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THE
EARLY HISTORY
OF THE
PROPERTY OF MARRIED WOMEN,

AS COLLECTED FROM ROMAN AND HINDOO LAW.

A Lecture,

DELIVERED AT BIRMINGHAM, MARCH 25, 1873,

BY

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LECTURE.

LADIES AND GENTLEMEN,—The subject to which I am about to ask your attention, however briefly and superficially it may be treated, may perhaps convey one lesson. It may serve as a caution against the lax employment of the words “ancient” and “modern.” There are few persons, I suppose, who, approaching the Settled Property of Married Women without previous knowledge of its history, would not pronounce it one of the most modern of subjects. It has given rise to vehement controversy in our own day; some of the questions which it suggests are not yet settled; and there are many here, I dare say, who believe that they remember the first dawn of sound ideas on these questions. Yet, as a matter of fact, the discussion of the settled property of married women is one of the oldest of discussions. I do not indeed say, considering the vast antiquity now claimed for the human race, that our very first forefathers troubled themselves about the matter; but nothing can be more certain than that very soon after those divisions of mankind which were destined to ultimate greatness are seen in possession of the institution which was the one condition of their progress to civilisation—the Family—they are discerned grappling with the very same problem, no doubt in an early form, which we ourselves have hardly yet succeeded in solving. This assertion, I may observe, is less incredible to a Frenchman, or indeed to a citizen of any Continental State, than it is possibly to an Englishman. The law of the Continent on the proprietary relations of husband and wife is in the main Roman law, very slightly transmuted; and through the institutions of the Romans the history of this branch of law may be traced to the earliest institutions of so much of the human race as has proved capable of civilisation.

I have undertaken to illustrate my subject by the records of two great systems of law—the Roman and the Hindoo. These systems are very far indeed from being the only sources from which information can be gathered concerning the infancy of mankind, or even concerning the Aryan race of men. But the evidence supplied by each of them is highly authentic, and, while both of them run back to what may fairly be called a vast antiquity, they both assume at their starting point the existence of the institution, by no means apparently universal among savage men, out of which, as I said, all civilisation has grown—the Family. I need scarcely add that, even for historical purposes, their value is very unequal.

There is no history so long, so continuous, and so authentic as that of the Roman law; and yet it is not a little remarkable that till about half-a-century ago it was systematically treated, except by a small minority of jurists, as if it had no history at all. This was a consequence of its great juridical perfection. Now, nothing could be more out of place here than a panegyric on the Roman law, seen from a lawyer's point of view. Let me, however, pause to observe that, considering the time and pains which a good many of us spend in acquiring the Latin language, it is much to be regretted that so few of us knew anything of this branch of Latin literature. For it is really so expressed, and so put together, as to deserve the name of literature. Moreover, it was the only literature of the Romans which has any claim to originality; it was the only part of their literature in which the Romans themselves took any strong interest; and it is the one part which has profoundly influenced modern thought. One result, however, of its symmetry and lucidity was that it was long regarded as a birth of pure intellect, produced, so to speak, at a single effort. Those who attempted to construct a history for it were few, and not of the highest credit. But it happened that, in 1816, the great German historian, Niebuhr, travelling in Italy, had his attention attracted at Verona to a manuscript of one of the Fathers, under the letters of which ancient writing appeared. This manuscript, when deciphered, proved to be a nearly perfect copy of an educational work, written in the second century of our era, for young Roman students of law, by one of the most famous of Roman lawyers, Gaius or Caius. At that period Roman jurisprudence retained enough of the traces of its most ancient state for it to be necessary that they should be explained to young readers by the author of

such a treatise; and it thus became possible to reconstruct, from the book of Gaius, the whole past history of Roman law with some completeness. Certainly, without Niebuhr's discovery the subject of this lecture could never have been understood, or its original outline restored.

Hindoo law, which I have placed by the side of Roman law, calls assuredly for no eulogy. It is full of monstrous iniquities, and has been perverted in all directions by priestly influence. But then a great deal of it is undoubtedly of prodigious antiquity, and, what is more important, we can see this ancient law in operation before our eyes. British legislation has corrected some of its excesses, but its principles are untouched, and are still left to produce some of their results. French law, as I said, is Roman law a little altered, but then it is the Roman law in its matured, developed, and refined condition, and the ancient institutions of the Romans are only seen through it dimly. But some of the institutions which the Romans and Hindoos once had in common may be seen actually flourishing in India, under the protection of English Courts of Justice.

The two societies, Roman and Hindoo, which I take up for examination, with the view of determining some of their earliest ideas concerning the property of women, are seen to be formed at what, for practical purposes, is the earliest stage of their history, by the multiplication of a particular unit or group, the Patriarchal Family. There has been much speculation of late among writers belonging to the school of so-called pre-historic inquiry as to the place in the history of human society to which this peculiar group, the Patriarchal Family, is entitled. Whether, however, it has existed universally from all time—whether it has existed from all time only in certain races—or whether in the races among whose institutions it appears, it has been formed by slow and gradual development—it has, everywhere, where we find it, the same character and composition. The group consist of animate and inanimate property, of wife, children, slaves, land, and goods, all held together by subjection to the despotic authority of the eldest male of the eldest ascending line, the father, grandfather, or even, more remote ancestor. The force which binds the group is Power, and any other source of union, such as blood relationship, is altogether secondary. A child adopted into the Patriarchal family belongs to it as perfectly as the child naturally born into

it, and a child who severs his connection with it is lost to it altogether. All the larger groups which make up the primitive societies in which the Patriarchal family occurs, are seen to be mere multiplications of it, and to be, in fact, themselves palpably formed on its model.

But, when first we view the Patriarchal family through perfectly trustworthy evidence, it is already in a state of decay. The emancipation or enfranchisement of male children from parental power by the parents' voluntary act, has become a recognised usage, and is one among several practices, which testify a relaxation of the stricter ideas of a more remote antiquity. Confining our attention to women, we find that they have begun to inherit a share of the property of the family concurrently with their male relatives; but their share appears, from several indications, to have been smaller, and they are still controlled, both in the enjoyment of it and in the disposal. Here, however, we come upon the first trace of a distinction which runs through all legal history. Unmarried women, originally in no different position from married women, acquire at first a much higher degree of proprietary independence. The unmarried woman is for life under the guardianship of her male relatives, whose primitive duty was manifestly to prevent her alienating or wasting her possessions, and to secure the ultimate reversion of these possessions to the family to whose domain those possessions had belonged. But the powers of the guardians are undergoing slow dissolution through the two great sapping agencies of jurisprudence, Legal Fictions and Equity. To those who are alive to the permanence of certain legal phenomena there is no more interesting passage in ancient law than that in which the old lawyer Gaius describes the curious forms with which the guardian's powers were transferred to a trustee, whose trust was to exercise them at the pleasure of the ward. Meantime, there can be no reasonable doubt that among the Romans, who alone supply us with a continuous history of this branch of jurisprudence, the great majority of women became by marriage, as all women had originally become, the daughters of their husbands. The family was based, not upon actual relationship, but upon power, and the husband acquired over his wife the same despotic power which the father had over his children. There can be no question that, in strict pursuance of this conception of marriage, all the wife's property passed at first

absolutely to the husband, and became fused with the domain of the new family; and at this point begins, in any reasonable sense of the words, the early history of the property of married women.

The first sign of change is furnished by the employment of a peculiar term to indicate the relation of husband to wife, as different from the relation of father to child, or master to slave. The term, a famous one in legal history, is *manus*, the Latin word for "hand," and the wife was said *convenire in manum*, to come under the hand of her husband. I have elsewhere expressed a conjectural opinion that this word, *manus* or hand, was at first the sole general term for patriarchal power among the Romans, and that it became confined to one form of that power by a process of specialisation easily observable in the history of language. The allotment of particular names to special ideas which gradually disengage themselves from a general idea is apparently determined by accident. We cannot give a reason, other than mere chance, why power over a wife should have retained the name of *manus*, why power over a child should have obtained another name, *potestas*, why power over slaves and inanimate property should in later times be called *dominium*. But, although the transformation of meanings be capricious, the process of specialisation is a permanent phenomenon, in the highest degree important and worthy of observation. When once this specialisation has in any case been effected, I venture to say that there can be no accurate historical vision for him who will not, in mental contemplation, re-combine the separated elements. Taking the conceptions which have their root in the family relation—what we call property, what we call marital right, what we call parental authority, were all originally blended in the general conception of patriarchal power. If, leaving the Family, we pass on to the group which stands next above it in the primitive organisation of society—that combination of families, in a larger aggregate, for which at present I have no better name than Village Community—we find it impossible to understand the extant examples of it, unless we recognise that, in the infancy of ideas, legislative, judicial, executive, and administrative power are not distinguished, but considered as one and the same. There is no distinction drawn in the mind between passing a law, affirming a rule, trying an offender, carrying out the sentence, or prescribing a set of directions to a communal functionary. All these are regarded as exercises of an identical power

lodged with some depositary or body of depositaries. When these communities become blended in the larger groups which are conveniently called political, the re-combination of ideas originally blended becomes infinitely more difficult, and, when successfully effected, is among the greatest achievements of historical insight. But I venture to say that, whether we look to that immortal system of village communities which became the Greek or Hellenic world—or to that famous group of village-communities on the Tiber, which, grown into a legislating empire, has influenced the destinies of mankind far more by altering their primitive customs than by conquering them—or to the marvellously complex societies to which *we* belong, and in which the influence of the primitive family and village notions still makes itself felt amid the mass of modern thought—still I venture to say, that one great secret for understanding these collections of men, is the reconstruction in the mind of ancient, general, and blended ideas by the re-combination of the modern special ideas which are their offshoots.

The next stage in the legal history of Roman civil marriage is marked by the contrivance, very familiar to students of Roman law, by which the process of “coming under the hand” was dispensed with, and the wife no longer became in law her husband’s daughter. From very early times it would appear to have been possible to contract a legal marriage by merely establishing the existence of conjugal society. But the effect on the wife of continuous conjugal society was, in old Roman law, precisely the same as the effect on a man of continuous servile occupation in a Roman household. The institution called Usucapion, or (in modern times) Prescription, the acquisition of ownership by continuous possession, lay at the root of the ancient Roman law, whether of persons or of things; and, in the first case, the woman became the daughter of the chief of the house; in the last case the man became his slave. The legal result was only not the same in the two cases because the shades of power had now been discriminated, and paternal authority had become different from the lordship of the master over the slave. In order, however, that acquisition by Usucapion might be consummated, the possession must be continuous; there was no Usucapion where the possession had been interrupted—where, to use the technical phrase (which has had rather a distinguished history), there had been *usurpation*, the breaking of *usus* or enjoyment. It was possible, therefore, for the wife, by absent-

ing herself for a definite period from her husband's domicile, to protect herself from his acquisition of paternal power over her person and property. The exact duration of the absence necessary to defeat the Usucapion—three days and three nights—is provided for in the ancient Roman Code, the Twelve Tables, and doubtless the appearance of such a rule in so early a monument of legislation is not a little remarkable. It is extremely likely, as several writers on the ancient law conjectured, that the object of the provision was to clear up a doubt, and to declare with certainty what period of absence was necessary to legalise an existing practice. But it would never do to suppose that the practice was common, or rapidly became common. In this, as in several other cases, it is probable that the want of qualification in the clause of the Twelve Tables is to be explained by the reliance of the legislature on custom, opinion, or religious feeling to prevent the abuse of his legislation. The wife who saved herself from coming under marital authority no doubt had the legal status of wife, but the Latin antiquarians evidently believed that her position was not at first held to be respectable. By the time of Gaius, however, any association of imperfect respectability with the newer form of marriage, was decaying or had perished; and, in fact, we know that marriage “without coming under the hand,” became the ordinary Roman marriage, and that the relation of husband and wife became a voluntary conjugal society, terminable at the pleasure of either party by divorce. It was with the state of conjugal relations thus produced that the growing Christianity of the Roman world waged a war ever increasing in fierceness; yet it remained to the last the basis of the Roman legal conception of marriage, and to a certain extent it even colours the canon law, founded though it be, on the whole, on the sacramental view of marriage.

For our present purpose, it is necessary to regard this newer marriage just when it had superseded the ancient and stricter usages of wedlock, and just before it began to be modified by the modern and much severer principles of Christian community. For at this point in the history of marriage, we come upon the beginnings of that system of settling the property of married women which has supplied the greatest part of Continental Europe with its law of marriage settlement. It appears an immediate consequence from thoroughly ascertained legal principles that, as soon as the wife ceased to pass by marriage

into her husband's family, and to become in law his daughter, her property would no longer be transferred to him. In the earlier period of Roman law, this property, present and prospective, would have remained with her own family, and, if she was no longer under direct parental authority, would have been administered by her guardians for the behoof of her male relatives. As we know, however, and as I before stated, the power of guardians was gradually reduced to a shadow. The legal result would seem to have been that the woman would be placed in the same position as a French wife at this day under what the French Code calls the *régime* of *biens séparés*, or an English wife whose property has been secured to her separate use by an appropriate marriage settlement, or by the operation of the new Married Women's Property Act. But, though this was the legal consequence, it would be a social anachronism to assume that in practice it followed rapidly or generally. The original object of the marriage "without coming under the hand" was doubtless to prevent the acquisition of excessive proprietary power by the husband, not to deprive him of all such power, and indeed the legal result of this marriage, unless practically qualified in some way, would unquestionably have been far in advance of social feeling. Here, then, we come upon an institution which, of all purely artificial institutions, has had perhaps the longest and the most important history. This is the *dos*, or dotal estate, something very different from our "dower." It has become the *dot* of French law, and is the favourite form of settling the property of married women all over the Continent of Europe. It is a contribution by the wife's family, or by the wife herself, intended to assist the husband in bearing the expenses of the conjugal household. Only the revenue belonged to the husband, and many minute rules, which need not be specified here, prevented him from spending it on objects foreign to the purpose of the settlement. The *corpus* or capital of the settled property was, among the Romans (as now in France), incapable of alienation, unless with the permission of a court of justice. If any part of the wife's property was not settled on her as *dos*, it became her *parapherna*. *Parapherna* means something very different from our "paraphernalia," and is the *biens séparés* of French law. It was that portion of a wife's property which was held by her under the strict law applicable to a woman marrying without "coming under the hand." The authority of her guardians having died out, and this part of her

property not having, by the assumption, been conveyed to the husband as *dos*, it remained under her exclusive control, and at her exclusive disposal. It is only quite recently, under the Married Women's Property Act, that we have arrived at a similar institution, since money settled to a wife's separate use, though practically the same thing, required a settlement to create it.

I have now abridged a very long, and, in some portions, a very intricate history. The Roman law began by giving all the wife's property to the husband, because she was assumed to be, in law, his daughter. It ended in having for its general rule that all the wife's property was under her own control, save when a part of it had been converted by settlement into a fund for contributing to the expenses of the conjugal household. But, no doubt, the exception to the general rule was the ordinary practice. In all respectable households, as now on the Continent, there was a settlement by way of *dos*. Not that we are to suppose there was among the Romans any such form of contract as we are accustomed to under the name of marriage settlement. The mechanism was infinitely simpler. A few words on paper would suffice to bring any part of the wife's property under the well-ascertained rules supplied by the written law for dotal settlements, and nothing more than these words would be needed, unless the persons marrying wished to vary the provisions of the law by express agreement. This simple, but most admirable, contrivance of having, so to speak, model settlements set forth ready made in the law, which may be adopted or not at pleasure, characterises the French Code Napoleon, and it was inherited by the French from the Romans.

Warning you that the account which I have given you of the transitions through which the Roman law of settled property passed, is, from the necessity of the case, fragmentary, and to some extent superficial, I pass to the evidence of early ideas on our subject which is contained in the Hindoo law. The settled property of a married woman, incapable of alienation by her husband, is well-known to the Hindoos under the name of *Stridhan*. It is certainly a remarkable fact that the institution seems to have been developed among the Hindoos at a period relatively much earlier than among the Romans. But instead of being matured and improved, as it was in the Western society, there is reason to think that in the East, under various influences which may partly be traced, it has gradually been reduced to dimensions and importance far inferior to those which originally belonged to it.

One of the oldest and most authoritative of the Hindoo juridical writers quotes a rule from Manu, which, taken as it stands, can bear no meaning except that at one period of Hindoo law the whole of a married woman's property was enjoyed by her independently of her husband's control. Whether any such doctrine was really contained in any treatise, passing under the name of the mythical personage given as the authority for it, it is impossible to say; but it may be believed that some such rule was attributed to a venerable antiquity. Nevertheless, it must be admitted that there are some difficulties in receiving it. The existing Hindoo written law, which is a mixed body of religious, moral, and legal ordinances, is pre-eminently distinguished by the strictness with which it maintains a number of obligations, plainly traceable to the ancient despotism of the family, and by its excessive harshness to the personal and proprietary liberty of women. Among the Aryan sub-races, the Hindoos may be as confidently asserted as the Romans to have had their primitive society organised as a collection of patriarchally-governed families. If then, at any early period, the married woman had among the Hindoos the property altogether enfranchised from the husband's control, it is a mystery, not easy to unravel, why the obligations of the family despotism were relaxed in this one particular. It is also to be recollected that, supposing the rule of which I am speaking to be extremely old, the student of very old law is liable to one special misapprehension. He is in danger of taking as a rule what the ancient legislator intended as an exception. A dispute having arisen as to the legality of an unusual and occasional practice, the legislator thinks fit to declare it legal, trusting all the while, consciously or unconsciously, to habit, sentiment, or prejudice, to prevent its extending itself in a way which, to him, as doubtless to the great bulk of the community, would appear not merely mischievous, but revolting. This, as I said before, is, doubtless, the true explanation of several broad rules of the Roman Twelve Tables which we know to have been subsequently modified by legislation or juridical interpretation, and there may be some similar explanation of the ancient Hindoo rule securing to the married woman the full control of her property. Nevertheless, there are really, in many branches of the Hindoo law, and in a great number of the bodies of unwritten custom which exist by its side, very clear indications of a sustained effort on the part of the Brahminical writers on mixed law and

religion, to limit the privileges of women which they seem to have found recognised by older authorities.

The attention of English and European students of the Hindoo law books was first attracted to this subject by a natural desire to scrutinise the sacred texts upon which the Brahmin learned were in the habit of insisting in defence of the abominable practice of Suttee or widow-burning. The discovery was soon made that the oldest monuments of law and religion gave no countenance to the rite, and the conclusion was at once drawn that, even on Hindoo principles, it was an unlawful innovation. This mode of reasoning undoubtedly gave comfort to many devout Hindoos, whom no secular argument could have reconciled to the abandonment of a custom of proved antiquity; but still, in itself it was unsound. The disuse of all practices which a scholar could show to be relatively modern would dissolve the whole Hindoo system. These inquiries, pushed much further, have shown that the Hindoo laws, religious and civil, have for centuries been undergoing transmutation, development, and, in some points, depravation at the hands of successive Brahminical expositors, and that no rules have been so uniformly changed—as we should say, for the worse—as those which affect the legal position of women. It is extremely likely, then, that what the Romans would call the *dos* was at one time a much more important institution among the Hindoos than it is now, and, indeed, that the married woman's authority over it was a great deal more extensive than was that of a Roman wife. In itself the fact that women, married and unmarried, are placed, on the whole, by Hindoo institutions in a position of great degradation would not, unfortunately, be exceptional or remarkable. What really has interest for the student of historical jurisprudence is the comparative recency of this degradation. The family despotism is proved by overwhelming evidence to have been so stringent among the Hindoos that there would be nothing astonishing in the weakest of the classes subject to it not having been yet emancipated from it. But that women should have become partially enfranchised, and should then have fallen back into a condition yet worse than the first, is really a surprising passage in legal history. There would be great temerity in pretending to advance anything like a complete explanation of it, and the best account that can be given does not, perhaps, amount to more than a plausible conjecture. Still we are not wholly unable to assign reasons why it was that the Hindoo

law, after apparently advancing further than what may be called the Middle Roman law in the proprietary enfranchisement of women, retreated afterwards to a point which is only represented in the oldest institutions of Rome, and the general interest of the subject is sufficiently great to warrant me in stating what those reasons are.

It will probably be conceded by all who have paid any attention to our subject, that the civilised societies of the West, in steadily enlarging the personal and proprietary independence of women, and even in granting to them political privilege, are only following out still further a law of development which they have been obeying for many centuries. That society, which once consisted of compact families, has got extremely near to the condition in which it will consist exclusively of individuals, when it has finally and completely assimilated the legal position of women to the legal position of men. In addition to many other objections which may be urged against the common allegation that the legal disabilities of women are merely part of the tyranny of sex over sex, it is historically and philosophically valueless, as indeed are all propositions concerning classes so large as sexes. What really did exist is the despotism of groups over the members composing them. What really is being relaxed is the stringency of this despotism. Whether this relaxation is destined to end in utter dissolution—whether, on the other hand, under the influence either of voluntary agreement or of imperative law, society is destined to crystallise in new forms—are questions upon which it is not now material to enter, even if there were any hope of solving them. All we need at present note is that the so-called enfranchisement of women is merely a phase of a process which has affected very many other classes, the substitution of individual human beings for compact groups of human beings as the units of society. Now, it is true that in the legal institutions of the Hindoos (political institutions, I need scarcely say, for many centuries they have had none) the despotism of the family group over the men and women composing it is maintained in greater completeness than among any society of similar civilisation and culture. Yet there is abundant evidence that the emancipation of the individual from the family had proceeded some way, even before the country had come under the Western influences through the British dominion. If I were to give you the full proof of this, I should have to take you through much of the detail of Hindoo law. I will mention one indication

of it, because few are aware that the peculiarity in question serves as a sort of test by which we can distinguish very ancient or undeveloped from comparatively matured and developed law.

All beginners in law have heard of the difference between distributing an inheritance *per stirpes* and distributing it *per capita*. A man has two sons, one of whom has eight children, and the other two. The grandfather dies, his two sons having died before him, and the grandfather's property has to be divided between the grandchildren. If the division is *per stirpes* the stocks of the two sons will be kept separate, and one half of the inheritance will be distributed between the eight grandchildren, and the other half between the two. If the division is *per capita* the property will be equally divided between the whole ten grandchildren, share and share alike. Now the tendency of matured and developed law is to give a decided preference to distribution *per stirpes*; it is only with remote classes of relatives that it abandons the distinctions between the stocks and distributes the property *per capita*. But in this, as in several other particulars, very ancient and undeveloped law reverses the ideas of the modern jurist, and uniformly prefers distribution *per capita*, exactly equal division between all the surviving members of the family; and this is apparently on the principle that, all having been impartially subject to a despotism which knew no degrees, all ought to share equally on the dissolution of the community by the death of its chief. A preference for decision *per stirpes*, a minute care for the preservation of the stocks, is in fact very strong evidence of the growth of a respect for individual interests inside the family, distinct from the interests of the family group as a whole. This is why the place given to distribution *per stirpes* shows that a given system of law has undergone development, and it so happens that this place is very large in Hindoo law, which is extremely careful of the distinction between stocks, and maintains them through long lines of succession.

Let us now turn to the causes which in the Hindoo law, and in the great alternative Aryan system, the Roman law, have respectively led to the disengagement of the individual from the group. So far as regards the Roman institutions, we know that among the most powerful solvent influences were certain philosophical theories, of Greek origin, which had deep effect on the minds of the jurists, who guided the development of the law. The law, thus transformed by a doctrine which had its most distinct expression in the famous

proposition, "all men are equal," was spread over much of the world by Roman legislation. The empire of the Romans, for one reason alone, must be placed in a totally different class from the Oriental despotisms, ancient and modern, and even from the famous Athenian Empire. All these last were tax-taking empires, which exercised little or no interference in the customs of village communities or tribes. But the Roman Empire, while it was a tax-taking, was also a legislating empire. It crushed out local customs, and substituted institutions of its own. Through its legislation alone it effected so great an interruption in the history of a large part of mankind, nor has it had any parallel except—and the comparison is very imperfect—the modern British Empire in India. There is no reason to suppose that philosophical theory had any serious influence on the jurisprudence of the Hindoos. I speak with reserve on the subject, but I believe that none of the remarkable philosophical theories which the genius of the race produced are founded on a conception of the individual as distinct from that of the group in which he is born. From those of them with which I happen to be acquainted, I should say that their characteristics are of exactly the reverse order, and that they have their nearest counterpart in certain philosophical systems of our own day, under which the individual seems lost in some such conception as that of Humanity. What, then, was the influence (for some influence there certainly was) which, operating on the minds of the Brahminical jurists, led them to assign to the individual rights distinct from those which would have belonged to him through mere membership in the family group? I conceive that it was the influence of religion. Wherever among any part of Hindoo society there prevailed the conviction of responsibility after death—whether that responsibility was to be enforced by direct rewards and punishments, or through the stages of the metempsychosis—the conception of the individual, who was to suffer separately and enjoy separately, was necessarily realised with extreme distinctness.

The portions of the race strongly affected by religious belief of this kind were exactly those for which the Brahminical jurists legislated, and at first they probably legislated for these alone. But with the notion of responsibility after death the notion of expiation was always associated. Building upon this last notion, the Brahminical commentators gradually transformed the whole

law until it became an exemplification of what Indian lawyers call the doctrine of spiritual benefit. Inasmuch as the condition of the dead could be ameliorated by proper expiatory rites, the property descending or devolving on a man came to be regarded by these writers partly as a fund for paying the expenses of the ceremonial by which the soul of the person from whom the inheritance came could be redeemed from suffering or degradation, and partly as a reward for the proper performance of the sacrifices. The law constructed on these principles became extremely unfavourable to the ownership of property by women, apparently because its priestly authors thought that women would have much greater difficulty than men in applying a proper share of the property to the funeral ceremonies of the person who had transmitted it. Their physical weakness and their seclusion (which was doubtless considered to be unavoidable) were probably regarded, among a society always more or less disturbed, as disqualifying them much more than any natural incapacity for sacerdotal functions. Whatever be the exact explanation, the Brahminical commentators who succeed one another in the Hindoo juridical schools show a visibly increasing desire to connect all property with the discharge of sacrificial duties, and with this desire the reluctance to place property in the hands of women is assuredly somehow connected.

There is, accordingly, much reason to believe that the text—which, as I told you, one of the most authoritative of the Hindoo legal treatises attributes to the mythical, semi-divine legislator, Manu—describes a condition of the law very like that which in very ancient times prevailed in India. “*Stridhan*,” says the rule, or woman’s property, includes “all the property which a woman may have acquired by inheritance, purchase, partition, seizure, or finding,” and this is a comprehensive description of all the forms of property as defined by the modes of acquisition. Nothing, however, in the existing Hindoo law gives this amplitude, or anything like it, to the *Stridhan*. The successive generations of Hindoo commentators have shown their hostility to it, not by abolishing it, but by limiting to the utmost of their power the circumstances under which it can arise. Minute distinctions are drawn between the various modes in which property may devolve upon a woman, and the conditions under which such property may become *Stridhan* are made as rare and exceptional as possible. The aim of the lawyers was to add to the family stock, and to

place under the control of the husband as much as they could of whatever came to the wife by inheritance or gift; but whenever the property does satisfy the multifarious conditions laid down for the creation of the *Stridhan*, the view of it as emphatically woman's property is carried out with a logical consistency very suggestive of the character of the ancient institution on which the Brahminical priests made war. Not only has the woman singularly full power of dealing with the *Stridhan*—not only is the husband debarred from intermeddling with it, save in extreme distress—but, when the proprietress dies, there is a special order of succession to her property, which is manifestly intended to give a preference, wherever it is possible, to female relatives over males.

Let me add that the account which I have given you of the probable liberality of the Hindoo institutions to females at some long-past period of their development, and of the dislike towards this liberality manifested by the Brahminical lawyers, is not to be regarded as fanciful or purely conjectural, although, doubtless, we can only guess at the explanation of it. It is borne out by a very considerable number of indications, one of which I mention as of great but very painful interest. The most liberal of the Hindoo schools of jurisprudence, that prevailing in Bengal Proper, gives a childless widow the enjoyment of her husband's property, under certain restrictive conditions, for her life; and in this it agrees with many bodies of unwritten local custom. If there are male children, they succeed at once; but if there are none, the widow comes in for her life before the collateral relatives. At the present moment, marriages among the upper classes of Hindoos being very commonly infertile, a very considerable portion of the soil of the wealthiest Indian province is in the hands of childless widows as tenants for life. But it was exactly in Bengal Proper that the English, on entering India, found the suttee, or widow-burning, not merely an occasional, but a constant and almost universal practice with the wealthier classes, and, as a rule, it was only the childless widow, and never the widow with minor children, who burnt herself on her husband's funeral pyre. There is no question that there was the closest connection between the law and the religious custom, and the widow was made to sacrifice herself in order that her tenancy for life might be got out of the way. The anxiety of her family that the rite should be performed, which seemed so striking to the first English observers of the practice,

was, in fact, explained by the coarsest motives ; but the Brahmins who exhorted her to the sacrifice were undoubtedly influenced by a purely professional dislike to her enjoyment of property. The ancient rule of the civil law, which made her tenant for life, could not be got rid of, but it was combated by the modern institution which made it her duty to devote herself to a frightful death.

If the *Stridhan* of the Hindoos is a form of married women's separate property, which has been disliked and perverted by the professional classes who had the power to modify it, the institution which was first the *dos* of the Romans, and is now the *dot* of Continental Europe, has received a singular amount of artificial encouragement. I have endeavoured to describe to you how it originated, but I have yet to state that it entered into one of the most famous social experiments of the Roman Empire. A well-known statute of the Emperor Augustus, celebrated by Horace in an official ode as the prince's greatest legislative achievement, had for its object the encouragement and regulation of marriage and the imposition of penalties on celibacy. Among the chief provisions of this "*Lex Julia et Papia Poppœa*"—to give its full title—was a clause compelling opulent parents to create portions, or *dotes*, for their marriageable daughters. This provision of a statute, which very deeply affected the Roman law in many ways, must have met with general approval, for at a later date we find the same principle applied to the *donatio propter nuptias*, or settlement on the married couple from the husband's side. In the matured Roman law, therefore, regular as it may seem to us, parents were under a statutory obligation to make settlements on their children.

It has been rather the fashion to speak of these experiments of the Roman Emperors on public morality as if they totally miscarried—I suppose, from some idea that the failure added to the credit of the moral regeneration effected by Christianity. But, as a matter of fact, the Christian Church conferred few civil benefits of greater moment to several generations of mankind than in keeping alive the traditions of the Roman legislation respecting settled property, and in strenuously exerting itself to extend and apply the principles of these disciplinary laws. There can be no serious question that in its ultimate result, the disruption of the Roman Empire was very unfavourable to the personal and proprietary liberty of women. I purposely say, "in its ultimate result," in order to avoid a learned controversy as to their position

under purely Teutonic customs. It is very possible that the last stages of the process, which it is difficult to call anything but feudalisation, were more unfavourable to women than the earlier changes, which were exclusively due to the infusion of Germanic usage; but, at any rate, the place of women under the new system when fully organised was worse than it was under Roman law, and would have been very greatly worse but for the efforts of the Church. One standing monument of these efforts we have constantly before us in the promise of the husband in the Marriage service, "With all my worldly goods, I thee endow;" a formula which sometimes puzzles the English lawyer, from its want of correspondence with anything which he finds among the oldest rules of English law. The words have, indeed, been occasionally used in English legal treatises, as the text of a disquisition on the distinction between Roman *dos*, to which they are supposed to refer, and the *doarium*, which is the "dower" of lands known to English law. The fact is, however, that the tradition which the Church was carrying on was the general tradition of the Roman *dos*, the practical object being to secure for the wife a provision of which the husband could not wantonly deprive her, and which would remain to her after his death. The bodies of customary law which were built up over Europe were, in all matters of first principle, under ecclesiastical influences; but the particular applications of a principle once accepted were extremely various. The dower of lands in English law, of which hardly a shadow remains, but under which a wife surviving her husband took a third of the rents and profits of his estates for life, belonged to a class of institutions widely spread over Western Europe, very similar in general character, often designated as *doarium*, but differing considerably in detail. They unquestionably had their origin in the endeavours of the Church to revive the Roman institution of the compulsory *dos*, which, in this sense, produced the *doarium*, even though the latter may have had a partially Germanic origin, and even though it occasionally assume (as it unquestionably does) a shape very different from the original institution. I myself believe that another effect of this persistent preaching and encouragement is to be found in the strong feeling which is diffused through much of Europe, and specially through the Latinised societies, in favour of *dotation*, or portioning of daughters, a feeling which seldom fails to astonish a person acquainted with such a country as France by its

remarkable intensity. It is an economical power of considerable importance, for it is the principal source of those habits of saving and hoarding which characterise the French people, and I regard it as descended, by a long chain of succession, from the obligatory provisions of the marriage law of the Emperor Augustus.

The importance and interest of our subject, when treated in all its bearings and throughout its whole history, are quite enough to excuse me, I trust, for having detained you with an account of its obscure beginnings. It has been said that the degree in which the personal immunity and proprietary capacity of women are recognised in a particular state or community is a test of its degree of advance in civilisation; and, though the assertion is sometimes made without the qualifications which are necessary to give it value, it is very far indeed from being a mere gallant commonplace. For, inasmuch as no class of similar importance and extent was, in the infancy of society, placed in a position of such absolute dependence as the other sex, the degree in which this dependence has step by step been voluntarily modified and relaxed, serves undoubtedly as a rough measure of tribal, social, national capacity for self-control—of that same control which produces wealth by subduing the natural appetite of living for the present, and which fructifies in art and learning through subordinating a material and immediate to a remote, intangible, and spiritual enjoyment. The assertion, then, that there is a relation between civilisation and the proprietary capacities of women is only a form of the truth that every one of those conquests, the sum of which we call civilisation, is the result of curbing some one of the strongest, because the primary, impulses of human nature. If we were asked why the two societies with which we have been concerned this evening—the Hindoos on the one hand, and the Romans and all the races to which they have bequeathed their institutions on the other—have had so widely different a history, no reply can be very confidently given, so difficult is it, among the vast variety of influences acting on great assemblages of men, to single out any one or any definite number of them, and to be sure that these have operated more powerfully than the rest. Yet, if it were absolutely necessary to give an answer, it would consist in pointing to the difference in their social history which has been the subject of this lecture, and in observing that one steadily carried forward, while the other recoiled from, the series of changes which put an end to the seclusion and degradation of an entire sex.

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