *C* the junior gets only maintenance ; *B* dies leaving a son *D* ; then, *D* can get the estate in preference to *C*, if lineal primogeniture governs the succession.

For, the estate being one to which survivorship applies, is the subject of co-ownership of the members of the family, *viz.*, *A*, *B*, *C* and *D*, the last three acquired a right to the estate from the moment of their birth ; in a joint family the rule of succession does not apply ; although when a member of a joint family dies, it is ordinarily said that his undivided co-parcenary interest passes by survivorship to the surviving members of the family, yet this proposition is not at all accurate ; what really happens is, that the deceased member's interest *lapses* ; the right of each member extended to the whole property, from its inception, that right remains unaffected by this death of a co-parcener, which results only in the removal of a rival right of a similar character, co-existing in the property, and which event does not transmit any fresh right to any member :—5 B. S., 62 ; 1 A.S., 105 ; 2 C.S., 379. Therefore *C* and *D* both had a right to the estate from before *B's* death which cannot confer any new right on *D* ; then if *D* succeeds to the estate, he can do so, only by virtue of lineal primogeniture, otherwise *C* being nearer in relation to all common ancestors commencing from *A*, would take, if *ordinary* primogeniture be applicable. Although by reason of the custom of primogeniture *B* alone held the estate, yet as regards co-ownership, his position was not higher than that of *C* or *D*, his brother and son respectively, and the latter can take only according to *lineal* primogeniture.

Accordingly it has been held by the Madras High Court that when the senior line becomes extinct by reason of there being no son or other male descendant of the last holder, and the right of exclusive possession of the impartible estate is to pass to a member of a different branch, then it devolves, in the absence of proof of special custom of descent, upon the nearest co-parcener in the next senior line, and not on the co-parcener nearest in blood,

i.e., by lineal primogeniture and not by ordinary primogeniture:—*Naraganti* v. *Venkata*, 4 M.S., 250; *Kachi* v. *Kachi*, 24 M.S., 562, 609. This is the conclusion that legitimately follows from the Mitákshará doctrines.

The tendency of decisions, however, has been, to attach special importance to the last holder who is sometimes considered to form a fresh stock of descent. This may be perfectly true in the Bengal School. But there is a great and fundamental distinction in doctrine between the two schools in this respect, which may be illustrated by the following example :—

Suppose, the last holder dies without leaving male issue, but leaving his paternal grandfather's fifth and youngest brother and the said grandfather's second brother's son's son.

If the estate is to pass by succession to the nearest heir of the last holder, then it will go to the granduncle, in preference to the first cousin, in both the schools. But if the family be joint and governed by the Mitákshará, then the property is to pass by survivorship and not by succession; and as regards survivorship, there cannot be any difference between the first cousin and the granduncle, the former represents his deceased grandfather the second granduncle of the last holder, both of them would be equally entitled by survivorship:—1 A.S., 105; 2 C.S., 379.

The heirship to the last holder is no test in such a case. If it be conceded that if there were a son left by the last holder he would take, then that would afford conclusive evidence of succession by *lineal* primogeniture, as has already been explained, and therefore the first cousin being in the next senior line, would take in preference to the granduncle.

But although the same conclusion would not follow from the Bengal doctrines, yet the succession of the eldest son of the last holder would follow, if the descent be governed by lineal primogeniture.

Where succession is governed by custom and not by the ordinary law, and the eldest son of the last holder succeeds according to it, it would be wrong to think that such succession has anything to do with heirship to the last holder; for, the whole course of succession must be taken to be governed by custom irrespective of heirship to the last or any holder, although relationship to him is undoubtedly the most important factor, but the same should be dissociated from the idea of heirship which does not apply.

It should be observed that succession by primogeniture may be either lineal, that is, in the line of the eldest or the next eldest and so on; or it may be ordinary, that is to say, it will not

devolve on the eldest line, but on the eldest from amongst the nearest in degree. Now the question arises, nearest in relation to whom ? in relation to the common ancestor of all the existing members of the family ? or in relation to the last holder ?

Succession of the nearest to the *last* holder seems anomalous in principle. Suppose, the existing holder's eldest son dies in his lifetime leaving a son, and then the holder dies leaving the said grandson and other sons ; then if the eldest among his nearest relations is to succeed, his second son would succeed to the exclusion of the pre-deceased eldest son's son. This kind of succesion, however, is never found in practice. And it should moreover be borne in mind that according to ordinary Hindu law the right of representation is admitted amongst male descendants, and so the eldest son's son would stand in the shoes of his pre-deceased father for the purpose of inheritance from his grandfather. Hence it is difficult to say that he is remoter than his uncle.

Now, if we take the holder of the estate to be the manager of the joint family property, and suppose the impartibility to be the result of family arrangement, then we may expect the primogeniture applicable to such a case to be ordinary, in the sense of the succession of the eldest amongst the nearest from the *common* ancestor, and not from the *last* holder. For according to the classificatory system of computation of degrees, as well as of rank and honour, the eldest amongst the nearest from the common ancestor, would be the object of respect payable by all the other members of the family, and therefore he is the proper person to step into the position of its head.

Hence ordinary primogeniture, *primâ facie* consistent with Hindu law and usage, appears to be the succession of the eldest amongst the nearest in relation to the *common* ancestor, and not in relation to the *last* holder.

If again the origin of an impartible estate be supposed to be a grant by the paramount power to a feudatory, then the course of succession to the *Raj* should likewise be presumed to have been settled at the time of the grant, in relation to the original grantee. Therefore, if ordinary primogeniture be the rule of succession *originally* fixed, the nearness or otherwise of claimants was necessarily to be calculated in relation to the original grantee, who must have been the person principally considered at the time of the grant.

In practice, however, the nearest in relation to the last holder, is likely to have a closer connection with the *Raj* and its officers and servants, than a distant relation of the *Rajah*, who may be the nearest in relation to the common ancestor. Hence the former would naturally be respected by persons connected

with the *Raj*, and be looked upon by them as the proper successor to the existing incumbent. He would thus be in an advantageous position to easily take possession of the estate on the death of the last holder, and then to maintain his title to the same. And thus has arisen the importance of the last holder, with respect to succession and other matters.

The kind of primogeniture applicable to a particular estate is generally settled by proof establishing the local or the family custom. So a consideration of the principles and the arguments set forth in the above discussion may not be necessary in cases where there is a clearly established custom of succession.

It has already been said that it is of the essence of special customs and usages modifying the ordinary law of succession, that they should be ancient and invariable; and it is further essential that they should be established to be so by clear and unambiguous evidence: *Ramalakshmi* v. *Sivanantha*, 14 M.I.A., 570=I.A. Suppl., 1.

Case-law on succession.—Let us now turn to the decisions, of our Courts on the subject of succession to these impartible estates.

In some cases, the greatest importance is attached to the last holder who is deemed to be full owner and as such to become a fresh stock of descent:—*Muttuvadu* v. *Periasami*, 16 M.S., 11. On appeal from this decision, the Judicial Committee have held that, "when an estate is impartible it is enjoyed in a different mode from that prescribed by the ordinary Hindu law, but the inheritance is to be traced by the same mode, unless some further family custom exists beyond the custom of impartibility;" and that accordingly the elder daughter's son who was the last male owner became the stock from which the descent had now to be traced, the ancestor who was his predecessor in title being no longer that stock: and that the son of the last male owner is entitled to succeed in consequence of the full and complete ownership of his father who had himself become a fresh root of title: 19 M.S. 451=23 I.A., 128.

The distinction between the Dáyabhága and the Mitákshará should, however, be always kept in view, according to the former of which it was held by the Privy Council in the *Tipperah* case, that "it is the nearest in blood to the *last* male holder, that is the proper heir, and *not* the senior member of the whole group of agnates:"—12 M.I.A., 523=12 W.R., P.C., 21.

I have already told you that an impartible estate may be the subject of co-ownership so as to pass by survivorship to male members, to the exclusion of the widow, the daughter and the daughter's son, of the last holder. It should be borne in mind

that this can take place only when the family is joint and governed by the Mitákshará. Succession has been determined by survivorship in the following cases:—*Naragunti* v. *Vengama*, 9 M.I.A., 66; 17 W.R., 316; 24 W.R., 255=2 I.A., 263; 1 M.S., 312=5 I.A., 61; 4 M.S., 250; 5 A.S., 542; 7 A.S., 1=11 I.A., 149; 4 C.S., 190=5 I.A., 149; 17 M.S., 316.

In a Mitákshará joint family there is no distinction between full and half blood; hence a half-brother senior in age succeeds by survivorship to an impartible estate, in preference to a younger brother of full blood:—*Subramanya* v. *Siva*, 17 M.S., 316; *Ramasami* v. *Sundara*, 17 M.S., 422.

In the jungle mehals, the lineal primogeniture appears to obtain as a local and family custom, as has been found in several cases, most of which are not reported, see 19 W.R., 239.

It has, however, been held with respect to the Talukdari estates in Oudh that in cases where the holder's name is entered in the second list prepared under Act I of 1869, and not in the third, the estate, although it is descendible to a single heir, is not to be considered as an estate passing according to the rules of lineal primogeniture:—*Achal Ram* v. *Uday Pertab*, 11 I.A., 51.

In such cases the degree prevails over the line; but where the degree is equal, the line prevails:—*Naraindar* v. *Achal*, 20 I.A., 77.

Priority among sons by different mothers.—When the last holder leaves sons by different wives of the same caste, the first-born son is entitled to become the successor, although his mother may be junior to his father's other wives that are also mothers of male issue. The rank or position of the mothers does not confer priority:—*Ramalakshmi* v. *Sivananantha*, I.A., Sup., 1; *Pedda Ramappa* v. *Bangari Seshamma*, 8 I.A., 1=2 M.S., 286; *Jagadish* v. *Sheo*, 23 A.,S., 369=28 I.S., 100.

But if the holder leaves sons by wives of different castes, then a junior son by the wife of the higher caste is superior to an elder son by a wife of the lower caste:—*Ramasami* v. *Sundara*, 17 M.S., 422; 22 M.S., 515=26 I.A., 55.

As succession depends on custom, there may be a valid custom whereby the junior son by a senior wife has prior right of succession, to an elder son by a junior wife. The seniority and juniority are determined by the date of marriage and not by age:—17 M.S., 422 affirmed by the Privy Council, 22 M.S., 515=26 I.A., 55.

It has been held that for determining who is to be heir to an impartible estate, the same rules apply which also govern the succession to partible estates, though these estates may be held by only one member of the family at a time; and accordingly it

has been held that an illegitimate brother succeeds in preference to a legitimate but remoter relation. I have already told you that it is difficult to understand the principle enunciated in this case, namely, *Jogendra Bhupati* v. *Nityanund*, 18 C.S., 151=17 I.A., 128.

Conclusion.—It ought to be stated at the conclusion that the conception of imparitible estates and their incidents, hitherto entertained by the people and the legal profession, upon the footing of which this chapter was originally compiled, seems to be completely at variance with their nature and character as explained in the recent decisions of the highest tribunal whose pronouncements are binding on all courts and suitors as positive rules of law. An imparitible estate is to be regarded as ordinary property, save and except this only that by reason of its impartibility, it is to descend to a single person to be selected from among the deceased owner's heirs all of whom cannot be entitled to participate in it, as it is not partible property; the selection is to be made according to custom, the heirs other than the one entitled to the estate are entitled to get only maintenance out of it. Subject to this liability to provide maintenance to the junior members, the holder of the estate is its complete and absolute owner, in the same way as of any other property, and competent to dispose of it in any manner he pleases either by a deed or a will, and it is descendible to one of *his heirs*, unless there be special family custom to the contrary proved by satisfactory evidence. Impartibility does not imply that the estate is to be preserved entire and undiminished; it merely means that the property is not liable to be divided by the deceased holder's heirs, if more than one.

In an Article contributed to the Law Quarterly Review vol. xvi, page 77, Sir Comer Petheram the late Chief Justice of Bengal points out that the doctrine enunciated by the Privy Council in *Sartaj Kuari's* case does not represent the Hindu view of their own law, and also the living customary rules or laws by which Hindus of the Mitákshará school regulate their lives and properties.

But the people are bound by the pronouncement of the Privy Council, so long as the same is not modified by their Lordships themselves or by the Legislature.

MAHOMEDAN LAW OF INHERITANCE.

MAHOMEDAN LAW OF INHERITANCE.

In its general features the Sunni School of inheritance bears a close resemblance to the Mitákshará law of succession, and is anterior to the Mitákshará as regards development. The heirs are divided into two classes, namely, the agnates and the cognates, or the residuaries and the distant kindred, respectively, according to English writers on Mahomedan law. The cognates including even the daughter's son, are all postponed to the agnates however distant. The agnates are composed mainly of males, and include only a few females born in the family, namely, the daughter of the deceased himself, and of his father and of his male descendants in the male line. The legal sharers resemble those for whom a provision of maintenance is made by Hindu law.

The Sunni School appears to have preserved the ancient usages, and to have put a strict construction on the passages of the Koran bearing on inheritance. While the Shia School introduced a complete change in law by abolishing all distinctions between agnates and cognates, and by establishing a different order of succession.

The Mahomedans, like the Hindus, believe their law to be of divine origin. But there is a great difference; for while the Hindu law is believed to have been communicated by God to man in the beginning of creation, the Mahomedan law is believed to have been, at a comparatively recent period, communicated by God to Mahomed, the only prophet who flourished in the seventh century and died in 632 A.D.

The Mahomedans are divided into two sects, namely, the Sunnis and the Shias: this division owed its origin to the difference of opinion with respect to the succession of the office of the Imam or spiritual leader; the Shias were in favour of heredity or succession by descent from Mahomet and nomination, whereas the Sunnis insisted on the principle of election.

This difference has also given rise to a difference as to the sources of law.

Mahomet's writings and sayings form the principal source of law.

(1) The Koran contains the prophet's writings and is respected by both the sects; it resembles the *Sruti* of the Hindus.

(2) As regards the prophet's sayings traditionally handed down, the Shias respect those only that were handed down by his descendants, whereas the Sunnis admit the authority of all traditions handed down by any person who heard or saw the prophet: the traditions are called *Hadis* or *Sunnat* and resemble the *Smriti* of the Hindus.

(3) Another source of law is the *Ijmaa-i-Ummat* or concordance of the followers, which includes the explanations and decisions given by the leading disciples of the prophet; the Shias do not admit the authority of these other than such as were given by the legitimate Imams according to themselves.

(4) The Mahomedans admit the authority of conclusions derived from ratiocination by analogy—which are called *Kiyas*.

The third and fourth sources resemble the commentaries on Hindu law, based on *yukti* or ratiocination.

SUNNI SCHOOL.

The heirs are divided into three classes: (1), *Zavi-il-furúz* or Legal sharers, (2) *Asabâh* or agnates or Residuaries, (3) *Zav-il-arham* or cognates or distant kindred.

Legal Sharers.—The sharers are,—husband or wife, daughter, son's daughter, father, mother, true grandfather, true grandmother, full sister, consanguine sister, uterine sister, and uterine brother.

'True grandfather' includes all paternal grandsires in the male line, the term is used in contradistinction to false grandfather, which means a male ancestor between whom and the deceased a female intervenes: mother's father, mother's mother's father, father's mother's father and the like are false grandfathers.

'True grandmother' is a female ancestor between whom and the deceased no false grandfather intervenes: mother's mother, mother's mother's mother, father's mother, father's mother's mother, grandfather's mother, grandfather's mother's mother and so on are true grandmothers; whereas mother's father's mother, father's mother's father's mother are false grandmothers.

'Son's daughter' is an expression denoting a daughter of a male descendant in the male line: it includes a son's son's daughter and so forth.

So the sharers are not, strictly speaking twelve in number as is ordinarily said. With reference to the ordinary enumeration it is also to be borne in mind that a deceased person can leave behind either a husband or a wife, not both.

Residuaries.—The Residuaries are subdivided into three classes: (1) residuaries in their own right, (2) those in right of another, and (3) those together with another.

(1) Residuaries in their own right are agnatic or consanguine or *sagotra* male relations. For the purpose of showing the order of their succession they are subdivided into three clesses: (*a*) the lineal male descendants, (*b*) the lineal male ascendants, and (*c*) the collaterals.

(*a*) The lineal male descendants as residuaries take to the exclusion of, (*b*) the ascendants, and (*c*) the collaterals. The order of successions amongst the descendants of different degrees, is that the nearer excludes the more remote. The right by representation is not admitted. Hence when there are a son, and a son of a predeceased son, the latter takes nothing.

(*b*) The lineal male ascendants take as residuaries in default of the male descendants. The order of succession amongst these is, that the nearer excludes the more remote, the father excludes the grandfather, and the great-grandfather can take nothing when there is a grandfather.

(*c*) The collaterals cannot inherit when there is any male descendant or any male ascendant, however remote. Amongst the collaterals the father's descendants take first; in their default, the descendants of the grandfather; on failure of them, the descendants of the great-grandfather; and so on *ad infinitum*. The order of succession in each branch is regulated by two rules,—(1) the nearer in degree excludes the more remote, (2) when the relations are of equal degree the full blood is preferred to half blood. A brother excludes a nephew, a full brother excludes a half brother, and a half brother excludes a full brother's son.

(2) The residuaries in another's right are certain female relations who become residuaries in right of certain male relations. They are—

(*a*) A daughter (when co-existing with a son).

(*b*) A son's daughter (when co-existing with a son's son or a remoter male descendant in the male line).

(*c*) Full sister (when co-existing with a full brother).

(*d*) Consanguine sister (when co-existing with a consanguine brother).

The term 'son's daughter' is to be taken in the sense explained before. Hence a son's son's daughter becomes a residuary with the great-grandson or a remoter male descendant.

With reference to the succession of these females and the males of the same degree with them, the rule is that a male takes twice as much as a female, and this rule is to be understood as applicable to all cases of succession of males and females of the same degree of relationship except where any special rule is laid down.

(3). The residuaries with another are full sister and consanguine sister (when co-existing with a daughter or son's daughter). The sisters become residuaries with another in default of their own brother. The reason for recognizing the sisters as residuaries with another is, that otherwise they would have been totally excluded, inasmuch as they could not take as residuaries in another's right by reason of their having no brother of their own, nor could they take as sharers when there is a daughter or a son's daughter.

The residuaries as the name imports, are entitled to take the residue, if any, left after satisfaction of the claims of the legal sharers that are entitled to take shares under the circumstances.

Legal Sharers and Residuaries.—On comparison of the relations that are legal sharers with those that are residuaries you will observe that the husband or the wife, the mother, the true grandmother, the uterine brother and the uterine sister can inherit only as legal sharers, whereas the others are both legal sharers as well as residuaries. The father and the grandfather are both legal sharers and residuaries in their own right; the daughter and the son's daughter are either sharers or residuaries in another's right; while the full sister and the consanguine sister are either legal sharers, or residuaries in another's right, or residuaries together with another.

Let us now consider in detail the circumstances under which the legal sharers, take shares, as well as the amount of their shares.

1. The husband or wife respectively takes $\frac{1}{4}$ or $\frac{1}{8}$ when there is a son, or daughter, or son's son, or son's daughter how low soever, of the deceased, and $\frac{1}{2}$ or $\frac{1}{4}$ when there is no such issue.

2. The daughter, if one, takes $\frac{1}{2}$; and if there be more than one they take $\frac{2}{3}$. The daughter takes as legal sharer when she does not become a residuary, *i.e.*, when there is no son, in whose right she becomes a residuary.

3. The son's daughter, if one, takes $\frac{1}{2}$; and if there be more than one they take $\frac{2}{3}$. The son's daughter can take as legal sharer if there be no son, daughter, or son's son. The first two being nearer exclude her, and with the last she becomes residuary.

But when there is a single daughter and no son or son's son, the son's daughter takes $\frac{1}{6}$ as legal share, being the difference of $\frac{2}{3}$ which two or more daughters would have taken and $\frac{1}{2}$ which is actually taken by the single daughter.

Similarly in default of nearer heirs and a residuary male descendant of equal degree, the grandson's daughter will take as the son's daughter.

The son's daughter and the grandson's daughter when they do not become legal sharers, are rendered residuaries by a residuary male descendant of equal or lower degree.

Suppose a person dies leaving a daughter, a son's daughter, a grandson's daughter and a great-grandson. In such a case the daughter takes $\frac{1}{2}$ and the son's daughter takes $\frac{1}{6}$ as their legal shares, and the residue is taken by the grandson's son and daughter, the former taking double the share of the latter. But if instead of one daughter there were two daughters, then the son's daughter could not take any legal share; she would take however as residuary with the great-grandson. Both the son's daughter and the grandson's daughter become residuaries with the great-grandson. The residue is to be divided into four parts, of which two are taken by the great-grandson, one is taken by the son's daughter and the remaining one by the grandson's daughter.

4. The father takes $\frac{1}{6}$ as his legal share when he does not become the residuary, that is to say, when there is any lineal male descendant however low. But though the father may be the residuary, yet he is entitled to take first as a sharer when there is a daughter, and then as the residuary. Otherwise he might have been totally excluded under certain circumstances, there being no residue left.

5. The mother takes $\frac{1}{6}$ as her legal share. But when there is no sharer or residuary in the descending line, nor more than a single brother or sister, she is entitled to $\frac{1}{3}$. When there is no father she takes $\frac{1}{3}$ of the whole, but when there is the father she takes $\frac{1}{3}$ of the remainder after the share of the husband or the wife has been satisfied.

You will observe that the mere existence of two or more brothers and sisters would reduce the mother's share to $\frac{1}{6}$, although they might not take anything by reason of the existence of a male ascendant.

6. The true grandfather's share is $\frac{1}{6}$. He takes this share in default of the father, and in the same circumstances under which the father would have taken if alive; that is to say, when there is any male descendant in the male line. In default of the male descendants and of the father the grandfather takes a residuary.

Similarly on failure of the nearer ones, a remoter paternal

grandsire in the male line takes $\frac{1}{6}$, when he does not become a residuary.

7. The true grandmother's share is $\frac{1}{6}$. The mother's existence is a bar to the inheritance of grandmothers both paternal and maternal. The paternal grandmothers are excluded also by the father. All the grandmothers of the same degree take the sixth jointly. The father's mother and the mother's mother will take the sixth dividing it equally. A nearer grandmother of either side excludes a remoter grandmother. The mother's mother will exclude the father's mother's mothers.

8. A single full sister's share is $\frac{1}{2}$; two or more full sisters take $\frac{2}{3}$. The full sister becomes a sharer in default of the full brother and under the same circumstances in which her brother if she had one would have been a residuary and would have rendered her a residuary; with this difference that the full sister cannot become a legal sharer when there is a daughter or son's daughter, with whom also she becomes a residuary. So a full sister can take the legal share, provided there be no descendant who can take either as sharer or residuary, no male ascendant and no full brother.

9. A single consanguine sister takes $\frac{1}{2}$; two or more such sisters take $\frac{2}{3}$. A consanguine sister can take the legal share under the same circumstances as the full sister, and in her default and in default of a consanguine brother.

But if there be a single full sister who takes $\frac{1}{2}$ as her share, the consanguine sister takes $\frac{1}{6}$, if there be no consanguine brother.

10. The uterine brother or the uterine sister, if one, takes $\frac{1}{6}$ as his or her share; if there be more than one, they take $\frac{1}{3}$. There is no distinction between them, by reason of sex. They are entitled to the above share, when there is no descendant taking as sharer or residuary and when there is no ascendant residuary. The existence of a brother and a sister of either the whole or the half blood offers no obstacle to their inheritance as sharers: so their position is better than that of brothers and sisters by the same father only.

Rules of Distribution.—The legal shares are $\frac{1}{8}$, $\frac{1}{4}$, $\frac{1}{2}$, $\frac{1}{6}$, $\frac{1}{3}$ and $\frac{2}{3}$. When there are different sets of heirs and each set is composed of more persons than one, write down in a line the fractions representing the shares and the residue if any. Multiply the denominator of each share and the residue by the number of persons that are entitled to the same, and then reduce the fractions last obtained to their equivalents with the L.C. Denominator. The L.C.D. will represent the number of parts into which the estate is to be divided, and the numerator of each of the last mentioned fractions will represent the number of parts

which each of the individuals in the different sets of heirs will respectively obtain.

Increase.

Sometimes it so happens that the shares of the legal sharers who are entitled to take, being added up, the sum becomes more than unity. In such a case the common denominator is to be increased to a number equal to the sum of the numerators. This is called *increase*, and when this occurs there is nothing left for the risiduaries. On looking to the fractions representing the shares, you will find that in whatever different combinations these fractions may be, their common denominator will be either 6, 8, 12 or 24. An increase may take place when the common denominator is 6, 12 or 24.

Under certain circumstances the 6 is to be increased to 7, 8, 9 or 10; the 12 to 13, 15 or 17; and the 24 to 27.

6 is increased to 7, when there are
husband and two full sisters; or husband, one full sister and a consanguine or uterine sister.

It is increased to 8, when there are
husband, two full sisters and mother; or husband, one full sister and two uterine sisters.

It is increased to 9 when there are
husband, two full sisters and two uterine sisters; or husband, one full sister, two uterine sisters and mother.

It is increased to 10, when there are
husband, two full sisters, two uterine sisters and mother.

12 is raised to 13 when there are
widow, two full sisters and mother

It is raised to 15, when there are
husband, two daughters, father and mother; or
widow, two full sisters, and two uterine sisters; or widow two full sisters, one uterine sister and mother.

It is raised to 17, when there are
widow, two full sisters, two uterine sisters and mother.

24 is raised to 27, when there are
a widow, two daughters, father and mother.

The doctrine of increase as explained above, may on a superficial consideration, appear to be arbitrary and based upon no principle. But if you study the subject carefully, you will perceive that the so-called increase means in mathematical language, proportionate reduction. The fraction representing the share of a legal sharer when he was individually considered, is no doubt intended to indicate that the legal sharer is entitled to such *por-*

tion of the estate as corresponds to the fraction. But when there co-exist legal sharers, entitled to take shares, the aggregate whereof exceeds unity, then the doctrine of increase requires us to take the fractions as representing the *proportions* according to which the estate is to be divided amongst the different sharers, and not as representing the *portions* of the estate, such as were originally intended.

Take for instance the case of husband and two sisters. The husband's share is $\frac{1}{2}$; and the two sisters' share is $\frac{2}{3}$. Then according to the principle of increase,

husband's share : two sisters' share : : $\frac{1}{2}$: $\frac{2}{3}$
: : $\frac{3}{6}$: $\frac{4}{6}$
: : 3 : 4

$\therefore$ husband's share $= \frac{3}{7}$.
and two sisters' share $= \frac{4}{7}$.

Take another instance, *viz.*, the case of husband, two full sisters, two uterine sisters and mother; then according to the above principle, husband's share : two full-sisters' share : two uterine sister's share : mother's share : : $\frac{1}{2}$: $\frac{2}{3}$: $\frac{1}{3}$: $\frac{1}{6}$: : $\frac{3}{6}$: $\frac{4}{6}$: $\frac{2}{6}$: $\frac{1}{6}$: : 3 : 4 : 2 : 1.

$\therefore$ husband's share $= \frac{3}{10}$,
two full-sisters' share $= \frac{4}{10}$,
two uterine-sisters' share $= \frac{2}{10}$,
and mother's share $= \frac{1}{10}$.

Return.

You will observe that legal sharers entitled to take may co-exist, the sum of whose shares is equal to unity or more. In such a case the residuaries have nothing left for them. On the other hand, there may be a residue left after satisfaction of the claims of the legal sharers, but no residuary to take the same. In a case like this, the residue comes back to those legal sharers that under the circumstances are entitled to take shares; with this exception, however, that the husband or the wife cannot take the residue in preference to the distant kindred. The case of the residue reverting to the legal sharers for want of a residuary to take the same is technically called the *return*.

The legal sharers that may be entitled to the return are, (1) daughter, (2) son's daughter, (3) mother, (4) true grandmother, (5) full sister, (6) consanguine sister, (7) uterine sister, and (8) uterine brother,—that is to say, the legal sharers with the exception of the husband or the wife, and of the father and the true grandfather, the latter two being residuaries in their own right. You will remember that when the daughter or the son's daughter

co-exists with a full sister or consanguine sister, the sister becomes a residuary; hence in such a combination there is no return.

The *return* is the reverse of what is called the *increase*. The return means proportionate increase, whereas the so-called increase means proportionate reduction. In the one case, the aggregate of the shares assigned to the sharers when individually considered, is less than unity; while in the other, it is greater than unity. The principle of distribution is the same in both cases, with this difference that, in the case of return, you are to deduct first the share of the husband or wife who is not entitled to the return, and to distribute the remainder among the sharers in proportion to the fractions representing their original shares. Thus, for instance, when there are a widow, a daughter and the mother, the widow's share being $\frac{1}{8}$, the remainder $\frac{7}{8}$ is to be divided between the daughter and the mother in the ratio of $\frac{1}{2} : \frac{1}{6}$; and $\frac{1}{2} : \frac{1}{6} :: \frac{3}{6} : \frac{1}{6} :: 3 : 1$,

$\therefore$ daughter's share $= \frac{3}{4}$ of $\frac{7}{8} = \frac{21}{32}$,
and mother's share $= \frac{1}{4}$ of $\frac{7}{8} = \frac{7}{32}$.

If instead of one daughter there are two, then the $\frac{7}{8}$ is to be divided in the ratio of $\frac{2}{3} : \frac{1}{6}$. And $\frac{2}{3} : \frac{1}{6} :: \frac{4}{6} : \frac{1}{6} :: 4 : 1$,

$\therefore$ two daughters' share $= \frac{4}{5}$ of $\frac{7}{8} = \frac{28}{40}$,
and mother's share $= \frac{1}{5}$ of $\frac{7}{8} = \frac{7}{40}$.

The above are the rules regarding the succession and inheritance of the relations that are called sharers and residuaries. The principal features distinguishing the Sunni School of inheritance from other systems of jurisprudence are, that it postpones the distant kindred or cognates, including even the daughter's son, to the agnates however distant, and that it shows a consideration at the same time to different relations with whom a person is bound by the ties of natural love and affection. Most of the relations enumerated above are no doubt excluded by the existence of nearer ones. The relations, however, that can under no circumstances, be excluded and must take some share or other, are those from whom a person immediately derives his existence, those who derive their existence immediately from that person, and one who in the eye of almost all systems of law, is viewed as one and the same person with that person: in other words, the father and the mother, the son and the daughter, and the husband or the wife.

Distant Kindred or Cognates.

Let us now proceed to consider the succession of the distant kindred. The succession opens to them on failure of the legal sharers and the residuaries. The above rule, however, is subject

to this exception, namely, that the husband or the wife does not exclude them, the residue of the estate, after deducting his or her share, goes to the distant kindred.

The distant kindred are divided into four classes :—

The first class includes those descendants of the deceased that are neither sharers nor residuaries, that is to say, the children of the daughter and of the son's daughter how low soever.

The second class comprises those ascendants, that cannot take either as sharers or residuaries; that is to say, the false grandfathers and the false grandmothers, however high.

The third class comprehends those descendants however low, of both parents, who are neither sharers nor residuaries; in other words, the descendants of brothers and sisters other than the male descendants of the full and consanguine brothers, these being residuaries. They are the daughters of the full and the consanguine brothers; and the sons and daughters, of the uterine brother, and of the sisters of all descriptions; and their descendants however low.

Under the fourth class come the descendants of the immediate parents of both the parents, *i.e.*, the descendants of the father's father, the father's mother, the mother's father and the mother's mother, other than those that are legal sharers or residuaries. They are the father's uterine brother and the father's sisters, the mother's brothers and the mother's sisters, the daughters of father's full and consanguine brothers, as well as the descendants of all these how low soever.

The order of succession amongst the four classes of the distant kindred is the same as amongst the residuaries. First come the descendants; in their default, the ascendants; and on failure of them, the collaterals: amongst the collaterals again, the descendants of the parents come first; and in their absence, the descendants of the grandparents.

The four classes of the distant kindred, therefore, take in the order in which they have been enumerated above.

The order of succession amongst the relations of each group is governed by rules somewhat complicated. The general rules applicable to the four classes are, that the nearer in degree excludes the more remote; and that, of two relations equal in degree, if one be immediately related through a sharer or a residuary and the other not so, the former is to be preferred to the latter.

THE SHIA SCHOOL.

Heirs generally.

According to the Shia School, the causes of heritable right are two, namely: (1) *Nasab* or consanguinity, and (2) *Sabab* or special connection.

The *Sabab* or special connection is of two kinds, namely: (1) *Zoujiyat* or conjugal relation, whereby the husband and the wife become heirs to each other under all circumstances, (2) *Valá* or the threefold peculiar connection, namely: (*a*) the *Valá* of emancipation or that subsisting between the master and an emancipated slave, (*b*) the *Valá* of *Jamin-i-jarirah* or that between a person and his surety taking the responsibility for any offence that may be committed by him, and (*c*) the *Valá* of *Imámat* or the spiritual connection between the *Imám* or spiritual head and a Mahomedan.

Of the three kinds of *Valá*, the *Imám's* succession only need be considered; the estate of a male goes to the *Imám* in default of the heirs by blood relationship notwithstanding the widow, who is not entitled to claim the residue left after deduction of her legal share, *i.e.*, one-fourth of the estate. The estate of a female, however, cannot go to the *Imám*, if there is the husband, who is entitled to the residue in preference to the *Imám*.

Heirs by blood relationship.

The *Nasab* or consanguinity is the principal cause of inheritance, and applies to all relations agnate or cognate. For the purpose of the order of succession, the relations are divided into three groups or classes:—

1. The first class consists (1) of the two parents, and (2) of the descendants male or female how low soever.

2. The second class comprizes (1) all ancestors other than the parents, how high soever, male or female, on the father's or the mother's side, and (2) all descendants of the parents, namely: brothers and sisters, full or half, and their descendants, how low soever.

3. The third class comprehends all collaterals near or remote (1) on the father's, and (2) on the mother's side, namely: the paternal and the maternal uncles, granduncles and so forth, how high soever, and their descendants how low soever.

When there is any heir of the first class, none of the second and the third classes, can take anything; nor can a relation of the third class inherit when there is any heir of the second class.

Legal Sharers.

(1) The husband, or (2) the wife, (3) the daughter, (4) the

father, (5) the mother, (6) the full sister, (7) the half sister by the same father only, (8) the brother and sister by the same mother only,—are the legal sharers according to the Shia School.

1 & 2. The husband and the wife are entitled to take only as legal sharers when co-existing with the heirs by *Nasab*, and their respective shares are the same as under the Sunni School.

The husband inherits a share of all kinds of property left by the wife; and so does the wife, provided she has issue of her body by the deceased; otherwise, she does not get any share of land, but she is entitled to the legal share of the *value* of the buildings and trees standing on land, and of household effects, not the things themselves.

3. The daughter becomes a sharer under the same circumstances and takes the same share, as under the Sunni School, *i.e.*, when there is no son,—with whom she becomes a residuary; and if one, she takes half, and if there be two or more daughters they take two-thirds.

4. The father takes, as a legal sharer when there is any issue, however low, of the deceased, and as a residuary when there is no such issue; and his share is one-sixth.

5. The mother gets a sixth as her legal share when the deceased has left any descendant how low soever; but if there is no issue and if there be the father then she is entitled to a third, provided there be not *brethren*, *i.e.*, two brothers, or one brother and two sisters, or four sisters,—by the same father and mother, or by the same father only; although these brothers and sisters cannot themselves get anything, yet their existence prevents the mother from getting more than a sixth, not only as a sharer, but even by way of return.

6 & 7. It should be remarked that the brothers and sisters belong to the second group of heirs; so they can take as legal sharers only when there is no heirs of the first group.

It should also be borne in mind that brothers and sisters and their descendants inherit together with grand-parents however high.

According to the Shia School, a paternal grandfather is deemed equal to a full brother or to a consanguine brother, *i.e.*, a half brother by the same father only; and a paternal grandmother is deemed equal to a full or a consanguine sister.

A full sister and a consanguine sister become legal sharers respectively under the same circumstances, subject, however, to the above doctrine, that is to say, they cannot be legal sharers when there is a grandfather, with whom they must become residuaries.

It should also be noted that under the Shia School, a full or

a consanguine-sister cannot become residuary with a daughter as under the Sunni School; for, none in the second group can take anything when there is any one of the first group.

8. The uterine brother and sister, *i.e.*, the brother and sister by the same mother only take as legal sharer when the succession goes to the second group of heirs.

A single such brother or sister takes one-sixth as his or her legal share, two or more such brothers and sisters take one-third to which they are equally entitled without any distinction based on sex.

The maternal grandfather and grandmother are deemed equal respectively to a brother and a sister by the same mother only, when co-existing with the latter, and are therefore entitled to take a share of the third allotted to two or more uterine relations.

Succession of the first group.

The first group consists of the parents and the descendants. When any one belonging to this group is in existence, none of the second or third group can take anything.

The only persons who can succeed together with a descendant are the parents and the husband or the wife.

Amongst the descendants the nearest in degree, whether male or female excludes the more remote; for instance, if there be a daughter and a predeceased son's son, the latter takes nothing.

If there be a son and a daughter, the son takes twice as much as the daughter. And this rule generally applies to all cases when a male and a female of the same degree inherit together.

Amongst descendants sprung from a son and a daughter, there is the right of representation with respect to their respective shares, *i.e.*, the son's descendants whether one or more, will take the son's share and the daughter's issue will take the daughter's share; for instance, when there are a son's daughter and a daughter's son, they being of equal degree become heirs together, but the former takes two-thirds and the latter one-third being the respective shares which their father and mother if alive would have taken.

When there is a son or son's issue who becomes heir, then each of the parents takes a sixth. But should there be neither son nor his issue, but a daughter or her issue only becomes heir with parents, then the shares of the latter are under some circumstances liable to increase, *i.e.*, when there is a residue left after satisfaction of the claims of all the legal sharers.

Increase and Return.

There is no *Increase* or proportionate reduction under the Shia

School when there is a deficiency; but the same falls entirely on the daughter or the full or consanguine sister, on the ground of their share being liable to be reduced under some other circumstances.

For instance, when there are the husband, the father, the mother, and a daughter, their shares are $\frac{1}{4}$, $\frac{1}{6}$, $\frac{1}{6}$ and $\frac{1}{2}$, and the equivalents of these with the Least Common Denominator are $\frac{3}{12}$, $\frac{2}{12}$, $\frac{2}{12}$ and $\frac{6}{12}$; here the husband and the parents take their full shares, and the daughter gets only $\frac{5}{12}$, instead of $\frac{6}{12}$.

When there is a residue left after satisfaction of the claims of the legal sharers, it *returns* to the legal sharers themselves excepting the husband or the wife who are not entitled to the *return*, and excepting also the mother if there be two or more brethren. The return is divided in proportion to the legal shares, in other words, the estate after deduction of the husband's or the wife's share, and sometimes also of the mother's share, is distributed in proportion to the legal shares.

For instance, when there is the father, the mother, and a daughter, then their shares are $\frac{1}{6}$, $\frac{1}{6}$ and $\frac{1}{2}$; so there is a surplus of $\frac{1}{6}$ which returns to them all if there be no brethren depriving the mother of the right to the return: the property is therefore to be divided in the proportion of $\frac{1}{6} : \frac{1}{6} : \frac{1}{2} :: \frac{1}{6} : \frac{1}{6} : \frac{3}{6} :: 1 : 1 : 3$.

$\therefore$ the father's share $= \frac{1}{5}$,
the mother's share $= \frac{1}{5}$, and
the daughter's share $= \frac{3}{5}$.

Should there be brethren, and the mother be not therefore, entitled to the surplus, then the $\frac{5}{6}$ remaining after deduction of the mother's $\frac{1}{6}$, is to be divided between the father and the daughter in the ratio of $\frac{1}{6} : \frac{1}{2} :: \frac{1}{6} : \frac{3}{6} :: 1 : 3$;

$\therefore$ the father's share $= \frac{1}{4}$ of $\frac{5}{6} = \frac{5}{24}$, and
the daughter's share $= \frac{3}{4}$ of $\frac{5}{6} = \frac{15}{24}$.

If there be the husband, the father, and a daughter, then allotting a fourth to the husband, the remaining three-fourths is to be divided between the father and the daughter in the ratio of $\frac{1}{6} : \frac{1}{2} :: \frac{1}{6} : \frac{3}{6} :: 1 : 3$,

$\therefore$ the father's share $= \frac{1}{4}$ of $\frac{3}{4} = \frac{3}{16}$, and
the daughter's share $= \frac{3}{4}$ of $\frac{3}{4} = \frac{9}{16}$.

If there be the widow, the father, the mother, and a daughter, then deducting the widow's $\frac{1}{8}$, the remaining $\frac{7}{8}$, is to be divided in the ratio of $\frac{1}{6} : \frac{1}{6} : \frac{1}{2} :: \frac{1}{6} : \frac{1}{6} : \frac{3}{6} :: 1 : 1 : 3$,

$\therefore$ the father's share $= \frac{1}{5}$ of $\frac{7}{8} = \frac{7}{40}$,
the mother's share $= \frac{1}{5}$ of $\frac{7}{8} = \frac{7}{40}$, and
the daughter's share $= \frac{3}{5}$ of $\frac{7}{8} = \frac{21}{40}$.

Succession of the second group.

If there be no heir of the first group, then the heirs of the second group become entitled to the inheritance.

The husband or the widow is entitled to the larger share, namely, $\frac{1}{2}$ or $\frac{1}{4}$ respectively, while inheriting with any heir of the second group.

The second group consists of two branches, namely, (1) the paternal and the maternal grandparents and their ancestors how high soever, forming one branch, and (2) the brothers and sisters and their descendants how low soever, constituting the second branch.

The nearest in degree among heirs of each branch is entitled to inherit to the exclusion of the more remote. But the heirs of one branch cannot exclude those of the other branch, on the ground of nearness; the relations belonging to both the branches become co-heirs and are entitled to inherit together with each other irrespective of nearness or remoteness. Thus, when there is a brother or a sister whether full or paternal or maternal, no nephew or niece can inherit; nor can a great-grandparent succeed together with a grandparent on either side. But a nephew or a niece will become a co-heir with a grandparent; and a great-grandparent will inherit together with a brother or a sister.

The paternal grandfather and grandmother are for the purpose of succession deemed equal to a full brother and sister respectively, and in their default, to a consanguine or paternal brother and sister respectively; and the maternal grandfather and grandmother, to a maternal or uterine brother and sister respectively. The paternal brother and sister are excluded by a full brother or sister, but a maternal brother or sister is co-heir with a full brother or sister; and in default of the full brother and sister, the paternal brother and sister take their place.

Thus, should there be the paternal grandfather and grandmother, the maternal grandfather and grandmother, a full brother and a full sister, and a maternal brother and sister, then one-third of the estate will go to the four maternal relations to be taken by them equally, there being no distinction based on sex in their case; and the remaining $\frac{2}{3}$ will go to the four paternal relations, namely: to the two grandparents and to the brother and the sister, the two females each taking half as much as each of the two males.

When a male and a female of equal degree on the paternal side are co-heirs, the male takes twice as much as the female; but this inequality between males and females does not apply to

the maternal or uterine relations who are entitled to take equally irrespective of their sex.

There is the right of representation for the purpose of determining the amount of shares to be taken by remoter relations in either branch, when the inheritance goes to them; the descendant of a brother or sister will take his or her share. Similarly a great-grandparent will take the place of the grandparent through whom he or she is related.

A maternal relation is not entitled to take more than his or her appointed share when there is a paternal relation entitled to take as co-heir; the surplus if any will go to the paternal relations only.

To understand the foregoing rules, let us take some concrete cases:—

Suppose there are four grandparents of the father as well as of the mother, and a daughter of a full brother, a son of a full sister, a son of a consanguine brother, and a son of a maternal sister, and a daughter of a maternal brother. In such a combination the paternal brother's son is excluded,

the two parents of the paternal grandfather take his, *i.e.*, a full brother's share,
the two parents of the paternal grandmother take her, *i.e.*, a full sister's share,
the two parents of the maternal grandfather take his, *i.e.*, a maternal brother's share,
the two parents of the maternal grandmother take her, *i.e.*, the maternal sister's share.
the full brother's daughter takes the full brother's share,
the full sister's son takes the full sister's share,
the son and daughter of the maternal sister and brother take the latter's share respectively,
∴ the four maternal great-grandparents and the maternal nephew and niece will together take $\frac{1}{3}$,
and the four paternal great-grandparents and the children of full brother and sister will together take $\frac{2}{3}$; hence
the share of the maternal nephew $= \frac{1}{4}$ of $\frac{1}{3}$,
the share of the maternal niece $= \frac{1}{4}$ of $\frac{1}{3}$,
the share of the maternal grandfather's two parents $= \frac{1}{4}$ of $\frac{1}{3}$, or $\frac{1}{8}$ of $\frac{1}{3}$ each,
the share of the maternal grandmother's two parents $= \frac{1}{4}$ of $\frac{1}{3}$, or $\frac{1}{8}$ of $\frac{1}{3}$ each,
the share of the full brother's daughter $= \frac{2}{6}$ of $\frac{2}{3}$,
the share of the full sister's son $= \frac{1}{6}$ of $\frac{2}{3}$,
the share of the paternal grandfather's father $= \frac{2}{3}$ of $\frac{2}{6}$ of $\frac{2}{3}$,

the share of the paternal grandfather's mother $= \frac{1}{3}$ of $\frac{2}{6}$ of $\frac{2}{3}$,
the share of the paternal grandmother's father $= \frac{2}{3}$ of $\frac{1}{6}$ of $\frac{2}{3}$,
and
the share of the paternal grandmother's mother $= \frac{1}{3}$ of $\frac{1}{6}$ of $\frac{2}{3}$;
$\therefore$ their shares are $= \frac{1}{12}, \frac{1}{12}, \frac{1}{24}, \frac{1}{24}, \frac{1}{24}, \frac{1}{24}, \frac{2}{9}, \frac{1}{9}, \frac{4}{27}, \frac{2}{27}, \frac{2}{27}$, and $\frac{1}{27}$
$= \frac{18}{216}, \frac{18}{216}, \frac{9}{216}, \frac{9}{216}, \frac{9}{216}, \frac{9}{216}, \frac{48}{216}, \frac{24}{216}, \frac{32}{216}, \frac{16}{216}, \frac{16}{216}$, and $\frac{8}{216}$.

Suppose again that there are the husband, a full sister and a maternal brother, then the husband's share is $\frac{1}{2}$, the full sister's share is $\frac{1}{2}$, and the maternal brother's share $\frac{1}{6}$, here there is a deficiency of $\frac{1}{6}$, which falls entirely on the full sister, the doctrine of *increase* being not recognized by the Shia School; hence the husband and the maternal brother take their shares in full, while the full sister takes $\frac{1}{2} - \frac{1}{6} = \frac{2}{6} = \frac{1}{3}$ instead of $\frac{1}{2}$.

Succession of the third group.

The heirs of the third group succeed in default of the heirs of the first and the second groups, *i.e.*, in default of all descendants, all ascendants, and all descendants of the parents of the *Propositus.* They are all other collaterals, namely: the uncles, granduncles, and so forth, how high soever, and their descendants how low soever, on both the father's and the mother's side.

The rules of the order of succession amongst them are: (1) that the descendants of the nearest ancestor must be exhausted before the inheritance can go to the descendants of a remoter ancestor, (2) that amongst the descendants of the ancestors of the same degree, the nearest in degree will exclude the more remote, (3) that the distinction between the full, the consanguine, and the uterine brothers and sisters and their descendants, obtains amongst similar relations of the parents and so forth, the consanguine being excluded by the relations of full blood, (4) that the paternal relations take twice as much as the maternal relations, (5) that amongst co-heirs, the males take twice as much as the females, but not so the uterine relations on either side, (6) and that the right of representation obtains for ascertaining the shares of the remoter in descent among collaterals similar to that obtaining amongst the descendants of brothers and sisters of different descriptions.

To the second of the above rules there is a single exception, namely, where there are the son of a paternal uncle of the full blood and only a paternal uncle of the half blood on the father's side then the former takes, in preference to the latter; but if there be an uterine brother of the father, then the former would be excluded.

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