THE HINDU LAW

دھرم شاستر

INHERITANCE, PARTITION, STRIDHAN AND WILLS.

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HINDU LAW

OF

INHERITANCE, PARTITION, STRIDHAN AND WILLS:

WITH LEADING CASES from 1825 to 1888.

BY

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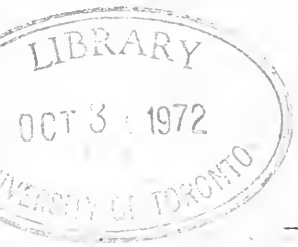

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TO

The Hon'ble Sir Stewart Colvin Bayley,

K.C.S.I., C.I.E., C.S.,

LIEUTENANT-GOVERNOR OF BENGAL,

THIS VOLUME IS DEDICATED BY KIND PERMISSION,

As a slight tribute of high respect,

BY HIS HONOR'S HUMBLE SERVANT AND ADMIRER,

THE AUTHOR.

PREFACE.

IN presenting this work to the public, the writer hopes it will meet a want greatly felt by Legal Practitioners, chiefly in the Mofussil. The principles of Hindu Law on the important subjects of Inheritance, Partition, Stridhan, and Wills, as expounded, in the decisions of the High Courts and the Judicial Committee of the Privy Council, have been set forth with the view of shewing the distinctions that exist between the different schools, noting at the same time such cases as have been followed, overruled and distinguished from. These cases date from so far back as 1825 and have been brought down to 1888.

A. C. M.

MANBHUM, CHOTA NAGPORE,

August, 1888.

TABLE OF CASES CITED.

ON INHERITANCE.

In treating of inheritance the status of a Hindu joint family, its partibility and other incidents, present themselves for consideration. A Hindu joint family according to Dyabhaga, the Bengal School of Hindu Law, is a sort of corporation, some members of which are entitled to mere maintenance and some, including in some cases females, are coparceners or persons who enjoy the joint property and have a right to claim partition, and on partition to hold a share. Until partition, which can take place on the death of the father, the shares of each of the coparceners are undetermined, for they arise from their being members of the family and not their taking the place of any one particular person. Thus in a Hindu family which is joint, and sons are living as members of a joint family, the right of one of the co-sharers does not pass upon his death to the other co-sharers, but becomes part of the estate of the deceased co-sharer, and would devolve, failing male issue, on his widow, daughter and daughter's son and make a family different from his own, though undivided; but they are not coparceners. Coparcenary with a man can exist up to his sons, grandsons and great grandsons. Each of these is entitled to a share of his property, but the son of a great grandson is not a coparcener, he being the fourth in descent from him, the common ancestor. And the reason is stated by Sir Henry Maine in his work on Village Communities, p. 3 "that the right of inheritance according to Hindu Law is wholly regulated with reference to the spiritual benefits to be conferred on the deceased proprietor." The doctrine that spiritual benefit to the deceased, by the offering of funeral oblations, determines the order of succession to his estate is the basis of the law of Dyabhaga. The right to do the spiritual benefit is regulated by the degrees of capacity to confer that benefit, that is, the degrees of proximity in relationship to the deceased.

Hindu Joint Family.

Co-parceners.

Menu has laid it down: "Not brothers, nor parents, but sons if living, or their male issue, are heirs to the deceased, but of him who leaves no son, nor a wife, nor

a daughter, the father shall take the inheritance, and if he leave neither father nor mother, the brothers." As observed above, the term "son" goes as far as the great grandson, who can confer benefits by presenting the funeral cake as well as his three immediate predecessors, *viz.*, father, grandfather and great grandfather. If there be more than one son, they take in equal shares *per stirpes* and not *per capita*. The grandson or great grandson inherits the share of his grandfather if he have died in the lifetime of his father; and so, if there be more than one widow, their rights are equal. After the widow comes the daughter. The rule, according to the Bengal School, is that, in the event of a man dying without male issue, the widow first succeeds to her husband's estate, next the daughter, then the daughter's son, then the father, then the mother, then the brother, then the brother's son, and so on. The places to the widow and the daughter are assigned upon the principle of spiritual benefit. The widow succeeds failing male issue, because "she rescues her husband from hell," and the daughter because she, as the son, is "a cause of perpetrating the race." Narada says: "The son of a man is even as himself, and the daughter is equal to the son; how then can any other inherit his property notwithstanding the survival of her who is as it were himself?" (Dyabhaga, chapter XI, section 11, verse 1.) The widow is "half the body of her deceased husband," and yet her right to succeed to the estate of her husband is postponed to that of sons, grandsons and great grandsons, because, according to verse 43, section 1, chapter XI, her power to confer spiritual benefit commences from the date of her husband's death, whereas sons, grandsons and great grandsons confer such benefit from the moment of their birth.

Spiritual benefit regulates order of succession.

The daughter comes immediately after the widow, because "she can confer spiritual benefit on her father by giving birth to a son who will deliver him and his ancestors from hell." Upon these lines the order of succession, as laid down by Jimut Vahana, is as follows: "First comes the maiden daughter; then she who is mother of male issue or is likely to become so. Childless widow and barren daughters are excluded from inheritance, and succession through a daughter ceases with her son, for, says Jimut Vahana, he is the giver of funeral oblations, and not his son nor the daughter's

daughter. The whole theory of inheritance is thus founded upon the principle of spiritual benefit, and it is by that principle alone that questions relating to it are determined. Some doubt was entertained on this proposition by some lawyers of the Bengal School, inasmuch as the text of Menu was in these words: "To the nearest sapinda, male or female, the inheritance belongs." "This," it was said, "indicated nearness of kin according to the order of birth and not according to the presentation of offerings." But all doubt on this head is dispelled by what Menu says in verse 29, section 6, chapter XI, Colebrooke's Dyabhaga: "Inheritance is in right of benefits conferred, and the order of succession is regulated by the degree of benefit and oblations of food as well as libations of water to three persons, and the fourth in descent is the giver of oblations, but neither is the fifth in ascent a receiver of offerings nor is the fifth in descent a giver of them." Now there are three sorts of offerings to the deceased ancestors of Hindus: Firstly, the entire funeral cake which is called an undivided oblation; secondly, the detached pieces of that cake and called divided oblations; and, thirdly, a mere libation of water. The first is offered to the three immediate paternal ancestors, that is father, grandfather and great grandfather, by those male heirs termed sapindas; the second by relatives, called sakulyas; and the third by relatives, called samanadakas as shewn by the late Mr. Justice Dwarika Nath Mittra in Guru Gobind Sahu Mundul *v.* Anund Lal Ghose Mozumdar, 5 B. L. R. F. B., 28. The second, *viz.*, fragments of the cake (Lepas) are offered to the three paternal ancestors beyond those who receive the cake, being persons who are in the fourth, fifth and sixth degree of remoteness from the offerer; and the third is offered to those ancestors who are seven degrees beyond those who receive the second, *viz.*, the fragments of the cake, and fourteen degrees remote from the offerer. Besides these three classes, Mr. Justice Mittra, in his judgment in the case cited, notices another class (4) of certain specified strangers, commencing with the spiritual preceptor and pupil and ending with the learned Brahmin of the same village, leaving aside the king who comes in by right of escheat. The sapindas are allowed to come in before the sakulyas, because undivided oblations are considered to be of higher spiritual value

Funeral offerings by Sapindas and Sakulyas.

than divided ones, and the sakulyas are preferred to the samanadakas, because divided oblations are considered to be more valuable than libations of water. Sapindaship is mutual, as he who receives offerings is the sapinda of those who present them to him in the same degree as he who receives them. This is very clearly shown by Mr. Justice Mittra in his learned judgment referred to: "If two Hindus are bound during the respective terms of their natural life to offer funeral oblations to a common ancestor or ancestors, either of them would be entitled after his death to participate in the oblations offered by the survivor to that ancestor or ancestors; and hence it is that the person who offers these oblations, the person to whom they are offered, and the person who participates in them, are recognised as sapindas of each other."

The principle of spiritual welfare being the basis on which the selection of heirs depends, those sapindas, as expounded by Mr. Justice Mittra, who are competent to offer funeral cakes to the paternal ancestors of the deceased, are invariably preferred to those who are competent to offer such cakes to his maternal ancestors only, for the first kind of cakes is of superior religious efficacy to that of the second. Similarly, those who offer larger number of cakes of a particular description are invariably preferred to those who offer a less number of the same description, and where the number is equal those that are offered to nearer ancestors are always preferred to those offered to more distant ones. Upon these grounds the question in Guru Gobind Sahu Mundul *v.* Anund Lal Ghose, 5 B. L. R. F. B., whether the father's brother's daughter's son of the deceased were nearer sapindas than the great great grandsons of the deceased's great grandfather, was decided in favor of the former, as he was a sapinda and offered cake to one of the three ancestors of the deceased, overruling Gabinda Harikar *v.* Woomesh Chunder Roy, Sutherland's F. B. Rep., 176. This principle was further given effect to by the Full Bench later on in another case, where it was held: "According to the Bengal School of Hindu Law a brother's daughter's son is a sapinda, and is therefore a preferable heir to the great great great grandfather's great great great grandson."

Sapindas to paternal are preferred to Sapindas to maternal ancestors.

Degumber Roy Chowdhry *v.* Moti Lal Bundyopadhya, 9 I. L. R., 563.

The doctrine as to who are sapindas is elucidated by Mr. Colebrooke in the following passage of the Dyabhaga: "Since the father and certain other ancestors partake of three funeral oblations as participating in the offering at obsequies, and since the son and other descendants to the number of three present oblations to the deceased, and he who while living presents an oblation to an ancestor, partakes, when deceased, of oblations presented to the same person; therefore, such being the case, the middlemost of seven who while living offered food to the manes of ancestors, and when dead partook of offerings made to them, become the object to which the oblations of his descendants were addressed in their lifetime and shares with them when they are deceased the food which must be offered by the daughter's son and other descendants beyond the third degree. Hence those ancestors to whom he presented oblations, and those descendants who present oblations to him, partake of an undivided offering in the form of (pindee) food at obsequies." These persons are sagotra sapindas and are agnates, that is persons connected with each other by an unbroken line of male descent. Those sapindas who are connected by the female line are cognates or bandhus, or sagotra sapindus according to the Mitakshara, and these come to be connected with the agnates by means of the ceremony of the Parbana shrad which every Hindu is bound by his religion to perform for his salvation, and is the most important ceremony prescribed by the Hindu religion. It consists in the presentation of a certain number of oblations, namely one to each of the first three ancestors in the paternal and maternal lines respectively; or, in other words, to the father, grandfather and the great grandfather on the one line and the maternal grandfather, the maternal great grandfather and the maternal great great grandfather in the other. It is related in the Dyabhaga as the Trai Purashik Pind, or Pind relating to three ancestors, and it is through the oblations prescribed at this ceremony that the relation of sapinda is determined. On the principle of participation a bandhu who offers a cake to his maternal ancestors will be the sapinda not only of those ancestors, but of all other persons whose duty it was to offer cakes to the same ancestors. Thus the maternal ancestors of *A* may be the paternal ancestors of *B*, and thus *A* will be the bandhu or bhinna gotra sapinda of *B*, both being under

Agnates and Cognates.

an obligation to offer pind to the same persons. A sister's son in addition to the oblations which he presents to his own father, grandfather and great grandfather presents oblations to the three ancestors of his own mother, who are also the three ancestors of the owner, *viz.*, the brother of his mother.

Similarly a brother who offers no cake to his own brother, but as he offers to his own three ancestors, who are also the three ancestors of his brother as well, participates in the benefit derived by the offering. The nephew offers cake to his own three ancestors, two of whom are the father and grandfather of the owner, and the grand-nephew to his own three ancestors, one of whom is the father of the owner. Thus all these are the sapindas of the owner as they offer cake to the same ancestors, although all not equally. The great grandnephew, since he offers in the ascending line up to the brother of the owner, is not his sapinda, but is a sakulya.

Bandhus.

The members of the family of the sister and that of the brother, although distinct, being connected by funeral oblations, are bandhus; and these bandhus, like sapindas, extend so far as the fourth in descent, and come before sakulyas and samanadakas. Among bandhus, again, the principle of religious efficacy being the standpoint, selection of heirs takes place according to it, preference being given to heirs in the female line, or to remoter heirs to heirs in the direct male line or of collateral relations. This principle was adopted in Gobind Pershad Talukdar *v.* Mohesh Chunder Ghuttack, 15 B. L. R., 35, wherein it was held: "By the Hindu law the great grandsons of the paternal grandfather are entitled to succeed as heirs to the deceased proprietor, and are to be preferred to the brother's daughter's son, because, although the former can offer but one oblation and the latter two, yet that offered by the former is offered to a paternal ancestor, and is therefore of superior religious efficacy to those offered by the latter, which are to maternal ancestors only."

Another authoritative ruling on this point was given in Khetter Gopal Chatterjee *v.* Purno Chatterjee, 15 W. R., 482.

In a later case, *viz.*, Pran Nath Surmah *v.* Surat Chunder Bhuttacharjee, 10 C. L. R., 484, on the principle of religious efficacy, a nephew's daughter's son being according to the Bengal School within the fourth degree, was preferred to an uncle's daughter's son.

It was held that, although the uncle's daughter's son offers two oblations, they were offered to remoter ancestors, *viz.*, the grandfather and the great grandfather, whilst the nephew's daughter's son offers to the father of the deceased proprietor. The status of a daughter's son deserves further consideration, and will be treated at some length before the position of the collaterals is considered. In Surju Kunwari *v.* Gandharp Sing, Sudder Dewanny Reports, p. 142, it was held by the Original Court that the daughter could come in for an inheritance after failure of male issue and not her son. This position was assailed by reference to texts contained in Mr. Colebrooke's work. Menu says: "The son of a man is even as himself, and the daughter is equal to the son; how then can any other inherit his property notwithstanding the survival of her who is as it were himself?" Vrihaspati lays down: "As a son so does the daughter of a man proceed from his several limbs. How then should any other person take her father's wealth?" Vishnu states: "If a man leave neither son nor son's son (nor wife, nor female issue), the daughter's son shall take his wealth, for in regard to the obsequies of ancestors, daughter's sons are considered as son's sons." If the married daughter and maiden daughter are preferred as heirs to the widow daughter, on the ground that the two former may have sons who would benefit their maternal grandfather by offering oblations, it is much more reasonable to suppose that an existing daughter's son is by far more eligible as an heir. In N. Krishnamma *v.* N. Papa, 4 Madras High Court Reports, the Madras High Court held that a daughter's son is one of the nearer sapindas and is a preferable heir to a brother's son. In Jamyatram *v.* Bai Jumna, 2 Bombay High Court Reports, p. 10, it was held that after the widow come the daughters and their sons successively. Thus the consensus of opinions of the three High Courts is in favor of the daughter's son's right to inherit after the widow and the daughter. With the daughter's son the succession in the descending line ceases. It then vests in the father, who offers two oblations to other manes in which the deceased proprietor participates, whilst the mother does not do so personally, but she confers benefits upon her deceased son by the birth of other sons (brothers of the deceased), in whose offerings he will participate. As to the right of brothers

it accrues after that of the parents, and they divide the inheritance equally between themselves, excluding the sons of their deceased brothers. Jimut Vahana says, Dyabhaga, chapter XI, section 5, verse 3: "The brother confers benefits on the deceased owner by offering three oblations to his father and other ancestors in which the deceased participates; and he occupies his place as presenting those oblations to the maternal grandfather and the rest, which the deceased was bound to offer, and he is therefore superior to the brother's son, who has not the same qualifications." In like manner, a nephew whose father is living is shut out, because, until his father's death, he cannot offer oblations; he also is excluded so long as his paternal uncle is living, as the paternal uncle in collateral succession, although equality of division is the rule, still confers greater benefits. But amongst brothers there may be those who are of the whole blood and others who are of the half blood; some who lived jointly with the deceased at the time of his death and some who were separate from him. Brothers of the whole blood are preferred to those of the half blood, as the former offers three oblations to the paternal ancestors and three to the maternal ancestors, which the deceased were bound to offer, and the latter, *viz.*, of the half blood, only offer to the paternal ancestors of the deceased. The brothers of the half blood take precedence of the sons of brothers of the whole blood, as they offer three oblations in which the deceased participates, while the brother's sons only offer two. United brothers take precedence of the separated brother. The order as laid down by Mr. Macnaghten is as follows: "(1) The uterine associated brethren, (2) the unassociated brethren of the whole blood, (3) the associated brethren of the half blood, (4) the unassociated brethren of the half blood. Should a man die leaving a uterine brother separated, and a half brother associated or reunited, these two will inherit the property in equal shares.

Brothers of the whole blood preferred to brothers of the half blood.

In Kylash Chunder Sircar *v.* Guru Churn Sircar, 3 W. R., p. 43, the respondents as brothers of the whole blood of the deceased claimed a preferential right to that of the appellants, who were brothers of the half blood. It was held that all depended on the nature of the estate. If the property be undivided and immoveable, the uterine brothers would have no greater right than brothers of the half blood, as it descended to them from their

father and was not acquired by the exertions of any one of them. "It was emphatically the father's property, and as all the brothers, both uterine and of the half blood, stood in the same degree of relationship to the original owner of the property, it is but reasonable that any part of that property which circumstances may cause to be divided, should be apportioned equally amongst all the sons." The text of Yama, "the whole of the undivided immoveable estate appertains to all the brothers, but divided immoveables must on no account be taken by the half brothers," supports this view. The conclusion deduced from this is, "when the brothers hold undivided immoveable estate, in that case on the death of one of them without nearer heirs, the others divide his share irrespective of difference in blood." Upon this basis equal rights of uterine and half brothers were decreed in the case of Trelock Chunder Roy *v.* Ram Luckhee Dassee, 2 W. R., p. 41; Shib Narain Bose *v.* Ram Nidhee Bose, 9 W. R., p. 87. These rulings were overruled by a Full Bench of the Calcutta High Court in the case of Raj Kishore Lahory *v.* Ram Money Dossee, I. L. R., 1 Calc., 27, in which, after a full consideration, it was held the text of Vrihat Menu in Dyabhaga, chapter XI, s. 5, clauses 34 and 35, *viz.*,—If a brother by the same mother be living, one by a different mother shall not take the estate; the law is the same even though it be immoveable property; but on failure of the whole blood one of the half blood may indeed possess the estate—referred to cases where there had been separation, total or partial, and with or without reunion. The question was elaborately discussed by the then Officiating Chief Justice, Mr. Justice Macpherson, in his judgment. "Were I," he said, "of a different opinion I should still not be prepared, simply on account of cl. 35, to restrict the rule as suggested; for so to restrict it is directly opposed to the main principle of the Bengal School of Inheritance, and to the express declarations of the writer of the Dyabhaga himself and of Raghu Nandana. Yama, moreover, is not a lawgiver of very special authority, though no doubt he is one of the early propounders of the law, whose rules are to be accepted when they are certain and intelligible and not opposed to those laid down by other sages of equal or greater authority. As a matter of fact the rule laid down in cl. 35, s. 5, Chapter XI of the Dyabhaga has never, so far as I can ascertain,

been accepted (unless it can be said to be so accepted in the Dayatatwa) as laying down that in the succession to an undivided estate the whole brother does not take before the half, until the decisions of Division Benches of this Court which have led to this reference.

Sri Krishna Tarkalankar (who lived about 1700, and whose opinion is entitled to very great respect) construed the Dyabhaga as laying down that the whole brother succeeded, when there had been no partition, in preference to the half brother. See his re-capitulation of the order of succession (Stoke's Edition of the Dyabhaga, p. 352) where he sums up the law as laid down in the Dyabhaga thus: "If the mother be deceased, a brother is the successor. In the first place the uterine or whole brother; if there be none, a half brother; but if the deceased lived in renewed coparcenary with a brother, then in case of all being of the same blood, the associated whole brother is heir in the first instance, but on failure of him the unassociated brother. So in the case of all being of the half blood the associated half brother inherits in the first place, and on failure of him the unassociated half-brother. But if there be an associated half brother and an associated whole brother, then both are equal heirs."

The same view is propounded by him in his Dayakrama Sangraha, chapter I, s. 7, cls. 1 to 6, and it seems clear that Sri Krishna, in laying down the law as he did, had no intention of departing in any way from the Dyabhaga.

To turn to more recent writers on this subject. In Halhed's "Gentoo Laws," published in 1776, Sri Krishna is followed implicitly. I do not refer to Halhed's treatise as deeming it of much authority, but merely as showing what was in fact supposed to be the construction of the Hindu law on the question now before us.

Sir Francis Macnaghten, in his "Considerations of the Hindu Law," published in 1824 (pp. 111, &c.) also follows Sri Krishna. Referring to the question of separation and reunion and the confession existing in the texts on the subject, he remarks that it is certain that if all continue joint from the beginning, or if all are in an actual state of separation, or if all return to union after having once been separated, the uterine excludes the half brother from succession."

So Sir William Macnaghten in his "Hindu Law" (Ed. 1828, Vol. I, p. 26) lays it down quite distinctly that after the mother brothers inherit—first the uterine associated brethren; next the unassociated brethren of the whole blood; thirdly the associated brethren of the half blood; and fourthly the unassociated brethren of the half blood. Elbeerling adopts the same opinion (para. 175, p. 78).

In the second volume of Macnaghten at page 66 there is a case which has been referred to as contradicting Macnaghten's own text. But so far as concerns the first of the two questions, which are supposed to be dealt with in that case, it turns upon a wholly different point, *viz.*, that when the first of the three brothers (one of whom was of the half blood) died his share went by survivorship to the other brothers to the exclusion of his widow. This shows that the case must have been one under the Mitakshara Law; and Baboo Shama Churn Sircar (Vyavastha Darpana, p. 1058, note) says it was an up-country case. The second question put does seem to involve the issue as to the superiority or equality of whole and half blood among brothers. But the answer given is so loose and so little in reply to the question asked that but little value can be attached to it. The case stated is that the first son who died left a widow and a uterine brother. The reply assumes that he died leaving no widow.

The table of inheritance and succession published some five and twenty years ago by the late Baboo Prosonno Coomar Tagore purports to be framed in accordance with the Dyabhaga, Dayatatwa, Dayakrama Sangraha, and other works of the Bengal School. In this table precedence is given to the brother of the whole blood who stands No. 10 in the list of heirs, while the half brother stands as No. 11. In the footnotes to the table it is stated that the brother of the whole blood succeeds first. Then in continuation of a *resumé* of the law of succession where there has been separation and reunion, there is this note: "The undivided immoveable estate on the death of the owner will be equally divided among the whole and half brothers." This note may be said to throw some doubt on the table; but it is clear to me that Prosonno Coomar Tagore would never have framed the table as he did (and reproduced it in

pamphlet shape in 1868), if he had not intended the rule given in his note to be construed in a limited sense, restricted to cases of succession to a portion of the joint estate which on a partial partition had remained undivided.

In the Vyavastha Darpana of Baboo Shama Churn Sircar preference is given to the whole blood. The text of Yama is translated thus: "Whatever immoveable property may remain undivided, that appertains to all; but the divided immoveables must on no account be taken by the half brothers: and a distinct opinion is expressed that this is the real meaning of the text, in fact, that it must be read as suggested in Colebrooke's Digest, and that it does not apply to ordinary cases of succession amongst brothers who have never separated at all (Vyavastha Darpana, pp. 203, 204, and p. 1,057, note).

No cases have been cited to us in which the question has been judicially decided, except those which are mentioned in the order of reference.

On the whole I am of opinion that in Bengal the brother of the whole blood succeeds in the case of an undivided estate in preference to a brother of the half blood."

This view was approved by the Judicial Committee of the Privy Council in Sheo Sundary *v.* Pirthee Sing, L. R. 4 I. A., 147, their lordships holding that according to the Dyabhaga a brother of the whole blood in a joint family succeeds in preference to a brother of the half blood to the share of a deceased brother.

After brothers, as in the case of the three sapindas of the first degree, come their sons, and then their grandsons.

Brothers' great grandsons not heirs.

Brothers' great grandsons are excluded so long as any sapinda exist, for they are fifth in descent from the father.

Sisters are nowhere mentioned in the order of succession, and the current of rulings is against her succession, *vide* Ram Dyal Deb *v.* Musst. Mugnee, 1 W. R., 227; Anund Chunder Mookerjee *v.* Teeta Ram Chatterjee, 5 W. R., 215, &c., &c., &c.

Sisters not heirs.

There is no doubt the authority of the Vyavahara Mayukha assigning the sister a place next to the paternal grandmother is against the opinion of Nanda Pandita and Balam Bhatta that the term "brethren" means "brothers and sisters" in the same manner in which the word "parents" means "mother and father," and accordingly the sisters inherit in default of brothers.

Females, though related as sapindas, are generally excluded from inheritance. The widow, the daughter, the mother and the paternal grandmother are exceptions under express texts based upon the doctrine of spiritual benefits conferred on the deceased. Females excluded from inheritance.

Although a sister cannot succeed to her brother's estate she may succeed to her sister, *vide* Rai Sham Bullab *v.* Pran Kishen Ghose, 5 Sudder Dewanny Reports, p. 21. Exclusion of the sister to inherit her brother's property is so certain that in Raj Koonwaree Kirpa Moyee Debeah *v.* Rajah Damudar Chunder Deb, 7 Sudder Dewanny Reports, p. 192, it was held that a daughter could not succeed to her mother who inherited from her son and not her husband, as she could not even be a distant heir of her brother. This principle was given effect to in Kalee Pershad Surmah *v.* Bhoirabee Dabee, 2 W. R., p. 180, in which it was held that neither sisters nor sisters' daughters could inherit the estate of the brother. Similarly brothers' sons' daughters are not competent to inherit, *vide* Radha Pearee Dossee *v.* Doorga Monee Dossee, 5 W. R., p. 131. In Koruna Mai *v.* Jai Chunder Ghose, 5 Sudder Dewanny Reports, it was held that the sister's son was entitled to inherit as heir to his mother's brother on the principle that she is the source of production of daughter's sons to the father, and as such she could enter on the succession until birth of a male issue, just as she would to the estate of a father who died leaving no male issue or widow. But this decision was controverted in Kesub Chunder *v.* Kishen Persad, S. D. Reports of 1860, p. 340, inasmuch as a Hindu estate can never be in abeyance, but must always vest at once in the person who at the time of descent is the heir. Sister cannot inherit the estate of the brother.

Having treated of the rights of brothers and sisters, the status of a daughter's son should here be considered. He comes after the daughter, but where a man died leaving a widow and two daughters by her, and another daughter by a former wife deceased, and this daughter died in the widow's lifetime leaving two sons, the question arose whether after the widow's death, as one of the daughters was dead, her sons represented her and took a moiety, or whether the surviving daughter took the whole. The Bombay High Court held in Jamzatram *v.* Bai Jamun, 2 Bombay High Court Reports, p. 10, that when a separated Hindu dies leaving landed property and no son or son's

son, his widow on his death takes for her life, and the daughter, on his death subject to the widow's life estate, takes an estate in remainder vested immediately in interest, but not coming into the possession of themselves or their sons, as the case may be, until after the death of the widow.

In Amirta Lal *v.* Rajany Kant Mitter, L. R., 2 I. A., the Privy Council held that, although a daughter who is a childless widow is incompetent, according to the Bengal School, to take by inheritance from her father, yet where two daughters have already succeeded jointly by inheritance to their father's estate, and at the death of one of them the survivor is a childless widow, the latter will nevertheless take by survivorship the whole estate. Her disqualification to inherit existing at the death of her sister does not destroy the heritable right which has once vested, nor the right of succession by survivorship to her sister which is incident thereto.

The widow in default of male issue is the next heir, but where there are several widows they hold jointly, and no part of the husband's property passes to any more distant relation till all are dead, *vide* Bhugwandeen Doobey *v.* Myna Baee, 11 Moore's Indian Appeals, p. 487.

The position of the step-mother is the next point to which we should direct our attention. According to Vyavastha Darpana, 2nd edition, verse 68, "if a deceased son, who leaves neither wife nor son, the mother must be considered as heiress after the father, the term "mother" meaning the genetrix alone." The step-mother is not entitled to inherit, Dyabhaga, chapter IX, s. 6, p. 213. This view was given effect to in Lakhi Prya *v.* Bhyrub Chunder Chowdry, 5 S. D. R., p. 315, and Bhyrobee Dossee *v.* Nobokissen Bose, 6 S. D. R., p. 53; Lalla Jotu Lall *v.* Musst. Dooranee Koer, 5 F. B., p. 173, on the principle that the text referred to the natural mother and not the step-mother.

Step-mother not entitled to inherit.

The succession, therefore, according to the Bengal School, is 1st the son, 2nd the grandson, 3rd great grandson, 4th widow, 5th maiden daughter, 6th married daughter who has or is likely to have male issue, 7th daughter's son, 8th father, 9th mother, 10th brother, 11th brother's son, 12th brother's grandson, 13th sister's son, 14th paternal grandfather, 15th paternal grandmother, 16th uncle, 17th uncle's son, 18th uncle's grandson, 19th

Order of Succession.

father's sister's sons, 20th paternal great grandfather, 21st paternal great grandmother, 22nd granduncle, 23rd granduncle's son, 24th granduncle's grandson, 25th grandfather's sister's son, 26th maternal grandfather, 27th maternal uncle, 28th maternal uncle's son, 29th maternal uncle's grandson, 30th mother's sister's son.

The shares of illegitimate children should here receive some attention. They in the higher classes do not go in as heirs, but are only entitled to maintenance. But the illegitimate son of a Sudra may in some cases inherit either jointly or solely. The text of Manu: A son begotten by a man of the servile class, on his female slave or on the female slave of his male slave, may take a share of the heritage if permitted by the other sons, is interpreted by Jimut Vahana to mean the son of a Sudra by a female slave or other unmarried woman may share. But Mr. Justice Mittra in Narain Dhara *v.* Rakhal Gain, 23 W. R., p. 334, and I. L. R., 1 Calc., 1, held that the passage should be read as "the son of a Sudra by an unmarried female slave may take a share." The term slave or Dassi was used towards concubines who were persons either purchased or born in the house and incapable of leaving it at their own free will, and the children of these concubines were regarded as intermediate between legitimate sons and the offspring of a promiscuous intercourse. These latter are absolutely debarred from inheriting even to a Sudra, *vide* Datta Persi *v.* Datta Bangara, 4 Madras High Court Reports, 204, 215, and Rohi *v.* Govind, 1 Bombay Reports, p. 97, and Vencatachella *v.* Parvartham, 8 Madras High Court Reports, p. 134.

Illegitimate sons entitled to half of the share of a legitimate son.

Now as regards the share of illegitimate sons recognised by the Hindu law Vijnaneswara lays it down that he without brothers may inherit the whole estate in default of daughter's sons, that is, until the line which terminates with a danghter's son is exhausted he cannot take the whole estate, the daughter excludes him from the whole estate, allowing him but a part, *viz.*, the half share of a son. If there were legitimate sons, each would have equal moieties on division, but the illegitimate, because he is illegitimate, takes half of the moiety, the remaining three-fourths going to the legitimate son, *viz.*, his brother. In the same way if there were a widow, daughter, or daughter's son, he would have half and the other half would go to the widow, daughter, or daughter's son as the

case may be. He would take the whole upon the extinction of all these or if they did not exist. This is the view taken by Devanda Bhatta in Dattaka Chandrika, ss. 30 and 31, and by Jagannatha and Mr. Macnaghten in his work, page 18.

As brothers can claim to each other, illegitimate sons can do so equally to each other, but they cannot claim to inherit to collaterals; they can only claim to the estate of their father.

Exceptions to rules of succession.

There are, however, exceptions to these rules of succession, and the chief of these are those which regulate the descent of a woman's stridhan and heirship by right of primogeniture and by long-established custom in a particular family or class. The question of descent of stridhan will be fully considered in a subsequent chapter. The doctrine that the first born is entitled to a greater share than that of the rest of his brothers is not in force at the present day, and is replaced by the rule that all legitimate sons of the same rank stand on equal footing, although the offspring of several wives and the number by each differs. The sons generally take *per capita*, and their rights at the partition of the ancestral estate are not regulated according to the period of time when their mothers were married. Priority of marriage when there are several wives gives a preferable claim to the management of the property and regulates the order of precedence to succeed as heirs to the husband in default of sons. The rule of equal division between the sons was laid down in Bhyro Chand Rai *v.* Rasoowoona, 3 S. D. A., p. 303. Primogeniture applies to zemindaries and other estates which are regarded in the nature of principalities and are impartible. It must not apply to any and every family, and thus override the generally acknowledged law of the community. The Bombay High Court in Bhagangrav bin Davalatrav Ghorpade *v.* Molograv bin Davalatrav Ghorpade, 5 Bombay High Court Rep., p. 161, held "the custom by succession by reason of primogeniture has hitherto, so far as we are aware, been recognised iu other parts of India as applicable only to large zemindaries and other estates which are considered to partake of the nature of principalities. The custom in the case of a petty Hindu family that the family estates should descend to the eldest son, the second and other sons being entitled to maintenance, cannot be supported." In Neel

Kristo Deb *v.* Beer Chunder Manikya, 12 Moore's Indian Appeals, and 3 B. L. R., p. 13, it was admitted that the right of succession to both Raj and zemindari was governed not by the general law but by Kulachar, or family custom, which was that the reigning Rajah should name a Jubraj and a Burra Thakoor, of whom the first succeeded to the throne and the latter to the office of Jubraj. One of the parties contended that he had a right to be appointed Jubraj as he was the elder brother by the half blood, and a promise was made to him by a former Rajah. The other side insisted that the choice of the reigning Rajah was free and seniority could not defeat the custom. It was argued that in the case of a Raj or kingdom or other impartible estate descending by inheritance to a sole heir, the Court must view the property as though it were part of an undivided joint ancestral estate, and as the previous holder was the father of the deceased Rajah and the claimants, the Raj had vested in all the brothers jointly, though of course it could only be held by one. This being so, all the brothers were equally near to the father, and on the death of one it would survive to the eldest. But the Lords of the Privy Council held that in the case of an impartible estate survivorship cannot exist as an incident of joint ownership, which is inconsistent with the separate ownership of the Raj. Title by survivorship, where it varies from the ordinary rules of heirship, cannot, in the absence of custom, be the criterion to ascertain the heir to a property which is solely owned and enjoyed, and which passes by inheritance to a single heir upon the double ground of nearness of kin and religious efficacy; it was held the whole blood was entitled in preference to the half blood, and nothing vested in any member of the family until the death of the last holder, and that at his death the heir was the person who was nearest to him.

In the case of Katama Natchiar *v.* The Rajah of Shivagunga, 9 Moore's Indian Appeals, p. 539, which was governed by the Mitakshara, the *ratio decidendi* was in perfect harmony with the last—the Tipperah case. The Shivagunga case settled that where an impartible zemindari was joint property the heir to it must be sought for from the male coparceners, and no female nor separated member could succeed. The Tipperah case

held that amongst these coparceners the person to succeed was the one who was nearest to the last male holder at the time of his death and the principle of survivorship did not apply.

Custom in a family must be proved.

Long-established custom in a particular family or class has the effect of law, but the custom must be strictly proved and shown to have been strictly followed. Thus in Raj Kissen Sing *v.* Ramjoy Surma Mozoomdar, I. L. R., 1 Calc., 186, in which the right of the eldest son to succeed to the estate by virtue of a family custom to the exclusion of the other sons was questioned, the origin and nature of the estate being uncertain, and there appearing to be no authority for holding that the mode of descent according to the family usage could not be discontinued so as to let in the ordinary law of succession, it was held such family usages are different from a territorial custom. In Rowat Urjun Sing *v.* Rowat Ghunsiam Sing, 5 Moore's Indian Appeals, 169, family usage by which the eldest son successively for eight generations succeeded to a zemindary to the exclusion of other sons was held valid in a suit by younger brothers for a partition of the Raj.

Succession by nomination among Gossains allowed.

Amongst Gossains or Sunyasis succession by nomination of the last owner is allowed, *vide* Dhunsing Gir *v.* Mya Gir, 1 Select S. D. Reports, p. 202, and Khuggender Narain Chowdry *v.* Shorup Gir Oghornath, I. L. R., 4 Calc., p. 543.

Exceptions to the general rule.

In Hurry Churn Doss *v.* Nimai Chand Keyal, I L. R., 10 Cal., 138, the custom of remarriage of widows amongst the caste to which the parties belonged having been proved to prevail, the widow, who was childless in the lifetime of her father, was preferred to the brother of the latter, as she had two children by a Shunga marriage which she contracted afterwards. In Kally Churn Shaw *v.* Dukhee Buhu, I. L. R., 5 Calc., 692, it was contended the plaintiffs being sons of a widow married to the last owner were illegitimate as her marriage was not valid. Evidence was given to prove that a man belonging to the Halwaie caste to which the parties alleged they belonged might marry a widow even if he has a wife, provided that he is childless, and these conditions being present in the case it was held plaintiffs were entitled to a share of the property of the deceased.*

The next exception to the rule of succession as noticed

* The marriage of widows is legalised by Act XV of 1856.

by Mr. Strange in his work on Hindu Law, Vol. I, p. 133, and in Vyavastha, Darpana, pages 10 and 11, is that when a Hindu disappears and is not heard of for some time, no person can succeed to his property as heir, until the expiry of 12 years from the date on which he was last heard of, *vide* Jonmenjoy Mozumdar *v.* Kesub Lall Ghosh, 2 B. L. R., p. 134.

No succession opens before expiry of 12 years from the date when the last owner was heard of.

MITAKSHARA.

———o———

Property vests by survivorship.

According to this School, the interest which a son takes in the father's ancestral estate is from the first a vested interest and saleable at any time. Property vests by survivorship and not by succession as it does under the Bengal School, and thus by death the interest of survivors is extended and birth likewise cuts it down. Birth creates right under the Mitakshara, whilst according to the Bengal School death is the means of acquisition. The difference between the two Schools lies chiefly in the power of alienation.

Father may alienate property at times of distress.

According to the Mitakshara the father is subject, as regards immoveable ancestral property, to the control of his sons down to the great grandsons. In cases, however, where the sons and other heirs are minors and incapable of giving their consent to a gift, sale, or mortgage, the father may alienate the property at times of distress for the sake of the family and for pious purposes. The sons have no right of interference over property acquired by the independent exertions of the father. There are conflicting texts on this point. Yajnavalka lays it down : " Land or other immoveable property a man shall neither give away nor sell, even though he acquired them himself, unless he convene all his sons." In Mitakshara, verse 9 runs as follows: "The grandson has a right of prohibition if his unseparated father is making a donation or a sale of effects inherited from the grandfather, but he has no right of interference if the effects were acquired by the father." This difference was reconciled in Muddun Gopal Thakoor *v.* Ram Bux Pandey, 6 W. R., p. 7, in which the High Court of Calcutta held that a father under Mitakshara law is not incompetent to sell immoveable property acquired by himself, and this property is exempt from partition if it be acquired without detriment to or use of the joint property. This is the rule of law under the Mithila School according to Vivada Chintamani, where it is defined that sons have no ownership in the father's self-acquired property. Although the Vivada Chintamani does not say

expressly about the son's right to the father's ancestral estate, still the Calcutta High Court in Kanto Lall *v.* Gridharee, 9 W. R., p. 469, held that the right of the son to his father's estate accrues on his birth as it does under the Benares School. The son under the Mitakshara law can compel the father to divide the ancestral estate whenever he pleases. This rule does not prevail in Bengal, where it is now a settled law that the Hindu law makes no distinction between ancestral and self-acquired property as regards the right of the father, to alienate, sell and give. Lord Kingsdown said, in Nagalachamma Ummal *v.* Gopi Nadoraja, 6 Moore's I. A., p. 344 : "Throughout Bengal, a man who is the absolute owner of property may dispose of it by will as he pleases, whether it be ancestral or not." In Ganendra Mohun Tagore *v.* Upendra Mohun Tagore, 4 B. L. R., p. 159, Chief Justice Peacock held that a Hindu who has sons can sell, give or pledge without their consent immoveable ancestral property situate in the province of Bengal, and that without their consent he can by will prevent, alter or affect their succession to such property.

In Bengal the father is the absolute owner of property moveable as well as immoveable.

According to the Mitakshara School each son upon his birth takes a share equal to that of his father in ancestral immoveable estate, and can compel his father to make partition of such estate. Till partition he has no title to a share, but in Goormaun Das *v.* Ram Sarun Dass, 5 W. R., p. 15, it was held that the interest of the son in the father's estate is from the first a vested interest and saleable at any time. In the Presidencies of Bombay and Madras alienations by one coparcener of the ancestral estate to the extent of his own share, either for value or by gift, are good. In Bombay a limit is, however, placed to private conveyance for value only. In Bengal, this system of alienation by private deed is not yet adopted, but it is so far settled by the Privy Council that a purchaser of undivided property sold in execution of a decree during the life of the debtor for his separate debt acquires the debtor's interest in such property with the power of ascertaining and realising it by partition, *vide* Suraj Bunsi Koer *v.* Shew Prosad Singh, I. L. R., 5 Calc., p. 148, P. C.

Interest of the son in the father's estate according to the Mitakshara is a vested interest and saleable at any time.

The other point of difference between the two schools is in the recognition of religious efficacy by the offering of oblations. The doctrine of religious efficacy in

Doctrine of religious efficacy is the guide in determining succession according to the Dyabhaga.

determining the order of succession is invariably referred to as a guide according to the Dyabhaga and Dyakrama Sangraha, but this is not a text according to the Mitakshara. Whatever distinction between sapindas and samanadakas there is on account of the former offering the funeral cake and the latter mere libations of water, is, it is said, as evidentiary not of religious merit but of different degrees of propinquity.

According to the Dyabhaga the claims of rival heirs are determined by the degrees of nearness to the last owner and not by the number and nature of the offerings. For there have been instances where persons who confer a large number of offerings are postponed to persons who confer none at all, but are admitted as heirs because of their affinity. Yajnavalka defines sapindaship to refer to affinity and not to the ability of the sapinda to offer religious oblations. Sapinda denotes "relationship between two persons through their being connected by particles of one body." But as according to this definition a man is the sapinda of his paternal and maternal ancestors, his paternal and maternal aunts and brothers' wives are sapindas to each other, because they produce one body (the son) with those who have sprung from one body, and in this manner the principle could be carried to extreme limits so far even as to make the whole world akin. Vijneswara has restricted sapindas on the father's side in the father's line to the seventh ancestor, and on the mother's side in the mother's line to the fifth ancestor. The word "sapinda" which when analysed means, *Sa, i.e.*, Samana, like equal or the same, and *pinda*, ball or lump, and in this sense would apply to all men, but Vijneswara has limited its signification, on the principle of descent from a common ancestor, and in the case of females, on marriage with descendants from a common ancestor. All blood relations within six degrees, together with the wives of the males amongst them, are sapinda relations to each other. "To three," says Manu, "must libations of water be made; to three must oblations of food be presented; the fourth in descent is the giver of those offerings, but the fifth has no concern with them." The root of sapindas is the giving, receiving or participating in general oblations presented to a deceased ancestor, and the obligation to offer funeral offerings extends to the ancestor in three degrees. A

Hindu therefore is bound to offer funeral oblations to his father, grandfather and great grandfather, and also in right of his mother who is disqualified from discharging the duties of sapindaship, to her ancestors, to offer oblations to her father, grandfather and great grandfather. In his turn he is entitled to receive those oblations from his son, grandson and great grandson in the male line, and from his daughter's son who offers them in right of his mother. As a woman's duties of sapindaship devolve upon her son he is for those purposes included in his maternal family, but her daughter's and her son's sons and daughters are excluded.

As regards collaterals, the same criterion is adopted, *viz.*, who amongst them are bound to offer oblations to the same ancestor. It is beyond doubt that the proprietor's brothers and their sons and grandsons all offer oblations to the father of the proprietor and are his sapindas. His paternal uncles, and their sons and grandsons, offer to his grandfather and great grandfather as do the brothers of his grandfather and their sons and grandsons to his great grandfather, and thus the nearness or remoteness of the common ancestor is traced to the connection by means of the funeral cake. But the sapindaship of women is ascertained by the sapindaship of their brothers, that is to say, they are sapindas of all with whom their brothers are sapindas. Women, however, cannot perform the duties of sapindaship as shown above, and their duties devolve upon their sons, who are bound to offer cakes to their fathers, grandfathers and great grandfathers. These sons include as their sapindas all with whom their mothers' brothers are sapindas. These sapindas are called bandhus, *i.e.*, kinsmen sprung from a different family, but allied by funeral oblations. For as Mr. Justice Mittra observed in Amrita Kumari Debi *v.* Lakhinarayan Chuckerbutty, 2 B. L. R., F. B., p. 33 : "It is a well known principle of Hindu law recognised in all the Schools current in the country that the relation of sapinda exists not only between the immediate giver and the immediate recipient of funeral oblations, but also between those who are bound to offer them to a common ancestor or ancestors. Thus, for example, brothers are not required to perform the obsequies of each other, but they are nevertheless sapindas, being connected with each other through the medium of the oblation which they are respectively bound

Bandhus.

to offer to their common ancestor. The same rule holds good in the case of the brother's son, and in fact of every sapinda who does not stand in a direct line of ascent or descent with the deceased proprietor himself."

Although Acharkanda lays down that according to the Mitakshara, "whenever the word sapinda is used there consanguinity must be known to exist directly or indirectly," yet it is evident that it is occasionally used, as in the Bengal School, as denoting connection through the pinda or the funeral cake. Sir William Jones remarked "that the doctrine of funeral cakes is the key to the whole Hindu law of inheritance." All the Schools of Hindu law that are current in the country are agreed in accepting this principle as their guide, however much they may differ from one another with reference to particular points connected with its application. Those commentators who adopt the other doctrine of consanguinity merely extend the limits of the sapinda relation by including a large number of persons besides those who are connected by funeral oblations. The author of Mitakshara at all events is no exception to the general rule. The text of Menu, which says "to the nearest sapinda the inheritance belongs," is frequently cited by him as a leading authority on all questions of Hindu law."

Difference between the Bengal and Benares Schools.

The radical difference between the Dyabhaga and Mitakshara lies in this, that the former allows the bhinna gotra sapindas to come in along with, instead of after, the gotraja sapindas, the principle of religious efficacy being the sole guide in deciding between rival claimants. According to the Mitakshara, the succession after great grandson devolves on the wife, daughters, parents, brothers, their sons, gentiles, *i.e.*, those sprung of the same family, including sapindas, sakulyas and samanadakas, their cognates or bandhus; then a pupil and a fellow-student, the priest, and finally the king by escheat except the property of a Brahmin. The bandhus succeed only on failure of the gentiles or gotraja sapindas, on the principle that sogotras, however distant in degree, take precedence of bandhus, or those claiming collaterally through a female. These bandhus are of three kinds, *i.e.*, bandhus to the person himself, *viz.*, (1) his first cousins, bandhus to his father; (2) his father's first cousins; and (3) his mother's first cousins. On failure of the

first the next in order succeeds. This enumeration was made the basis of argument in Thakur Jib Nath Sing *v.* The Court of Wards, 5 B. L. R., p. 442, and L. R. 2 Ind. App., p. 163, but the right of collateral succession extended to the grandson of the common ancestor. The plaintiff claimed as heir to his father's sisters' son in preference to the great grandson of the deceased's great great great grandfather. Adopting the text of Yajnavalka that gentiles or gotrajas must be exhausted before the bandhus can succeed.—the case was decided against the plaintiff. The order of succession computed according to the Mitakshara is that sapindas or kinsmen connected by funeral oblation should be reckoned up to the seventh degree, and samanadakas or those connected by a common libation of water, as far as the fourteenth degree. After the samanadakas come those termed the cognates or bandhus. This enumeration shows that bandhus are not confined in a man's own degree or generation, but extends to those in the degree above or below him. In short all sapindas who trace their connection through a female are bandhus to one another. This was the finding of the Privy Council in Girdhari Lall Roy *v.* The Government of Bengal, 1 B. L. R., P. C., p. 51. It is ruled therein that the maternal uncle is bandhu to the deceased by his sister's son. The claims of a preceptor or pupil to the property of a person dying without heirs have not been found in any reported case, and the doctrine that the king does not take by escheat the estate of a Brahmin was overthrown in the case of the Collector of Masulipatam *v.* Cavaly Vencata Narainapali, 8 Moore's Ind. App., p. 500. The position of the sister's son as a bandhu is fully illustrated by the late Mr. Justice Mittra in Amrita Kumari Debi *v.* Lakhinarayen Chuckerbutty, 2 B. L. R., F. B., p. 33. In it he combated the proposition that the bandhus of the three classes specified are bandhus to members of the class to which they respectively belong and are strangers to the Bandhus of the other classes. Verse 1, Sec. 6, Chap. II of the Mitakshara runs as follows: "On failure of gentiles the cognates are heirs. Cognates are of three kinds, related to the man himself, to his father, or to his mother, the sons of his own father's sister, the sons of his own mother's sister, and the sons of his own maternal uncle must be considered as his own cognate kindred. The sons of his father's paternal aunt,

the sons of his father's maternal aunt, and the sons of his father's maternal uncle must be deemed as his father's cognate kindred. The sons of his mother's paternal aunt, the sons of his mother's maternal aunt, and the sons of his mother's maternal uncles must be recognised as his mother's cognate kindred." Mr. Justice Mittra observed: "There is nothing whatever in this verse to justify the contention that the author of the Mitakshara intended thereby to lay down an exhaustive list of bandhus or cognates." He says first of all that bandhus are entitled to inherit in default of gotrajas; and, secondly, that bandhus are of three kinds, *viz.*, those who are related to the man himself and those related to his father and mother respectively. Their can be no doubt whatever that if he had finished the sentence at this point no one could have seriously contended in the face of these two propositions, so manifestly general in their character, that he intended to exclude one single individual who is really entitled to claim the benefit of his own definition. The only argument, therefore, which can be advanced in support of this contention is the simple fact of his having concluded this sentence by quoting a text from one of the Hindu sages which contains the names of a limited number of bandhus. We are of opinion that this argument, *per se*, is entitled to no weight whatsoever. Isolated texts from various Hindu sages and of a similar description are to be found in the Mitakshara, and it would be manifestly erroneous to contend upon the authority of any one of them that an exhaustive enumeration of heirs was intended to be made thereby. The following text of Vrihad Vishnu quoted in p. 326 of Colebrooke's Edition of the Mitakshara might be referred to as an illustration:—

"The wealth of him who leaves no male issue goes to his wife. On failure of her, it devolves upon the daughter; if there be none it belongs to the father; if he be dead it appertains to the mother. It would obviously be improper to say, from the mere fact of the author of the Mitakshara having referred to this text, that he intended to declare that the particular persons mentioned therein are the only heirs to the estate of a deceased Hindu who has left no male issue, or that such was the intention of Vrihat Menu himself. As to the particular text before us, there is absolutely nothing in it from which it can reasonably be inferred that the author of it at least, if

not the author of the Mitakshara, had such an intention in view. Menu says : " By that male child whom a daughter, whether appointed or not, shall produce by a husband of equal class the maternal grandfather becomes the grand sire of son's sons. Let that child give the oblation and take the inheritance.

" It is manifest from the above that the maternal ancestors also are entitled to receive funeral oblations, and this proposition strikes at the very root of the contention that has been raised before us. Now the sister's son is no other relative than the daughter's son of the father ; and if it be once conceded as it must be that the daughters son is a sapinda, it would follow as a matter of course that the sister's son is at least a sapinda of the father ; and as such he would be clearly entitled at all events to rank as a pitri bandhu or father's cognate. In point of fact, however, he is also a sapinda of the deceased proprietor himself, not so near as the daughter's son, but nearer than every one of those individuals who are admittedly recognized as bandhus." According to Pasera Mahdav " there are sapindas who are connected by the tie of consanguinity, for instance, the father and the son are sapindas to each other, and the body of the father is perpetuated in the son without any intervention. So also is the son by the medium of the father a sapinda of his paternal grandfather and of his paternal great grandfather. So also the son by the medium of his maternal grandfather is sapinda of his maternal aunt and uncle, and by the medium of his paternal grandfather he becomes a sapinda of his paternal aunt and uncle." The Nirnaya Sindhu says : " Those are sapindas between whom exists a reciprocity of giving and receiving funeral oblations. The fourth person and the rest share the remains of the oblation wiped off with the kusa grass ; the father and the rest share the funeral cakes. The seventh person is the giver of oblations, the relation of sapinda or men connected by the extension of the funeral cake, therefore to the seventh person, or sixth degree of ascent or descent. It should not be supposed that an uncle or nephew are not reciprocally sapindas, as he who shares in the oblations offered by the uncle shares also in those offered by the nephew. In short, if any one of those who participate in the funeral oblation offered by one individual be also the presenter of funeral oblations

to one of his coparticipators, then the whole number become sapindas of each other. In default of the brother's son, the father, uncle, the daughter-in-law, the sister, and her sons are entitled to perform the shradhs because they are the heirs." It is thus clear that the sister's son is a bandhu and is expressly recognised as heir. Indeed Mr. Justice Mittra, in the concluding part of his judgment, very forcibly argued: "In what way are the sister's son of the father and of the mother better qualified to inherit than the sister's son of the deceased proprietor himself? What doctrine of Hindu law, directly or indirectly sanctioned by the author of the Mitakshara, can be cited in support of the contention that the maternal grandfather himself is not an heir, when his son's sons and his daughter's sons, nay even when the son's sons and the daughter's sons of the father's and mother's maternal grandfather are acknowledged as such? How, again, are we to reconcile the proposition that the maternal uncle, or in other words the uterine brother of the mother, is to be excluded from the line of inheritance, when her cousins, namely the sons of her father's sisters and the sons of her mother's sisters, are to be included in it?" The Full Bench distinctly found that the sister's son is entitled to inherit under the Hindu law as administered in the Benares School, and is a bandhu. This view was adopted by the Full Bench of the High Court in a recent case, *viz.*, Umaid Bahadoor *v.* Udai Chand, I. L. R., 6 Calc., p. 119, conformably with Lallubhai Bapubhai *v.* Manka Virbai, I. L. R., 2 Bom., 422.

Sister's sons entitled to inherit under the Benares School.

The sister's son as an heir under the Bengal School was settled in Karuna Mai *v.* Jai Chundra Ghosh, 6 Sudder Dewanny Reports, p. 42. Both the schools are agreed in regard to the maternal uncle, *vide* Gridharee Lal Roy *v.* The Government of Bengal, 12 M. I. A., 448, and the sister's son being heirs.

Under the Bengal School as well.

Both are equally agreed as to the step-mother having no right to succeed. The Full Bench of the High Court of Calcutta, in Lala Jotee Lall *v.* Mussamut Dooranee Koer, Sutherland's F. B. Rulings, p. 173, held that it would be contrary to the principles of Mitakshara to hold that the word "mother" includes the step-mother.

Mother does not mean step-mother.

Succession to the estate of a separate householder is regulated as follows: First come the gotraja sapindas; then the gotraja samanadakas, all according to the nearness

of their line to the deceased. The gotraja sapindas are all the males of the deceased's family related to him within six degrees downwards and upwards, together with their respective wives; the fourth, fifth and sixth, descendants in the deceased's own line inherit first; next the father's line, *viz.*, the deceased's brothers, second, third, fourth, fifth and sixth descendants; next the grandfather and his descendants to the sixth degree, and so on. Gotraja samanadakas are all the male descendants, ascendants, and collaterals within thirteen degrees, together with their respective wives; or according to some, "all persons descended from a common male ancestor and bearing the same family name." Succession by inheritance is the rule according to the Dyabhaga, but according to the Mitakshara there are three different modes in which the estate of a deceased person devolves: first, if the deceased was a member of a joint undivided family his interest in the joint property passes by survivorship to his joint tenants. This principle was exhaustively explained by Sir Barnes Peacock, C.J., inSadaburt Pershad Sahu *v.* Foolbashi Koer, on a reference to Full Bench, 3 B. L. R. (F. B.) p. 34. He said: According to the Mitakshara law if a member of a joint undivided family dies without a son and leaving a brother, his widow does not take his share by descent. If he leaves a son, the son takes by descent; but if he leaves only a widow the survivors take by survivorship, and they hold the property which they take by survivorship legally and equitably for themselves and not in trust for the heirs of the deceased. The deceased's heirs have no interest either legally or equitably in the share which passes by survivorship to the surviving cosharers.

Gotraja Sapindas.

Rule of survivorship.

That will be made very clear if you suppose the case of a joint family consisting of a father and two sons and two uncles, the brothers of the father taking property by descent from the father of the father and of the two uncles. The father and the two sons take one-third and two uncles each take one-third, that is, they take that which upon partition would be allotted. Then suppose that one of the sons dies without issue leaving a widow, such widow, according to the Mitakshara law, would not take his share in the estate. Then the question is, would it go to the person who would be heir if the widow was dead or had not existed? It clearly does

not go to the heir, because the heir would be the surviving brother and not the father. If it would go to the heir, the surviving brother would take the whole of the interest of the deceased brother, but the law is that it goes by survivorship, and the survivors take legally and equitably for themselves and not in trust for the brother of the deceased. Neither the widow of the deceased nor his brother would take any interest by inheritance from the deceased in the joint family estate."

2nd.—If the deceased was separated from his coparceners and not reunited with any of them after separation with the rest, his estate descends agreeably to the rules of inheritance, which also apply to the self-acquired and other separate property of a member of a joint family, *vide* Katama Natchiar *v.* The Raja of Sivagunga, 9 Moore's I. A., p. 539.

3rd.—If the deceased was reunited after separation his estate goes by survivorship and by rules of inheritance according to circumstances. The heirs of a deceased person who was separate from his coparceners and who was reunited with them can be summed up as follows :—

Heirs of a deceased person who was separate from his coparceners.

First son, 2nd grandson, 3rd great grandson, 4th widow, 5th daughters, 6th daughter's son, 7th mother, 8th father, 9th brother, 10th brother's son, 11th paternal grandmother, 12th grandfather, 13th uncle, 14th uncle's son, 15th paternal great grandmother, 16th great grandfather, 17th grand uncle, 18th his son ; then the paternal grand parents of the 4th degree and their two male descendants. In the same order the ancestors of the 5th and 6th degrees and their two male descendants. Then come the remaining sapindas, *viz.*, the deceased's male descendant of any of the 4th, 5th or 6th degree and the brother's grandson and the like. Then the samanadakas, like the bandhus, such as the sister's son, maternal grandfather, and so on. Then come the preceptor, the pupil, the fellow-student and last of all the king, who succeeds to a Brahmin's estate as well as any other estate. Succession to the estate of a person who was reunited after separation takes place as follows :—

First, son, grandson and great grandson ; 2nd, reunited full brother ; 3rd, reunited half brother and unassociated whole brother ; 4th, reunited mother ; 5th, reunited father ; 6th, any other reunited coparcener ; 7th, unassociated half brother ; 8th, unassociated mother ; 9th, unassociated

father; 10th, wife; 11th, sister; 12th, unassociated sapindas; 13th, samandakas; 14th, bandhus.

Difference in the order of succession according to the Mitakshara and the Dyabhaga.

The difference prominently apparent from the above order of succession and that according to the Dyabhaga is that the mother precedes the father, since her propinquity as held in Umaid Bahadur *v.* Uddai Chand, I. L. R., 6 Calc., 119, is greater than that of the father who is a common parent to other sons, but the mother is not so, and she takes first, conformably with the text, to the nearest sapinda the inheritance next belongs. The Dyabhaga allows the bandhus to come in along with the gotraja sapindas, and not after them according to the Mitakshara.

According to the doctrine of the Bengal School, as Mr. Macnaghten states, the unmarried daughter is first entitled to the succession; if there be no maiden daughter then the daughter who has, and the daughter who is likely to have male issue, are together entitled to the succession, and on failure of either of them the other takes the heritage. Under no circumstances can the daughters, who are either barren or widows destitute of male issue or the mothers of daughters only, inherit the property. But there is a difference in the law as it obtains in Benares on this point—that school holding that a maiden is, in the first instance, entitled to the property; failing her the succession devolves on the married daughters who are indigent to the exclusion of the wealthy daughters; in default of indigent daughters the wealthy daughters are competent to inherit, but no preference is given to a daughter who has or is likely to have male issue over a daughter who is barren or a childless widow. According to the law of Mithila an unmarried daughter is preferred to one who is married; failing her, married daughters are entitled to the inheritance. But there is no distinction made among the married daughters; and one who is married and has or is likely to have male issue is not preferred to one who is widowed or barren. Nor is there any distinction made between indigence and wealth. These principles were given effect to by the Lords of the Privy Council in Wooma Daee *v.* Gokula Nund Dass, I. L. R., 3 Calc., p. 587, and the High Court of Allahabad, in Audh Kumari *v.* Chundra Dai, I. L. R., 2 All., p. 561. In the last, Chundra Dai, a daughter of one Bishan Persad, deceased, who died without leaving male issue, sued certain persons for the possession of a moiety of her deceased father's separate immoveable

property, claiming by right of inheritance. Sri Dai, another daughter of Bishan Persad, also sued the same persons in like manner for the remaining moiety of such property. The defendants set up as a defence to these suits among other things that Bishan Persad had two other daughters, Pran Dai and Sita Dai, and that such daughters being in indigent circumstances were entitled to the estate of Bishan Persad to the exclusion of Chundra Dai and Sri Dai, who were persons of wealth, and that Bishan Persad having four daughters Chunder Dai and Sri Dai had no right to moieties of his property.

Petitions were presented by Pran Dai and Sita Dai to be made parties to the suit. The first Court passed a decree in favor of the plaintiffs in these terms: "That decrees be given in favor of the plaintiffs, but so as not to interfere with the rights of the other daughters." And at a subsequent stage held that the four daughters had equal rights; the term indigent, "Nirdhan," did not apply to any of the four daughters, that Sita Dai and Pran Dai were not paupers, and that upon determining this question of indigence and wealth, regard were had to the amount of money and property possessed comparatively by different parties, and the person who possessed more was regarded wealthy and one who possessed less indigent. Every person would be indigent with reference to the person who was in better circumstances than he, and wealthy with reference to the person who was in worse circumstances. None of the four daughters lack the necessaries of life, that is, no one of them is so poor as to be unable to procure food: no one of the four lives by begging; the word 'Nirdhan' means an indigent person who may have been reduced to starvation." On appeal the High Court (Pearson, J.) held, in conformity with the Bombay High Court, in Rukmabai *v.* Manchabai, 2 Bombay H. C. Reports, p. 5, and Poti *v.* Norotum Bapu, 6 Bombay H. C. Reports, p. 183, that comparative poverty is the only criterion for settling the claims of daughters on their father's estate. The original Sanskrit word which has been translated indigent has also been translated unprovided and unendowed. The plaintiffs were married to two brothers, men of considerable wealth, having a valuable estate in Sitapur, comprising 811 acres, for their maintenance and keep, horses and elephants. So long as daughters have sufficient provisions made for them, whether by their father or husbands, they cannot come

in as heirs before their comparatively poor and indigent sisters.

Points of difference between the two Schools.

The chief points of difference between the two Schools lie, as already shown, in the law of succession being based only upon the individual right of offering, receiving and participating in general oblations, the nature and number of which is the standard whereby heirs are ascertained according to the Dyabhaga, whilst by the Mitakshara heirs are ascertained by the nearness of kin. Jimut Vahana has laid it down that in a Hindu joint property the sons have no proprietary interest while the father lives, and they have no right to demand a partition of the estate, ancestral or otherwise. The father may, if he chooses, effect a partition and distribute amongst the sons according to the rules of partition enjoined by the Bengal School. According to the Mitakshara, the ownership of the son co-exists with that of the other members of the family in the whole ancestral estate, and not the self-acquired estate of the owner, and he can by partition ascertain what his individual share in the estate is. It is thus plain that right to property according to the Dyabhaga accrues, by reason of his relationship to the owner, on the extinction of the owner's right. It is not by death alone that a man's interest in a property is extinguished, but it may be owing to his degradation from his tribe or by his going into retirement. By the Mitakshara, property vests by birth, and from that moment the son has a vested interest in the estate, in which he can have a share by demanding a partition. His power of alienation, by mortgage, sale or gift, extends to his own share of the undivided property. In Deen Dyal Lal *v.* Jugdeep Narain Sing, I. L. R., 3 Calc., p. 198, it was held that the right, title and interest of one co-sharer in joint ancestral estate may be attached and sold in execution to satisfy a decree obtained against him personally under the law of the Mitakshara, as well in Bengal as in Bombay and Madras. The purchaser at such a sale acquires merely the right to compel a partition as against the other co-sharers which the judgment-debtor possessed.

Son's liability to pay father's debts is a pious duty.

In regard to the son's liability to pay the debts due by the father, payment of such debts is a pious duty, and its discharge is such a necessary purpose as to give validity to a sale or mortgage by the father as against his minor sons. But the debts must be proved not to have been

incurred for immoral purposes. In Lutchman Dass *v.* Girdher Chowdry, I. L. R., 5 Calc., p. 855, a Full Bench of the Calcutta High Court held that, where the manager of a joint Mitakshara family (the family consisting of the father and a minor son) raised money on the mortgage of certain family property, it not being proved, on the one hand, that there was legal necessity for raising the money, nor, on the other hand, that the money was raised or expended for improper purposes, or that the lender made any enquiry as to the purpose for which the money was required, a mortgagee could not enforce by suit against the father and son the mortgage itself during the father's lifetime, but that the debt being an antecedent one he would simply be entitled to a decree directing the debt to be paid out of the whole ancestral estate including the mortgaged property. It is thus clear that to make the sons liable for the debts of a father, legal necessity for the loan, and that it was not contracted for immoral purposes, should be proved. This was the opinion of the Privy Council in the case of Girdharee Lall *v.* Kantoo Lall, I. L. R., 5 Calc., p. 148. In Persad Narain Sing *v.* Hanuman Sahoy, I. L. R., 5 Calc., p. 845, the facts were: a father, the manager of a Hindu family subject to the Mitakshara, executed bonds mortgaging a portion of the ancestral estate, having at the date of the mortgage a wife and two sons, one of whom was alleged to be an adult and the other a minor. The mortgagee instituted suits on the bonds, making the father alone a defendant, and in execution of decrees obtained by him in those suits four portions of the ancestral estate were attached and sold by the Court, the sale certificates being of the right, title and interest of the judgment-debtor, and were purchased by the mortgagee, who got possession of the whole 16 annas of the four portions of the ancestral estate sold. In a suit by the widow and the two sons to recover their shares in the property from the representatives of the mortgagee, it was held that, as the father alone executed the mortgages and was alone made a defendant in the suits on the bond, the sale in execution as against the minor could pass the entire 16 annas of the estate only in the event of the defendants proving that sufficient necessity existed for incurring the debt. If no necessity was proved, only the right, title, and interest of the father passed by the sale, although the loans might

Legal necessity must be proved.

have been applied by him to immoral purposes, and the sons might, if properly proceeded against, have been bound to pay the father's debt. As against the adult son only the right, title and interest of the father would pass unless necessity were shown. Sale of property, other than that included in the mortgage bond if sold, would only pass the right, title, and interest of the father. A clear exposition of the position of a managing member of a family and the obligation of sons to pay their father's debt after his death is contained in the judgment of the Madras High Court, I. L. R., 11 Mad., p. 65, in Kunhali Beari *v.* Keshava Shaubaga. All the decided cases on the points were fully discussed by Muttusami Aiyar and Parker, JJ. In the case the appellant (defendant) was the purchaser at a Court sale, the respondent (plaintiff) and some defendants, Nos. 6 to 9, were the five sons of defendant No. 1, defendants Nos. 2 and 3 were his brothers, and defendants Nos. 4 and 5 were his brother's sons. The respondent and defendants Nos. 1 to 9 are Konkani Brahmins, residing in South Canara and constituting a joint Hindu family which is governed by the Mitakshara law. One Kunhali Beari obtained money decrees against the defendants Nos. 1 and 2 in original suits Nos. 176 and 177 of 1863 and No. 108 of 1865 on the file of the District Munsiff of Vitla, and in their execution the judgment-creditor brought to sale the first and second defendant's half share of the property in suit, and one Mame Beari purchased it for Rs. 340 on the 7th March 1874, and resold it to the appellant in April 1876. "It is conceded," the judgment proceeded, "that the half share was separated either under process of the Court or by consent and is now in the appellant's possession." The respondent was a minor at the time of the attachment of sale. Of the three decrees, in execution of which the sale took place, the decree in original suit No. 108 of 1865 was alone passed against defendants Nos. 1 and 2, and of the half share purchased at the Court sale a moiety or a quarter share belonged to the respondent's father, and the respondent would be entitled on partition to a sixth part therein or to a twenty-fourth share of the entire family property. The respondent instituted the present suit to set aside the sale so far as it affected his undivided interest, and both the Courts below upheld his claim. It was not shown that the debt for which the decrees

Father's interest alone passed if no necessity proved.

were passed was vicious or immoral, and the contention in second appeal is that the respondent's interest also passed by the Court sale ; we are of opinion that it is well founded. The distinction which was formerly made between a mere money decree and a decree which executed a pre-existing mortgage of ancestral property was not considered to be sound in Nanomi Babuasin *v.* Modun Mohun, I. L. R., 13 Calc., p. 21. It was held in that case irrespective of the distinction that if the purchaser bargained and paid for the entire estate, including the father's and the son's interests therein, the purchaser was at liberty to defend his title upon any ground which would have justified the sale had the sons been brought in to defend their interests in execution proceedings. It was observed that "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 of 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." In the case before us there is no doubt that the purchaser bargained and paid for the first defendant's quarter share, which included the son's interest also, and the debt was proved to be neither immoral nor vicious nor illusory. As ruled by this Court in Narasama *v.* Gorappa, I. L. R., 9. Mad., 428, which followed the decision of the Privy Council, the respondent's interest must be taken to have passed by the Court sale. It is now argued for him that the Privy Council's decision is not applicable to a case in which the father was not the managing member of the joint family. The *ratio decidendi* is not that the father was sued as the head or representative of the joint family as between him and his brother, but that the father had power to sell also the son's interest, in ancestral property, to pay his own antecedent debts, which are neither vicious nor immoral, and which it is the son's pious duty to discharge. It is then suggested that the son's pious obligation can only arise after the father's death, and that there can be no valid sale during his lifetime. If the suggestions were adopted it would negative the father's power to sell the son's interest at all during his life, and it is inconsistent with the course of decisions that recognise such power. Again, it is admitted that if the father is the managing member of a joint Hindu family, which consists of himself, his brothers and sons, he can

then sell the son's interest for his personal debts which are not immoral or vicious, but it is not shown how he can then take advantage of the son's obligation which is to arise only after his death. The true foundation for the pious obligation is the relation between father and son as such, and it is the son's pious duty to pay his debt, whether he is a managing coparcener or not at his death, or when he contracted the debt. The text is whether the father has a disposing power over the son's share, and this power he has, whether he or his brother is the managing member of the joint family.

Jagabhai v. Jagjivandas.

Our attention is next drawn to two decided cases, *viz.*, Basa Mal *v.* Maharaj Sing, I. L. R., 8 All., 213, and Jagabhai Lalubhai *v.* Vijbhukhandas Jagjivandas, I. L. R., 11 Bombay, 37. In the latter case the defendant obtained a money decree against two brothers, Jagjivandas Doyaram and Dayabhai Doyaram. Both were in possession of family property as managing members of a joint Hindu family. They had firms at Surat and Bombay in which they were jointly interested. The business of the firms was the family business, and the decreed debt was contracted in the course of that business. In execution of this the defendant in that case attached some ancestral property of both the judgment-debtors ; and the sons of Jagivandas sued to set aside the attachment on the ground that, by reason of their father's debt before the attachment, his interest in ancestral property survived to them and ceased to be liable in their hands for the payment of his personal debts. The District Judge held that the son's shares were not liable, but the High Court reversed that decree. Adverting to the above decision of the Privy Council in Nanomi Babuasin *v.* Modun Mohun, West, J., observed : " By this the disposition of the family estate or a disposal of it under proceedings taken against the father alone is made to affect the son's as well as the father's interest, except so far as the son can establish in a proceeding taken for that purpose that the voluntary disposal was made under circumstances which deprived the father of the disposing power, or that the enforced disposal was on account of an obligation to which the son was not subject. The father is in fact made the representative of his family both in transactions and suits, subject only to the right of the sons to prevent the entire dissipation of the estate by particular instances of

wrong-doing on the father's part." This decision then is an authority for the view that, as between the father and son, the father is the representative of his branch of the family; that as against the son he has a disposing power in regard to the share of the family property belonging to that branch; and that the son can only invalidate the sale in execution by showing that it was on account of an obligation to which he was not subject under the Hindu law. The fact of Jagjivandas and his brother Dayabhai having been in possession of family property as managers of a joint Hindu family is referred to as one of the circumstances showing that the debt decreed in that case was a family debt. In Basa Mal *v.* Maharaj Sing, the son brought the suit to set aside the Court sale, alleging that the mortgage on which the decree was founded was executed by the father to raise money for immoral purposes. The facts found, however, were that the property which was sold was ancestral, that it was in the son's possession, and that a considerable portion of the money advanced was required by the father for the payment of revenue; but that the father made it necessary for him to borrow by impudent and extravagant proceedings, and that the purchaser had knowledge of the son's claim. The Subordinate Judge held that the son's share did not pass by the sale, but the High Court held that it did, observing that the son failed to show that the debt was immoral, whilst the decree and sale certificate showed that the sale was of the entirety of the interest in the execution of a decree against the father. In its judgment, however, the Court referred to the decisions of the Privy Council in Girdharee Lall *v.* Kantoo Lall, L. R. 1 I. A., 321; Deen Dyal Lall *v.* Jugdeep Narain Sing, L. R. 4 I. A., 247; Suraj Bunsi Koer *v.* Sheo Prosad Sing, L. R. 6 I. A., 88; Bisessur Lal Sahu *v.* Maharajah Luchmessur Sing, L. R. 6 I. A., 233; Muttyan Chettiar *v.* Sangili Vera Pandia Chinnatambiar, L. R. 9 I. A., 128; Babu Hirdey Narain Sahu *v.* Rooder Perkash Misser, L. R. 11 I. A., 26; and Nanomi Babuasin *v.* Modun Mohun, I. L. R., 13 Calc., p. 21, and concluded as follows: "It seems to us that two broad rules are deducible from the foregoing authorities. First, when a decree is made against the father and manager of a joint Hindu family in reference to a transaction by which he has professed to charge or sell joint ancestral property, and a sale has taken place in execution of such

Basa Mal *v.* Maharaj Sing.

decree of the joint ancestral property without any limitation as to the rights and interests sold, the rights and interests of all the caparceners are to be assumed to have passed to the purchaser, and they are bound by the sales unless and until they establish that the debt incurred by the father, and in respect of which the decree was obtained against him, was incurred for immoral purposes of the kind mentioned by Yajnavalka, Chap. II, Sloka, 47 ; see Ramdin's Translation, p. 205, and Manu, Ch. 8, Sloka, 159 ; Jones's Institutes of Menu, 4th Ed., p. 198, and one which it would not be their pious duty to discharge. Next, if however the decree, from the form of the suit, the character of the debt recovered by it, and its terms is to be interpreted as a decree against the father alone and personal to himself, and all that is put up and sold is his right, title and interest in the joint ancestral estate, then the auction-purchaser acquires no more than the father's individual right and interest—the right to demand partition to the extent of his share.

The contention in the case before us is that the father must be the managing member of the joint family, consisting of himself and of his brothers, and that the Privy Council's decisions are otherwise not applicable ; but the facts of the case last cited do not show that the father had a brother, and that the question was discussed with reference to his position as managing member in relation to his brother. The term " manager " is probably used in the decision to exclude the case of a divided son. As to the Privy Council's decisions, the first case noticed by the Allahabad High Court is that of Appovier *v.* Rama Suba Aiyan, 11 Moore's I. A., 75. That case is important only as embodying the explanation by Lord Westbury of the notion of a joint Hindu family, and it is otherwise not pertinent to the question now under our consideration. The next is Girdharee Lall *v.* Kantoo Lall, L. R. 1 I. A., 321. The property in dispute in that case was acquired by one Kunhya Lal, who had two sons—Bhikari Lall the elder and Bajrung Shye the younger. Upon the death of the father the elder son Bhikari became the manager of the joint Hindu family, and had a son named Kantoo Lall. The two brothers became heavily indebted, granted bonds and other charges on the property which they had inherited from their father. On being much pressed by their creditors they sold the

lands then in dispute and applied most of the sale proceeds in discharge of their debts. About this time the younger brother had also an infant son. Then both Kantoo Lall, the son of the elder brother Bhikari Lall, and the son of the younger brother instituted a suit to recover the lands on the ground that the sale by their fathers was in excess of their rights under the Mithila law, which is the same as the Mitakshara law as to the son's liability. The Privy Council held that the suit must fail on the grounds that the debt was not shown to be immoral and that the ancestral property which descends to a father under the Mitakshara law is not exempted from liability to pay his debts because a son is born to him. They made no distinction between the claim of the son of the younger brother and that of Kantoo Lall, because the younger brother was not the managing member of the joint family, but dealt with both claims alike with reference to the pious duty of sons to pay their father's debts. In support of their opinion the Judicial Committee referred to the rule of Hindu law as stated by Lord Justice Knight Bruce, *viz.*, the freedom of the son from the obligation to discharge the father's debt has respect to the nature of the debt and not to the nature of the estate, whether ancestral or acquired by the creator of the debt; and applying it to the case before them in which the debt was not shown to be immoral declined to set aside the sale in 1874. This decision is then a clear authority against the contention that the pious obligation which arises only after the father's death cannot be referred back to validate a sale by the father, and that, unless the father is the managing member, the rule founded on the pious duty of the son cannot be applied.

Mudden Thakur's case.

The third case is Mudden Thakur's case. He purchased at a sale in execution of a decree against the two fathers named in Girdharee Lall *v.* Kantoo Lall. The Judicial Committee upheld the sale as against Kantoo Lall and his cousin; the principle on which this decision rested being that the purchaser in execution was not bound to go behind the decree or further back than to see that there was a decree against the two fathers, that the property sold was property liable to satisfy the decree if the decree had been properly given against them, and that if he made an enquiry to that extent, and then purchased the estate under an execution *bonâ fide* and for value, the

sale was not liable to be set aside at the suit of the sons.

The fourth case was Deen Dyal *v.* Jugdeep Narain Sing. In that case the contest had no reference to the father's position as the managing coparcener of a joint family of brothers. The decree was against the father alone, and it was in terms what is designated a money decree, though the document on which it was based was a hypothecation bond, and there was an averment after decree that the debt decreed was a family debt. The Judicial Committee held that the interest which passed by the sale in execution was the right, title and interest of the father as an individual coparcener, and that the interest amounted only to a right to demand partition and not to a specific share in any particular portion of the property of the joint family. In the result it treated the theory of the pious obligation of the son as immaterial under the circumstances of the case, and the right of the purchaser as limited to that of the father as an individual coparcener. The principle then on which it seems to rest was that, if a creditor had desired to make the son's interest liable, he should have made him a party to the suit and shown in the suit that the debt was a family debt; that otherwise the right, title and interest of the judgment-debtor, which alone it was competent to him to bring to sale, must be taken to be the interest of the father as an individual; and that it is not competent to the purchaser to go behind the decree and seek to extend the interest liable to be sold by a reference after decree and sale either to the character of the debt as a family debt or of the transaction on which the suit was founded as a hypothecation of joint family property. The decision in Kantoo Lall's case pointed out that the decree against the father should be given effect to with reference to the exposition of Hindu law by Lord Justice Knight Bruce that the freedom of the son from the obligation to pay his father's debt had reference to the nature of the debt and not to the nature of the property sold as ancestral or self-acquired. The decision in Deen Dyal's case proceeded, on the other hand, upon the view that the interest that passes by the Court sale is what is liable to be sold as the individual property of the judgment-debtor, strict regard being had to the frame of the suit and to the terms of the decree in relation to the coparcenary law and the law of procedure.

Deen Dyal *v.* Jugdeep Narain Sing.

Case of Soraj Bunsi Koer.

The fifth case is Soraj Bunsi Koer's case. In that case there was a decree against the father, and it gave effect to a mortgage executed by him. But when the mortgaged property was attached in execution the son objected to the attachment on the ground that the debt was not binding on him. His objection was, however, overruled, and he was referred to a regular suit. With notice of the son's claim the purchaser bought the property at the sale held in execution, and the contest was whether in that state of facts the sale was binding on the son. It must be remembered that one of the facts found in that case was that, if the creditor had instituted the enquiry which he was bound to have instituted as ruled in Honuman Persaud's case, 6 Moore's I. A., 424, he should have seen that the necessity for the debt was the father's improper and immoral way of life which required the expenditure of funds not derivable from his regular income, and that it was conceded that the son had established against the execution-creditor a case which, if he had been the purchaser at the execution sale, would have entitled the son to full relief against him. The contest was thus narrowed to the point whether he was entitled to the same relief as against the purchaser, and as the latter had notice, the Judicial Committee distinguished it from Mudden Thakur's case and upheld the sale only to the extent of the father's interest in the property sold. In their judgment the Judicial Committee referred to Kantoo Lall's case and Mudden Thakur's case, and approved of the principle laid down in the former, *viz.*, that the freedom of the son, as far as regards ancestral property, from the obligation to discharge the father's debts under Hindu law can be successfully pleaded only by a consideration of the invalid nature of the father's debts, adding however that the case went beyond the decision of the Sudder Dewanny Adawlut in treating the son's obligation to pay his father's debts unless contracted for immoral purposes as a sufficient answer to his suit to set aside the sale.

As to Mudden Thakur's case, they approved of the principle on which it was decided, *viz.*, that a purchaser at an execution was not bound to go further back than to see that there was a decree against the father and that the property was liable to satisfy the decree, and that if he instituted enquiry on both these points and purchased *bonâ fide* and paid value,

the entire property, including the son's interest, would pass by the Court sale. They deduced two propositions as established beyond doubt, *viz.*, "(1) that when joint ancestral property had passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debts, his sons by reason of their duty to pay their father's debts cannot recover that property unless they show that the debts were contracted for immoral purposes and the purchasers had notice that they were so contracted; (2) that the purchasers at an execution sale being strangers to the suit, if they had not notice that the debts were so contracted, are not bound to make enquiry beyond what appears on the face of the proceedings."

Bisesur Lal Sahu *v.* Maharajah Luchmessur Sing.

The sixth case is that of Bisesur Lal Sahu *v.* Maharajah Luchmessur Sing. In that case the joint Hindu family consisted of two minors—Mosahib and Cheeman, the sons of Ram Nath Dass, the son of Nath Dass. The creditor brought these suits in respect of rent due from members of the joint family. In one the widows of Nath Dass and Ram Nath Dass were impleaded as the guardians of the two minors, and the rent claimed accrued due in respect of the mouzah of Rudarpur which was leased to Nath Dass and Ram Nath Dass, since deceased. A decree was passed against the minors, but it contained a direction that it was to be executed against the property of the deceased lease-holders and not against the person and self-acquired property of the judgment-debtors. In the other two suits also decrees were passed for rent due beyond what was decreed in the first suit. A mouzah called Modunpur was sold in execution of all the three decrees for Rs. 35,000, and the guardians of the minor made no objection to the sale at that time. It was found that the mouzah sold was the property of the joint family. In the second suit, one of the two sons mentioned in the first suit as minors, Mosahib, was alone impleaded as the heir of Nath Dass, and the rent claimed was in respect of the mouzah Ramnugger. The decree directed that it was to be executed against the property left by the deceased lease-holder of Ramnugger, Nath Dass, and not against the person or self-acquired property of the defendant. The third decree was passed in a suit in

which the widow of Nath Dass was impleaded as the guardian of Mosahib, and it contained a similar direction as to the property against which it was to be executed. The second and third decrees were informally drawn up. Three years after the sale of the mouzah of Modunpur, Mosahib and Chuman sold their alleged right to recover from the purchaser the difference between the amount of the first decree, Rs. 8,000, and Rs. 35,000, for which the mouzah of Modunpur was sold. The contention was that the mouzah was not liable to be sold in execution of the second and third decrees. The Privy Council held that whatever irregularity there might have been in drawing up the decrees, they were substantially decrees in respect of a joint debt of the family and against the representatives of the family, and may be properly executed against the family property. The principle of this decision is then that in execution proceedings the Courts will look at the substance of the transaction, and will not be disposed to set aside an execution upon mere technical grounds when they find that it is substantially right.

Muttyan Chettiar *v.* Sangili Vera Pandia.

The next case is Muttyan Chettiar *v.* Sangili Vera Pandia. In that case the rule laid down in Kantoo Lall's was held to apply even when the ancestral estate affected by it was an impartible zemindari. The eighth case is that of Hirdey Narain Sahu *v.* Rooder Perkash Misser. In it there was only a money decree against the father; and the Privy Council applying the principle laid down in Deen Dyal's case, held that nothing more than the right of the father to demand partition of his share passed by the Court sale. They said that the decree was an ordinary one for the payment of money and that that case was distinguishable from the cases where the father, being a member of a joint family governed by the Mitakshara law, had mortgaged the family property to secure a debt and the decree had been obtained upon the mortgage and for the realization of the debt by means of the sale of the mortgage property. Thus the decision in Deen Dyal's case was reconciled with the dictum in Soraj Bunsi Koer's case by recognizing a distinction between a money decree and a decree which directed the sale of specific property in execution of a previous mortgage by the father.

The last case is that of Nanomi Babuasin *v.* Modun Mohun, in which also there was only a money decree

against the father, and the sons were not impleaded in the suit as defendants. It was held that the debt not being immoral or vicious the entire ancestral property which was attached and sold passed by the Court sale. The grounds on which the decision rests are—(1) that the father's disposing power extended to the sons' interest also if the debt was not contracted for immoral purposes ; (2) that the purchaser at the Court sale bargained and paid for the entire estate ; and (3) that, assuming that the sons might impeach the sale by reason of their not having been impleaded, they could only do so by showing that the debt was contracted for immoral purposes, and that, as the debt was found in that case to be a family debt, their right was of no avail to them.

Son cannot object to pay father's debts unless they were contracted for immoral purposes.

From the foregoing decisions it is clear that the son cannot set up his vested interest as a coparcener with his father in respect of ancestral estate for the purpose of denying the father's power to alienate it for an antecedent or against his creditors' remedies for his debt if such debt has not been contracted for an immoral purpose. This rule is deduced from the principle that the freedom of the son from the obligation to pay his father's debt has reference to its nature as immoral or vicious and not to that of the estate as ancestral or otherwise. The contention that there was no family necessity for the debt, or that it was only the personal debt of the father, or that the pious obligation arose only on the father's death, and that it could not be referred back to the date of the sale, cannot be upheld. The answer given to it by the Privy Council is destructive, as it may be of independent coparcenary rights in the sons ; the decisions have 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 debt if not tainted with immorality. Another proposition which is deducible is that it is immaterial whether the decree against the father is a money decree or one founded on a mortgage and containing a direction for the sale of the mortgaged property. The reason is that, it being held that the father has a disposing power over ancestral property in respect of his antecedent debt which is not tainted with immorality, the Court can sell in execution whatever he can lawfully sell and the entire property will pass by such sale. As to the

contention that the son was not a party to the suit or the decree, the answer is, all that the sons can claim is that, not being parties to the sale or execution proceedings, they ought not to be debarred from trying the fact or the nature of the debt in a suit of their own, and it will avail them nothing unless they can prove that the debt was not such as to justify the sale.

Father need not be managing member.

As to the contention that the father is not the managing member of the entire joint family, it is to be observed that the father's disposing power does not rest on his position as such, and that in Kantoo Lall's case it was held to have been possessed both by Bhikari Lall and his brother, though as between them the former was alone the managing coparcener. The principle is that by reason of the disposing power mentioned above the father represents his sons also in transactions and suits, provided that the power is properly exercised.

The only cases then in which the son's interest is not affected by the Court sale are—(1) where the debt is immoral; and (2) where the purchaser does not bargain and pay for the entire estate. The reason is that in the one case the father has no disposing power at all, and in the other that power is exercised only to create a smaller interest than it extends to.

According to the Mitakshara, the son's proprietary right to the whole ancestral estate, merged in the co-equal rights of other members of the family, gives him a right to partition, and by partition he acquires a right to a share of the estate in lieu of his right to the whole. The Bengal School allows a right to a share and not to the whole ancestral estate, as in the Mitakshara, and by partition to ascertain what that share is, and then the co-sharers can hold and enjoy their respective shares separately. As partition is a chief source of difference between the two schools, its nature and incidents require notice, *viz.*, the property to be divided, the persons among whom it is to be divided, and the mode of division.

In Bengal the son cannot demand a partition of property during his father's lifetime, whilst the Mitakshara expressly gives him that power.

PARTITION.

The property to be divided is that which has been previously held as joint property in coparcenery. Where a family lived in commensality, eating together and possessing property in common, the presumption of law is that all the property in their possession is joint property, until it was shown by evidence that one member of the family was possessed of separate property. Coparceners are those members of a family who by birth acquire a proprietary interest and who on partition would have shares in what is called ancestral property. It is that which descends upon a person in such a manner that his sons, grandsons and great grandsons, that is, his heirs down to the third degree who are entitled to offer the funeral cake to him, can have some rights to it, and which they by the Mitakshara law can set up to resist any uncalled-for disposal or alienation of it by the father for immoral purposes. It is distinguished from what he has inherited from a collateral relation, a brother, nephew, cousin or uncle, or priest or a fellow student, and is his separate property. His descendants are not coparceners with him in it, and they cannot interfere with his dealings with it. As they are not coparceners with him, they cannot ask for a share of it. Property separate or self-acquired is ancestral and joint property the moment it passes from the hands of the holder by descent into the hands of some one in the next generation, and becomes the property of several persons united together as a joint family, and continues to go down by one rule of descent only, *viz.*, the rule of descent in the case of joint property. Mr. Justice Phear in delivering judgment in Rajah Ram Narain Singh *v.* Pertum Singh, 11 B. L. R., 403, defines the distinction between joint property and separate property under the Mitakshara as follows: "Property is joint when it belongs to all the members, who may be many, of a joint family. Property is separate when it belongs to one member of a joint family alone and not to the others jointly with him. As long as it is separate and in the condition of self-acquired property, the person who is the holder of

Who are coparceners?

Joint family property.

it has no one to consult in regard to the disposal of it except himself; but the moment it passes from his hands by descent into the hands of some one in the next generation, it becomes joint family property—the property of several persons united together as a joint family with regard to it, the property of a new joint family springing from a new root, and it continues to go down by one rule of descent only." Even if a property descend according to an established custom in regard to its succession among the existing members of the family controlling the general Mitakshara law to the eldest son, it is ancestral property, and the father has no power against his son to alienate or incumber the estate, except upon a justification of a family necessity. Such property, like separate or self-acquired property, is indivisible. Things which are indivisible by their nature, "such as apparel, carriages, riding horses, ornaments, dressed food, water, pasture ground, roads, female slaves, houses or gardens, utensils, necessary implements of learning or of art and documents evidentiary of title to property," are left in the possession of one member of the family in consideration that the value of these would be balanced by a corresponding value of other things in the hands of another. But if such property were considerable, they are either enjoyed by the heirs in turns or jointly, or sold and their value distributed. Enjoyment by turns is made of property consisting of idols and places of worship, and the time of enjoyment is prescribed according to the shares of the members in the property.

Property which is indivisible.

Self-acquired property.

The other class of property not liable to partition is the self-acquired property. Yajnavalka defines it as follows: "Whatever is acquired by the coparcener himself without detriment to the father's estate, as a present from a friend, or a gift at nuptials, does not appertain to the co-heirs. Nor shall he who recovers hereditary property which has been taken away give it up to the coparceners, nor what has been gained by science." Menu and Vishnu have laid down, "what is gained without expenditure, that is, without using the common property, is indivisible."

Jimut Vahana classifies the various sorts of acquisitions which are not liable to partition as follows: (1) the gains of science obtained from displaying and making known one's own knowledge; (2) gains of valour; (3)

wealth received on account of marriage at the time of accepting bride; (4) items of property required for personal use. The words "without detriment to the father's estate," were interpreted by the Madras High Court to apply to those cases where a coparcener acquired a property without the slightest assistance from the joint patrimony, however indirect. If a member of a joint Hindu family, who, having been educated or maintained at the family expense, acquired some property by the savings he made from some lucrative employment, it was said to be joint property. On this basis, *viz.*, that acquisitions have been made by skill or education imparted at the family expense, the Madras High Court as well as the Bombay High Court in Chalkonda *v.* Ratnachalam, 2 Madras High Court Reports, 56; Gangadhareda *v.* Narasamah, 7 Madras High Court Reports, 47, held that the property having, in the first case, been acquired by skill as a dancing girl imparted at the mother's expense, and in the second the gains being of a vakil who had his education at the family expense, and in the third case, *viz.*, of Bai Mandha *v.* Narottamdas, 6 Bombay H. C., 6, it being found by the Chief Justice that as gains were through his business as a money-lender and a vakil and he had used the joint family property, all the property so acquired was joint family property and divisible. But this doctrine was overthrown by the Lords of the Privy Council in Palliem Valoo Chetty *v.* Palliem Goorgah Chetty, L. R. 4 I. A., 109, where it was contended that the property acquired by a successful merchant was joint property because he had been educated out of the joint fund.

Their Lordships observed: "It is not necessary to consider whether the somewhat startling proposition of law put forward by the appellant, which stated in plain terms amounts to this, that if a member of a joint Hindu family receives any education whatever from the joint funds he becomes for ever incapable of acquiring by his own skill and industry any separate property, is or is not maintainable. Very strong and clear authority would be required to support such a proposition. From the reasons that they have given it does not appear to them necessary to review the text books or the authorities which have been cited on this subject. It may be enough to say that, according to their Lordships' view, no texts which have been cited go to the full extent of the proposition contended."

Their Lordships approved of the judgment of the Calcutta High Court—Dhanuk Dharee Lall *v.* Gunput Lal, 11 B. L. R., 201. Mr. Justice Mittra observed: "It is true that in a case of this nature, where the defendant pleads self-acquisition, the onus of proving such acquisition lies on the defendant; but all that the Hindu law requires the defendant to prove in such a case is that the property which he claims as his own was acquired 'without detriment to the paternal estate,' or in other words without using the paternal estate or the proceeds thereof. The defendant having shown that in acquiring the property in suit he did not use any property which belonged to the joint family, the presumption of joint ownership is at once rebutted, and it is for the plaintiff to show that the property was acquired in the manner alleged by him. His case in the Court below was that the defendant received his education from the joint estate, and that he is consequently entitled to participate in every property that has been acquired by the defendant by the aid of such education. But this contention is nowhere sanctioned by the Hindu law, and I see nothing in justice to recommend it.

"It is a mistake to say that in every case in which a Hindu pleads separate acquisition it is incumbent on him to show the source from which the money came. No doubt, as remarked by their Lordships of the Privy Council in the case of Dhurm Das Pandey *v.* Mussamut Shama Sundari Debea, 3 Moore's I. A., 229, the source from which the money comes is the 'chief criterion' for determining as to whether a particular property is joint or separate; but their Lordships never said that it is the only criterion so as to render it obligatory on the party who pleads self-acquisition to give evidence of the particular source from which the money was derived."

Ancestral property is self-acquired when recovered from a stranger by a coparcener.

Ancestral property which had been taken possession of by a stranger and held adversely by him, if received by one coparcener unaided by the family funds or by other co-heirs, and which the other members of the family had been unable to recover, is a self-acquired property. The recovery of possession shall be an actual fact and not merely the order for possession passed in a suit, *vide* Bissesur Chuckerbutty *v.* Sital Chunder Chuckerbutty, 9 W. R., 69; and Bolaram *v.* Court of Wards, 14 W. R., 34. According to Vasistha he among coparceners who has

made an acquisition at the charge of joint property takes a double share; if the common stock be not improved he takes an equal share. Estates conferred by Government in the exercise of their sovereign power are the self-acquired property of the donee.

In Babu Beer Pertab Sahu *v.* Maharajah Rajender Pertab Sahy, 12 Moore's I. A., p. 1, and Brij Inder Bahadoor Sing *v.* Rani Janki Koer, L. R. 5 I. A., pp. 1 and 318, this principle was given effect to in conformity with the Shivagunga and Tirhoot cases, 9 and 6 Moore's Indian Appeals, 539 and 191. There a large zemindari, Hussenpur, an impartible Raj, was in the possession in 1765 of *F.* who refused to acknowledge the sovereign rights of the Company or to pay revenue to them and was deposed. His property was confiscated. In 1790, upwards of twenty years afterwards, this property was conferred on *C.*, the next heir, after extinction of *F.'s* line, as a matter of favor in consideration of *C.'s* father and grandfather. Held that the estate must be taken to have been the separate and self-acquired property of *C.* The fact that he was the member of a family, which had so long held the estate in succession to the line of *F.*, and the son and grandson of persons who had established claims on the gratitude of the Company, might have been a motive determining the selection of him as a grantee, but it did not affect the nature of the estate, or give it the character of ancestral property, and that the legal foundation of his claim was still the grant to him from those who had the power to make or withhold it. These cases were distinguished from Thakoor Hurdeo Bux *v.* Thakoor Jowahir Sing, I. L. R., 3 Calc., 522; and Hur Pershad *v.* Sheo Dyal, L. R. 3 I. A., 259, in which it was held that the sunnud and summary settlements were a mere grant by the Government to one member of the family, of property which belonged to the family jointly, and for services presumably rendered with the use of the joint family funds, and thus could not be self-acquired property within the meaning of Hindu law.

Zemindaries in the nature of a Raj are not partible.

Zemindaries which are in the nature of a Raj or sovereignty which descend to a single member by special family custom, and properties allotted by the State to persons in consideration of the discharge of particular duties or as payment for an office, are not divisible, nor are the savings of such income by the purchases made

from such savings; but as soon as they pass from him to a successor they become divisible and ancestral property. In Bombay, the offices of Desmukh, Despandya, Desai and Patel are remunerated by lands granted by the State, but these lands have so often been partible that in Adrishappa bin Gadgiappa *v.* Gorshedappa bin Gadgiappa, L. R. 7 I. A., 162, it was held that no presumption that it is indivisible would be made. The burden of proving impartibility would be upon the holder of the property by evidence of a local or family usage. Thus it could be summarised that zemindaries in the nature of a Raj or principality, separate property, self-acquired property, property from their nature indivisible, and debutter lands which by mutual consent the parties can enjoy by palla or turns of worship, and estates allotted by Government to a man of rank, are indivisible. Everything else, or in other words "whatever is acquired at the charge of the patrimony, is subject to partition."

Ancestral property is liable to partition.

It has been shown that all ancestral property is the joint property of the family, and is liable to partition. There may be joint property liable to partition and yet not ancestral. Such property is what has been acquired by the members of a joint family by or with the assistance of joint funds, or by their joint labour. It does not signify that it is an increment to ancestral property, or that it has arisen without any nucleus of descended property. In Ram Pershad Tewary *v.* Sheo Churn Doss, 10 Moore's I. A., 490, the plaintiff started a business, without any material help from the ancestral property, and he, with his four brothers, carried on the business together, each contributing by his labour to the increase of the common stock. Although the plaintiff supplied the capital on which he and his brothers traded, it was held all gains and profits made on the business were the joint property of the family, and partible on a partition. To establish a greater claim than that of a co-sharer, the plaintiff was bound to prove a special contract sanctioned by mercantile partnership. The great difference between joint property not ancestral and ancestral property lies in this, that in the ancestral property the sons of the father have by birth a vested interest in it, and by virtue of it they could resist any improper alienation of it; but as regards simply joint property his sons have no interest until they are admitted to a share at the pleasure of the

father. Self-acquired property becomes joint property if voluntarily put in the joint stock by the owner. In Ramaha *v.* Venkata, I. L. R., 11 Mad., 247, it was held that property acquired by means of income derived from ancestral property is also ancestral property, and that a son born seven months after the father made a gift of such property is entitled to recover from the donee.

We have thus ascertained that ancestral property and property acquired at the charge of the patrimony are liable to partition, and we will now inquire how and between whom partition can be effected. In Bengal, as noticed, the son has no right to demand a partition of property during the father's lifetime. The father is at liberty to dispose of all his property, no matter of what sort or how acquired, at his own pleasure. If, however, partition is made either of his own accord or at the request of his sons, his discretion as regards allotments of ancestral property is limited. He cannot give himself more than his double share. To each of his sons an equal share should be assigned, as any inequality in shares must be permitted by the law on account of the superior merit or age of the son he prefers.

The father himself being the sole judge of the qualifications of the son in whose favor he makes a greater allotment, the result is the same if it were said that he may distribute the property as he pleases. The right of a son, grandson, great grandson under Mitakshara law to a partition of movable and immovable property in the possession of a father is now beyond question. Their right resting on equality of interest by birth is established in Kali Pershad *v.* Ram Churn, 1 All., 159; Laljeet *v.* Raj Coomar, 12 B. L. R., 373. A son born after a partition had taken place between a father and his sons is entitled to a share, and there have been instances of a partition having been opened up again in order to give him the share which he would have had if he had been alive at the first partition. Indeed ancestral property, that is property which come down from the grandfather, was so much regarded as liable to distribution that any partition made before the period when the mother was capable of bearing children was held illegal. But the general rule is that, if pregnancy be known at the time, the partition must take place after the birth of the child; if it is not known and a son is born after a partition a fresh partition of the estate must take place. If there had been division of

Son born after partition is entitled to a share from his brothers.

the whole property among the sons, and the father retained no share for himself, the sons between whom partition was made must give up from their shares an equal share to the afterborn son. This is the law both according to Dyabhaga and the Mitakshara. The texts of Menu and Narada are "that the son born after partition shall alone take the parental wealth, or he shall participate with such of the brethren as are reunited with the father." In the Full Bench ruling in Kalidas Das *v.* Krishna Chunder Das, 2 B. L. R., pp. 119 and 120, Chief Justice Sir Barnes Peacock ruled as follows : Sec. 6, verses 1 and 2, Mitakshara, Chapter I, are as follows : How shall a share be allotted to a son born subsequently to partition of the estate ? The author replies : "When the sons have been separated, one who is (afterwards) born of a woman equal in class shares the distribution." Here the text quoted is set out : "The sons being separated from their father, one who shall be afterwards born of a wife equal in class shall share the distribution." Here what is distributed is distribution, meaning the allotments of the father and mother, he shares that ; in other words he obtains after the demise of his parents both their portions ; his mother's portion however only if there be no daughter, for it is declared that daughters share the residue of their mother's property after payment of her debts."

This is made more clear by verses 3, 4, 5, and 6. Verse 3 : "That a son by a woman of a different tribe receives merely his own proper share from his father's estate with the whole of his mother's property (if there be no daughter)." Verse 4, the same rule is propounded by Menu : "A son born after a division shall alone take the parental wealth. The term parental must be here interpreted appertaining to both father and mother ; for it is ordained that a son born before partition has no claim on the wealth of his parents ; nor one begotten after it on that of his brother."

Verse 5, the meaning of the text is this : "One born previously to the distribution of the estate has no property in the share allotted to his father and mother who are separated (from their children) ; nor is one born of parents separated from their children a proprietor of his brother's allotment."

Verse 6 : "Thus whatever has been acquired by the father in the period subsequent to partition belongs entirely to the son born after separation, for it is

so ordained. All the wealth which is acquired by the father himself who has made partition with his sons goes to the son begotten by him after partition : those born before it are declared to have no right." This shows that a son begotten after his father has been separated from his brothers alone inherits the share which his father took upon partition as well as any wealth acquired by his father himself, but the allotments once vested in his brothers by such father cannot be divested in his favor ; and even as regards the allotment taken by the father on partition, the after born son would not take anything if the father should alienate his own share or allotment during his lifetime." These principles are not applicable to cases under the Bengal law, as, firstly, a son cannot demand a partition of property during his father's lifetime, and after his death the property descends to the sons, who, on partition, holds equal shares, the principle of Hindu law being equality of division. Secondly, if any coparcener dies without male issue, but leaving a widow, a daughter or daughter's son, his share will descend to them and will not lapse into the share of other members, as it would under the Mitakshara law.

A wife cannot demand partition during the life of her husband, since she and he are united in religious ceremonies ; nor can the mother or grandmother, but her right to a share will accrue on a division being made by the agency of her sons or grandson, or any one of them, or by the heir of any of them (since deceased) as the case may be. This share was equal to that of the sons. The women could never compel a partition so long as the sons chose to remain undivided. They are entitled to no more than a maintenance. The widow, if she had no peculiar property or stridhan, is to have a share equal to the shares of the sons. Her right depends upon whether the father has left male issue or not, and whether she is a mother or a childless wife. If the father died leaving no male issue his widow becomes his heir whether he is divided or not. If the father died leaving issue, and a widow who is not the mother of such issue, she is entitled to no more than maintenance. If the father died leaving male issue, and a widow the mother of such issue, she is entitled to maintenance until partition, but she cannot herself demand a partition. If it is a widow and not the mother of the issue, she is entitled to no more than maintenance. The widow who is the mother of the issue has no

Women cannot compel partition.

interest until partition, *vide* Jadu Nath *v.* Bhobo Nath, 9 W. R., 61, nor can she claim a share if she has only one son. Similarly, if a man dies leaving three widows, each of whom has one son, and these three come to a division, none of the mothers would have a right to share, for each of them has her claim intact upon her own son ; but she as grandmother will be entitled to a share of the sons if one of her sons divide among themselves. If she has more than one son and these divide between themselves she will have the share of a son. In each case the share of the widow will be equal to the share of the persons who effect the partition. If a mother has three sons, one of whom dies leaving grandsons, and a partition takes place between the two surviving sons and the grandsons, the mother will be entitled to the same share as if the division had been effected between these sons, or, in other words, the property will be divided into four shares, of which the mother will take one and each surviving son will take another, and the grandson will take the fourth. The right of the widow to a share arises, firstly, when the partition takes place between her own descendants, upon whose property her maintenance is a charge ; and, secondly, when it takes place in respect of property in which her husband had an interest. If she were the only heir, and the father left no male issue, she can call for a partition without waiting for a partition to be brought about by the act of others, as laid down in Soudaminy Dassee *v.* Jogesh Chunder Dutt, I. L. R., 2 Calc., p 262 ; Dharm Das Pandey *v.* Mussamut Shama Sunder Debea, 3 Moo. I. A., 229. If there were two widows of the same man, and they partitioned their deceased husband's estate, the effect of such partition was merely to divide the enjoyment, and their title was wholly unaffected by it. Their title would remain joint, and the surviving widow would take the whole, as neither widow has a separate power of alienation, and the reversionary heirs of the husband would take nothing until the death of the survivor. In Bhugwan Deen Dobay *v.* Myna Baee, 11 Moore's I. A., 487, the facts were as follow : A Hindu died at Benares childless, and he was separate in estate from his brother ; his wealth was self-acquired, and consequently his two widows were his co-parceners. The property was divided between them, and each had possession of her share. One of them died in the separate possession and enjoyment of her share ; she disposed of her share by will in favor of her father and

brother. The questions that presented themselves for determination were whether the surviving widow succeeded to the share, or whether the deceased widow had validly disposed of it. Another point in the case was whether the surviving widow had not by partition lost her right by survivorship in consequence of the alienation.

The Lords of the Privy Council remarked : "The estate of two widows who take their husband's property by inheritance is one estate ; the right of survivorship is so strong that the survivor takes the whole property to the exclusion of even the daughters of the deceased widow. They are, therefore, in the strictest sense coparceners, and between undivided coparceners there can be no alienation by one without the consent of the other. Further, the fact that something in the nature of partition had been made between the two widows did not operate to enlarge either widow's estate so as to give her a greater power of disposition over it than she would have otherwise had." This was the view of their Lordships as well in Sri Gaja Pathi Sremani Pathi Mohan *v.* Sri Gaja Pathi Radhamani Pathi, 1 C. L. R., 97. But in Janki Ram Mookerjee *v.* Mothura Nath Mookerjee, I. L. R., 9 Calc., 580, a Full Bench of the Calcutta High Court held that where a Hindu governed by the Bengal School of Hindu Law dies intestate, leaving two widows, his only heirs, surviving him, either of these widows may sell her interest in her deceased husband's property, and a purchaser thereof is entitled to enforce a partition as against the other widow. The partition if decreed should be effected in such a way as would not be detrimental to the future interests of the reversioners.

The Full Bench was of opinion that their views did not militate against the decision of the Privy Council, but were rather in unison with them, inasmuch as they do not say that no partition between widows could take place, but no partition affecting the right of survivorship of either. Mr. Justice R. C. Mitter in delivering judgment observed : "In cases of necessity, such as are mentioned in paragraphs 61 and 62, section 1, chapter XI of the Dyabhaga, she (a Hindu widow) may effect even an absolute alienation to enure after her death. If there were no provisions to the contrary the right of alienation of the interest of one of two or more widows jointly inheriting their husband's estate would logically flow from these two propositions. So far as the doctrines of the Hindu law prevalent

in the lower provinces of Bengal are concerned, there does not, in our opinion, exist any such contrary provision.

One of the cardinal points of difference between the Mitakshara and the Dyabhaga is that, according to the latter, the right of alienation being a necessary incident of ownership, one of two or more joint owners can alienate his interest in the joint property without the consent of the coparceners.

The author of the Mitakshara, relying upon certain texts of Vyasa in paragraph 30, chapter I, section 1, lays down the rule of law that "among unseparated kinsmen the consent of all is indispensably requisite, because no one is fully empowered to make alienation since the estate is common."

"But the texts of Vyasa," says Jimut Vahana, "exhibiting a prohibition, are intended to show moral offence, since the family is distressed by a sale, gift or other transfer which argues a disposition in the person to make an ill-use of his power as owner. They are not to invalidate the sale or other transfer.

"So likewise other texts (as this: 'Though immoveables or bipeds have been acquired by a man himself, a gift or sale of them should not be made by him, unless convening all the sons') must be interpreted in the same manner, for here the words 'should be made' must necessarily be understood.

"Therefore, since it is denied that a gift or sale should be made, the precept is infringed by making one; but the gift or transfer is not null, for a fact cannot be altered by a hundred texts." (Dyabhaga, chapter II, paragraphs 27 to 30.) It is clear, therefore, that according to the Dyabhaga the right of alienation is in no way affected by the joint inheritance of two or more widows in their husband's estate.

As regards the right of enforcing partition, it is also clearly laid down in the Shastras. The passage from the Mitakshara which bears upon the point is not fully translated, as has been pointed in page 451, Madras High Court Reports, Vol. III. It is to the following effect: "There (in that order) the first to inherit is the wife patni. Patni is she who is (so) made by marriage, and this from the Smriti or rule of grammar "Patyor-no Yagva Samyagai." (The particle *ni* is added to *pati* to signify one who partakes in the holy sacrifice.) Singular number, because the class

is denoted. Hence, if there be several, whether of the same or different castes, they divide and take the property according to their shares.

In page 132 of the Viramitrodya, the same rule of law is thus laid down: "First of all the patni or the lawfully-wedded wife takes the estate. The term 'patni' itself signifies a woman espoused in the prescribed form of marriage agreeably to the aphorism of Panini. The term 'pati' (husband) is changed into patni (meaning the correlative), implying relation through a sacrifice." The singular number (in the term "patni" in Yagesvara's text 1) implies the class; "hence, if a person leaves more wives than one, then all of them—first, those of the same class (with the husband) and after them those of a different class—shall take the husband's property, dividing the same amongst themselves."

In the Dyabhaga there is no special provision of this nature in the chapter on the widow's succession; but the right of partition is provided for in all cases of joint inheritance by the following passages. First, the term partition of heritage (Dyabhaga) is expounded, and on that subject Narada says: "Where a division of the paternal estate is instituted by sons, that becomes a topic of litigation called by the wise Partition of Heritage. What comes from the father is 'paternal,' and this signifies from the father's demise. The expressions 'paternal' and 'by sons' both indicate any relation, for the term 'partition of heritage' is used for any division of the goods of any relation by any relations"—chapter 1, paragraphs 2 and 3.

"Since any one parcener is proprietor of his own wealth, partition at the choice even of a single person is thence deducible; and concurrence of heirs, suggested as one case of partition, is recited explanatorily in the text, the brethren being assembled"—chapter 1, paragraph 35.

Partition may be enforced in the case of joint succession of two or more widows at the instance of one of them.

Upon these passages it is quite clear that, in the case of a joint succession of two or more widows to their husband's estate, the partition may be enforced at the instance of any one of them. So far then as the original treatises go they clearly recognize the right of alienation by one of two or more widows jointly succeeding to their husband's estate, and of enforcing partition of the joint heritage. But it has been urged that these questions have been decided by the Judicial Committee of the Privy

Council in a contrary way. The first of the cases cited before us is Bhugwandeen Doobay *v.* Myna Baee, 11 Moore's I. A., 487. The facts of that case are these: One Rai Deno Nath died, and his estate was inherited by his two widows, Myna Baee and Dula Baee. The latter died, leaving her share of the heritage, which had been separated under an order made by a Judge in a summary suit pursuant to Act XIX of 1841, to her father and brother under a will executed by her before her death. The Judicial Committee of the Privy Council held that under the Mitakshara law, which governed the case, the will was invalid against the surviving widow who was entitled to succeed to the property in suit by right of survivorship; (2) that there was no severance of the joint tenancy of the two widows; and (3) that there could not be partition between them so as to affect the right of survivorship of either. Their Lordships closed their judgment with the observation that the case might have been decided upon the single ground that in a joint estate the alienation of the interest of one coparcener without the consent of the rest is invalid.

It will appear from this analysis of the decision that it does not bear upon the question before us. It was not decided then that there could be no partition between the widows binding between them during their lifetime, but what was held was that any such partition would not affect the right of survivorship of either. This is all that was decided in that case upon the question of partition, and the decision in Gajapathi Nilamani *v.* Gajapathi Radhamonee, I. L. R., 1 Mad., 290, and L. R., 4 I. A., 212, following the first mentioned case, only reaffirmed that proposition.

As regards the observations upon the question of the right of alienation, they are entirely based upon the Mitakshara law; but it has been already shown that upon this point the law as laid down in the Mitakshara is different from that of the Dyabhaga.

The last case cited is Amerto Lal Bose *v.* Rojonee Kant Mitter, L. R., 2 I. A., 113, and 15 B. L. R., 10. This is a Bengal case, and all that it decides is that between widows jointly succeeding to their husband's estate, as well as between daughters jointly inheriting their father's property, there is right of survivorship.

We are, therefore, of opinion that the contention that

these decisions have laid down the law contrary to our opinion expressed above is not correct.

On the other hand, in Srimati Poddomoni Dassi *v.* Srimati Jagadumba Dassi, 6 B. L. R., 134 (which was a case of succession of two daughters), it was held that either of them was entitled to enforce partition, although such partition might not be binding on the reversioners. There remains to notice the case cited before us of Kathaperumal *v.* Venkabai, I. L. R., 2 Mad., 194; but with deference to the learned Judges who decided it, it seems to us that their decision was based upon a misapprehension of the Privy Council cases referred to above. The learned Judges were of opinion that according to these decisions there could not be any kind of partition between two widows jointly inheriting their husband's property. We have already shown that the judgments of the Privy Council do not go to that length."

In Bilaso *v.* Deno Nath, I. L. R., 3 All., 88, the Full Bench of the Allahabad High Court likewise established the right of a Hindu widow, entitled by the Mitakshara law to a proportionate share with sons upon partition of the family estate, to claim such share not only *quoad* the sons, but as against an auction-purchaser at the sale in execution of a decree of the right, title and interest of one of the sons in such estate before voluntary partition. The case was referred to the Full Bench, as there were some conflicting decisions.

The Full Bench delivered the following judgment: "The plaintiff in this case, Bilaso, is a Hindu widow, the mother of two sons, Poran Mull and Lali Mull, who were members of an undivided family, and before partition the right, title and interest of one son—Poran Mull—in a house forming the ancestral property were sold in execution of a decree and purchased by one Deno Nath, and subsequently the other son, Lali Mull, obtained a decree against the auction-purchaser entitling him to half the house. Bilaso has brought a suit to recover from the auction-purchaser and her son, Lali Mull, her share on partition of the property. The question referred to us is whether a Hindu widow entitled by the Mitakshara to a proportionate share with sons upon partition can claim such share not only *quoad* the sons, but as against an auction-purchaser at a sale in execution of a decree of the right, title and interest of one of the sons before voluntary partition."

In an undivided family consisting of mother and sons the mother is only entitled to maintenance so long as the family remains undivided in estate ; but in case a partition is made, the law gives her a right to an assignment of a share in the property left by her husband equal to a son's share. The right the mother has is a right to participate in the property left by her husband, and it has been described as a latent and inchoate right of participation which becomes effective when separation takes place. Such being the right of the mother and the sons' obligation towards her in respect of the assignment of a specific share of the property on partition, we have to see what position the purchaser in execution of the right, title, and interest of a member of an undivided family takes.

In Sremutty Soorjeemoney Dassee *v.* Denobundoo Mullick, 6 Moore's I. A., p. 539, their Lordships of the Privy Council, referring to a coparcener in an undivided family, observe: "His rights may pass to strangers either by alienation or, as in case of creditors, by operation of law, but in all cases those who came in, in the place of the original co-sharer, by inheritance, assignment or operation of law can take only his rights as they stand, including, of course, a right to call for a partition." And moreover in Deen Dyal *v.* Jugdeep Narain Sing, I. L. R., 3 Calc., 198, it was held that the right of the purchaser at the execution sale is limited to that of compelling the partition which his debtor might have compelled had he been so minded before the alienation of his share took place. The auction-purchaser of the undivided interest of the son thus stands strictly in the place of the latter, and is in no better position, and is bound by the obligations which bound his vendor, and the mother's right to an assignment of a share out of the whole joint property will accrue on a partition being made, and is of a character which cannot be defeated by the purchaser. It may be noticed that in the case of Deen Dyal Lal *v.* Jugdeep Narain Sing, already referred to, their Lordships expressly refrained from making any declaration as to the extent of the judgment-debtor's undivided share acquired by the auction-purchaser, as they observe, if a partition takes place, his wife may be entitled to a share.

According to Dyabhaga, where a partition is made by the sons, their mothers are to have shares and not those who are not mothers of sons. If the partition is made by the

father, his sonless wives then are entitled to shares—*vide* Sri Krishna's Comment on the Dyabhaga, p. 82." Even the childless wives of the father are pronounced equal sharers according to Vyasa and Dyakrama Sangraha, p. 98, of his own acquired property, and the reason for the distinction is that in the former case they take as mothers, while in the latter case they commonly take as wives. The allotment of equal shares to a wife is permitted where no stridhan or peculiar property has been bestowed by her husband and the others; and where stridhan has been given half of a son's share is to be given to the wife. The text of Yajnyavalka runs thus: "To a woman whose husband marries a second wife let him give an equal share as a compensation for the supersession, provided no stridhan have been bestowed on her, but if any have been assigned let him allot half."

Grandmother entitled to a share on partition by her grandsons.

The right of a grandmother to share arises on the same lines as that of the mother. If the sons of one son divide among themselves their grandmother will be entitled to have a share; and so if the grandsons of several widows divide, all the grandmothers will be entitled. The case of Shibo Sundary Dabia *v.* Bossomutty Dabia, I. L. R., 7 Calc., 191, fully supports this view, giving effect to the principles of the allotment of a share to the widow equal to the share of the persons who effect the partition, on the principle that, in the property divided, she had a charge of maintenance, and that her husband had interest in it. The right of the grandmother to a share is expressly asserted by Vyasa and Vrihaspati. In Dyakrama Sangraha, pp. 102 and 103, and Dyabhaga, p. 163, the authority of Vrihaspati is thus given: "The mother on the death of her husband takes a share equal to that of each of her sons." Here also occurs the following passage: "When the grandfather's estate is divided by grandsons, the grandmother takes a share equal to that of a grandson," and the authority of Vyasa is quoted as follows: "Even childless wives of the father are pronounced equal sharers; so are all the grandmothers. They are declared equal to mothers." The great grandmother can, on the grounds laid down for succession by inheritance, take a son's share if a son be one of the partitioning parties with great grandsons by another son. If a grandson and great grandson divide, she would take a grandson's share, but when a partition

takes place among great grandsons only, she, the great grandmother, has no right to a share, as she being above the fifth degree of ancestors is beyond the limits of coparcenary.

Stepmother excluded from having a share in the ancestral estate.

The stepmother is altogether excluded by the Bengal School from having a share in the ancestral estate. The authority in Vyavastha Darpana, 2nd Edition, pp. 480 and 481, concurred in by Jimut Vahana, Raghunandana and Sree Krishna is, when partition is made by sons no share need be allotted to the stepmother who has no male issue, but food and raiment must be assigned; for the late owner of the property was bound to support her, *vide* Colebrooke's Digest, Vol. III, p. 13. The term "mother" in the text is explained in Dyabhaga, p. 63, and Dyakrama Sangraha, pp. 102 and 103, as meaning the natural parent. What has already been said about a mother not having a right to call for a partition when she has an only son, is supported by the text, Vyavastha, 289, in Vyavastha Darpana, 2nd Edition, p. 481, *viz.*: "When the father of an only son leaves one wife, then food and raiment-vesture only shall of course be allotted to her." Nothing is said about the appropriation by her of a share; the law has only ordained the allotment of a share to the mother or stepmother when partition is made among *sons*. The stepmother, it appears, is to have a share when there is a partition among her own sons, and the mother likewise when partition is effected among her own sons. In Madras and Bombay, the mother has always had, whenever there has been a partition between her sons, a share equal to that of a son, either by way of maintenance or as a part of the inheritance even in the lifetime of the father. Verses 1 and 2 of Sec. VII, Chap. I of the Mitakshara lay down that upon a distribution made either during the life of a father or after his decease the wife is to take an equal share; she will be only entitled to half a share if any separate property have been given to her. The current of decisions, by the High Courts of Calcutta and Allahabad, of cases under the Mitkashara has been in the same direction, *vide* Laljeet Sing *v.* Raj Coomar Sing, 12 B. L. R., 373; Pursid Narain Sing *v.* Honoman Sahay, I. L. R., 5 Calc., 845; Jodu Nath *v.* Brojo Nath, 12 B. L. R., 385; Notobar *v.* Ramyad, 12 B. L. R., 90; Samrun *v.* Chunder Ram, I. L. R., 8 Calc., 17; and Bilaso *v.* Dena Nath,

I. L. R., 3 All., 88. Mr. Justice West elaborately discussed in his judgment in Lakshman Ram Chundra Joshi *v.* Satyabhama Bai, I. L. R., 2 Bom., 504, that what a widow has for her share in the ancestral property in the event of there being an only son is not a mere maintenance, and there could be a partition between him and the widow. He cited the following passage of Vyasa in Vyavahara Mayuka, Chap. IV, Sec. IV, p. 19: "Even childless wives of the father are pronounced sharers." And from this the inference is plain that a widow having a son is a sharer and not one merely entitled to maintenance. In Laljeet Sing *v.* Raj Coomar Sing, 12 B. L. R., 373, a mother was considered a necessary party to a suit brought by a son for partition. "If the mother is a necessary party to a suit for partition," Mr. Justice West argues, "it is hard to conceive of her as not having an interest in the property as distinguished from a mere claim against the persons of her sons for a sufficient allotment. It is consistent with the existence of this interest that in many cases an order to provide a suitable maintenance for the widows, even sonless widows of a deceased father, should have been regarded as a necessary preliminary or ingredient of a decree for partition. In the case of Komulmony *v.* Ram Nath, 1 Fulton's Reports, p. 203, sec. 5, says: "The right of a Hindu female to maintenance is one peculiarly needing protection and ought not to be defeated but upon the clearest grounds. A nuptial and testamentary gift by the husband might have this effect, or at all events might put her to an election." In that case the partition had been made under a will which bequeathed the whole property to the sons without mention of the widow; but her right was maintained by construing the will as having tacitly reserved it. In Jodoo Nath *v.* Brojo Nath, 12 B. L. R., 385, a mother who had taken some benefit under her husband's will was declared entitled, on a partition amongst the sons, to so much as with her legacy would make her share equal to one of theirs. This seems to be in substance allowing the widow to elect to take a son's share against the provisions of the will. In the case of Mangala Dabi *v.* Deno Nath Bose, 4 B .L. R., 72, O. C. J., Sir B. Peacock, C.J., ruled, with the entire concurrence of Mitter, J., that an adopted son could not convey to a stranger such a right to the family dwelling as to deprive

his adoptive mother of her right of residence. For this position a Bombay case, Pran Koonwar *v.* Deb Koonwar, 1 Bom., 404, is quoted, and reference is made to a passage of Katyana in Colebrooke's Digest, Book II, Chaps. 18 and 19. This precept, which the Court construed as of legal, and not merely moral, obligation, seems to put the requisites for the maintenance of the family on the same footing as the family dwelling. If the one cannot be affected by alienation without a due provision made for the widow, neither, it may not unreasonably be contended, can the other. The authority of this case is recognised in Srimati Bhogobati *v.* Kanailal Mitter, 8 B. L. R., 225, where Phear, J., applies it to support the proposition that as against one who has taken the property as heir the widow has a right to have a proper sum for her maintenance ascertained and made a charge on the property in her hands. She may also, doubtless, follow the property for this purpose into the hands of any one who takes it as a volunteer, or with notice of her having got up a claim for maintenance against the heir."

A widow has a right to have a proper sum for her maintenance.

It has been followed and extended in the case of Gauri *v.* Chandra Moni, I. L. R., 1 All., 262, in which the purchaser at an execution sale of the rights of a nephew was successfully resisted as to one-half of the family dwelling by the widow of the judgment-debtor's uncle.

These several authorities no doubt afford, in combination, a strong support to the proposition that a widow's maintenance, especially as against the sons, is a charge on the estate, a right *in rem* in the fullest sense adhering to the property into whatever hands it may pass. Jagannatha insists on her right to a partition as against her sons (*vide* Colebrooke's Digest, Book 5, Chap. II, p. 30), and according to Sir W. Macnaghten, Macnaghten's Hindu Law, 49, "the widow in Bengal is not only entitled to share an undivided estate with the brethren of her husband, but she may require from them a partition of it, although her allotment will devolve on the heirs of her husband after her decease;" and this authority was on the authority of a number of unreported cases recognized in the recent case of Soudaminee Dossee *v.* Jogesh Chandra Dutt, I. L. R., 2 Calc., 262, though subject to the discretion of the Court. It is not easy to see how a widow, who cannot be deprived of her proper share by her husband's will, whose maintenance is secured by a text recognised as legally binding

and must be provided for in any partition, and who may demand severance of her proper aliquot allotment, can as to her life interest be less than an actual co-sharer in the estate. Yet Jimut Vahana says: "There is neither partition nor coparcenary with the mother"—no coparcenary as he explains in the special sense of membership of a joint Hindu family. In the recent case of Baboo Deen Dyal Lal *v.* Baboo Jugdeep Narain Singh, L. R., 4 I. A., the Privy Council, holding that a purchaser at an execution sale of the father's interest had acquired a right only to a severance of his share as distinguished from the sons, recognized that in the partition to be thus made the wife also of the judgment-debtor, if he had one, might be entitled to an allotment. This is to be referred to the wife's right in her husband's property acquired by her marriage. As to this "there is no proof." The Dyabhaga says (Chap. XI, sec. 1, p. 26), "that it ceases on her husband's death. But the assertion of the widow's right of property, if there be male issue, appears only from the law ordaining the succession of male issue." Jimut Vahana in this way makes out that, while the widow's right to her husband's whole share or whole estate subsists in spite of the survival of other undivided coparceners, it is extinguished by the superior right of a son, grandson or great grandson through the operation of the special texts in their favor. In Bengal, then, it seems that the widow has a complete proprietorship, subject to restrictions on waste as against other coparceners, no proprietorship at all as against other coparceners, no proprietorship ut all as against sons. Yet in Bengal, as in the provinces governed by the Mitakshara, "where partition is made by brothers of the whole blood after the decease of the father, an equal share must be given to the mother." The mother's ownership, which has, according to this view, been extinguished, revives again on a partition amongst her sons. Her ownership in the meantime is complete. The mother's right during that time may be considered in some degree analogous to the wife's equity to a settlement under the English law. Out of prudence and affection her deceased husband would have made a distinct provision for her had that seemed necessary. She may at any moment require that such a provision be made by the sons and duly secured. They cannot free themselves from the coparcenary relation without giving her an equal share. Although, therefore,

her power of disposition is, in many respects, limited to her own life, there seems to be nothing unreasonable in pursuing the analogy somewhat further. As it is a consequence of her forbearance that the estate is larger by the particular portion that she might have required to have distinctly settled on her, she may fairly claim, as against her son's assignees or creditors, a maintenance allowed as a charge on the estate which they appropriate, except in cases of a responsibility arising from her fraud or direct participation in the son's transactions. As regards her husband's united brethren (and brethren here are the type of all coparceners) the widow's right appears according to the Dyabhaga to be developed into a completed ownership, subject to its proportion of the common burdens at the moment of her husband's death. If she chooses, she may forthwith have her own share ascertained and separated. But this is placed by the Dyabhaga, Chap. III, sec. 11, p. 29, on the ground that the several coparceners are really rather like tenants-in-common, each having a right only to an aliquot, though unseparated part, so that on the death of one there is no right of survivorship to intercept his widow's right of succession under Yajnavalka's text which the Bengal lawyers apply to a united as well as to a divided family.

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In the case of a widow of an ordinary coparcener as against the surviving brothers or cousins forming the joint family, her identity with her deceased husband cannot be considered less than where the husband was separated from his brethren and has left sons. But the right of the widow rests on different tests. Katyayana, as quoted in the Vyavahara Mayukha (Colebrooke's Digest, Book 5, Chap. 8, *placitum* 481, says: "In an undivided family, if the husband have died, the widow obtains maintenance or a share of the property for her life." The passage of Narada to a similar effect applied by the Vyavahara Mayukha to the widows of unseparated and of reunited brethren is by the Mitakshara limited to the latter class, but Vijnyaneshwara refers to it, not for the purpose of cutting down the widow's advantages, but in order to support her right to complete inheritance. His antagonist desiring to reduce her to a mere maintenance in all cases, he contends that the passages relied on cannot extend beyond the widows of reunited brethren, but as he admits the claims

of the wives and daughters of disqualified persons (Mitakshara, Chap. II, sec. 10, *placita* 13 & 14) and of the concubines of one deceased to a provision (Mitakshara, Chap. II, *placita* 27 & 28), which in the latter case is directed to be made by the king succeeding as *ultimus haeres* by "excluding or setting apart a sufficiency for the food and raiment of the women," it follows a portion that he could not have meant the widow of one who had actually held as a qualified coparcener to be left destitute or dependent on the mere caprice of the survivors of her husband amongst the males of the united family. The passages in Menu (Mitakshara, Chap. IX, *placita* 199 & 200) which forbid a woman to make a hoard out of the common property and reserve from partition only the ornaments usually worn by her, being immediately followed by an enumeration of the males disqualified for inheritance, and an injunction that all are to be supported, that injunction is in all probability meant to extend to the widows disqualified by their sex as well as the brethren excluded by their defects. Narada distinctly imposes the duty of maintenance on the brethren, *vide* Chapter 13, Sloka, 28, "Muti bhartarya putrayah potipakshah probhuhstriyah, vineyogat marakshasu bharune cha sa is vahart. When the husband is deceased, his kin are the guardians of his childless widow in disposing (of her), and in the case of her as well as in her maintenance they have full power." And there is no indication that Vijnyaneshwara, in assigning to the widows under some circumstances more than this, intended in any case to allow them less. He seems rather to have taken it for granted that no question could arise in the case of the widow of a deceased member of a joint family, and the passage cited in the Mayukha is a mere explication, not an extension, of the doctrine of the elder authority. This right to maintenance under the Mitakshara law takes the place of the general right to an actual possession of her husband's share, which, as we have seen, is allowed by the Dyabhaga notwithstanding the subsistence of a state of union between the deceased and his brethren. Yet, as in the division of an estate by coparceners, there is no express injunction to assign an aliquot part to any widow, except the widow of a father, a distinction may be taken, and has been pressed upon, as to her rights in ordinary cases anterior to division, which, it is argued, are of a merely

personal kind against the surviving coparcener. The text of Katyayana which we have already quoted is against this contention, and Sir T. Strange says that in every case "an allowance.....proportioned to her support.....with a reference to the amount of property so as, at the utmost, (as has been said) not to exceed a son's or other parcener's share," is to be made to her, and that "care should be taken to have it secured." He thus places the widow of the ordinary coparcener on exactly the same level with a mother seeking maintenance. In this connection the reasonings of Mr. Justice Phear in the case of Laljeet Sing *v.* Raj Coomar Sing, 12 B. L. R., 375, are important to be attended to. The questions which arose for determination were, firstly, whether a son can sue his father to obtain partition of ancestral property during his father's lifetime; and, secondly, whether, if he does so and the mother is alive, the mother is entitled on the partition to have a share by way of maintenance or otherwise. "In this case it is admitted that the mother is alive, and the plaintiff has not made her a party to the suit: not only has he omitted to make her a party to the suit, but he maintains that he has no right to a share on any ground and ought not to be a party to the suit. With regard to the first issue just mentioned, the decision in Nayabya Mudali *v.* Subramanya Mudali, 1 Madras H. C. Reports, 77, has determined that a son can sue during his father's lifetime for partition of the ancestral estate. A decision of a Full Bench of this Court in Raja Ram Tewary *v.* Luchman Persad, B. L. R., Sup. Vol., 731, is to the like effect. Also a judgment delivered by a Division Bench of this Court in Sheo Dyal Tewaree *v.* Jodunath Tewaree, 9 W. R., 61, countenances the proposition that, on a division of the ancestral property during the father's lifetime, his wife is entitled to a share for her maintenance, although no doubt it does not judicially determine the point. Notwithstanding these authorities bearing upon both these issues, it was very strongly urged upon us on behalf of the defendant on the one side, and on behalf of the plaintiff on the other, that neither proposition was well founded in Mitakshara law. We have thus felt it necessary to examine somewhat closely the texts of the Mitakshara so far as it bears upon these two issues.

The first section of Chapter I. may be described as an elaborate discussion, and somewhat artificial analysis of

several ancient texts serving to lead up to the conclusion that each member of a joint Mitakshara family acquires by birth a certain indefinite right of property in the paternal and ancestral estate; that the father as head of the joint family has independent power of disposal for certain purposes of the family effects other than immovable property, but is subject to the control of the sons and the rest of the family in regard to the immovable estate, whether acquired by himself (though it must be remarked by the way that this is afterwards greatly modified, see s. 5, para. 10) or inherited from his father or other predecessor (para. 27); with, however, this one exception relative to the control—namely, that while the members of the joint family are minors or incapable of giving their consent to a gift and the like, one member of the family may conclude a gift, hypothecation, or sale even of the immovable estate, if a calamity affecting the whole family require it, or support of the family render it necessary, or indispensable duties, such as the performance of the father's shradh, make it unavoidable (para. 29). The three last paragraphs but one of the same section, *i.e.*, paras. 30, 31, 32, furnish an interpretation of two or three texts which, without it, would seem inconsistent with the foregoing view of the law, and explain that these texts only refer to certain precautionary formalities which ought to accompany, but which are not essential to the validity of any dealing with joint family property. And the last para. (33) reserves to a later part of the commentary, the mention of a certain distinction between the right acquired by birth in paternal and that in the ancestral estate. We find this distinction reasoned out in s. 5 and given concisely in para. 10 of that section. One effect of it is, as already stated, to relieve the father from the control of his sons as regards his acquired property.

The indefinite right in the joint property which, as thus explained, is acquired by birth is capable of being rendered personal (so to speak) and separate by partition, and in the next paragraph (which Mr. Colebrooke has made the first paragraph of s. 2) the commentator proceeds to consider "at what time, by whom, and how partition may be made." For this purpose he first cites the text of his author (Yajnavalkya) which runs thus: "When the father makes a partition let him separate his sons from himself at his pleasure, and either dismiss the eldest with the best share, or if he choose all may be equal sharers." After deve-

loping this text slightly, the commentator says in para. 6 that the power of unequally distributing the property which it confers on the father, relates solely to his self-acquired property, because unquestionably he has not such power in regard to ancestral property, by reason of equality of ownership therein on the part of himself and his sons, which the commentator undertakes to explain later, and which he does explain (as already mentioned) in para. 10 of s. 5. The text with this qualification in effect may be put thus: "When a father makes a partition, he may give his children equal or unequal shares as he thinks fit, except that in partitioning ancestral property he must give them equal shares." The method of first deducing the general proposition from one text or authority, and then cutting it down by an exception made on the foundation of another, prevails through the whole of the commentary. The commentator next proceeds to state the occasions on which a partition may be effected—a step which ought logically to have been taken previously to making any mention of the father's power of distribution, for taken here it effects a break in the continuity of the discussion relative to the question of shares on partition. These occasions are (para. 7) at the pleasure of the father during his life; at the pleasure of the sons after his death; and also at the pleasure of the sons during his life against his will, provided that certain specified events occur. Nothing appears here to limit the application of this passage to the partition of the father's self-acquired property only; the partition of his property generally ancestral as well as self-acquired seems to be meant, and the Madras High Court has so interpreted the paragraph in Nayabya Mudali *v.* Subramanya Mudali, 1 Madras H. C. Reports, 77.

This view is confirmed incidentally by a remark which is made by the commentator in para. 4 of s. 3, and which will be presently referred to. Besides these occasions of partition, paras. 8 and 10, s. 5, no doubt add another, namely, at the pleasure of the sons during the father's life so far as regards ancestral property; and therefore the like result would in the end be reached if one supposed the previously mentioned occasions of partition to have been spoken in regard to self-acquired property only, excepting that under that supposition there would be no direct authority anywhere for the father's partitioning the ancestral property during his life, and that there is certainly no reason afforded

for this limitation upon the exercise of the father's discretion. On the whole, there seems to be no cause to impeach the justness of the Madras High Court's opinion, and hence to support it.

At the point which we have now reached the commentator returns to the question relative to the amount of the shares. He says (s. 2, para. 8): "Two sorts of partition at the pleasure of the father have been stated, namely, equal and unequal." And after quoting a text of Yajnavalkya—"If he make the allotments equal, his wives, to whom no separate property has been given by the husband or the father-in-law, must be rendered partakers of like portions"—he represents the effect of it to be that "when the father, by his own choice, makes all his sons partakers of equal portions, his wives, to whom peculiar property had not been given by the husband or the father-in-law, must be made participants of shares equal to those of sons. But if he give the sons unequal shares his wives do not take such portions, but receive equal shares of that which remains after the allotments to the sons have been deducted."

As in the previous section there is nothing here expressed to limit the application of these passages to the partition of self-acquired property alone unless it be the words "by his own choice;" but these seem to refer rather to the act of partition than to any discretion in regard to the magnitude of the shares, and the upshot of it all appears pretty plainly to be that, while the father in partitioning the property which he has, of whatever kind, may in some cases make a difference in the shares which he gives to his sons, he must in no case make any in the shares which he gives to his wives. There arises further the inference that in all cases of a partition by the father his wives are entitled to the shares mentioned; and this inference is rendered certain by para. 1 of s. 7, which will be quoted hereafter.

In the remaining paragraphs of s. 2 the commentator points out cases in which a father may be justified in giving even a nominal share to a son, and also that a legally effected distribution by the father in unequal shares cannot be set aside. This can only be done when the father has acted under undue influence, and so on. In the paragraphs of s. 3, the question of partition at the instance of the sons after the death of the father and mother is dealt with, and although this particular topic is a little remote from that which is before us, yet the reasoning by which

the result, namely, that brethren should divide only in equal shares (para. 7) is reached, exhibits some points which are of use to us, and for that cause has been already alluded to. At the outset of the section the commentator represents his opponents as objecting that such texts as that of Yajnavalkya (quoted in s. 2)—"let him either dismiss the eldest with the best share"—sanction an unequal distribution of property when the division is made in the father's lifetime, and that consequently an unequal division is admissible at every period; but the answer which the commentator makes is not that these texts were delivered in view of a special partition, as of self-acquired property only, but "true this unequal partition is found in the sacred ordinances, but it must not be practised," because amongst other things there exist counter or qualifying maxims and texts. The commentator then goes on to argue that, inasmuch as Apastamba declared that "a father making a partition in his lifetime should distribute the heritage," *i.e.*, the ancestral property (see s. 1, para. 2) "equally among his sons" therefore the sons dividing his property after his death (when it must all of it necessarily be in the situation of ancestral property) must divide it only in equal shares.

We thus see it disclosed that the texts quoted in s. 2 are quite general in their original meaning and are only restricted in operation so far as they are restricted at all by the force of other qualifying texts. We also see it recognised that the incidents of a partition effected at the instance of the sons must correspond strictly with those of a partition of the like property effected by the father. In this way it appears at once that the view which the Madras High Court took of the general scope of para. 7, s. 2, is correct; that the directions of paras. 9 and 10 of the same section with regard to shares of widows are equally general; and that these directions apply to partitions effected at the instance of sons as well as those effected at the father's own pleasure only.

The paragraphs of s. 4 only describe property which is of such a nature that it ought not to be divided; but those of s. 5 again revert to the distribution of joint property on partition. First, we had the case of partition by the father of his own will during his lifetime; secondly, partition effected by the sons after the

death of both father and mother of property generally which had been held by the father. Here we have something supplementary and more particular. The commentator declares that in the distribution of the grandfather's (*i.e.*, ancestral) property, whenever the partition takes place the adjustment of the grandson's share must be effected through their fathers ; thus, if the father is dead when the partition takes place, the grandsons only get the share which would have fallen to their father had he been alive at the partition ; and if he is alive, they only share with him what he gets. But the commentator states emphatically that in that share they are co-owners with the father, and on partition of it have equal rights with him independently of his will ; and he is at much pains to combat the contrary notion saying in particular that the text "when the father makes a partition," &c., &c., which has been already quoted, and others, so far as they countenance unequal distribution by the father, apply to his self-acquired property only. He goes on further to pursue this doctrine to its consequence, and in paras. 8 and 11 demonstrates that the son can, at any time during his father's lifetime, demand, whether his father be willing or not, a distribution of the ancestral estate. Finally, in few words (para. 10), he sums up by stating the difference in the son's right to the father's and the ancestral property, the distinction which he had previously promised to make. The paragraph runs as follows : "10. Consequently the difference is this: although he has a right by birth in his father's and in his grandfather's property, still, since he is dependent on his father in regard to the paternal estate, and since the father has a predominant interest as it was acquired by himself, the son must acquiesce in the father's disposal of his own acquired property ; but since both have indiscriminately a right in the grandfather's estate, the son has a power of interdiction if the father be dissipating the property."

Section 6 commences with the question : "How shall a share be allowed to a son born subsequently to a partition of the estate?" This is discussed at great length with reference to the text: "When the sons have been separated, one who is afterwards born of a woman equal in class shares the distribution ;" and the substance of the answer is that he only gets a share of that which is left

with the father and mother after the partition, and has no right whatever in that which has been allotted to his separated brothers; while they also, on the other hand, retain no right to any other portion of the father's estate of whatever kind, and get none in anything which the father may subsequently acquire.

A passage in the second paragraph of the section in which it is said generally of the afterborn son, of the text "what is distributed is distribution, meaning the allotments of the father and mother, he shares that"—seems inferentially to show that in any distribution obtained during the lifetime of the father, without limitation as to the nature of the property, a share is allotted to the mother as well as to the father, and this seems to be quite clear by the first paragraph of s. 7, which is as follows: "When a distribution is made during the life of the father, the participation of his wives equally with his sons has been directed." If he make the allotments equal, his wives must be rendered partakers of like portions. Yajnavalkya, the author, now proceeds to declare their equal participation when the separation takes place after the demise of the father: "Of heirs dividing after the death of the father, let the mother also take an equal share." The remainder of s. 7 is taken up with the discussion of the rights of unmarried daughters as against the sons on a partition effected after the death of the father; but with this we are not now in any degree concerned, because the 14th and last paragraph of the section declares that it is only after the decease of the father that the unmarried daughter participates in the inheritance. Before his death she obtains that only, whatever it be, which her father gives.

Father may during his life at his pleasure partition the whole of the property in his hands.

Thus upon a review of that part of the Mitakshara which affords materials relevant to the two principal issues which are before us, there appears to be no real obscurity. The result, so far as we are at present concerned, may be stated very shortly as follows: "The father during his life may, at his pleasure, partition the whole of the property in his hands or any of it, and if he does so, he must allot a share to his wife for her maintenance in addition to the share which he takes himself; also the sons can, at any time during the father's life, at their pleasure (even when any of the contingencies which

entitle them to divide the whole estate have not happened), call upon him to partition the ancestral property, and in that event also the mother must have her share as before. After the father's death, again, the sons may divide the property among themselves, but then too they must give a share to their father's widow, and to an unmarried sister if there is one. In all the cases alike the mother's share in the ancestral property must be equal to that of a son." And the father's powers of unequal distribution extend only to property acquired by himself, as laid down in Vyavastha Chandrika, Chap. II, Sec. 1, Vyavastha 47 : "A father is, without the consent of his son and the rest, competent to alienate his own acquired real property even without a legal necessity or for purposes not warranted by texts of the law." This evidently was added, having reference to Vyavastha Chandrika, Vyavastha 31: "A father cannot also alienate his own acquired immovable property and bipeds (slaves employed in cultivation) without the consent of all his sons. But he (the father) is subject to the control of his sons and the rest in regard to the immovable estate, whether acquired by himself or inherited from his father or other predecessor. Immovables and bipeds, though acquired by the man himself, there is no gift or sale of them without convening all the sons. Although a son and grandson have by birth alone ownership in the grandfather's property, yet under the texts cited, since sons are dependent on their father in regard to the paternal estate, and the father has a predominant interest as it was acquired by himself, the sons must acquiesce in the father's disposal of his own acquired property other than immovables and bipeds, but in regard to the grandfather's estate there is power vested in the grandson of interdiction to prevent illegal alienation." And of s. 38, *viz.*, "a father, without the consent of his son and the rest, is, however, competent to dispose of effects other than real property for indispensable acts of duty, and for purposes warranted by texts of law—as gifts through affection, support of the family, relief from distress, and so forth." It is a settled point that property in the paternal and ancestral estate is by birth, still the father has independent power in the disposal of effects other than immovables. It is argued by commentators that the passage refer to movable property acquired by the father. For the

author of the Mitakshara after discussion and deliberation comes to the conclusion " that it is a settled point that property in the paternal and ancestral estate vests in sons by birth, although the father have independent power in the disposal of effects other than immovables for indispensable acts of duty and for purposes prescribed by texts of law—as gifts through affection, support of the family, relief from distress, and so forth ; but he (the father) is subject to the control of his sons and the rest in regard to the immovable estate, whether acquired by himself or inherited from his father or other predecessor, since it is ordained " though immovables and bipeds have been acquired by the man himself, there is no gift or sale of them without convening all the sons," then in contravention thereof, for him to say in a subsequent section that he (the son) has no right of interference if the effects were acquired by the father : on the contrary he should acquiesce, because he is dependent ; would be not only unsettling the point already settled by himself with demonstration but absurd on the face of it, as he would thereby contradict his own conclusive dictum, unless this latter passage be applicable only to the movable property acquired by the father. Moreover it is manifest from the concluding passage which follows the above that a father is not declared competent to alienate his own acquired property without the consent of his son, but only to have a predominant interest therein, as it was acquired by him, and the son should acquiesce in the father's disposal of such property. That by this passage and the concluding passage of placitum 31 in Vyavastha Chandrika, p. 37, is meant the alienation by a father of his own acquired movable property is clear. Furthermore, if it had been the doctrine of the Mitakshara that a father, without the consent of his son and the rest, is competent to alienate his own acquired real estate for purposes other than those sanctioned by law or without a legal necessity, then he would not have laid down (p. 39) that " a father may conclude a gift, hypothecation or sale of immovable property if a calamity affecting the whole family require it, or the support of the family render it necessary, or indispensable duties make it unavoidable, thereby indicating that he cannot alienate such property for any other purpose or under any other circumstance without

the consent of his son and the rest." Yajnavalkya says: "Though immovables and bipeds have been acquired by the man himself, there is no gift or sale of them without convening all the sons." This is, it is argued, the settled law on the point in question, and is borne out by the Vivada Chintamani, Vivada Ratnakara, Vyavahara Mayukha, Modhorya, Vir Mitradya, and Smriti Chandrika. But the current of decision has been the other way, based perhaps on the dictum of Vrihaspati: If two texts differ, reason (or that which it best supports) must in practice prevail. A decision must not be made solely by having recourse to the letter of the written codes, since, if no decision were made according to the reason of the law, there might be a failure of justice." And thus on the authority of placitum 47 in Vyavastha Chandrika. Chap. II, it was held in Modun Gopal Thakur *v.* Ram Buksh Pandey, 6 W. R., p. 71, that according to the Mitakshara a father is not incompetent to sell immovable property acquired by himself. In Rajah Kishen Perkash Narain Singh *v.* Bawa Misser and others, 12 B. L. R., 430, the Judicial Committee of the Privy Council held that under the Mithila law self-acquired property can be given by its owner at his pleasure. In Jadu Nath Dey Sircar *v.* Brojo Nath Dey Sircar, 12 B. L. R., 389, Mr. Justice Macpherson, agreeably to the principles enunciated, ruled that a mother is, on partition by her sons after the father's death, entitled to a share equal to that of a son; but if she had been provided by stridhan or by will by her father or any relative to an amount as would be equal to the share of a son, she would have nothing. If it fell short of it, she was entitled to the difference between what she has received and the share of a son. The Hindu law on the subject is the same in principle in the case of a partition between a father and his sons in the mother's lifetime, and in the case of a partition between sons after the death of the father. In the Vyavahara Mayukha, Chapter IV, s. 4, v. 15, it is said: "In a case of equal partition between a father and his sons, a share belongs also to the wife." Yajnavalkya says: "If he make the allotments equal, his wives, to whom no separate property had been given by the husband or the father-in-law, must be rendered partakers of like portions." If any had been given they are only to get half; for he adds, "or if any had been given

let him assign half "—the half meaning so much as with what had been before given as separate property (stridhan) will make it equal to a son's share. But "if her property be already more than such share, no share belongs to her." In the Dyabhaga, Chapter III, s. 2, v. 31, it is said: "The equal participation of the mother with the brethren takes effect if no separate property had been given to the woman, but if any have been given she has half a share; and if the father make an equal partition among his sons all the wives who have no issue must have equal shares with his sons. To a woman whose husband marries a second wife let him give an equal sum as a compensation for the supersession, provided no separate property have been bestowed on her, but if any have been assigned let him allot half." Mahai Vera has the following commentary on the words "let him allot half:" "The allotment of a moiety implies that the other moiety is completed by the woman's separate property, else so much only should be given as will make her allotment equal to the son's." So in Colebrooke's Digest, Book V, s. 2, v. 87, as regards presents to be given to a second wife: "To a woman whose husband marries a second wife must be given an equal present on that second marriage, or equal to what the new wife shall receive on the nuptials, if she had herself received none of the wealth usually given to women; but if such wealth had been delivered to her, she is held entitled only to a moiety or part of the gift at the second wedding." In the note Jagannatha says: "Moiety (*ordhu*) in the masculine gender signifies part in general, not equal parts or exact half, which is signified by the same word in the neuter gender." I think these authorities show—and the reason of the thing would lead to the same conclusion,—that the expression "half" as applied to the share to be taken by a wife or mother is not to be read as meaning "half" literally, but as meaning such portion as may, with what she has already received, give her an equal share. Altogether, according to Hindu law, the mother is entitled to as much as, and no more than, will make what she on the whole received from her husband's estate equal to a son's share. At this point the question arises to whom does the share allotted to a mother on partition descend—whether to the heirs of her husband from whom such share was taken, or to such heirs of her husband as are living at the time

of her death ? The text of Narada is, let daughters divide their mother's wealth, or on failure of daughters their (the daughters') male issue. Gautama, too, says : " A woman's property goes to her daughters, unmarried or unprovided." But this is the law with regard to stridhan and estates in which a widow had a life or limited interest. But what a Hindu mother took on partition between her sons, it is now established law, is neither her stridhan nor an estate in which she had a life or limited interest. The question of succession to such an estate of the mother was the subject of consideration in Sorolah Dassee *v.* Bhoobun Mohun Neoghy, 15 I. L. R., 295. The contentions on the part of the appellants were that a wife by marriage takes an interest in her husband's estate, and that interest does not cease for all purposes upon his death, even if he leave sons. Although partition be made by the sons after the father's death, it is still the father's estate that is partitioned. The share allotted to the mother is not a new estate created by the partition, but the partition defines and gives effect to the right which has all along been in her. She takes it by inheritance, and accordingly, like all property inherited by a widow as such, it goes on her death to those who are then the heirs of her husband. The contention on the other side was, that a wife during her husband's life is ordinarily entitled only to be maintained by him ; that after his death her right as against her sons is no greater ; that the share which is allotted to her on a partition between her sons is allotted in lieu of or in satisfaction of the general claim to maintenance which she has previously had ; and that on her death that share reverts to those who were liable for her maintenance, and out of whose estates the share was taken. " In order to estimate the correctness of either of these views," Mr. Justice Wilson observes (Petheram, C.J., and Tottenham, J., concurring) " it is necessary to enquire briefly what is the nature of the interest that a wife takes in her husband's estate during his life and as against his sons after his death ; what is the nature of the estate that the sons take by inheritance from their father ; and how these two interests are to be reconciled with, or are controlled by, one another ?" The title of the wife is based ultimately upon two propositions—that a wife takes by her marriage an interest in her husband's estate, and that on a partition of the ancestral estate between sons their

A Hindu mother's share on partition is not her stridhan nor an estate in which she has a life or limited interest.

Sorolah Dassee *v.* Bhoobun Mohun Neoghy.

mother takes a share equal to a son's share. The text often referred to and cited by Jagannatha (s. 4151, Col. Dig., p. 551, Madras edition) says, "wealth is common to the married pair." Jimut Vahana (Dyabhaga, Chap. XI, s. 1, para. 26) speaks "of the wife's right in her husband's property accruing to her from her marriage." The Daya Tatwa, Chap. VI, s. 7, says: "Also in discussing wife's right her right is declared to extend during her lifetime to every property belonging to her husband." Also in the Shradha Veveka it is declared, "that property lies between husband and wife, *i.e.*, belongs to two masters, namely, husband and wife." Section 10, "therefore as the prohibition, namely, there is no partition between husband and wife, implies the existence of previous property, consequently the common right of both over the same property is indicated." Section 11, "otherwise in the absence of the common right of both partition itself would be unreasonable, consequently there would not have been the prohibitory proposition." Section 12, "this is also the meaning of the unity" (of husband and wife) declared by Laghu Harita "because she attains to unity (with her husband) through clarified butter, sacred texts, offerings and religious observances." All the Bengal authorities accept the rule embodied in the text of Vrihaspati cited in the Dyabhaga, Chap. III, s. 2, para. 29: "When partition is made by brethren of the whole blood after the demise of the father an equal share must be given to the mother, for the text expresses the mother should be an equal sharer." But, again, if there be any tenet of the Bengal law laid down clearly and without hesitation it is that sons, grandsons or great grandsons in the male line take the whole estate of their ancestor, take it on his death, and take it by inheritance in the strictest sense of the term. We have thus three propositions which, whatever their meaning may be, all rest upon unquestionable authority—that a wife takes by marriage an interest in her husband's property; that sons take by inheritance the whole of their father's estate; that upon a partition between sons of their father's estate their mother takes a share equal to a son's share. I propose first to examine shortly the nature and characteristics of a wife's interest in her husband's estate on the one hand and of a son's interest in his deceased father's estate on the other, looked at from a purely practical point of view, discarding,

as far as may be, all controversial matter and postponing all questions of principle or theory. If we look at the matter thus it will appear that a wife's interest in her husband's estate is of a very indeterminate character ; she may take everything or she may take very little, according as events turn out. As long as her husband lives she is ordinarily entitled merely to be maintained by him, and cannot claim any share of his estate or any voice in its management. He has full power of alienation while he lives, and subject to any question of her maintenance save disposition by will. Should he, however, during his life elect to partition his estate between himself and his sons, it would seem that a wife should be allowed a share equal to a son's if she be without male issue, but not otherwise. When her husband dies she may survive him, and there may be no sons, grandsons or great grandsons in the male line, and then she takes the whole estate as heir. She may survive and have no sons, but there may be sons by another wife, in which case she is entitled, and will ever remain entitled, to maintenance and no more. She may survive and have one son, in which case her right is, and as long at least as her son lives must always remain, the same—a right to maintenance. She may survive and have several sons, and in this case as long as her sons continue in the normal condition of a joint family, she is entitled to maintenance only ; but if her sons partition among themselves she takes a share ; and the same thing results if her grandsons partition. Thus whatever the principle applicable to the matter may be, the wife's interest in her husband's estate resolves itself in fact into a right of maintenance, except in the absence of lineal male heirs, in which case she takes the inheritance, and in two cases —one occurring in her husband's lifetime, the other after his death—in which she takes a share.

The wife's right to maintenance after her husband's death is in one sense undoubtedly a charge upon the estate, and she may sue to enforce it and have it secured. But it is not a charge in the fullest sense of the term, because it does not in every case necessarily bind any part of the property in the hands of a purchaser. If there be two groups separate each from the other, the maintenance of a widow is a charge on her own son's property, not on her step-son's. If her sons do partition it has long been the settled law in Bengal that her share is taken out

of their shares, not out of her step-sons. And she has in no case a right herself to initiate a partition. ... ... Looking from the same point of view at a son's rights in the estate which he inherits from his father, there can be no doubt that, for all ordinary purposes, the son is absolute owner of his father's estate, and can do what he pleases with it. I propose next to enquire on what principle Bengal lawyers have dealt with the two seemingly conflicting propositions—that a wife takes an interest in her husband's estate by marriage, and that his lineal heirs in the male line take his whole inheritance; and the inferences that they have thence drawn or constrained us to draw as to the nature of a mother's interest in a share allotted to her. The question is dealt with by Jimut Vahana in Chap. XI, s. 1, *viz.*, "the succession to the estate of one who leaves no male issue" and the section to the "widow's right of succession." In maintaining that right he has begun by citing in s. 2 the text of Vrihaspati that "a wife is declared by the wise to be half the body of her husband, equally sharing the fruit of pure and impure acts. Of him whose wife is not deceased half the body survives. How then should another take his property while his body is alive? Let the wife of a deceased man who left no male issue take his share, notwithstanding kinsmen, a father, a mother or uterine brother be present." In the course of the discussion he cites certain texts in favor of the brothers' claims and rejects them. In s. 19 he states a view put forward by supporters of those texts: "Some reconcile the contradiction by saying that the preferable right of the brother supposes him either to be not separated or to be reunited to them." * * * * "But it is said that in the instance of reunion, or in that of a subsisting coparcenary, the same goods which appertain to the brother belong to another likewise. In such case when the right of one ceases by his demise these goods belong exclusively to the survivor, since his ownership is not divested. They do not belong to the widow, for her right ceases on the demise of her husband; in like manner his property devolves not on her if sons or other male descendants be left. In s. 26 Jimut Vahana gives his answer to this: "It is not true that in the instance of reunion and of a subsisting coparcenary what belongs to one appertains also to the other parcener. But the property is referred generally to unascertained portions of the

aggregate. Both parceners have not a proprietary right to the whole, for there is no proof to establish their ownership of the whole. Nor is there any proof of the position that the wife's right in her husband's property accruing to her from her marriage ceases on his demise. But the cessation of the widow's right of property, if there be male issue, appears only from the law ordaining the succession of male issue." Shortly stated, neither son nor brother takes by survivorship so as on this ground to exclude the widow, but that each takes when he does take by inheritance ; and that the reason why the widow takes after the son but before the brother is because the existence of the son puts an end to her right derived from marriage, but that the existence of a brother does not do so. It is thus an essential part of the argument that upon the death of a husband leaving male issue his wife's interest in his property acquired by marriage ceases, and the issue take the whole, while if the husband die without male issue, the wife's interest does not cease. And the author thus negatives the view that the share which she takes on a partition between her sons comes to her either by inheritance from her husband or in continuation of any interest previously vested in her.

The right of a mother to take a share upon a partition between her sons and the incidents of that right are much considered by Jagannatha. The part of the discussion not directly relevant to the present case occurs in the notes to s. 87 (2 Colebrooke's Digest, p. 250, Madras edition, 1874). The precise question then under discussion is whether the share allotted to a wife or mother on partition becomes hers absolutely, with free power of alienation, and passes to her own heirs, or whether it is subject to the restraint upon alienation usually incident to property taken by women by inheritance from males and reverts to the estate of the husband or father. The question has since been answered in Bengal in the latter sense, at any rate in the case of an allotment to a mother. Jagannatha, in his work, quoting a passage from Bhavadeva, p. 252, says : "Although the mother survived the son has property in the paternal estate after the demise of his father of whom the principal right was predicated, and the mother's right which is subordinate neither resists nor is resisted by any other. Accordingly, though the first wife has property in her husband's estate, another subsequently married has also

property in the same estate." According to the opinion of Jimut Vahana, since the wife has an interest in the wealth of her husband during his life, and since there is nothing to annul her property after his decease, how can her husband's brother and the rest in any instance have a claim to the estate? To this it is answered no, for it is established that her property is actually lost by the lapse of her husband's right. Accordingly the property of the wife is divested even when the effects are given away by her lord. Those who affirm that the allotment of a share to the mother, when partition is made among sons, is founded on her ownership of the father's estate because she was his wife, accordingly contend "that a share of the distributed wealth must be allotted to a wife of the father, whether she has or has not a son, and whether partition be made before or after the death of the father." Whatever uncertainty there may be about the earlier passages of the Digest, Book V, Madras edition, this passage seems to me to assert that a wife's interest in her husband's estate is actually lost by the lapse of her husband's right, which, having regard to the words of Jimut Vahana, on which Jagannatha bases his reasoning, seem to mean by the death of the husband leaving lineal heirs in the male line. And he confirms this by showing that the contrary view—the view "that the allotment of a share to the mother when partition is made among the sons is founded on the ownership of the father's estate because she was his wife"—would lead to conclusions which the Bengal School of lawyers has always rejected.

In Sheo Dyal Tewaree *v.* Jadunath Tewaree, 9 W.R., 61, there were, among other sharers, an uncle and nephew, and one Golaba, the mother of one and the grandmother of the other, claimed a share. By the decree it was awarded to her, but no actual allotment had been made and no separate enjoyment had, when Golaba died before the appeal came in for hearing. A person alleging herself to be devisee of Golaba came forward to claim her share, relying upon the contention which the Privy Council showed to be open in 11 Moore's I. A., at p. 514. The case was one governed by the Benares School of Law, and in delivering judgment D. N. Mitter, J., said: "It is quite clear that the share which ought to have been allowed to Golaba was merged in the general estate, conceding, for the sake of argument, that she was entitled to any share under the Hindu law as it is administered in the Benares School." The text

of the Mitakshara that has been referred to merely says, "of heirs dividing after the death of the father let the mother also take a share," or in other words, "the mother or grandmother, as the case might be, is entitled to a share when sons or grandsons divided the family estate between themselves. But the mother or grandmother can never be recognized as the owner of such a share until the division has been actually made. She has no pre-existing vested right in the estate except a right of maintenance. She may acquire property by partition, for partition is one of the recognized modes of acquiring property under the Hindu law. But partition in her case is the sole cause of her right to the property."

In the last edition of Shama Churn Sircar's Vyavastha Darpana, s. 598, the learned author says: "The share which is given to a mother on partition as above is given to her in lieu of maintenance, and means allowing also for the performance of religious acts, and it reverts after her death to those heirs of her husband out of whose portion that share was allotted to her." In the late case of Kedar Nath Coondoo Chowdry *v.* Hemaginy Dossee, I. L. R., 13 Calc., 336, the actual point for decision was whether a widow, after a partition between her own son and the sons of another wife of her husband, could claim to have her maintenance charged on the estate of her step-sons, and it was held by the Chief Justice and Ghose, J., that she could not. Ghose, J., observed at page 341: "When the Hindu law prescribes a share being allotted to a woman after her husband's death upon a partition among her sons it is a share which is given to her simply in lieu of maintenance, and not because she is a coparcener in the estate, or that she has any pre-existing rights, and the share which is thus given to her reverts upon her death to those heirs of her husband out of whose portion the said share was taken." And in support of this are cited the passage just mentioned from Shama Churn Sircar, a case in Strange's Hindu Law, and the case already mentioned of Sheo Dyal Tewaree *v.* Jadu Nath Tewaree.

We were referred in argument to West and Buller's Hindu Law of Inheritance, 3rd edition, paragraphs 67, 237, 297, 303, and the following pages 781, 819, where an immense number of conflicting opinions, gathered from writers of all schools of Hindu law, are brought together bearing upon the mother's right to a share in a partition

between sons, and the subject is discussed in many aspects. But there is not in it any expression of opinion by the learned authors which assists us in ascertaining the Bengal law upon the question before us. Much stress was also laid upon the case of Laksman Ram Chunder Joshi *v.* Satya Bhama, I. L. R., 2 Bom., 494. The question in that case was as to the extent to which, and the persons against whom, a mother has an actual charge for her maintenance upon the ancestral estate of her sons, where no partition has taken place between them. So far the case does not directly bear upon the point before us ; but West, J., in his judgment, examines the whole subject of a widow's right in connection with her husband's estate very fully, and he examines it under the Bengal system of law as well as the others. Speaking of the mother's right to an allotment on a partition between sons or their representatives, he says : "This is to be referred to the wife's right in her husband's property acquired by her marriage." As to this there is no proof; the Dyabhaga says (Chap. IX, s. 1, para. 26) "that it ceases on her husband's death. But the cessation of the widow's right of property, if there be male issue, appears only from the law ordaining the succession of male issue." Jimut Vahana in this way makes out that while the widow's right to her husband's whole share or whole estate subsists, in spite of the survivors of other undivided co-parceners, it is extinguished by the superior right of a son, grandson or great grandson, through the operation of the special texts in their favor. In Bengal there it seems that the widow has a complete proprietorship subject to restriction on waste as against other co-parceners ; no proprietorship at all as against sons. Yet in Bengal as in the provinces governed by the Mitakshara, "when partition is made by brothers of the whole blood after the demise of the father, an equal share must be given to the mother. The mother's ownership, which has according to this view been extinguished, revives again on a partition amongst her sons. Their ownership in the meantime is complete." Great weight is due to any opinion of that learned Judge on a question of Hindu law. The opinion, however, here expressed did not form the ground of decision, but is upon a point collateral. I should not have ventured to comment upon the language used in thus stating a proposition, the substantial correctness of which is not

open to doubt, but that the precise words have been relied upon in argument. As these words have been relied upon, I must say I think it is more in accordance with the text of the Dyabhaga in the passage cited and with the current of the Bengal authorities to say not that in partition an old right revives but that in partition a new right arises.

The case of Bilaso *v.* Dina Nath, I. L. R., 3 All., 88, was also relied upon. The question in that case was, whether under Mitakshara law a mother's right to claim a share on partition was good, not only against her sons but against purchasers at an execution sale of the undivided interest of one of the sons. That question was answered in the affirmative. It is unnecessary to enquire whether the same rule would prevail in Bengal ; some of the reasoning on which the decision was based would not, I think, be applicable in a case governed by Bengal law.

The conclusion which I draw from the Bengal authorities is that a wife's interest in her husband's estate given to her by marriage ceases upon the death of her husband leaving lineal heirs in the male line ; that such heirs take the whole estate, and that the share which a mother takes on a partition among her sons she does not take from her husband either by inheritance or by way of survivorship in continuation of any pre-existing interest, but that she takes it from her sons in lieu of or by way of provision for that maintenance for which they and their estates are already bound. I think it follows as a necessary inference that on her death the share does not descend as if she had inherited from her husband, but goes back to her sons from whom she received it. And this is the conclusion drawn by Shama Churn Sircar and by Ghose, J., in the passages already cited.

After the sons and mother the claims of a daughter on partition among the sons require consideration. When it takes place during the life of the father, she has nothing specially apportioned to her. The father is bound to maintain her and to pay her marriage expenses. But when the partition takes place after the death of the father she receives a fourth share. The texts on the point are of Vrihaspati : " For the unmarried daughter a quarter is allowed, and three parts belong to the son ;" of Manu, " to the maiden sisters let their brothers give portions out of their own allotments respectively, and they who refuse

to give it shall be degraded." Sri Krishna observes that "the sisters also of these sharers must be rendered participators to the amount of a fourth share receivable by their brothers respectively for the purpose of marriage. Raghu Nundan lays down (*vide* Colebrook's Digest, Vol. III, p. 91): "The text which ordains the allotment of a fourth part (to the unmarried sisters) intends the appropriation of a sufficient sum for the nuptial ceremony." Mr. MacNaghten in his work, Vol. I, p. 51, asserts that "this provision for the sisters is made rather as a matter of indulgence, based upon the ground of family pride to uphold its respectability and to bestow the sisters suitably in marriage."

Illegitimate sons amongst Brahmans, Kshatriyas and Vaisyas do not inherit, but are entitled to mere maintenance.

Then come the illegitimate sons, *viz.*, sons of Dasi Putra (slave girls). Those of the higher classes are entitled to nothing but maintenance, as laid down in Viramitrodaya, p. 121, s. 17; Vyavahara Myakha, IV, pp. 29—31; Mitakshara, I, p. 12, para. 30; Dyabhaga, I, para. 28; and by the Lords of the Privy Council in Sarun Chartannya *v.* Saheb Perlad Sing, 7 M. I. A., 18. Amongst the Sudras, when partition is made by the father, he may have a share at the option of the father, and if made after the father's death, his share is equal to half of a share of a legitimate son. But when there are no legitimate sons but daughters or daughters' sons, he, according to the Mitakshara, is entitled to half a share, but the Dyabhaga, IX, paras. 29, 30, and Dayakrama Sangraha, Dattaka Chandrika, make him equal sharer with the daughter's sons. Devanda Bhatta explains this seeming inconsistency. The criterion for ascertaining the share due to an illegitimate son is the share he would take if he were legitimate, and then to give him half of it. Being illegitimate he only takes half of the moiety, leaving the remaining three-fourths to his brother. If there were no legitimate son but a widow daughter or daughter's son, he (the illegitimate son) would take only half, the other half going to the widow daughter or daughter's son respectively. If there were none of these, or upon the extinction of all, he takes the whole. And this is the view given effect to by a Full Bench of the Bombay High Court in Sadu *v.* Barga, I. L. R., 4 Bom., p. 38. In this case Sadu the illegitimate son, and Mahadeb legitimate son, having, after their father's death, come to hold his property jointly were held to be coparceners to the whole property, and to be bound

to maintain the two widows of their deceased father and his daughter if she were still unmarried, in which case they were bound to pay her reasonable marriage expenses; and Sadu as an illegitimate son would take only half a share. The dictum of Yajnavalka and Vijnaneswara is to the effect that an illegitimate son without brothers may inherit the whole estate in default of daughter's sons, or in other words, until the line which terminates with a daughter's son is exhausted, he cannot take the whole estate, but is only entitled to a part of it. The case of a widow is beyond question as she ranks before the daughter; but in the case under notice the illegitimate son having taken along with the legitimate son, the law of survivorship prevailed, and Sadu after Mahadeb's death took the whole estate subject to the maintenance of the widows and marriage expenses of the daughter. In this case Mr. Justice Nanabhai Haridas held "an illegitimate son had a right to call for a partition as against his brother; seeing that his right to take a share during his father's lifetime is expressly made to depend on the father's choice," the inference is plain he could enforce a partition as against his brothers but not as against his father. Mr. Justice Nanabhai Haridas argues, it must be allowed that the portion of a dasi putra in a Sudra family does differ in several respects from that of Auras putra. The latter may during his father's lifetime enforce a partition of ancestral property even against the father's wish. Whether the former can do so has not yet formed the subject of a judicial decision; but should the question ever arise it seems very unlikely that any such claim on his part would be recognised, seeing that his right to take a share during his father's lifetime is expressly made to depend on the "father's choice." Besides, when a partition takes place among brothers, auras putras, after their father's death, share equally; whereas the share of a dasi putra is only half the share of an auras putra. Again an only son who is an auras putra takes the whole estate to the exclusion of every other heir; while an only son who is a dasi putra takes the whole estate, "provided there be no daughters of a wife, nor sons of daughters." While admitting, therefore, that the position of a dasi putra in a Sudra family does differ in important particulars from that of an auras putra, I am not prepared to allow that the former is not a member of the family at all, not

that he is not a coparcener and not, therefore, entitled to succeed by right of survivorship. His legal status as a son is unquestionably recognised, and accordingly he inherits from his father even before the latter's widow; and if there are auras putras of his father he succeeds to the father's estate jointly with them. He is clearly therefore their coparcener. That he is their brother, not only in the popular, but also in the legal, acceptation of the term, is evident from the Mitakshara, Chap. I, sec. 12, pp. 1 and 2, where they are spoken of both by Yajnyavalka and Vijnanesvara as his "brethren" and "brothers" (bhratah). In Rahi *v.* Govind Valad Teja, I. L. R., 1 Bom., Chief Justice Westropp elaborately treats of the position of the widow, and exhaustively proves that she, not being mentioned in the commentaries of Vijnanesvara and Yajnyavalka, while others, *viz.*, the daughter and daughter's sons, have been specifically mentioned, was purposely excluded, being merely entitled to maintenance. In his judgment the Chief Justice observed: "As the general result of the authorities, both juridical and forensic, amongst the three regenerate classes of Hindus (Brahmans, Kshatriyas and Vaisyas) illegitimate children are entitled to maintenance; but unless there be local usage to the contrary cannot inherit, and that among the Sudra class, illegitimate children in certain cases do inherit."

The Smriti writer Yajnyavalka says: "A son begotten by a man of the servile class on his female slave may receive a share by his father's choice; or after the death of the father, the brothers shall allot him half a share; should he leave no brother, he shall take the whole, unless there be a daughter's son." It will be observed that in the concluding exception in that text Yajnyavalka mentions only the daughter's son and omits the widow and the daughter, both of whom in the ordinary course of succession amongst illegitimates rank before the daughter's son. Vijnanesvara in commenting on the above text of Yajnyavalka expanded it by bringing daughter's sons at large into competition with the illegitimate sons of the last owner as may fall within the scope of the term dasi putra.

The author (Yajnyavalka) next delivered a special rule concerning the partition of a Sudra's goods. "Even a son begotten by a Sudra on a female slave may take a

share by the father's choice. But if the father be dead, the brethren should make him partaker of the moiety of a share; and one who has no brothers, may inherit the whole property in default of daughter's sons."

The son begotten by a Sudra on a female slave obtains a share by the father's choice or at his pleasure; but after the demise of the father, if there be sons of a wedded wife, let these brothers allow the son of the female slave (dasi putra) to participate for half a share, that is, let them give him as much as is the amount of one brother's allotment. However, should there be no sons of a wedded wife, the son of a female slave takes the whole estate, provided there be no daughter of a wife nor sons of daughters. But if there be such, the son of the female slave participates for half a share only. "From this mention of a Sudra it follows that the son begotten by a man of a regenerate tribe on a female slave does not obtain a share even by the father's choice, nor the whole estate after his demise; but if he be docile, he receives a simple maintenance."

The result of the foregoing commentary appears to us to be that Vijnyanesvara holds that among Sudras the father of an illegitimate son by a Dasi may in his lifetime allot to such son a share equal to that of a legitimate son; and if the father die without making such an allotment, the illegitimate son by the Dasi is entitled to half of the share of a legitimate son; and if there be no legitimate son and no legitimate daughter or son of such a daughter, the illegitimate son by the Dasi takes the whole estate. If, however, there be a legitimate daughter or legitimate son of such a daughter, the illegitimate son would take only half the share of a legitimate son; and such daughter or daughter's son would take the residue of the property, subject of course to the charge of maintaining the widow of the deceased proprietor. The commentator is silent as to the widow, who, in the ordinary course of succession, would come before the latter, the daughter or the daughter's son, and the omission appears to be the result of arbitrary arrangement. And as the Vyavahara Mayukha by Nilakantha does not say either in qualification or contradiction of the respective rights of Sudra widows and illegitimate sons, and as Devala too in pl. 32 of Chap. IV, sec. 4, merely speaks of the rights of the illegitimate sons of a Sudra woman by a man of

Share to which a son by a female slave Dasi putra is entitled.

equal class with special reference to their rights as against legitimate sons, and not with reference to daughters or their sons, the silence cannot be said as a contradiction of the Mitakshara. So long, Westropp, C.J., *held*, there is no express contradiction or direct implication of the Mitakshara, our safest course is generally to follow it.

In this connexion the status of minors and the question of limitation require consideration. As regards minors Baudhayana has it: "The shares of sons who are minors should be placed under good protection until the majority of the owners." When he arrives at full age he may seek to have the partition set aside, so far as he is concerned, if he could show it was illegal or fraudulent. A guardian, or some one acting on his behalf, ought to be appointed to represent him and to look to his interests. But if the partition had been just and legal in every way the necessity for a guardian is dispensed with. Similarly, the absence of a coparcener would not prevent partition, but, when made, the share of the absent member would be reserved for him until his return, and this duty would lie on those coparceners who effect it, as well as the responsibility of showing that it was legal, fair and just. The right to reserve a share of property divided in a man's absence extends to his descendants to the seventh degree.

Minors on arriving at full age may seek to set aside fraudulent partition.

In Thakoor Dario Sing *v.* Thakoor Dari Sing, L. R., 1 I. A. and 3 B. L. R., 165, the Judicial Committee of the Privy Council held that, in a joint Hindu family in which partitions of family property have formerly taken place, the fact that there has been no division of the estate during six or seven generations does not deprive the members of the right to demand a partition. The principle of Hindu law presupposes union and not partition as the normal state of a Hindu family, and lapse of time is never in itself a bar to a partition. It was held in Kali Kishore Dey *v.* Dhununjoy Nag, I. L. R., 3 Calc., p. 230, that according to Art. 127, Schedule II of the Limitation Act, the period of limitation shall be twelve years, not from the plaintiff's exclusion, but twelve years from the time when the plaintiff claims and is refused his share. Consequently, if a plaintiff has been excluded for fifty years, and he then claims his share and is refused, he would have twelve years from the time of such refusal to bring his suit, or, in other words, he would have sixty-two years from the time of his exclusion; and if he never

Lapse of time is no bar to partition.

claims, or is refused, the period within which he may bring his suit appears to be indefinite.

When property is wrongly kept back by one of the co-sharers, it, when discovered, shall be divided equally among all the sharers. In this view the Mitakshara and the Bengal and Benares schools agree.

Partition is effected by express agreement between the parties, or by such acts of separate ownership as are inconsistent with continued unity of right and possession.

The text of Yajnavalkya on the subject is :—

Evidence of partition.

"A partition being denied, let the truth of it be ascertained by the evidence, first, of near kinsmen, then of relations more distant, then of witnesses who are connected with the parties, then by written proof, or separate acts of ownership in house or field."

Vrihaspati says : "They who have their income, expenditure and wealth distinct and have mutual transactions of trading and traffic are undoubtedly separate." Nareda says : "If there be any doubt with regard to partition among co-heirs it may be removed by kinsmen, who are the witnesses to it, by the partition deed, and by distinct income and expenditure."

Father under the Mitakshara can partition his own self-acquired property, and under Bengal Law he can distribute it as he likes.

From all these considerations the conclusion is plain that a father under the Mitakshara law, in dealing with his self-acquired property or any other property in which his sons take no interest by birth, and a father under Bengal law, in dealing with any property, may distribute it as he likes. The father under the Mitakshara can, at his choice, partition his own acquired property and regulate the division by his own will; but in the case of property inherited from ancestors, the proper time for partition, while both parents are living, is when the mother is past child-bearing, for, otherwise, Vishnu says: "The brothers divided by the father shall give the portion of the brother born after the division." In the second edition of the Vyavastha Darpana, p. 529, it is laid down, pl. 323 : "If the father, having separated his sons, and having reserved for himself a share according to law, die without being reunited with his sons, then a son who is born after the partition shall alone take the father's wealth." Gautama says : "A son begotten after partition takes exclusively the wealth of his father." By the term, according to law, it is thus hinted that if the father, through ignorance of the law, have made a partition in

which he took a very small share for himself, his son, afterwards begotten, shall receive a due allotment from the brethren. This is when partition is made during the life of the father, but so long as the family remains joint and separation has not been effected either by partition or by agreement, every son who is born becomes upon his birth entitled to an interest in the undivided ancestral property. And, as held in Appovier *v.* Ram Subha Arzan, 11 M. I. A., 73, neither the father nor any of the sons can, at any particular moment, say what share he will have on partition.

What is self-acquired property.

In speaking of the power of the father under the Mitakshara to do as he likes with his self-acquired property, it must be clearly understood what is self-acquired property. It is what has been acquired without detriment to or use of the joint estate. Property gained by the use of the common funds are expressly directed by Vishnu and Menu to be divided. Besides self-acquisitions Jimut Vahana declares the following exempt from partition: First, the gains of science obtained from displaying and making known one's own knowledge; second, gains of valour; third, wealth received on account of marriage at the time of accepting a bride; fourth, items required for personal use, and which are in their nature indivisible. Again: "A house, garden or the like, which one had constructed within sight of the dwelling place during his father's lifetime remains his indivisible property; for his father has assented by not forbidding the construction of it." Recovered hereditary property stands upon the same footing as self-acquired property. For instance, if a father recover the property of his father which remained unrecovered, he will not be forced to share it with his sons. But Sancha says, in case of land if one of the heirs recovers it solely by his own labour the rest may divide according to their due allotments, having first given him one-fourth part. According to Shankhu Sekheta there is to be no division of a dwelling, nor of water-pots, ornaments of women, clothes and channels for drawing water. Books must not be taken by the ignorant parceners as they belong to those of them who are learned.

Duties of heirs.

Having thus treated of partition in all its bearings, the duties which devolve on a person inheriting, by partition or otherwise, need recapitulation. They are: 1stly, the performance of the obsequies, &c., of the late

proprietor and the initiation of his children ; 2ndly, the discharge of his debts and obligations ; thirdly, maintenance of those persons who were entitled to be supported by the late proprietor and are entitled to maintenance from his assets. The second question was amply considered in the chapter on Inheritance, and to the third a full chapter will be devoted.

The first will here receive attention. Now as regards the initiation of children. Vyasa declares : " For any of the brothers, whose investiture and other sacraments have not been performed, the other brothers, of whom the sacraments have already been completed, shall perform those ceremonies out of the paternal estate ; and for unmarried sisters the sacraments shall be completed by their elder brothers." Vivada Chintamani, p. 247. Nareda and Vrihaspati say : " For those whose initiating ceremonies have not been regularly performed by the father, those ceremonies must be completed by their brethren out of the patrimony. "Smriti Chandrika, Chapter IV, pages 38 and 40. If no wealth of the father exists, the initiating ceremonies must, without fail, be performed by the brothers already initiated, contributing funds out of their own portions. Smriti Chandrika, Chap. IV, cl. 41. The ceremonies begin with Jatakarma and end in Upanyana. These are Jatakarma, Namakarana, Nishkramana, Annaprasana, Churakarana, Upanayana, and Vivaha. Jatakarma is a ceremony ordained on the birth of a male child before the cutting of the navel string, and consists in making the child taste clarified butter out of a golden spoon. Upanayana is investiture of the three first classes with their characteristic sacred threads. In the case of daughters, the word "ceremonies" under the text mean marriage, as there is no Upanayana for them. If there be no patrimony the marriage must be performed by the contribution of funds by the brothers. Smriti Chandrika, Chapter IV, cl. 44. The ceremonies which a Sudra is bound to perform to acquire the rank of a pure Sudra are of the tonsure.

As regards the performance of obsequies, it is urged that wealth is acquired for temporal enjoyment and to secure the spiritual benefit of alms. As the acquirer after death cannot have temporal enjoyment, it is right that the wealth should be applied to his spiritual benefit. The opinion of Vrihaspati is : " Of the property which descends by inheritance half should carefully be set apart,

for the benefit of the deceased owner to defray the charges of his monthly, six-monthly and annual obsequies." Indeed the performance of the funeral obsequies is so important that Gautama has it, out of the paternal estate Nava shraddha of the deceased must be performed. Vrihaspati says: "A brother, a brother's son, a sapinda or a pupil performing rites with a funeral cake for the deceased shall then obtain increase of prosperity."

In the event of one being heir to the estate and another qualified to perform the shraddha, one must give sufficient wealth to the other to cause the shraddha to be performed by him who is qualified to celebrate it. Indeed, it is laid down in Nirnaya Sindhu, section 3, page 22, that in default of all the king should cause the shraddha of the deceased to be performed out of his inheritance.

The importance of the shraddha ceremony can best be imagined by the following account of it by Mr. Cowell, contained in Tagore Law Lectures of 1870, p. 71 :—

Shrad ceremony.

"The shraddha or funeral obsequies rendered to deceased ancestors is unquestionably the most important. It fills so large a space in the daily life and thought of the Hindu, it influences so deeply the whole character of Hindu civilization, binding together at least seven successive generations of men in bonds of mutual dependence, which are consecrated by the strongest religious sentiment, and strengthened by the traditions of more than three thousand years, it underlies moreover in Bengal so completely the whole of the Hindu Law of Inheritance, that I think it useful, with a view to the clear understanding of the legal as well as the social organization of Hindus, to give a somewhat detailed account of it. These obsequies consist of oblations of food and libations of water, which it is the first and most indispensable duty of a Hindu to offer to the manes of his ancestors, without which these ancestors will be tormented with hunger and thirst, and will be repulsed from a region of bliss, while the sonless man will sink into Put or the region of everlasting torment. The presence of a son, natural or adopted, to perform the ceremony is indispensable to its complete spiritual efficacy and occasions the anxiety which pervades the community for the possession of male offspring. In the Dattaka Mimansa, the well-known treatise of Nunda Pandita on the subject of adoption,

it is cited from the Vedas or revealed scriptures, "that a Brahman immediately on being born is produced a debtor in those obligations to the holy saints for the practice of religious duties, to the gods for the performance of sacrifice, to his forefathers for offspring." "By a son," says Menu, "a man obtains victory over all people; by a son's son he enjoys immortality, and afterwards by the son of that grandson, he reaches the solar abode." Here, therefore, the instrumentality of the son in obtaining immortality for his father and in absolving him from his threefold debt is declared, and is in practice, as well as theory, the governing principle of family life. The reason is emphatically added that without him the obsequies would fail; the most significant rites of the shraddha, *i.e.*, the Parvana shraddha, performed by those who succeeded in the direct line, it is said would fail, and unaided by the puttra (son) the soul of the Hindu must sink in that Put from which it is the province of the son to deliver him.

The ceremony commences with the preparation by the sons of a funeral pile on a spot which is duly consecrated.

Then follows the cremation or burning, which is so managed that some of the bones remain for the subsequent ceremony of forming the ashes. Libations of water are offered to the deceased after the burning. Ten days of mourning ensue, and then his son or nearest kin gather his ashes and offer a shraddha singly for him. Food is then distributed to the assembled Brahmans. Then spreading kusa grass near the fragments of the repast, and taking some rice with tila and clarified butter, he must distribute it in the grass, while the purohits recite for him these prayers: "May thou in my family who have been burnt by fire, who are alive and yet unburnt, be satisfied with this food presented on the ground and proceed contented towards the supreme path of eternal bliss." Then taking in his left hand another vessel containing tila, blossoms and water, and in his right hand a brush made of kusa grass, he sprinkles water over the grass which is spread on the consecrated ground, naming the deceased and saying: "May this oblation be acceptable to thee." He afterwards takes a cake or ball (pinda) of food mixed with clarified butter and presents it, saying, "may this cake be acceptable to thee;" and deals out the food with this prayer: "Ancestors rejoice, take your

respective shares and be strong as bulls." And again sprinkles the water on the ground to wash their oblations. He next offers a thread on the funeral cake, saying: "May this raiment be acceptable to thee," the priest repeating his texts. He then strews perfume and leaves on the funeral cake and places a lighted lamp upon it. Afterwards he sprinkles water on it and offers rice and the priest offer salutations to the gods.

In these, the first funeral obsequies, the object in view is to effect by means of oblations the re-embodying the soul of the deceased after burning his corpse. The houses and persons of the mourner must then be purified; and after that the second obsequies begin, the object of which is to raise the shade of the deceased from this world (where else it would continue to roam amongst demons and evil spirits) up to heaven, and there beatify him as it were amongst the manes of his departed ancestors.

These ceremonies in honor of a single ancestor are denominated the ekodistha shraddha. They are offered monthly during the first year; two extra shraddhas being performed before the end of the 6th and 12th month, respectively, making, with the ceremony of cremation and the final ceremony, sixteen shraddhas in all.

The shraddha in honor of progenitors is termed Parvana shraddha. It is the offering of a double set of oblations at the Parvan, *viz.*, three cakes to the father, paternal grandfather and great-grandfather, and three to the maternal grandfather, his father and grandfather, and the remnants to each set of the three remoter ancestors of each line. It is in abeyance and cannot be performed after the death of their next male descendant until the sapinda karana in his honor have been performed, that is, until the last deceased has been associated with his forefathers, and the first in the line of those who received offerings from him has received the last oblations of food to which he is entitled. Numerous occasions for performing the Parvana shraddha are prescribed to the rigid Hindu, but general custom is content with observing them on the last night of the moon preceding the Doorgah Poojah, and on the occasion of visiting places of pilgrimage. At this shraddha three funeral cakes are offered to three paternal ancestors in male line, and three more to three maternal ancestors

in the male line, and two to the Vyswadevas of assembled gods.

The final ceremony marks the complete emancipation of the great-grandfather of the deceased from dependence on the filial attentions of his descendants, and is denominated the sapinda karana. It is the rite of associating the deceased with the manes of the departed ancestors by admixture of the pindas before described, and in strictness it should take place on the anniversary of the day of death; but in the case of the deceased leaving an only son or no son it may be performed at any time within one year from the deceased's death after the performance of the fourteen monthly shraddhas called masiks. It combines the last ekodistha shraddha, or obsequies performed singly for the deceased, with the Parvana shraddha or obsequies which the deceased was in the habit of offering in his lifetime to his three immediate ancestors in the male line, his father, grandfather and great-grandfather. Thenceforth the deceased is associated with his three ancestors, and the last obsequies have been paid to the great-grandfather, and the next Parvana shraddha will be in honor of the deceased, his father and grandfather. Previous to the performance of the sapinda karana the deceased is not denominated a "petri" or departed ancestor. It is celebrated as follows: "Four vessels are prepared and filled with water for the feet, scented wood, flowers, sesamum seed, and consecrated severally to the deceased and his three ancestors. From that consecrated to the deceased three equal portions are poured into the other three, a small quantity only being retained and two prayers are recited. Then four funeral cakes are offered to the deceased, being divided into three portions and mixed with the other three cakes. That portion of the petri consecrated to the deceased which was retained is then offered to him, and the whole ceremonies of ekodistha and Parvana shraddhas are completed."

These funeral obsequies and ceremonies are often referred to as the keystone of the Hindu Law, according to the Bengal School of Inheritance and Succession, and are therefore stated at length. The subjects of inheritance and partition are intimately connected with each other, and these having been exhaustively treated we should now bestow our attention on the subject of exclusion from inheritance and maintenance.

EXCLUSION FROM INHERITANCE.

IN the last chapter it has been observed that inheritance entails upon the heir the charge to do spiritual benefit to the deceased. And so he who is unable or unwilling to perform the necessary sacrifices is incapable of inheriting, and cannot claim the paternal estate. The category of persons disentitled to inherit is extended by the priests to those who labour under congenital defects, such as impotence, idiocy, being born blind, deaf or dumb, and without a limb or a sense. Persons afflicted with madness or an obstinate or agonising disease, or who are addicted to vice, or who are ignorant or wanting in devotion and the observance of time-honored customs, and are untruthful, are debarred from inheriting. Menu states: "Eunuchs and outcastes, persons born blind or deaf, the dumb and such as have lost the use of a limb, are excluded from heritage." Yajnavalkya adds: "And persons afflicted with an incurable disease." In Mitakshara, Chap. II, vol. 10, s. 1, it is said "to be the worst form of leprosy." In order to exclude a person from inheritance on the ground that he is blind, deaf or dumb, it must be shown that these infirmities are incurable and congenital. In Mohesh Chunder Roy *v.* Chunder Mohun Roy, 14 B. L. R., p. 275, it was pressed on the Court that the text of Menu, "eunuchs and outcastes, persons born blind or deaf, mad men, idiots, the dumb, and such as have lost the use of a limb, are excluded from a share of the heritage," especially "such as have lost the use of a limb," is wide enough to include the case of persons become blind, as in this case, at or just before the succession opened. But Mr. Justice (now Sir) L. S. Jackson preferred to follow the Dyabhaga, Chap. V., paras. 1 to 9, and the Dyakrama Sangraha, Chap. III., paras. 1 and 2, which expressly mention persons born blind and deaf, that is, by nature, and not those who have become so from some adventitious cause.

Persons disentitled to inherit.

In Murarjee Gokul Das *v.* Parvati Bai, I. L. R., 1 Bom., 185, it was argued that the "nirindraya" meaning "such as have lost the use of a limb," and the passage in Chap. II., p. 4, of the Mitakshara, "any person who is deprived of an organ (of sense or action) by disease or other cause, is said

to have lost the sense or limb, and consequently it would include blindness which supervened as well as congenital blindness. Sir Michael Westropp, in delivering judgment, observed that as Menu had already in the same text made express provision for the impotent, the blind, the deaf, the dumb, the insane and the idiotic, we are strongly inclined to think that by nirindraya he intended to provide for those who were deficient in a limb or member, and that Sir William Jones correctly interpreted his meaning. And we are strongly fortified in that conclusion by finding that it is that also of Vachaspati Misra, in his Vivada Chintamani. Commenting on the text of Menu he says: "Those who have lost the use of a limb signifies those who have been deprived of a hand, a leg, or any other member of the body. Such persons are not competent to perform ceremonies relating to the Vedas and Smriti. They are consequently not entitled to inherit paternal property. The three books of chief authority in Western India are Menu, the Mitakshara and Mayukha. Of these Menu is express on the point that blindness to disqualify for inheritance must be congenital. He is supported by Jimut Vahana and Jagannatha." In Uma Bai *v.* Bhaon Padmanji, I. L. R., 1 Bom., 557, the Chief Justice of the Bombay High Court held the same opinion, *viz.*, that Hindus not born blind, but subsequently became incurably blind, are thereby not rendered incapable of inheritance. As regards the deaf and dumb, it is necessary as well to show that the deafness or dumbness is incurable and congenital. In Poreshmani Dasi *v.* Deno Nath Doss, 1 B. L. R., p. 117, it being found that the father of the plaintiff was born deaf and dumb, Bayley and Macpherson, J J., held he was incapable of inheriting; and as the plaintiff was born to the deaf and dumb father long after the grandfather's death his property passed to the brothers of the deaf and dumb man, *viz.*, the uncles of the plaintiff. In Kali Dass *v.* Krishna Chundra Dass, 2 B. L. R., 103, the Full Bench on the same state of facts held that the son of a father who could not inherit, being deaf and dumb, was debarred from succeeding to his grandfather's estate. As to mental infirmity, the Madras High Court was of opinion in Terumamayal Ammal *v.* Ramasvami Ayyangar, 1 Madras H. C. Reports, 214, that it is not necessary to show utter mental darkness. It is sufficient if the person be of such an unsound mind as to be unable to conduct his own affairs.

Causes calculated to disinherit.

In Bengal the High Court of Calcutta held, in Dwarka Nath Bysack *v.* Mohindra Nath Bysack, 9 B. L. R., 208, that insanity at the time the inheritance opens is sufficient to exclude. Even if it be shown that the person is not in a position to offer the proper funeral oblations, he is unfit to succeed. Madness is a separate head of disqualification, exclusive of incurable diseases, as laid down in the Dyabhaga, and Chap. II, s. 10, Sch. 1, of the Mitakshara.

Leprosy is one of these maladies and disqualifies the person afflicted from inheriting. It is looked upon as the punishment of sin either in the present or past life. In Jonardan Pandurang *v.* Gopal and Vasudeb Pandurang, 5 Bom. H. C. Reports, p. 145, the Bombay High Court in concurring in an opinion of the Sudder Court at Madras held: "It is a fact well known in medical science that the disease of leprosy assumes in some cases a mild and curable form, while in others it appears in a virulent and aggravated type. The Court find on consulting the best authorities on the subject (the Vyavahara Mayukha and the Mitakshara) that it is in the latter case only that the disease is regarded in Hindu law as a disqualification entailing forfeiture of inheritance." In other cases, strictest proof must be submitted that the disease was incurable. In Ananta *v.* Ramabai, I. L. R., 1 Bom., 355, leprosy of the serious or ulcerous type having set in before partition, excluded the person afflicted from a share in the ancestral estate.

As respects lameness or loss of a limb, the opinion of Jagannatha is that lameness arising subsequent to birth is no disability, and that the loss of a limb or sense must be absolute or complete so as to prevent the use of it. A Pungoo or helpless cripple, or a person deprived of the use of hands and feet, is excluded from inheritance, as he cannot perform ceremonies relating to the Vedas and Smriti. A lame man who is able to walk a little is not a Pungoo, and is not disqualified from inheritance.

Incontinence of a Hindu widow is a bar to her inheriting.

The incontinence of a Hindu widow is a bar to her claiming the estate of her husband. Indeed chastity is the condition precedent to the succession by the widow of her husband's estate. But after it had once vested in the widow she could not be divested of it by reason of her subsequent unchastity. In Kerry Kolitany *v.* Monee Ram, 7 M. I. A., pp. 115 and 156, the Lords of the Privy

Council, upholding the decision of the High Court, held the incontinence of a Hindu widow disentitles her from claiming the estate of her husband. The law upon the subject was elaborately discussed in Matangini Debi *v.* Joykali Debi, 5 B. L. R., 470. Vrihaspati, as quoted in the Dyabhaga, Chap. XI, sec. 1, cl. 2, says: "In Scripture and in the Code of Law, as well as in popular practice, a wife is declared by the wise to be half the body of her husband, equally sharing the fruit of pure and impure acts. Of him whose wife is not deceased, half the body survives. How should then another take his property while half his person is alive? Let the wife of a deceased man who left no male issue take his share notwithstanding kinsmen, a father, a brother, or uterine brother be present. Dying before her husband a virtuous wife partakes of his consecrated fire; or if her husband die (before her) she shares his wealth; this is primeval law. Having taken his moveable and immoveable property, the precious and the base metals, the grains, the liquids, and the clothes, let her duly offer his monthly, half-yearly and other funeral repasts. With presents offered to his manes and by pious liberality let her honor the paternal uncle of her husband, his spiritual parents and daughter's sons, the children of his sisters, his maternal uncles, and also ancient and unprotected persons, guests and females of the family. Those near or distant kinsmen, who become her adversaries or who injure the woman's property, let the king chastise by inflicting on them the punishment of robbery. Yajnavalkya says (Dyabhaga, Chap. XI, sec. 1, clause 56): "Let the childless widow preserving unsullied the bed of her lord and abiding with her venerable protector enjoy with moderation the property until her death. After her let the heirs take it." Vishnu says (Dyabhaga, Chap. XI, sec. clause 7): "The widow of a childless man keeping unsullied her husband's bed and preserving in religious observances shall present his funeral oblation, and obtain his entire share."

Vyasa says: "After the death of her husband let a virtuous woman observe strictly the duty of continence, and let her daily, after the purification of the bath, present water from the joined palms of her hands to the manes of her husband. Let her day by day perform with devotion the worship of the gods and specially the

adoration of Vishnu, practising constant abstemiousness. She should give alms to the chief of the venerable for increase of holiness, and keep the various fasts which are commanded by sacred ordinances. A woman who is assiduous in the performance of duties, conveys her husband, though abiding in another world, and herself, to a region of bliss. As the wife rescues her husband from hell, and she doing improper acts through indigence, causes her husband to fall to a region of horror, for they share the fruits of virtue and vice; therefore, the wealth devolving on her is for the benefit of the former owner, and the wife's succession is consequently proper." The Mitakshara, as expounded by Katyayana, says: "Let the widow succeed to her husband's wealth, provided she be chaste, and in default of her the daughter inherits if unmarried." In the Vivada Chintamani the passage runs thus: "A widow who has no male issue, who keeps the bed of her lord inviolate, and who strictly performs the duties of widowhood, shall alone offer the cake at his obsequies and succeed to his whole estate. If the wife die before her husband she shall receive the consecrated fire; if not, the widow, faithful to her lord, shall take his wealth. In the Vyavahara Mayukha, Chap. IV, sec. 8, verse 2 runs as follows: "A wife faithful to her husband takes his wealth; not if she be unfaithful." The result, therefore, may be summed up in these words: "It is a settled rule that a wedded wife, being chaste, takes the whole estate of a man, who being separated from his co-heirs, and not subsequently reunited with them, dies leaving no male issue." Chief Justice Sir Barnes Peacock, having regard to the foregoing texts, and Mr. Colebrooke's opinion that an unchaste woman is excluded from the inheritance of her husband, and no misconduct other than incontinence operates disinherision nor after the property has vested by inheritance does she forfeit it, unless for loss of caste, unexpiated by penance and unredeemed by atonement, observed: "I see no authority sufficient to induce me to think that the estate taken by a Hindu widow by inheritance is an estate only so long as she continues chaste, or an estate liable to be forfeited by an act of unchastity. If the estate is to continue only so long as she continues chaste, it would cease immediately upon an act of unchastity; and in that respect a widow would be in a worse position than a wife,

Unchastity does not cause forfeiture of estate after the property has vested by inheritance.

inasmuch as a wife may inherit if her offence is expiated before the death of her husband ; but if a widow's estate cease, expiation could not restore it.

"So in the case of persons incapable of inheriting, such as a leper. Leprosy at the time when the right of inheritance accrues would destroy the right of inheritance, but leprosy after an heir has succeeded is no ground of forfeiture ; nor is the estate of an heir held only so long as he is free from a sinful disease which would prevent from inheriting.

Nor does leprosy after the property has vested.

"In the Vyavastha Darpana, p. 1016, it is stated that a woman who is adulterous at the time when succession opened, or who previously committed adultery which remained unexpiated by penance, forfeits her right to inheritance and maintenance ; and not she who was previously adulterous but co-habited with her husband, or expiated or was about to expiate the sin by penance before the time of succession ; and not she also who became adulterous after inheriting property, is not prevented from holding the estate unless the crime were such as to cause complete degradation by loss of caste unredeemable by atonement."

In Moniram Kolita *v.* Keri Kolitani, I. L. R., 5 Calc., 780, Mr. Justice Bayley and Mr. Justice Dwarka Nath Mitter held a different opinion in spite of the aforesaid clearly expressed opinion. The question was referred by the learned Judges to a Full Bench consisting of the Chief Justice and nine other Judges, and the majority held that the widow, having once inherited the estate, did not forfeit it by reason of her subsequent unchastity. Mr. Justice Glover, one of the dissenting Judges, argued as follows : "The theory of the Hindu law of inheritance is the capability by the heir of performing certain religious ceremonies which do good to the soul of the departed, and he takes who can render most service. The sons down to the third generation could do most, offer most oblations, and confer the greatest benefits, therefore they are first in the line of heirship. The widow comes next as being able to confer considerable though less benefits, and it is only because she is able to do this that she is allowed to take her husband's share.

Mr. Justice Glover's opinion is that a widow takes her husband's property so long as she is in a position to offer the continued funeral oblations.

"It would seem, therefore, to be a condition precedent to her taking that estate that she should be in a position to perform the ceremonies and offer the continual funeral

oblations which are to benefit her deceased husband in the other world; and in this respect her position is very different from that of a son. The son confers benefits upon his father from the mere fact of being born capable of performing certain ceremonies. His birth delivers him from the hell called *put*, and whether in after life he offer the funeral oblations or no he succeeds to his father's inheritance from the fact of being able to offer them. With the widow it is not so; she can only perform ceremonies and offer oblations so long as she continues chaste, and directly she becomes unchaste, from that moment her right to offer the funeral cake ceases."

The texts depended upon by Mr. Justice Mittra are of Vrihat Menu, v. 7, sec. 1, Chap. XI, of the Dyabhaga and of Catyana cited in verse 56 of the same section and chapter:—

(1) "The widow of a childless man, keeping unsullied her husband's bed and preserving his religious observances, shall present his funeral oblation and obtain his entire share."

(2) "Let the childless widow, keeping unsullied the bed of her lord and abiding with her venerable protector, enjoy with moderation the property until her death. After her let the heirs take it."

Mr. Justice Mittra expresses the same opinion.

"This passage," Mr. Justice Mittra observes, "shows clearly not only that the widow's right is a mere right of enjoyment, the word 'enjoyment' being understood in the sense explained above, but that the exercise of that right is absolutely dependent on her 'preserving,' *i.e.*, continually preserving, which is also the form used in the original (palayanti), and proves conclusively that the injunction is one in the nature of a permanently abiding condition which a widow is bound at all times and under all circumstances to satisfy; and the right of enjoyment conferred upon her being expressly declared to be subject to such a condition, every violation of it must necessarily involve a forfeiture of right."

Their Lordships the Judges of the Privy Council were of opinion that the words "abiding with her venerable protector" did not, under any circumstances, create a condition, or a limitation, of a widow's right to enjoy the property of her husband to the period during which she abides with her protector. They agreed with the Chief Justice in the opinion which he expressed at p. 82,

13 B. L. R., that neither the words "preserving unsullied the bed of her lord" nor the words "and abiding with her venerable protector" import conditions involving a forfeiture of the widow's vested estate; but even if the words were 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 Catyana's text taken by itself as what are the conclusions which the author of the Dyabhaga has himself drawn from them. It is to that treatise that we must look for the authoritative exposition of the law which governs Lower Bengal, whilst, on the other hand, nothing is more certain than that in dealing with the same ancient texts the Hindu commentators have often drawn opposite conclusions. Now how has Jimut Vahana dealt with this particular text. It has been seen for what purpose he cited it, but how does he comment on it in the rest of the section in which it occurs? He comments on the words "venerable protector," verse 57; he defines who are intended to take after the demise of the widow under the term "the heirs," verses 58 and 59; glances at her duty to lead an abstinent, if not an ascetic, life, and to avoid waste, verses 60 and 61; and deals with her power of alienation and the limitations upon it, verses 62, 63 and 64. But he nowhere says one word from which it can be inferred that in his opinion the text implied continued chastity as a condition for the duration of her estate, or that a breach of chastity subsequent to the death of her husband would operate as a forfeiture of her right. It can scarcely be supposed that a commentator so acute and careful as Jimut Vahana, if he had drawn from the text of Catyana the inference that a widow was to forfeit the estate if she should become unchaste after her husband's death, would not have stated that inference clearly by saying in verse 57, "let her enjoy her husband's estate during her life or so long as she continues chaste," instead of using only the words "during her life," and stating that "when she dies" the daughters and others are to succeed. In conformity with this view the High Courts of Bombay and Allahabad in Parvati *v.* Bhuban, 4 Bom. H. C. R., A. C., 25, and Nihalo *v.* Kissen Lall, I. L. R., 2 All., 150, held the same opinion as the majority of the Full Bench of the Calcutta High Court, *viz.*, that the texts neither expressly nor by necessary

Privy Council proves that continued chastity is not a condition on which a widow holds her husband's estate.

implication affirm the doctrine that the estate of a widow once vested is liable to forfeiture by reason of unchastity subsequent to the death of her husband. Their Lordships referred with approbation to the following remarks of Mr. Justice Jackson in p. 64 and of the Chief Justice in p. 82, 13 B. L. R. :—

"From unascertained causes, Mr. Justice Jackson observed, immoveable property is notoriously—in some parts of Bengal to a very large extent—in the hands of Hindu widows, whose relations with the families of their deceased husbands are not always amicable; whose personal liberty is now, it may be said, wholly unlimited; and whose enjoyment of the estate not merely differs, but often seriously impairs the prospects of reversioners. If therefore it be recognized as a rule of law by this tribunal (which, constituted as it is to-day, concludes and binds by its decisions every Court of Justice in a province numbering forty-two millions of Hindu inhabitants) that a Hindu forfeits by unchastity the estate which she has taken as the heir of her husband, then I apprehend not only will a fruitful cause of domestic discord be largely extended, but a motive will be afforded, to say the least of it, for publishing and bringing into Court the most deplorable scandals. That such a ruling will tend in any great degree to purity of life and manners I do not believe; but it is likely enough to furnish a stimulus to perjury or to collusive proceeding equally nefarious. This indeed is not a reason for deciding in one sense or the other the question we have before us, but it is mentioned only for the purpose of showing the gravity of that question.

* * * * *

Regard being had to the remote antiquity of the shastras; to their vulgarly accepted sacred origin and immutable character, and to the changes, nevertheless, sweeping and progressive, in the constitution and condition of Hindu society during the centuries since Narada and Menu wrote; to the fragmentary state, the obscure and too often conflicting tenor of these writings; finally to their inapplicability, even at the time of their composition, to the whole people—regard, I say, being had to these things, I conceive that we must act upon the shastras in dealing with property and judicable rights only so far as they are sanctioned and continued by the usage and custom of the people.

This is not merely my own opinion ; if it was I should scarcely venture to advance it, but is the opinion of persons whose competence to speak will not be denied. Sir Henry Maine in his Ancient Law, p. 17 (edition 1863), observes : " The Hindu Code, called the laws of Menu, which is certainly a Brahmin compilation. undoubtedly enshrines many genuine observations of the Hindu race ; but the opinion of the best contemporary orientalists is that it does not, as a whole, represent a set of rules ever actually administered in Hindustan. It is in great part an ideal picture of that which, in the view of the Brahmins, ought to be law." * * * * *

It is useful and instructive to observe in many particulars the divergence of custom from the written law. Mr. Burnell, in his introduction to a translation of part of the Madhovajee Commentary (Dyabhaga), p. 13, uses the following language: " The Digests however were never intended to be actual codes of law. * * * *

" There is not a particle of evidence to show that these works were ever even used by the Judges of ancient India as authoritative guides ; they were, it is certain, considered as merely speculative treatises, and bore the same relation to the actual practice of the Courts as in Europe treatises on jurisprudence to the law which is actually administered."

And so West and Bühler, in their Digest of Hindu Law, Introduction, page 36, say : " It is therefore unreasonable to charge the Smriti Codes with a want of precision and of discrimination between moral and legal maxims, &c., &c." Such strictures would only be justified if they were really " codes " intended from the first to settle the law between man and man.

The Chief Justice remarked : "If the widow had sufficient property of her own to maintain herself, she might alienate the whole of her husband's property for her life and still perform all her duties for the benefit of her husband's soul. In fact there is no trust attached to the property. It is a personal obligation on the widow, and the proposition really is that if she does not fulfil it she shall be deprived of her estate. We must see whether that is a received doctrine in the Bengal School of Hindu Law. It is there said that the conclusion that the estate must be taken away from her as a matter of course is not wanting in express authority to support it, and texts are

cited which show that it is only a chaste widow who is competent to perform the religious and other acts conducive to the spiritual welfare of her husband. Also a text of Vyasa is cited, which says: "After the death of her husband let the virtuous widow observe strictly the duty of continence; and let her daily, after the purification of the bath, present water from the joined palms of her hands to the manes of her husband." "It is clear," says the judgment, "that according to the author of the Dyabhaga there are two reasons for allowing the widow to succeed to the estate of her deceased husband, *viz.*, first, because she can rescue him from hell by living in the mode prescribed by the Hindu shastras; and, secondly, because she might cause his soul to fall into a region of torment by doing improper acts through indigence." Let this be granted. The reasons for allowing a person to succeed to an estate are not necessarily the conditions upon which he is to hold it. In the case of the male Hindu heir, it is admitted they are not. And the description of the person who is qualified to succeed to an estate has not the force of a condition by which the estate will be defeated if the qualification afterwards ceases, as is before shown in the case of a daughter becoming an issueless daughter. The last text referred to is from Catyana cited in the Dyabhaga: "Let the childless widow preserving unsullied the bed of her lord and abiding with her venerable protector enjoy with moderation the property until her death. After her let the heirs take it." This may no doubt be read as making the enjoyment conditional on keeping unsullied the bed of her lord; but it may also be only an injunction to do so, as in the text of Vyasa: "Let the virtuous widow observe strictly the duty of continence," and the way in which it is used by the author of the Dyabhaga seems in favor of this. The passage, Ch. XI., s. 1, v. 56, begins: "But the wife must only enjoy the husband's estate after his demise. She is not entitled to make a gift, mortgage or sale of it. If Mr. Colebrooke had thought that the words of Vridha Menu and Catayana were intended to make the enjoyment of the estate conditional, I think he would have made it clear in his translation that it was so. If the injunction is to have the force of a condition, and the violation of it is to cause a forfeiture of that estate, the Full Bench decision in Gobind Moni Dasi *v.* Shamlal, B. L. R. Sup.

vol. 48, cannot be supported, because the whole estate of the widow would be forfeited by an alienation and the heirs would take it. I think this text cannot be considered as a declaration that the enjoyment of the estate is subject to the condition of remaining chaste. As to the remark that as an unchaste woman no longer remains half the body of her husband her estate must necessarily come to an end, I think it may be said that the estate cannot be considered as still the husband's, otherwise a son would not take in preference to the widow. On the husband's death the estate ceases to be his. She being half the body of her husband is the reason why the widow is preferred to a daughter. It is important to refer to the cases which the Chief Justice considered at length in the course of his judgment: "The first case mentioned is in 2 Macnaghten's Hindu Law, p. 20. It is stated that a person died, leaving a widow and a brother of the half blood, and subsequently to his death the widow violated the hitherto unsullied bed of her husband and had a child by a paramour of another class, while the brother's conduct was consistent with his religion; and the question is put which of the two is entitled to succeed to the property of the deceased. The answer is, it is the general doctrine that the virtuous widow of a man who dies leaving no heir down to the great grandson succeeds; but that if she, on the death of her lord, be faithless to his bed, she has no right of succession, consequently the widow in such case would be excluded by her husband's half brother." The words "she has no right of succession" must, with reference to the facts stated, be taken to mean that she loses or forfeits the estate, but it is open to the remark that the texts cited do not directly support the opinion. The next case is at page 21 of the same volume. "In the question, it is uncertain whether the widow had become a prostitute and had violated her husband's unsullied bed, and she has no title to his property and ought to be expelled from his house." It is doubtful whether this is an authority upon the question now before us. The next case is, where it is stated that the woman became pregnant after the death of her husband, the fruit of an adulterous intercourse. The answer is "a virtuous widow of a person who leaves no male heir down to the great-grandson succeeds her husband, and if she violate his bed she becomes degraded." Consequently

the widow described has no right to her husband's heritage and cannot claim her maintenance even though she obtained an agreement for her subsistence previously to her offence. The texts of Vyasa and Catyana enjoining that a widow shall remain chaste are cited as authorities. It is to be observed that it is said that she becomes degraded, and consequently has no right to her husband's heritage; and it seems to be considered that the loss or forfeiture of the estate is caused by the degradation or loss of caste. Indeed it is possible that it was assumed in the other cases that there had been loss of caste. In the case of Maharanee Bassunt Koomaree *v.* Maharanee Kammul Koomaree, 7 Selborne's Reports, 144, a widow was held to have forfeited her claim to maintenance by eloping with a paramour. There was no question as to the forfeiture of an estate inherited from her husband, for there was an adopted son.

In the case of Raj Koonwari Dossee *v.* Golabee Dassee, S. D. A., 1858, the wife had eloped in the lifetime of her husband, and there is no doubt that the right of succession is forfeited by that.

The case of Doe d. Radamoney Raur *v.* Nilmoney Das, Montriou's Hindu Law Cases, 314, is an express decision by four Judges of the Supreme Court, that a Hindu widow forfeits her right to her husband's estate by incontinence after her husband's death. The decision of Sir Lawrence Peel on Doe d. Saummony Raur *v.* Nemy Churn Das seems to be founded on the assumption that the forfeiture was consequent on loss of caste, as he applies Act XXI of 1850 to it. It seems probable that the opinion of Sir Thomas Strange was then the received doctrine of the Supreme Court. Mr. Colebrooke's opinion in 2 Strange, p. 272, is no doubt open to the remark made in the referring judgment that it was given in a case which originated in Trichinopoly; nor does it appear that it was given with any reference to the authorities current in the Bengal School. But the case in 2 Macnaghten, p. 112, is a Bengal case, and the opinion there agrees with Colebrooke's.

Elberling, pp. 73 and 75, and West and Bühler, p. 99, are cited as supporting the opinion of the referring Judges. Elberling, at p. 73, says: "The enjoyment of the property as given her (the widow) upon two conditions—first, that she remains chaste; second, that

she does not make waste." And at p. 75: "A widow is to reside in her husband's family, yet as she forfeits her right to the property only by not remaining chaste or by making waste, the mere residing with her own family cannot cause a forfeiture of her right to the enjoyment of the property if it be not done for unchaste purposes." And he cites the text of Catyana: "Let the childless widow preserving unsullied the bed of her lord and abiding with her venerable protector enjoy with moderation the property until her death. After her let the heirs take it." If Elberling be correct that the enjoyment of the property is conditional, it must be forfeited as well by the breach of one condition as the other; and upon an act of waste the estate of the widow would be determined, and the property would pass to the heirs of the husband. This, I believe, has never been held to be the law. In West and Bühler, p. 99, it is said "that a widow having married herself to another husband by the pot ceremony had forfeited her right of heirship." But at p. 299 the question is put: "A woman of the Darik caste having lost her husband became the mistress of a man of (another) Sudra caste and had a daughter by him. Can she claim to be the heir of her husband?" The answer is: "A woman who was chaste at the death of her husband becomes his heir." The "remark" by the author upon this is: "According to Strange's Elementary Hindu Law adultery divests the right of a widow to inherit after it has vested." On the other hand, the shastris' opinion seems to be supported by the Viramitrodaya, where it is said, p. 2, "that these persons (those disabled to inherit) receive no share only in case the fault was committed or contracted before the division of the estate. But after the division has been made a resumption of the divided property does not take place because there is no authority (enjoining such a proceeding); and noticing the opinion of Colebrooke, they say the authorities quoted by him do not support the view that any forfeiture of property necessarily attends expulsion from caste." In the next page there is an opinion that "a widow who remarries cannot be considered a faithful wife. She cannot, therefore, claim the property of her first husband." It is difficult to reconcile these opinions.

Another authority cited in the argument before us for the respondent is Colebrooke's Digest, Book V., v. 484,

which, read with the previous verse, says that a woman who takes delight in being faithless to the bed of her husband is held unworthy of property which has been promised to her by him as her exclusive property; and it was argued that *a fortiori* she would be of property inherited from her husband. There is a material difference between the two cases. Allowing that the word translated "wife" means also widow, the not giving that which has been only promised is different from taking away what the widow has actually succeeded to by virtue of the law of succession and is in the enjoyment of.

The judgment of the Privy Council in Cassi Nath Bysack *v.* Hurro Sundary, Kirby's Digest, p. 198, was relied upon as showing that the decision in Montriou's Reports was considered as law; but the question of forfeiture by unchastity did not, as I have already remarked, arise in the case; and it was sufficient for the Judicial Committee to say that the widow did not forfeit her right of succession by removing from the brothers of her late husband.

In the case of Parvati Koomar Dhundiram *v.* Bhiku Kumar Dhundiram, 4 Bom. H. C. R., A. C., 25, the Court held that if the inheritance be once vested in the widow it is not by Hindu law liable to be divested, unless her subsequent incontinence be accompanied by "loss of caste," unexpiated by penance, and unredeemed by atonement, citing Strange's Hindu Law and adopting the words in p. 136, and referring to Mr. Sutherland's opinion, Vol. II., p. 269, that the degradation is the cause of exclusion from inheritance. It was argued that as maintenance is forfeited, the estate of the widow should be also. But the text of Narada is: "Let the brothers allow maintenance to his (deceased's) women for life, provided these preserve unsullied the bed of their lord; but if they behave otherwise the brethren may resume that allowance." And in Mr. Burnell's work, p. 30, a text of Narada is given: "If any one leaving brothers dies or renounces worldly affairs (*i.e.*, becomes a religious mendicant) and leaves no issue, the rest may share his property except the stridhan, and let them support his wives as long as they live if they preserve undefiled the bed of their husband; but from others they may resume it (the stridhan)." Thus we have in this case an express text authorising the resumption. The absence of any text

authorising the heirs of the husband to resume the estate after the widow has succeeded to her deceased husband's property is relied upon as showing that it cannot be divested. And this argument is strengthened by the fact that in another case there is an express text.

Besides, the argument drawn from these texts is founded on an alleged but false analogy between a widow's estate and a widow's maintenance. In the former case the estate is given to her by express words and is now here expressly taken away, and whilst hers it is independent of other ownership, her enjoyment being only according to the texts, subject to the advice or control of her male relatives. But maintenance is not so much a right in the estate of another as a duty of that other to be performed towards all those who, but for the intermediate existence of himself, might be entitled to the estate. Let them allow a maintenance, assign a duty to the owner rather than a right to the widow, although such duty may be enforceable by a widow who is without reproach. Moreover the verses in Mitakshara, Ch. II., s. 1, v. 37, and Mayukha, Ch. IV., s. 8, vol. 2, would seem to show that even the incontinent widow of one who has actually possessed the estate is entitled to maintenance for her life.

It was argued that in the Benares School property inherited by a woman from her husband is classed among stridhan, and therefore these texts would apply to it ; and that it is the same in the Mithila School. Whether this be so according to the Mitakshara is at least doubtful. The contrary has been held both at Madras and Bombay in the cases of Singa Malothammal *v.* Valayada Mudali, 3 Madras H. C. Rep., 312. See also Kamavadhani Venkata Subbaya *v.* Joysa Narasingappa, 3 Madras H. C. R., 116, and Jamiyatram *v.* Bai Jamno, 2 Bombay H. C. Rep., 10, and apparently in the Privy Council also in the case of Bhugwandeen Doobay *v.* Myna Baie, 11 M. I. A., 487.

It is certainly not so in the Bengal School, by the law of which we are to be governed in this case. I think I have now noticed all the arguments and authorities produced on the part of the respondents and most of those for the appellant, the argument for whom rested mainly upon the absence of any text that the estate of the widow should be divested if she become unchaste ;

and also upon this that, although by the Hindu law there are various causes of exclusion from inheritance (Dyabhaga, Chap. V.), when the estate is once vested it is not forfeited by the subsequent existence of any of them. In the case of Mussamut Bulgavinda *v.* Lal Bahadur, S. D. A., 1854, p. 244, it was held that a person who has once succeeded to property is not to be dispossessed of it if he subsequently becomes insane. It was urged by the respondent's pleader that there being no positive text governing the case we must look to the principles of the law to guide us in determining it; and that the five texts afforded ample analogy, quoting the words of the Judicial Committee in the case of Katama Natchiar *v.* Rajah of Shivagunga, 19 M. I A., p. 608. There the question was how the property descended, and it was absolutely necessary to determine it. And the estate is by positive texts vested in the widow, and there is no necessity to determine that it shall be taken away from her, or to go beyond what has been declared by the texts to be the law. I think we are not at liberty to declare a doctrine which is not shown to have been received and sanctioned by usage to be the law, because it may seem analogous to a doctrine that has been received.

When an estate is once vested it is not forfeited by the subsequent existence of any causes of exclusion.

Giving all the effect they deserve to the arguments founded upon the status of women under the Hindu law and the peculiar character of a widow's estate, I still am of opinion that the estate once inherited is not forfeited simply by unchastity. The reasonings of the Judicial Committee of the Privy Council and the Chief Justice on the various texts clearly show "that inheritance when it has once vested in a person cannot be divested by subsequent acts of disqualification."

Devotees who have absolutely abandoned all secular connexion do not inherit.

The other persons who are excluded from inheritance are those who have abandoned all earthly interests and have given themselves up entirely to devotion. There are three classes of persons who come within the category of devotees:—1st, the Vanaprastha or hermit; 2nd, the Sanyasi or Jogi or ascetic; and 3rd, the Brahmachari, or perpetual religious student. In order to bring a person under any one of these heads it is necessary to show an absolute abandonment by him of all secular connexion and a complete resignation of all earthly affairs. A person merely calling himself a Byragee or religious

mendicant will not be precluded from claiming the property to which he is heir. In Teeluck Chunder *v.* Shama Churn Prokash, 1 W. R., p. 209, an issue was framed whether the defendants being Byragees were excluded from inheritance on account of their being Byragees. It was found the defendants were not ascetics who have given up all worldly cares and transactions, and have not left the "household order." They calling themselves Byragees and at the same time selling, buying, marrying, and having children do not make themselves Byragees in the strictest sense of the term, and they are not consequently excluded from inheritance.

A Byragee merely in name is not excluded from inheritance.

Having regard to the sense in which the "Byragee" is used by Hindu lawyers, it was held in Khoodiram Chatterjee *v.* Rookinee Boistobee, 15 W. R., p. 197, that a Hindu by becoming a Byragee, and yet not relinquishing worldly transactions, does not divest himself of his title to his family estate.

The grounds of disqualification which exclude males apply equally as against female heirs, and as regards the disability on the part of a person who, but for the disability, would have been heir, it helps the immediate next heir to succeed. If the disqualified person has issue living or in *ventre sa mere*, such issue will inherit as if the father were actually dead, and if the defect which produces exclusion is subsequently removed, the right to inheritance revives just as it ceased to be so and the right of a son born after partition arises. But it will not vest the property in the hitherto disqualified party at once. The Hindu law never allows the inheritance to be in abeyance, and when one was not capable of succeeding when the descent took place, the subsequent removal of his incapacity will not enable him to dispossess a person whose title was better than his when the succession opened, though inferior to his own after the removal of the defect. For instance, a man who is blind, but it so happened his blindness got cured before his father's death, he certainly would be entitled to inherit his father's estate. If it was not removed when his father died leaving a brother, the latter would inherit. If during the lifetime of the brother and after he had inherited the son was cured of his blindness, the latter could not inherit, and on the death of his brother (his uncle) his widow, if there was one, would inherit, and not the formerly blind

Inheritance never remains in abeyance, and succession is traced to the heir of the last full owner.

son. For succession would be traced to the last full owner, who in this case was the uncle, and whose widow is a nearer relation than his nephew. If there were no nearer heirs than the nephew, he, the latter, would certainly succeed. The case of Bhoobun Moye Debea *v.* Ram Kishore Acharji, 10 M. I. A., 279, and 3 W. R., p. 15, was disposed of on the rule of Hindu law that in the case of inheritance the person to succeed must be the heir of the last full owner. On the death of the last full owner his wife succeeds as his heir to a widow's estate ; and on her death the person to succeed is the heir at that time of the last full owner.

Act XXI of 1850 does away with forfeiture of right or property by reason of a person renouncing a religion.

As regards outcastes, Act XXI of 1850 has rendered degradation or exclusion from caste immaterial, from whatever cause it may arise, in circumstances where, had it not been for the Act, it would have debarred a person from inheriting. The purport of the Act is : " So much of any law or usage now in force within the territories of the E. I. Co. as inflicts on any person forfeiture of right, 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."

MAINTENANCE.

THE next subject for consideration must necessarily be maintenance. For, those who but for some mental or bodily defect would have been entitled to inherit their ancestor's estate must have food and raiment. The very constitution of Hindu society casts upon the head of an undivided Hindu joint-family the duty of maintaining its members, their wives and children, to perform their ceremonies and to defray their marriage expenses. According to Menu and Narada this right is not founded on contract, and a suit for maintenance in the absence of special contract is not triable by the Small Cause Court. Besides those disqualified to inherit, illegitimate sons, persons taken in adoption, but deprived of their rights by the subsequent birth of a legitimate son, concubines or female slaves, dasi and widows of the members of the family, provided they are and continue chaste, and the parents, including the step-mother and mother-in-law, are entitled to maintenance. The sister or step-sister is entitled to maintenance until her marriage and to have her marriage expenses paid. After marriage her maintenance is a charge upon her husband's family, but if they are unable to support her, she must be provided for by the family of her father.

Who are entitled to maintenance.

Under the Mitakshara system sons, grandsons and great-grandsons have to be maintained out of the joint estate, for all have an interest in it. This right to be maintained extends to every member of the joint family and the dependents of each member. In Mutuswamy Jagadru Yettappa Naiken *v.* Venkataswamy Yettappa, 2 B. L. R., P. C., 15, the Judicial Committee of the Privy Council held that the illegitimate sons of men of the three regenerate tribes is entitled to maintenance. According to the Bengal School sons have not ownership over the ancestral estate or the self-acquired property of the father. The father's power over both is unrestricted, and the sons acquire interest after the father's decease. But there is a limitation to the father's power which could be exercised morally, though not legally, over his estate.

Sons acquire interest in their father's property according to the Bengal School after his decease.

Vrihaspati says a man may give away what remains after his family are clothed and fed, the giver of more who leaves his family naked and unfed may taste honey at first, but shall afterwards find it poison; for it had been at the expense of the moral, and in some cases of the legal, duty of maintaining the members of the family which is the first temporal obligation of the Hindu. The text of Devala is: "As the suspended waterpot matures the pipala tree, so a father, grandfather, and great-grandfather cherish a son from the moment of his birth with honey, flesh meat, pot-herbs, milk and milky food, reflecting he will give the annual shradha." The Mitakshara lays down that where there may be no property, but what has been self-acquired, the only persons whose maintenance out of such property is imperative are aged parents, wife, and minor children. It will thus be seen that the obligation to maintain a son exists so long as he is an infant. Where, however, the whole of the family property is impartible and controlled by the law of primogeniture, an adult son is entitled to maintenance if not disqualified from inheriting—*vide* Ram Chundra Sakha Ram Gopal Vagh, *v.* Sakha Ram Gopal Vagh, 2 I. L. R., Bom., 346. This case was decided by Melville and Pinhey, JJ. Melville, J., observed: "What we have to determine is whether in a case in which there is practically no family property to be divided an adult Hindu is entitled to maintenance from his father who is in the enjoyment of a pension granted by Government in lieu of a resumed sarangan. I am of opinion that he is. As a general rule perhaps a Hindu is not bound to support a grown-up son—*vide* Prem Chand Pipara *v.* Hoolas Chand Pipara, 12 W. R., 494, Civil Rulings. But in Hemmat Sing *v.* Ganpat Sing, 12 Bom. H. C. R., 94, it was held that when the family estate is impartible, and one to which the law of primogeniture applies, a son can sue his father for maintenance." Pinhey, J., in concurring in the judgment of Melville, J., observed: I have felt great doubts whether it is good Hindu law to say that an adult son in an undivided Hindu family who is suffering from no disability recognized by that law can claim a separate maintenance from his father. In Prem Chand Pipara *v.* Hoolas Chand Pipara, 12 W. R., Mitter, J., in delivering the judgment of the Court, said: "We find no authority in the Hindu law to support the proposition that a father is obliged to support

Obligation under the Mitakshara exists to maintain aged parents, wife and minor sons.

a grown-up son. I confess that I incline to the same opinion. By Hindu law the obligations of a father and of a son are not reciprocal, *e.g.*, a son under Hindu law is liable for his father's debts, but a father is not for his son's debt. Moreover it seems too strange a proposition to say that a father is liable to maintain his grown-up son, however worthless, notwithstanding that the son does not choose to take any trouble to maintain himself. Although, however, I have looked through many books on Hindu law, and I have referred to the reported decisions of the Indian High Courts, I have been unable to find any authority to support the opinion to which I incline, except the decision of the Calcutta High Court which I have already cited. * * * * *

A son is bound to pay his father's debts, but a father is not to pay his son's.

The plaintiff's pleader argued that the pension was impartible, that there was no other family property, and that therefore plaintiff was entitled to sue for maintenance. Holding (as both my brother Melville and I do hold) that defendant's pension is impartible, the contention of the plaintiff's pleader is supported by the decision of this High Court in Himmut Sing *v.* Ganput Sing, 12 Bom. H. C. R., 94, and I feel bound to follow that decision, supported as it is by the dicta in Strange's Hindu Law, p. 353, para. 23 (Edition of 1864), and Steele's Law and Customs of Hindu Castes, p. 40, para. 30, last line (Edition of 1868)." Further on Pinhey, J., in commenting on the practice of adult sons suffering from no disability to depend upon their fathers for maintenance, expressed himself thus: "I can conceive nothing more fatal to the happiness of Hindu family life than for this Court to affirm the principle that a Hindu father is liable to have to provide for each of his sons a separate maintenance, while the son may choose to live a life of idleness, and probably in consequence, in a licentious city like Poona, a life of vice. I am quite unable to agree with the District Judge who tried this case on appeal in considering the plaintiff entitled to either pity or sympathy. The plaintiff is between 30 and 40 years of age, and I think if he had any manliness of character or generosity of spirit he would rather have earned an honest livelihood by breaking stones on the road than have claimed a separate maintenance from his old father, who would appear from Ex. 22 to be at least 70 years of age, to have two other sons, and probably the other

innumerable dependents who usually hang round the head of a once wealthy Marathi family."

In Rajah Nilmoney Sing Deo *v.* Baneshur, I. L. R., 4 Calc., 91, the case was for maintenance. The appellant asserted that he was an illegitimate son of the Rajah, and as such he was by the Hindu law entitled to maintenance, and claimed eight annas per diem. The Rajah did not dispute the paternity, but that if the plaintiff had been his son by a Dasi, he would, by the custom of the family, have been entitled to some maintenance. The plaintiff had no such right, as he was a son by a common woman of a different and inferior caste. The lower Courts came to the conclusion that the plaintiff was not the son of a Dasi, but were of opinion that, as the son of a Dasi is as much illegitimate as any other illegitimate son, no laws of distinction could be drawn, and if the former were entitled to maintenance the latter would be with equal right. On appeal to the High Court Mr. Justice Jackson observed: "The family being absolutely governed by the Dyabhaga, the law of Bengal, it is quite clear that no such claim as the present is countenanced. All the passages which refer to, and which enjoin as a sacred duty, the maintenance of the family refer, in the first instance, to what is to be done with the estate after the father had died. They also refer chiefly to provisions for persons who are disqualified from inheriting, and who, but for such disqualification, would have partaken of the inheritance. We are not aware of a single passage which can be referred to, in which a son, by such connection as we have before us in this case, is described as a proper object of maintenance. * * * This matter is absolutely, as it seems to me, concluded by authority, for we have not one but several decisions of our own Court, among which I may instance one—Prem Chand Pepara *v.* Hoolas Chand Pepara, 12 W. R., p. 494—and another Mon Mohini Dasi *v.* Balok Chundra Pundit, 15 W. R., 498, where claims of maintenance standing vastly highly than the present claim, and advanced against living fathers, were rejected."

Husband is bound to maintain his wife under any circumstances.

The case of the wife is different. The husband is bound to maintain her under any circumstances. His obligation is quite a personal one and arises from the moment of marriage. So long as she is an infant she could live with her parents, but they are under no sort of obligation

to do so. As a matter of affection merely they maintain her, and they, if unable or unwilling to maintain her, can demand maintenance from her husband, who is bound to supply it. He is alone responsible for her maintenance irrespective of his not having any property, but should there be any in possession of any one of his relatives, he could be sued along with the husband if he deserted her without cause. As soon, however, as the wife is mature her home must be her husband's house. He is bound to maintain her while she resides with him. Nothing will justify her leaving his place except such violence and ill usage as would render it impossible for her to live with him. The keeping of a concubine is not a justification for her, nor is the husband's taking another wife without any of the reasons which justify such a course. To have, for instance, a Mahomedan woman in the same house is repugnant to the religious feelings of a Hindu, and is regarded to be an act of impropriety justifying the wife to leave her husband. In Lala Gobind Persad *v.* Doulat Bath, plaintiff, wife of Gobind Persad, 14 W. R., 451, it was found the defendant, a Hindu, kept a Mahomedan mistress, and by such conduct compelled his wife under her religious feeling to leave her husband's house. She left and resided with her mother and continued to live in chastity. It was held the husband was bound to give maintenance to his wife. The circumstances were such as to justify the course pursued by the wife and the Court in decreeing maintenance to her. Ordinary quarrels as are incidental to married life in general, as in Kullyanessuree Dabee *v.* Dwarka Surmah Chatterji, 6 W. R., 116, and Sidlingappa *v.* Sidava, I. L. R., 2 Bom., 634, are not such as to entitle a wife to a separate maintenance from her husband unless she proves that by reason of his misconduct, or by his refusal to maintain her in his own place of residence or other justifying cause, she is compelled to live apart from him. The justifying causes are said to be the husband's being an outcast or degraded, and, according to Devala, if he be an abandoned sinner and heretical mendicant, or impotent or degraded, or afflicted with phthisis, or if he have been long absent in a foreign country. According to Manu, the wife is justified in leaving a mad husband, a deadly sinner or an eunuch, or one without manly strength, or one afflicted with leprosy or a similar sinful

Maintenance to be according to the circumstances of the wife.

disease. And in all such cases the husband is bound to give the wife one-third of his property, provided that would be sufficient for her maintenance. No rule, however, can be laid down as to the amount which ought to be awarded. Every case must be determined upon its own peculiar facts, and the wealth of a family would be a proper criterion to determine the question. One brought up in affluence would naturally have more wants than one brought up in poverty.

In Mahdhavrav Keshav Tilak *v.* Ganga Bai, I. L. R., 2 Bom., 639, the Bombay High Court has ruled "that a Hindu widow is not entitled to a larger share of the annual produce of the family property as maintenance than the annual proceeds of the share to which her husband would have been entitled on partition if he were living." The liability of the husband to maintain his wife, observed Sir M. A. Westropp, is an obligation arising out of the status of marriage amongst Hindus expressly imposed by the Hindu law. And generally in such other instances in which maintenance is prescribed by the same law we hold that the right depends on the status to which the law appends it. In England and other Christian countries marriage creates a special status. In Mordaunt *v.* Mordaunt, L. R., 2 Probate and Divorce, p. 126, Lord Penzance says: "But is it true that marriage is an ordinary contract? Surely it is something more. I may be excused if I dwell somewhat on this matter, because I conceive it lies at the very root of the question in discussion. Marriage is an institution. It confers a status on the parties to it and upon the children that issue from it. Though entered into by individuals it has a public character. It is the basis upon which the framework of civilized society is built, and as such is subject in all countries to general laws which dictate and control its obligations and incidents, independently of the volition of those who enter upon it." Although the liability of the husband to maintain his wife is not bound upon an ordinary contract, a wife who leaves her home for purposes of adultery cannot claim to be maintained by him—*vide* Vavahara Maynkha, Chap. IV., p. 11, pl. 12, and Smriti Chandrika, V., pl. 43. If, however, she leaves her husband's home by his consent he is bound to receive her again when she is wishful to do so, and if he refuses to take her, she will be entitled to maintenance. When a

A wife cannot claim maintenance if she leaves her husband for improper purposes.

wife has once got a maintenance, she does not forfeit it by subsequent unchastity. There is difference of opinion on this point if the maintenance were on the full scale.

As regards the widow, no doubt the family house of her husband is a proper place for her to live in. But there may arise circumstances which would justify her to return to her father's care. If she be young and surrounded by young men it would be prudent and decent for her to go to her father's house, which would be not only a safer but a happier home. It is now settled by the Calcutta and Bombay High Courts in Rajah Pirthi Sing *v.* Ranee Raj Kowar, 20 W. R., p. 21, and Kasturbai *v.* Shivaji Ram, I. L. R., 3 Bom., 372, that a Hindu widow does not lose her right to maintenance by reason of her leaving her husband's house, provided she does not leave for purposes of unchastity or for any other improper purpose. The only persons whose maintenance is imperative are aged parents, minor children and wife. The right of the widow to receive maintenance from the family of her father-in-law is, according to the Smriti Chandrika, XII, s. 34, dependent on their having any property of her deceased husband.

Maintenance of aged parents, minor children and chaste wife is unconditional.

The Full Bench case of Khetra Moni Dasi *v.* Kasi Nauth Dass, 2 B. L. R., 15, and 9 W. R., 413, is of great importance. It was a suit by a widow against her father-in-law claiming a monthly allowance in money for maintenance and the expenses of religious rites. She was married, when five years old, to the defendant's youngest son in 1853. He died in 1859. She alleged that after his death she was ill-treated by the defendant and his wife and daughters, and thus being unable to stay in his house any longer went to reside with her father. She did not assert that there was any ancestral property or any property belonging to her late husband in the possession of the defendant. The latter denied his legal liability to her in any respect, and that he or his family had ever ill-treated her, and said that she had been to his house only on two occasions and then for the performance of religious ceremonies for the benefit of her deceased husband; that she had against the defendant's consent and orders refused to render the service due to him in his old age, and had chosen to reside with her father; that the defendant was not a wealthy person and had received no heritage, and that it was only from the

Widow cannot claim maintenance from her father-in-law.

earnings of a laborious service that he was able to give a somewhat decent support to his family, but that being incapacitated for further service he was compelled to place his sole dependence upon a pension of Rs. 63-4 per mensem. The Court of first instance made a decree in favor of the plaintiff. The defendant appealed to the High Court. The Division Court were disposed to think the suit unsustainable, but there being conflicting decisions on the point it was referred to a Full Bench, the question being—"Can the widow of a Hindu refusing to live in the house of her father-in-law maintain a suit against him for a pecuniary allowance by way of maintenance." Peacock, C.J., and Macpherson, J., were of opinion in the negative, and Loch and Kemp, JJ., in the affirmative. The decision was in accordance with the opinion of the Chief Justice, who observed as follows:—

The question referred for the decision of the Full Bench is whether the widow of a Hindu refusing to live in the house of her father-in-law can maintain a suit against him for a pecuniary allowance by way of maintenance. In the present case the plaintiff left the house of her father-in-law and went to reside with her own father, and she alleged that she was driven to do so by ill-usage on the part of her father-in-law. There is no allegation in the plaint that the defendant has any ancestral property or any property upon which the plaintiff's maintenance is a charge.

Two questions seem to arise out of the point submitted for the opinion of the Full Bench, *viz.*, first, whether the widow of a Hindu refusing to live in the house of her father-in-law can sue him for a pecuniary allowance by way of maintenance if she leave his house without reasonable cause; and, secondly, is she entitled to maintenance if she leave on account of ill-usage or other reasonable cause. In the case cited, Khoodemoni Debia *v.* Tarachand Chuckerbutty, 2 W. R., 134, it was held that a daughter-in-law has a right to maintenance from her father-in-law so long as she is chaste, whether she continues to live with him or not; and Mr. Justice Kemp is still of that opinion. It appears to me, however, that according to the law as administered in Lower Bengal a daughter-in-law has not in either case a legal ground of action to recover maintenance against her father-in-law. The rights of a wife or of a widow and those of a son's widow to maintenance

Son's widow has not the same rights against her father-in-law as a wife or widow has against her husband or his heirs.

appear to me to be governed by very different principles. A son's widow has not the same legal rights against her father-in-law as a wife has against her husband, or as a widow has against the heirs of her who take his estate by inheritance. The father is not heir to his son in preference to the son's widow. A son's widow has no right in her father-in-law's estate, and upon partttion of such estate she is not like a daughter entitled to a share, even though the estate was ancestral.

The rule laid down in Rajamoni Dasi *v.* Sibchunder Mullick, 2 Hyde, 103, *viz.*, that the maintenance of a son's widow is a mere moral duty on the part of her father-in-law, and that the case is distinguishable from those in which an heir takes property subject to the obligation of maintaining persons who are excluded from inheritance, or those whom the deceased proprietor was morally bound to maintain, appears to me to be correct. The obligation of an heir to provide out of the estate which descends to him maintenance for certain persons whom the ancestor was legally or morally bound to maintain is a legal as well as a moral obligation, for the estate is inherited subject to the obligation of providing such maintenance. A son who takes his father's estate by inheritance is bound to provide maintenance for his father's widow. The obligation is a charge upon the estate which continues as long as the widow remains chaste, whether she continue to live in the family of the heirs or not.

I apprehend that a son's widow has no greater right to sue her father-in-law for maintenance after her husband's death than she would have in her husband's lifetime if he were unable to maintain her; if there is a legal obligation, does it extend to every widow whom every son (however numerous the family) may leave without a sufficient provision for her maintenance? Does it extend to cases in which the marriages are contracted after the sons are of mature age and whilst they are living separate? If not, to what extent is the rule limited by the Hindu law?

I have looked carefully into the authorities, and cannot find anything to satisfy me that a son's widow is entitled to sue to compel her father-in-law to maintain her, where he has no ancestral property, and nothing beyond his separate estate which has been acquired by himself. Some of the books speak of the husband's

relations generally, but I apprehend that a brother or other distant relation cannot be legally, although he may be morally, bound to support all the widows of all his brothers or other near relations who have no means of subsistence, unless he takes some property which renders him liable to the charge.

The dependent members referred to in the Vyavastha Darpana, and who are spoken of as being entitled to maintenance, are said to have claims to be maintained out of the late proprietor's estate.

If a son takes his father's estate by inheritance, it is only reasonable that he should be held legally liable to do what the father or husband was morally liable to do, and which it is to be presumed he would have done out of the estate if he had lived; but I am not sure that even in such cases the legal liability is carried to that extent. In Ramdhun Bhuttacharjee, 2 I. L. R., 766, 852, it was said that the father-in-law was bound to maintain the widow of his eldest son, as "according to Hindu law and the precedents of the Court the widow is entitled to maintenance from the heir of the family." The father was not the heir of his son during the widow's life, and the case seems to have confounded the case of a widow seeking for maintenance from the son as heir of her husband, or to have referred to the father as the heir of the family in respect of ancestral estate. The maintenance of a widow being a moral obligation on the late proprietor, the son who inherits takes the estate, not for his own benefit, but for the spiritual benefit of the late proprietor, and he ought to perform the obligation of maintaining the widow. If the father-in-law is legally responsible for the maintenance of his daughter-in-law, where is the legal obligation to stop if he dies without leaving property?

This is not the case of a widow or heiress, such as are spoken of by the Chief Justice in the case referred to by Mr. Justice Loch. There is no ancestral property upon which the daughter-in-law has a charge for maintenance. This is not a question of a charge upon inheritance, for the father-in-law is not stated to have inherited anything.

He states that he is a pensioner of Government with a small pension, not more than sufficient to maintain himself and his own family. It is not necessary to determine that he is so, but for the sake of argument it may be asked, is such a pensioner bound to maintain all the widows of all

his deceased sons? Is he to save nothing for his own widow, lest he should die before her when his pension would cease? According to the decision in Khudeemoni Debia *v.* Tarachand Chuckerbutty, 2 W. R., 134, the daughter-in-law would be entitled to have a part of the pension to be spent by her in her own father's family, though the father might be willing to provide for her in his own. Is the father-in-law to send food or money; and what distance is he to send it, if the daughter-in-law chooses to live with her own father? If a son and a father joint in food and estate should separate and each take his own share of the estate, another son after partition should enter into business and lose all that he has taken, would the father, after the death of the son, be bound to support his widow? We must not convert all the moral obligations enjoined by the Hindu law into legal liabilities. We should do much mischief by want of care in this respect. I am of opinion that in the present case the plaintiff has no legal right to be maintained by her father-in-law so long as she elects to live with her own father, and that the decree of the lower Court must be reversed with costs, and the plaintiff's suit dismissed. The Judges were equally divided in opinion, and the case was decided according to the opinion of the Chief Justice. The plaintiff appealed under sec. 15 of the Letters Patent. The judgment of Phear, J., is so full and exhaustive, and bears so fully upon the texts touching the question, that it is important to give it here: "Plaintiff does not pretend that the defendant will not maintain her at his own house; nor does she go so far as to seriously contend that the conduct of the defendant or of the members of his family towards her has been such as to entitle her to refuse to reside under his roof. In truth no issue is raised on the facts of the case, and the sole question for the Court is whether the plaintiff, not finding it agreeable to live in her father-in-law's house, can legally claim from him a money allowance by way of maintenance to enable her to live elsewhere."

The argument of the plaintiff's pleader may be concisely summarised as follows: That all the injunctions of the old Hindu sages constitute positive law, except so far only as Jimut Vahana for the school of Bengal sets apart some few precepts as laying down merely a moral duty and not a legal obligation; that the duty of maintaining the different members of the family is everywhere throughout the

shastras inculcated upon the head of the family, and does not fall among Jimut Vahana's exceptions; it has therefore the force of law, and as such has been recognised by the leading English text-writers, Macnaghten, Strange, &c., that the Vyavastha of the Pundits and the decisions of the Sudder Court have always supported the legal character of the duty; and, finally, that the son's widow is admittedly a member of the father's family. This argument is very plausible at first sight, but does not bear being very closely looked into. Indeed I think that it fails fatally for the plaintiff at its very root. It seems to me that it cannot be doubted there are plenty of instances, other than those by Jimut Vahana, in which the old writers clearly intended to enjoin a moral duty as distinguished from a legal obligation; and in my opinion the subject of maintenance affords some of the most conspicuous examples of this. Of the texts relied upon by Baboo Anoda Prosad Banerjee the strongest are perhaps the following: "The ample support of those who are entitled to maintenance is rewarded with bliss in heaven, but hell is the portion of that man whose family is afflicted with pain by his neglect; therefore let him maintain his family with the utmost care."

Menu: "Even they who are born or yet unborn, and they who exist in the womb, require funds for subsistence. The deprivation of the means of subsistence is reprehended." Narada: "A man may give what remains after the food and clothing of his family; the giver of more who leaves his family naked and unfed may taste honey at first, but shall afterwards find it poison."

Many more of a similar tenor might be cited which reiterate in words more or less emphatic the doctrine that it is incumbent upon every man to maintain the dependent members of his family. There are also no doubt other passages to be found, where certain specified members of the family are declared to have a legal claim upon the family property upon a disposition of it taking place, but these are not applicable to the present case for reasons which I shall presently mention; and therefore I omit for the moment to notice them.

Now it seems to me very plain that the writers who enumerated the foregoing precepts and their like only desired in them to lay down moral principles for the guidance of the head of the family. The only sanction appealed to is of a religious and prospective character.

The civil power is in no way brought under notice, although it may be remarked that some authors knew well enough how to use that power, if necessary, for the enforcement of their commands. Indeed it often enough happens that precepts of a general character uttered by the Rishis are accompanied by directions that the king or sovereign power should punish the infraction of them, but nothing of the sort occurs here. In these places the authors are not dealing with rights of individuals; they do not pretend to define anything of the nature of a right, and they give no hint of a remedy by which any right could be asserted. I repeat that it seems to me clear they were here simply prescribing to the head of the family principles which he should observe in his government, and were not intending to give a foothold for the intrusion of the civil power within those inner limits from which it has been undoubtedly for ages the policy of the Hindu social system to exclude it. It may well be, on the other hand, that the head of the family cannot lawfully eject a dependent member from his circle without reasonable cause. Possibly the defendant is legally bound to afford the plaintiff subsistence under his roof, she on her part conforming to his order and working for the common fund if he should think necessary. If so, no doubt the Civil Court would, in the event of default on his part, find the means of compelling him to perform his duty. But this is not the plaintiff's case. She claims simply by way of maintenance and on the bare right to be maintained without other consideration or annuity to be paid out of the father's property in which her husband, had he been alive, would have had no interest whatever. If then her suit be well founded it follows that a son's widow has a legal right to a share in the father's property during his lifetime, while her husband before his death had not such a right. Every Hindu lawyer will feel that it needs very strong authority to support such a distinction as this. It appears to me, however, that the matter is altogether bare of authority, except so far as the texts which I have quoted or referred to afford any, and I have already said that in my opinion they do not. I am not speaking regardless of the additional texts which are appealed to by Mr. Justice Loch in his elaborate judgment, but it seems to me a mistake to treat them as having application to the claim put forward by the plaintiff in this suit.

Without pursuing them in detail I think I may without error say that they all have reference to the terms upon which partition or inheritance of property is to take place. Mr. Justice Loch concludes from the passages quoted by him (particularly as I gather a text, Katyayana and the commentary of Jagannatha upon it in p. 600, Madras Edition of Colebrooke's Digest, Vol. II) "that the maintenance of a Hindu widow is not merely a moral obligation, but a charge on the inheritance." This is no doubt true if the word inheritance means the inheritance of her husband, but even then it does not, I apprehend, so much flow from the texts quoted as from other portions of positive law laid down by the old law-givers. Yajnavalkya, for instance, commanded that a husband should maintain his wife, and if he did not keep her in his own house he should give her a third part of his wealth, or being poor should provide her with maintenance, and on the death of the husband no one will question that she becomes entitled by the Hindu law which is current in Bengal to the whole inheritance in the event of there being no issue, or otherwise to a share by way of maintenance. Nothing can be clearer than the rights of a Hindu widow by positive law as against the inheritance of her husband. But I know of no authority which specifically gives her the like rights or any other rights as against the property of her father-in-law. So again sons and others, who by reason of infirmity, &c., &c., are disqualified from taking the share in an inheritance which would otherwise come to them, are directed to be maintained by those to whom their shares thus go over ; and a direction of this kind given by the law-giver, when prescribing the mode and condition of inheriting, is, I think, rightly construed as amounting to the creation of a charge upon the inheritance. No circumstances of this nature are attendant upon the general texts, which alone can be made to bear upon the question of maintenance by the father of the son's widow. It seems to me that the two classes of cases are quite distinct, namely, those in which the claimants of maintenance have expressly given to them the right of recourse to a particular fund, and those in which no such rights have been expressly given. It cannot be logically inferred that, because some dependent members of a family whom the head is

declared morally bound to maintain are entitled by express provisions of the law to make good their claims against his estate as so many charges upon it, therefore all dependent members whom he is declared morally bound to maintain have the same rights even in those instances where such express provisions are absent. But this, it appears to me, is exactly the mistake in reasoning which has been committed in this case, and without it the plaintiff's claim cannot get any real support from the old Hindu law-givers.

The English text-writers, as Macnaghten and Strange, naturally do not carry the matter further ; for they only profess to exhibit a compilation of the law made from the old Sanscrit authority as expounded by the Pandits. Sir T. Strange's words are most general and seem to me in no way calculated to support the conclusion which Mr. Justice Loch draws from them. Undoubtedly they express very emphatically that "maintenance by a man of his dependents is with the Hindu a primary duty." The question before us is whether the obligation to maintain is such in character as to give the defendant, who is the object of it, a legal claim to be paid an annual sum out of the supporter's estate. Mr. Justice Loch's quotation from Strange is in the text preceded by the sentence, the obligation to "maintenance as between parents and child is eventually mutual." If therefore the obligation amounts to a pecuniary charge in the one case it must in the other, but I have never yet heard it argued that by Hindu law a father in indigent circumstance is entitled to a money allowance from the son, payable out of the latter's self-acquired property. I cannot myself think that Sir T. Strange intended to do more than give the doctrines of the Hindu moral law on a social and domestic duty of high importance, and I am unable to construe his words into an enunciation of a legal right of recourse to specified property.

Macnaghten's text scarcely bears upon the point under discussion, and has not been appealed to, but several of the cases given by him in his Hindu Law have been cited by Mr. Justice Loch in his judgment, and by the pleader of the appellant before us. I will not treat these in detail now. It is sufficient, I think, to say of them that in case the claim put forward for determination was a claim by a widow to be held a co-sharer

with her deceased husband's brothers or others in property in their hands after the death of the father. This claim was in every instance negatived, but at the same time it was said she was entitled to proper "maintenance." The widow was in fact told, "you have mistaken your rights; you are not entitled to any share of the property. The utmost you can ask is to be maintained." And in this view these precedents are really adverse to the present plaintiff's claim; for they impliedly declared that the son's widow has no proprietary rights whatever against the deceased father's property. Indeed it is expressly said in one of Macnaghten's precedents (one not quoted before us or by Mr. Justice Loch) that the widow is only entitled to be maintained in the joint-family of her late husband, and cannot by law claim a money payment of the nature of alimony. Sec. 2, Macnaghten's Hindu Law, p. 111, case, IV.

Of the seven decisions of the Sudder Dewanny Adawlut, which have been brought to our notice in the argument, only one appears to me in any way to favor the plaintiff's case. This is the decision in the case of Ujjalmoni Dasi *v.* Joygopal Chowdhry, 4 S. D. A. (1848), 491. It appears that in that case the Principal Sudder Ameen had taken a Vyavastha from the Pandit of the division which declared the widow of a son dying before his father entitled to a maintenance proportionate to the amount of the father-in-law's property. The Sudder Dewanny Adawlut did not actually decide whether this was good law or not, its judgment was sought upon other points only, and in giving it Mr. W. Jackson said: "The plaintiff's widow is admitted by the Pandit's Vyavastha to have a legal right to maintenance under the Hindu law from the family estate." Seemingly the only question brought before the Court was whether this assumed right had been displaced by a special agreement, and, if not, at what amount should the maintenance be assessed. In Rai Sham Ballabh *v.* Pran Krishna Ghose, 3 Selborne's S. D. R., 33, it is reported that three sons took the inheritance on the death of their father, continued to live jointly, and with them lived the widow of a brother who had predeceased his father. The three brothers having died a suit for partition took place, and the property was divided among their respective

sets of heirs, one-third going to each set. The widow who was a party was declared entitled to nothing but food and raiment. Her claim was accordingly dismissed, and no charge of any kind in her favor was established against the estate.

In the case of Mussamut Bhelu *v.* Phul Chand, 3 Selborne's S. D. Reports, 223, two brothers are represented as having lived together in joint enjoyment of property under the Mitakshara law. One died leaving a widow, and his share, of course, went to the surviving brother. The Court held (no doubt rightly) that the brother thus taking by survivorship the share of the property from which the widow was legally entitled to obtain maintenance at the hands of her husband during his life was also bound to maintain the widow. In other words, he took the property with its burden. The Court does not support its judgment by the statement of this reason, but I think it affords the true explanation of the decision. In the case of Mussamut Hemlota Chowdrain *v.* Pudmamoni Chowdrain, 4 Selborne's S. D. R., 19, the widow's claim to share in the deceased father's estate was dismissed, because her husband had died in his father's lifetime. She was at the same time told that her claim should have taken the form of a claim for maintenance, and she was left the option of suing for it in another action. So that here no decision was judicially come to as to her right to maintenance, and still less was there any declaration either that she was originally entitled to make a money claim against the father or that she was now entitled to proceed against his estate. In Hira Sundry Gupta *v.* Nobogobind Sen, S. D. R., 1850, 422, the report is so scanty that no conclusion either way can be drawn from it. Also nothing is said as to whether the deceased husband left property or not. The like observation may be made with regard to Sham Dhun Bhuttacharjee, S. D. R., 1852, p. 796, and it may also be added that the father-in-law had expelled the widow from his family and so refused to give her even food and raiment under his own roof. In the case of Shama Sundari Debi *v.* Baikanta Nath Roy, S. D. R. (1858), 1220, no decision was delivered by the Court as to the right to maintenance or as to the circumstances under which it was put forward in that case. It was only determined that his widow did not forfeit the right which she had, by residing away, involuntarily ; and to this effect only do the decisions,

Khudeemoni Debia *v.* Tara Chand Chuckerbutty, 2 W. R., 134, Ahalya Bai Debia *v.* Lakhimani Debia, 6 W. R., 37, and the judgment of the Supreme Court in the case of Siba Sundari Dasi *v.* Krishna Kishore Neogy, 2 Tayler and Bell's Reports, 190, as I read them lay down the law. Probably at this date it would hardly be contended that if the plaintiff is entitled to a charge upon the father-in-law's property at all she loses the right to it merely by adopting such place of residence as is most agreeable to her.

I have now, I believe, reviewed all the authorities which have been put forward in support of the plaintiff's right to succeed in this suit. The result to my mind is that the claim which the plaintiff now sets up as a legal right has no basis in the precepts of the old Hindu law-givers, and has not been shown to have been ever judicially affirmed by the superior Courts of this country. On the other hand, there is certainly one decision of this Court, *viz.*, Ragumoni Dasi *v.* Sib Chunder Mullick, 2 Hyde, 103, which declares that a right such as that which is now sought to be established has no foundation in Hindu law.

It seems to me, therefore, that the view taken by the Chief Justice and Mr. Justice Macpherson is entirely correct. I am quite of opinion, notwithstanding the earnest pleading of Baboo Aunoda Persad to the contrary, that the Hindu law-givers did intentionally often enjoin moral duties as distinct from legal obligations, and I agree with the Chief Justice that we must not convert these moral duties into legal liabilities. The mischief which we might do, as the Chief Justice remarks, by want of care in this respect, is very great. For instance, if we upheld the right of every widow of every son who died during his father's lifetime, to compel the father to pay her out of his property a money allowance in lieu of maintenance, can any one fail to see that we should not only sap the very foundation of the Hindu family system, but should impose upon the father a burden most unreasonable, if not impossible, for him to bear. I may add that the Privy Council in a late judgment has discountenanced the supposition that everything uttered by the old law-givers remains to this day so much positive law (see 1 B. L. R., P. C., p. 12. Their Lordships say: "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 governs the district with which he has to deal and has been sanctioned by usage."

I express no opinion as to whether any one taking by inheritance property out of which a dependent member of the late owner's family had in fact been receiving maintenance up to the time of the deceased's death, would or would not take it charged with the continuance of that maintenance. I apprehend that a question of this kind would in every case depend upon the facts. I also say nothing as to the right of a dependent member of a family to compel the head to afford food and raiment within the family house, or in the case of forcible exclusion therefrom to make a money payment in lieu of such maintenance. I confine myself strictly to the issue which I mentioned at the outset as being the issue of law on which the plaintiff's suit depends, and on that issue, I think, the plaintiff fails to make out her right. Accordingly it appears to me that the decision which is now appealed against should be affirmed with costs.

Mr. Justice L. S. Jackson and Mr. Justice Hobhouse have requested me to say that they concur in the judgment which I have just read.

The other Judges, Bayley, Glover and E. Jackson, having agreed, it now is settled that widows are entitled to be maintained by persons who hold assets over which their deceased husbands had and would have a claim. The High Court of Bombay as well gave effect to this doctrine in Madhoorav *v.* Ganga Bai, I. L. R., 2 Bom., 639. It was held that the widow is not at the utmost entitled to a larger share of the annual produce of the family property than the annual proceeds of the share to which her husband would have been entitled on partition were he now living. The maintenance is calculated independently of her unproductive stridhan, such as clothes and jewels, and should be equal to the share of a son. But property which produces an income is taken into consideration in allotting the maintenance. A member of the family who, having had an allotment for maintenance, squandered it cannot bring a suit either for a money allowance or for subsistence out of the family property. This too was laid down by the Bombay High Court in Savitri Bai *v.* Luxmi Bai, I. L. R., 2 Bom., 573. As the right of maintenance of a widow is based on the assets in the hands of her husband's

Widows are entitled to be maintained by those who hold assets over which their deceased husband had a claim.

relatives, the maintenance varies as the assets increase or decrease, *vide* Raka Bai *v.* Ganda Bai, I. L. R., 1 All., 594.

The next question which arises is whether maintenance is merely a liability which ought to be satisfied out of the family property, or is it an actual charge upon it which follows it at the hands of whomsoever that might hold it? Vrihaspati says: "A man may give what remains after the food and clothing of his family, the giver of more who leaves his family naked and unfed may taste honey at first, but shall afterwards find it poison." Vyasa says: "They who are born, and they who are yet unbegotten, and they who are actually in the womb, all require the means of support." Menu declares: "The support of persons who should be maintained is the approved means of attaining heaven. But hell is the man's lot if they suffer." These are all religious injunctions, but it has been settled by Courts of law that maintenance, even of a widow, is not such a lien upon the estate as binds it in the hands of a *bonâ fide* purchaser for value without notice of her claim. This was the dictum of Phear, J., in Bhagabati *v.* Kanai Lal, 8 B. L. R., 225, and Jackson, J., in Adhiranee Narain Comary *v.* Shona Malee Pat Mohadul, I. L. R., 1 Calc., p. 365, and the Bombay High Court in Lakshman *v.* Satyabhama Bai, in I. L. R., 2 Bom., 494. Phear, J., observed: "When the property passes into the hands of a *bonâ fide* purchaser without notice it cannot be affected by anything short of an existing proprietary right; it cannot be subject to that which is not already a specific charge, or which does not contain all the elements necessary to its ripening into a specific charge." The High Court of Madras in Lachenna *v.* Bapanamma, Mad. H. C. R., Dec. 1860, p. 230, held that a sale of property made by a husband was invalid where nothing was left for the maintenance of the wife.

Bonâ fide purchasers without notice are not liable for maintenance of widows unless it exists already as a charge on the property.

The Bombay High Court, however, in Lakshman *v.* Satyabhama, I. L. R., 2 Bom., 524, was of opinion that the texts which are said to render maintenance a charge upon the inheritance are similar to those which charge it with the payment of debts, expenses of marriage and other ceremonies. But these charges are not payable by a purchaser for value, whether with or without notice, but a decree actually settling the amount of maintenance would be a valid charge; and if by a will a property be

Bombay High Court held: a decree fixing maintenance on the property makes a valid charge.

bequeathed, and the widow's maintenance were fixed and charged upon the estate by the very will, a purchaser taking with notice of the charge would be bound to satisfy it, *vide* Prosonno *v.* Borbosa, 6 W. R., 253. It will thus be seen that the Calcutta and Madras High Courts coincide as regards the widow's maintenance being a charge on the property in the hands of a purchaser with notice, the Bombay High Court holding that it is so when there is a decree (not a personal decree) actually settling the amount of maintenance and making it a lien upon the property, and when it is so by an agreement between the widow and the holder of the estate. The reasons for these propositions given by West, J., are fully stated in his judgment contained in this work under the head of Partition. The three High Courts are agreed in the opinion that debts contracted by a Hindu take precedence over maintenance as a charge upon the estate. This was held by the Madras High Court in Natchiarammal *v.* Gopal Krishna, I. L. R., 2 Mad., 126, by the Calcutta High Court in Johorri Bibee *v.* Sri Gopal Misser, I. L. R., 1 Calc., 470, and Adheranee *v.* Shona Malee, 1 I. L. R., Calc., 365, and by the Bombay High Court in Lakshman *v.* Satyabhama, I. L. R., 2 Bom., 494.

As regards the ancestral family house there is a distinction between the widow's right to continue to live in it and her right over other parts of the property.

A family debt has precedence over the widow's right to maintenance.

A family debt, as held by the three High Courts, has precedence over the widow's right to maintenance out of the family estate, that is, it must first be satisfied out of the family estate; but her right to continue to live in the family house cannot be extinguished unless a suitable accommodation be found for her. In Mangala Debi *v.* Deno Nath Bose, 4 B. L. R., p. 76, and 12 W. R., p. 35, O. C. J., the latter plaintiff in the original suit sued for possession of a dwelling house by right of purchase effected in his favor by the adopted son of Mangala Debi. He served a notice to the adoptive mother of the vendor to quit the house within a week, and deliver up possession to him. The original Court decreed the plaintiff's case. In appeal the Chief Justice Sir B. Peacock observed, with the full concurrence of Mitter, J.:—

"I have very great doubt myself whether a son, either natural-born or adopted, is entitled to turn his father's widow and the other females of the family who are entitled

Widow's right to live in the family house does not cease so long as a suitable accommodation is not found her.

to maintenance out of the dwelling selected by the father for his own residence, and in which he left the females of his family at the time of his death. No one who is at all acquainted with the usages and customs of Hindus can doubt that it would be highly injurious to the reputation of the females to be turned out of the residence, at least until some other proper place has been provided for them." It is laid down by Katyana that "except his whole estate and his dwelling house, what remains after the food and clothing of his family, a man may give away, whatever it be, whether fixed or moveable, otherwise it may not be given." The meaning of that passage is that he must not give away his whole estate without providing food and clothing for his family, and that he must reserve "one house without which he himself or his family might want a dwelling." Jagannatha in his commentary, referring to this text, says: "It is meant generally, comprehending a pond supplying water for common use or the like," the meaning being that whatever is appurtenant to a dwelling is to be retained with the dwelling. In the Dyabhaga, Chap. VI., section 2, verse 29, it is said, "that no division of a house takes place."

The only difficulty is in deciding whether this is a moral precept, or whether the right of the family to remain in the dwelling house causes such a want of title on the part of the owner to sell as would preclude the operation of the maxim current in Bengal of *factum valet.*

In the Dyabhaga, Chap. II., verses 16, 17 and 18, a distinction between the restriction of ownership and a mere moral precept is, I think, pointed out. In verse 16 it is said: "So," Vishnu says, "when a father separates his sons from himself, his will regulates the division of his own acquired wealth. But in the estate inherited from the grandfather, the ownership of father and son is equal." Verse 17 says: "This is very clear. When the father separates his sons from himself he may by his own choice give them greater or less allotment if the wealth were acquired by himself, but not so if it were property from the grandfather, because they have an equal right to it. The father has not in such case an unlimited discretion."

Verse 18 then proceeds: "Hence since the text becomes pertinent by taking it in the sense above stated, because there is ownership restricted by law in respect of shares

and not unlimited discretion, both opinions, that the mention of like ownership provides for an equal division between father and son in the case of property ancestral, and that it establishes the son's right to require partition, ought to be rejected." That shows that with regard to ancestral property the father's inability to make an unequal partition of ancestral property among his sons depends on restricted ownership, and that he has not an unlimited discretion over his property. In those cases where a man has no title to convey, or where his right is restricted, the rule of *factum valet* does not apply. That rule will not give a good title to a person to whom another conveys more than he has a legal right to convey. The distinction is pointed out clearly in Macnaghten's Hindu Law, from pages 4 to 10.

If a man's right is not restricted, *factum valet* applies; his act is valid if he has title, although he may be guilty of an immoral act in doing what he has a legal right to do; but if his right is restricted, the rule of *factum valet* does not enable him to go beyond the restriction. The most difficult question here is,—whether this passage of Katyana, which says that a dwelling house may not be given, is a mere moral precept or a restriction for a man's right to convey. It seems to me at present that it is a restriction and not a mere moral precept, and that the son and heir of the father has not such a right in the dwelling of the family that he can at once of his own pleasure turn out all the females of the family or sell it, and give the purchaser a right to turn them out.

It appears to me that in the present case the adopted son was not entitled to turn the widow of his (vendor's) father out of the dwelling house in which she was left by her husband at the time of his death; at any rate that he could not do or authorize a purchaser to do so without providing some other suitable dwelling. It seems quite contrary to every principle of Hindu law, by which the property taken by an heir is for the spiritual benefit of the deceased, to suppose it would not have contained some provision to protect a Hindu widow from being turned out of the dwelling in which her husband left her at the time of his death, without notice or even after a week's notice.

The defendant Mungala Debi having been left by her husband with an adopted son, an infant, properly took the

management of the house, and I apprehend that according to the doctrine laid down by the Privy Council in Hunooman Pershad Pandey *v.* Mussamut Babooee Munraj Konwaree, 6 Moore's I. A., 393, she had a right to do that which was beneficial, and I think she had a right to let out certain portions of that house to other persons as monthly tenants for the purpose of obtaining maintenance for herself and her infant child. * * * * *

In this case it is not proved even that the demand for possession was made before the suit was brought by agents of the plaintiff authorised to make that demand for possession, and upon that ground alone, if there were no others, it appears to me that the defendants are entitled to a decree. I have thought it right not to decide the case merely upon that last point without adverting to the other points ; because, although I do not recollect a case myself in which an attempt has ever been made by a Hindu son, whether natural-born or adopted, to turn his mother out of the house in which his father left her at the time of his death, I cannot think that it is consistent with the Hindu law that such a right should be conferred on a purchaser. I am now speaking of the dwelling house of the family—I am not speaking of dwelling houses which belong to an ancestor as a mere matter of investment or productive property.

It appears to me that the plaintiff has not established a right to turn the defendants out of possession of this house, and that the judgment of the lower Court ought to be reversed. The plaintiff in this case has attempted to do that which, as a Hindu, he must have known would cast discredit upon the widow if she had to venture from the house in which her husband left her without previously having some other proper place of residence provided for her. He ought, therefore, in my opinion to pay the costs in the lower Court and the costs of this appeal."

This principle was approved both by the Bombay and Allahabad High Courts.

In Jumna *v.* Machni Saha, the Allahabad High Court (Pearson and Spanke, JJ.), I. L. R., 2 All., 315, held that a gift of his entire estate by a husband leaving his widow without maintenance was subject to her maintenance, and the wife is the co-owner with her husband of his estate, and he cannot alienate it altogether without providing maintenance for her.

Wife is the co-owner with her husband of his estate,

In Narbadabai *v.* Mohadeo Narayen, I. L. R., 5 Bom., 99, the case was that a husband by gift to his undivided sons by his first and second wives made over the whole of his self-acquired property without providing for his third wife, who was left absolutely destitute. West, J., remarked : "A gift to a son by a Hindu parent must ordinarily be sustained. But as amongst the sons having a birthright in the estate it is not to be grossly unfair. Even as to self-acquired property it is prescribed that the acquirer shall not part with it so as to leave his family destitute." See West and Bühler, H.L. (2nd Edition), 366. These rules do not interfere with the usual dealings of mankind. A father supporting his family may deal with his estate, and if he encumbers or sells it to meet his engagements, no one can impeach the transaction. It is disposed of to meet family debts, supposing these debts to have arisen in the ordinary pursuit of his calling or the administration of his estate (West and Bühler, 2nd Edition, 342). Beyond these limits the interests of the family cannot be sacrificed, and the right of a wife to maintenance, and possibly to a share on partition, though it may not amount to more than in equity to a settlement, and is not the subject of contract until ripened and defined by events, yet is not to be evaded by any arrangement purposely made in fraud of it. The plaintiff's case was decreed, and it was held she was entitled to have her maintenance charged upon the property made a gift of by her husband, in the hands of her step-sons, notwithstanding any agreement made by her with her husband during his life.

STRIDHAN.

STRIDHAN or women's property is distinct from property which devolves upon them by inheritance either from their father or their husband. It means, as the term imports, *stri* female and *dhana* wealth. It does not exclusively mean money, but jewels and ornaments and other things of value. It may be derived by gift, by earnings, and even by inheritance ; but as a general rule that over which a woman has absolute power, *viz.*, of giving, selling and using independently of her husband, is her stridhan. Menu describes it to be what was given before the nuptial fire, what was presented in the bridal procession, what has been conferred on the woman through affection, and what has been received by her from her brother, her mother or her father. Narada says it to be that which was given before the nuptial fire, which was presented in the bridal procession, that which is her husband's donation, and that which has been given by her brother or by either of her parents. Katyana explains what is given to women at the time of their marriage near the nuptial fire is said to be her separate property given her before the nuptial fire, as well as what she receives while she is conducted from the paternal abode to her husband's place in the bridal procession. Besides these six sorts of property styled stridhan, Yajnavalkya adds that which is presented to her on her husband's marriage to another wife ; and Vishnu that which has been given to her by kindred, *viz.*, maternal uncles and others, as well as that which is called gift subsequent to marriage made by the family of her kindred, or even by her husband and parents through affection ; whatever she has for her subsistence, meaning what is saved from her food and raiment and her ornaments, according to Devala are her stridhan. Her gains, means, interest on loans or a treasure discovered by her. Her ornaments are hers exclusively, and the heirs of her husband have no sort of right to them. All other property which she earns, either as a gift by persons other than her kindred and by other ways than the six alluded to is subject to her husband's dominion, and can be taken by him even though no distress exist. These do not constitute what is called a woman's property. She has not absolute power over property given by her husband during his lifetime, and according to Narada even after his death she cannot give, mortgage or sell any immovable property given her

Stridhan defined.

by her husband. Narada says: "What has been given by an affectionate husband to his wife she may consume as she pleases when he is dead, or may give it away, excepting immovable property." It is her stridhan so far that it passes to her heirs and not to her husband's heirs. In Rudr Narain Singh *v.* Rup Kuar, I. L. R., 1 All., 734, it was held: "Immovable property given to a wife by a husband would appear to be held on terms similar to those on which property inherited from her husband is held, and her acts in respect of it are liable to question in a similar manner by the next heirs. And there seems no doubt plaintiff is in a position to question the alienation made by the widow as next heir, whether the property be held to be the lady's stridhan, governed by the law of succession applicable to stridhan or it be held subject to the ordinary succession of property inherited from her husband. In the latter case the plaintiff is next heir to the husband, and if it be subject to the succession as stridhan, the lady being a childless widow, he will succeed failing the husband" as her heir as well.

Movable property given by a husband does not become absolute stridhan so long as he lives, and immovable not even after his death.

It is laid down that movable property given by a husband does not become absolute stridhan only so long as he lives; but the immovable property given by him does not become so even after his death. It is of use clearly to state what are stridhan during the life of the husband: first, the wealth received at the nuptial fire; second, presented in the bridal procession; third, given by the father; fourth, received from the father's relatives; fifth, given by the mother; sixth, received from the mother's relatives; seventh, property received from the husband's relatives; eighth, presented on her husband's espousal of another wife; ninth, the gift subsequent; tenth, subsistence; eleventh, ornaments; twelfth, fee or perquisites; thirteenth, gains; and fourteenth, whatever is given to the husband or any person intending the benefit of the woman. All these a woman is at liberty to dispose of by gift, mortgage or sale independently of her husband, who has no power to take the same without being in distress. At times of famine, or other calamity, or for the celebration of a religious ceremony indispensably necessary, a husband can take his wife's stridhan, and he, Yajnavalkya declares, is not liable to make good the property of his wife taken under the circumstances set forth.

The author of the Dyabhaga divides stridhan into two

Yautaka and Ayutaka.

classes, *viz.*, yautaka and ayutaka. Yautaka means property given to a female at the time of marriage. The time of marriage has been explained by Raghunandana to begin with the ceremony of vriddhi sraddha and to end with the ceremony of patyabhivadana or obeisance to the husband. Ayutaka is that which does not come within the term yautaka. According to the Mitakshara property which a wife may have acquired by inheritance, purchase, partition, seizure, or finding is denominated by Menu and other sages woman's property.

Bombay High Court held what a married woman inherits from her husband, son, &c., is stridhan by Mitakshara law.

In Jamyatram *v.* Bai Jamna, 2 Bombay H. C. Reports, 10, the Bombay High Court held that only that property which is inherited by a married woman from members of her own family is her stridhan. In inheriting from her husband, her son or members of her own family, she takes according to Mitakshara law as stridhan. The Judicial Committee of the Privy Council, in the case of Bhugwandeen Doobey *v.* Myna Baee, 11 M. I. A., 487, declared that property, whether movable or immovable, which a widow inherits from her husband is not stridhan. Likewise they, in the case of Chotey Lall *v.* Chunni Lall, I. L. R., 4 Calc., 744, held that property inherited by a female, for instance, a daughter or widow, from their male predecessors or relations, does not become her stridhan. It was observed: "The law of inheritance in the case of women has been recently declared in the case of a widow by two decisions of this Board. Both are to be found in Vol. XI, Moore's Indian Appeals. The first is Mussamut Thakur Deyhee *v.* Rai Baluk Ram and others, p. 139; and the other is Bhugwandeen Doobey *v.* Myna Baee, p. 487. After a very full consideration of the authorities, and in two elaborate judgments discussing at length those authorities, this tribunal decided that under the law of the Mitakshara a widow's estate inherited from her husband is a limited and restricted estate only.

Contrary decision of the Privy Council.

After these decisions the question is reduced to this point: whether a daughter inheriting from her father stands in a higher and different position from that of a widow? Reliance has been placed on the often cited text in the Mitakshara relating to woman's property. The words most relied upon are contained not in the text but in an interpretation of the text. The 11th section of the 2nd chapter, para. 1, defines what is woman's property

The important part of the paragraph is: "The author now intending to explain fully the distribution of woman's property begins by setting forth the nature of it What was given to a woman by the father, the mother, the husband or a brother, or received by her at the nuptial fire, or presented to her on her husband's marriage to another wife, as also any other (separate acquisition), is denominated woman's property." It seems that the word in the original text "any other" is *adi*, and that the proper translation of the word would be "or the like," so that the passage ought to be read "or received by her at the nuptial fire, or presented to her on her husband's marriage to another wife, or the like." The interpretation gives a more specific definition, and instead of "or the like" there are given the words which have been so often cited and have given occasion to so much discussion. "Also property which she may have acquired by inheritance, purchase, partition, seizure, or finding, are denominated by Menu and the rest woman's property." The original text does not afford any foundation for the argument in favor of the right of the widow and daughter to the entire interest in land acquired by inheritance; the interpretation no doubt does. No decision of this tribunal has been referred to with regard to the estate taken by the daughter inheriting from her father, but the arguments which were pressed at their Lordships' bar in the present case by Mr. Cowell were presented and fully developed in the former cases before this tribunal relating to widows. The reasons by which these arguments were answered in the judgment of the Court—reasons which it is not necessary to repeat—are for the most part applicable to the case of a daughter.

But their Lordships cannot regard the question of the daughter's estate as *res integra*. It has been the subject of numerous decisions in India. The Indian authorities are carefully collated in the judgment of Mr. Justice Pontifex and of the Judges of the High Court. The result appears to be that the Courts in Bengal and Madras have determined, in a series of decisions, that the daughter takes a qualified estate only. No doubt in the Courts of Bombay there have been rulings and dicta in favor of the view that she takes the entire property. Their Lordships do not think it necessary, especially after their own decisions as to widow's estates, to go into

an examination of the Indian cases. They agree in the conclusion of the High Court, which affirms that which was stated many years ago to be the law by Sir William Macnaghten in his Treatise on Hindu Law, p. 22, in these terms: "But though the schools differ on these points, they concur in opinion as to the manner in which such property devolves on the daughter's death in default of issue male. According to the law as received in Benares and elsewhere it does not go as stridhan to her husband or other heir, and according to the law of Bengal also it reverts to her father's heirs."

With regard to the case most relied upon in the High Court of Bombay, it would seem to have been there admitted that, after the decisions which have taken place, the daughter's estate, according to the Benares school, was only a restricted one. * * * *

Their Lordships think that after the series of decisions which have occurred in Bengal and Madras, it would be unsafe to open them by giving effect to arguments founded on a different interpretation of old and obscure texts; and they agree in the observations which are to be found at the end of the judgment of the High Court, that Courts ought not to unsettle a rule of inheritance affirmed by a long course of decisions, unless, indeed, it is manifestly opposed to law and reason. They do not think this rule is opposed to the spirit and principles of the law of the Mitakshara; on the contrary, it appears to them to be in accordance with them.

Stridhan is not a life estate.

At the same time it is to be borne in mind that a woman's estate is not a life estate, nor is it in any sense an estate held in trust for reversioners. She is responsible to no one, and so long as she is alive no one has any vested interest in the estate. She is forbidden to commit waste or to endanger the property, but she can do anything else she likes with it in the way of spending the income or investing the principal as she likes. The savings she effects she can give away as she likes during her life; but if she does not spend the savings and allows it to accumulate, the question arises, may she dispose of these at her pleasure? If she has invested them or made any purchases, has she control over them, and can she dispose of them during her life? If not disposed of, does the investment or property pass at her death as the rest of her property, or does it pass as her

Accumulations made out of the savings to be an addition to the estate must be distinct and tangible. One or two years' savings are not accumulations.

separate property to her own heirs? The High Court of Bengal held that accidental balances of one or two years of the widow's income or property purchased by the widow out of the current savings, that is, out of the year's income, would not be strictly an addition to the corpus of the estate, but might be disposed of by her at her pleasure or sold, and the proceeds spent as she chose. To be an accumulation, there must be a fund distinct and tangible.

A Hindu widow can alienate to the extent of her interest.

In Hansbati Koerain *v.* Ishri Dutt Koer, I. L. R., 5 Calc., 529, it was held the alienation of the life interest of the widows in favor of their daughters and of her heirs is valid, and it is a settled law throughout India that a widow holding a Hindu widow's estate has a right to alienate to the extent of her own interest. The whole subject was fully discussed by Mr. Justice Ainslie, who reviewed all the decided cases bearing on the question. He observed: "In the case of Kerry Kolitany *v.* Moneeram Kolita, 13 B. L. R., Mr. Justice Dwarka Nath Mitter, in the referring order at page 6, speaks of the widow as nothing more than a trustee for the soul of her husband;" and commenting on a passage of the Dyabhaga, Chap. XI, sec. IV, 61, says: "It is clear from this passage that every use made by a Hindu widow of the estate inherited from her deceased husband which is not conducive to his spiritual welfare is under the Hindu law current in the Bengal school an unauthorised act of waste." In the view taken by the learned Judge, a widow clearly cannot give away property purchased out of the profits of her husband's estate, whether the purchase-money be taken from current income or from past accumulations; but that view was expressly dissented from by the learned Judges who concurred with him generally on the question before the Full Court. See the observations of Mr. Justice Glover at p. 53, and the learned Chief Justice Sir Richard Couch (in whose judgment Macpherson, Pontifex, JJ., and I myself concurred) said a widow is not a trustee; she has the usufruct as well as the property in the thing inherited from her husband. This is in consonance with the decision of the Full Bench in the case of Gobindmani Dasi *v.* Sham Lal Bysack, 2 B. L. R., Sup. Vol., 48. Sir Barnes Peacock there said: "Upon the whole, after considering all the cases upon the subject, we are of opinion that a conveyance by a Hindu

widow for other than allowable causes, of property which has descended to her from her husband, is not an act of waste which destroys the widow's estate and vests the property in the reversionary heirs, and that the conveyance is binding during the widow's life." It is unnecessary to quote other cases, for it is now well settled that a widow can alienate her estate, *i.e.*, she can anticipate the profits; but that she is answerable to any one for the way in which she expends the money so raised, provided that the reversionary estate is not diminished from what it was when it came into her hands, has never been held as far as I knew. * * * * * * * * * *

The fact that unappropriated property or properties purchased and not disposed of in the widow's lifetime do not pass as stridhan may be explained on the theory that, when a widow has at her death left money accumulated or property purchased out of surplus profits, and not appropriated to any person during her life, it was her intention to add such monies or properties to the estate, and to abstain from exercising her full rights over them.

In the case of Sreemutty Puddomonee Dossee *v.* Dwarka Nath Biswas, 25 W. R., 335, Mr. Justice Jackson said: "There are certainly no materials for a determination whether she (the widow) bought it out of current income or accumulations. But we are inclined to think that enquiry unimportant and to base our decision, if necessary, on a broader and clearer ground, *viz.*, that Rashmoni having purchased this land (if she did so) with moneys derived from the income of her husband's estate then lying in her hands, was competent afterwards to alienate her right and interest in whole or in part to re-invest them into money and spend if she chose." * * * * * * * *

In the case of Mussamut Bhogobutty Dayee *v.* Chowdry Bholanath Thakoor, 15 W. R., 63, it was said: "And as regards the first of these classes of property, namely, those which appear in the form of immovable property purchased from the accumulations made by Chundrabalee from the profits of the estate which she received, there are several decisions which I may refer to—that of Chundrabalee Debia *v.* Brody, 7 B. L. R., 93, and 15 W. R., 63, and Nehal Khan

v. Hurchurn Lall, 1 Agra H. C. Rep., 219, by which it has been distinctly held that in cases of a widow enjoying the property of her deceased husband she is not entitled to alienate immovable property or any property that she has purchased out of the profits of such estate any more than she can alienate the immovable property itself of which the estate consists. No authority whatever has been shown to us on the other side, and it seems to me that these decisions are substantially in conformity with the Hindu law." This view is supported by the Agra case, but the whole of that judgment on the point is contained in the following words: "Purchases with such funds would not belong to the widow otherwise than as the lands from which the money arose belonged to her." (In this case the widow had alienated and the alienation was cancelled.)

But in the case of Chundrabalee Debia *v.* Brody, 9 W. R., 584, there had been no alienation, and the question was whether the property was stridhan. The judgment stated that, although the widow was allowed to make the fullest use of the usufruct of the estate while she lived, whatever she left behind became the property of the next heir and was not liable for the widow's personal debts.

Mr. Justice Glover observed: "A Hindu widow, with a life interest in her deceased husband's estate, would be entitled to make the fullest use of the usufruct of that estate; and it seems doubtful whether she would be in any way restrained, however wasteful her expenditure, so long as she kept within the limits of her income and made no attempt at alienation of the corpus. If on the contrary she thinks to economize, she can during her lifetime give away her savings to any one she pleases; but if she have left savings undisposed of at the time of her death, these would form part of the estate, and go with that estate to the next heir of her husband."

Accumulations properly so called are not stridhan.

The conclusion fairly drawn from these rulings is that accumulations cannot be considered to be the stridhan of the widow and pass on her death to the next heir of her husband.

Order of succession to stridhan.

The order of succession to stridhan is as follows: A Hindu's property is inherited according to both the Mitakshara, and the Dyabhaga by (1) full brother; (2) mother; (3) father: and a married woman's property

according to Mitakṣhara by (1) maiden daughter; (2) married but unprovided daughter; (3) married and 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.

Succession to Yautaka and to father's gifts other than nuptial presents is: (1) by unbetrothed daughter; (2) betrothed daughter; (3) married daughter; (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 and grandson.

Succession to Ayautaka, 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; (5) daughter's son; (6) barren and childless widow daughters; (7) son's grandson; (8) whole brother; (9) mother; (10) father; (11) husband; (12) rival wife's son's son. According to this order it was held in Jadu Nath Sircar *v.* Basant, 11 B. L. R., 286, that the mother succeeds to the property of her daughter bequeathed to her by her father before her marriage in preference to her husband. The property is stridhan.

Yantuka means property given to a female at the time of marriage, of which there are eight forms:—

Forms of marriage.

(1) The Brohma; (2) Doiva; (3) Arsha; (4) Prajapatya; (5) Asura; (6) Gandarva; (7) Rakshasa; (8) Poishacha. According to Brahma form, the bride is given by her father when he has adorned her as elegantly as he can to the bridegroom. By the Doiva, the gift is made to the priest, and the Arsha to the bridegroom from whom he receives cattle for religious purposes. Prajapatya form is that when the father gives his daughter to a suitor saying "perform all duties together." A son produced by this marriage confers purity on himself and on six descendants in the male line. Asura marriage is contracted by receiving property from the bridegroom; Gandarva by reciprocal amorous agreement; Rakshasa by seizure in war; and Poishacha by deceiving the damsel, *i.e.*, the lover secretly embracing her when she is sleeping or flushed with strong liquor or disordered in her intellect.

The Brahma, Doiva, Arsa, and Prajapatya are legal for a Brahmin; the Gandarva and the Rakshasa marriage are peculiar to the Kshatrya; the Asura marriage is

permitted to a Vaishya and a Sudra; the Poishacha is forbidden to all and should be practised by no person whomsoever.

Marriage and the Annaprasanna, which is the feeding a child with rice in the sixth or eighth month, or when he has cut his teeth, are the only ceremonies enjoined in the case of Sudras and women. "The nuptial ceremony," says Menu, "is considered the complete institution of women ordained for them in the Vedas. By it a Brahmin who has completed his period of studentship becomes a grehasta or house-keeper, and the act of receiving the bride effects the final regeneration. Only one wife is enjoined, the principal deities of the Hindus having been married each to one wife—Vishnu to Lakshmi, Siva to Parbati, Indra to Sachi. It seems, however, that the rule against a plurality of wives is only directory and not imperative. There is nothing in Hindu law or usage to render polygamy illegal."

The succession according to the Mitakshara, s. 11, cl. 1, *viz.*, "what was given to a woman by the father, the mother, the husband or a brother, or received by her at the nuptial fire, or presented to her on her husband's marriage to another wife, as also any other separate acquisition, is denominated a woman's property," was disputed in the case of Thakro *v.* Gunga Prasad, I. L. R., 10 All., 200. Property named Shahpur Thator was made over to the widow by her husband while about to marry a second time. The name of the widow was recorded in respect of the entire mouzah. The widow shortly afterwards effected a deed of gift of this property in favor of her daughters, describing it to be her acquired property and stridhan. The plaintiff claimed the property as belonging to his father and as his son and heir. He alleged the mutation of names was effected in order that this widow might hold the property benami for his father. The Lords of the Privy Council, having regard to the fact that plaintiff was not joined in the suit by another son who would, if the property were really their father's, and that there was a complete mutation of names from the husband of all that he possessed in the village of Shahpur into the name of his wife, held it is not unusual for a husband, upon his being about to marry a second wife, to make a present to his first wife as in this case, and if he does so the property so presented becomes her stridhan.

Privy Council held in Thakro *v.* Gunga Prasad a present of property by a husband to his wife while about to marry a second wife is stridhan.

A widow who has inherited her husband's property is bound to pay his debts and to do other acts for his spiritual benefit.

As a son is bound to pay his father's debts, unless contracted for immoral purposes, so is a widow who has taken her husband's property. Her obligations to pay her husband's debts is said to be for the spiritual benefit of her husband. The performance of the funeral obsequies of her husband is the first and primary religious purpose which a widow is bound to carry out at any expense to the estate, as that is an absolute necessity. For pilgrimages by the widow to holy places she may dispose of a part of the estate, but due regard must be had to the bulk of the property, and should the circumstances of the family not permit the expenditure would be totally inadmissible, *vide* Mahomed Ushruff *v.* Brojessurree Dassee, 11 B. L. R., p. 118; Motiram Kowar *v.* Gopal Sahoo, 11 B. L. R., p. 416. The performance of ceremonies for other members of the family which the husband was bound to perform in his lifetime and in the benefits of which he had participated is another necessary purpose for which the widow might alienate the estate, *vide* Ram Coomar *v.* Ichamoyee, I. L. R., 6 Calc., 36, and Chowdry Jonmenjoy Mullick *v.* Prosonomoyee Dassee, 11 B. L. R., 488. The Judicial Committee of the Privy Council have stated in the case of Cossinath *v.* Horosundary, 2 Morley's Digest, p. 198, the circumstances under which alienation by a widow is allowable. They say: "It is admitted on all hands that, if there be collateral heirs of the husband, the widow cannot of her own will alien the property except for special purposes. For religious or charitable purposes, or those which are supposed to conduce to the spiritual welfare of her husband, she has a larger power of disposition than that which she possesses for purely worldly purposes. To support an alienation for the last she must show necessity. On the other hand it may be taken as established that an alienation by her which would not otherwise be legitimate may become so if made with the consent of her husband's kindred, but it surely is not the necessary or logical consequence of the latter proposition that, in the absence of collateral heirs to the husband or on their failure, the fetter on the widow's power of alienation drops. The exception in favor of alienation with consent may be due to a presumption of law that where that consent is given the purpose for which the alienation is made must be proper."

Necessity must be proved for alienation for purposes other than the spiritual benefit of the husband.

It is important to state how the consent of the husband's kindred is to be had. In Varjivan Rangji *v.* Ghelji Gokul Das, I. L. R., 5 Bom., p. 571, the Bombay High Court held: "It may be taken as well established that the consent of heirs will render valid an alienation by a widow under circumstances which would not otherwise qualify it." But then the question arose who are the heirs whose consent will thus render the alienation indefeasible? It is important to bear in mind in this connection the doctrine laid down by the Privy Council in the case of Raj Lakhee Dabee *v.* Gokul Chunder Chowdry, 13 Moore's I. A., p. 228; 12 W. R. (P.C.), 47; and 3 B. L. R. (P.C.), 57. Their Lordships say: "They do not mean to impugn the authorities which lay down that a transaction of this kind may be valid by the consent of the husband's kindred, but the kindred in such cases must generally be understood to be all those who are likely to be interested in disputing the transaction. At all events there should be such a concurrence of the members of the family as suffices to raise a presumption that the transaction was a fair one and one justified by Hindu law."

Consent of heirs will render valid an alienation not mentioned in the Hindu law.

WILLS.

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The history of wills among Hindus has long been a perplexity to lawyers. In old Hindu times it was altogether unknown, and it is said that there is no synonym for it in the native languages. It is very probable the example of Englishmen making wills stimulated Hindu gentlemen in the Presidency towns in the same direction.

Origin of Hindu wills traced to religious influence.

But it is more likely that, as all institutions in Hindu society owe their origin to religious influence, the origin of wills too may be traced to it. Indeed the hold of religion was so strong on the minds of the Hindus that sales which are urged in other countries of things of which in reality there was a gift, were denied and gifts pleaded. And the reason for this is, that it would be more easily believed as a "man is never more disposed to pious generosity than in his last days, when the approach of death furnishes him with the strongest motive for investing in the next world that wealth which he can no longer enjoy in the present."

This opinion was the result of observation of the enormous amounts bestowed for religious purposes stated in the early Bengal wills. The gifts made when a man was dying could be revoked if the giver survived or delivered up. The dictum of some of the Hindu sages are as follows:—Katyana says: "What a man has promised in health or in sickness for a religious purpose must be given; and if he die without giving it his son shall doubtless be compelled to deliver it." And again: "After delivering what is due as a friendly gift (promised by the father) let the remainder be divided among the heirs." Harita says: "A promise made in words, but not performed in deed, is a debt of conscience both in this world and the next." Such debts were at first treated as a moral obligation, and gradually as a legal obligation. It was first held to apply in the case of pious gifts, and gradually it came to be enforced against all property whatsoever, separate, self-acquired, the undivided share of a co-heir or ancestral property in the hands of a father or sole owner. This is exactly how wills had their origin.

The earliest known will is that of Omi Chand notorious in Indian history. In Tagore *v.* Tagore, 4 B. L. R., O. C. J., p. 138, Mr. Justice Phear referred to it to disprove that wills are creations of the English Courts, and their origin cannot be traced to the written sources of Hindu law. He observed: "It is highly improbable that the first will ever made by a Hindu came to be contested in the English Court without the fact of its novelty being made the most of in the contest, and the result being carefully reported. Now the earliest Hindu will dealt with in a reported suit was made so long ago as 1758, and the inference is irresistible from the terms of the will itself, and the mode in which the case was treated by the Court, that it was not then a strange occurrence that a Hindu should make a will or a testamentary disposition of his property. In truth, I can hardly doubt that the judicial decisions in this matter (as in all other matters of development of commercial and social economy with which we are acquainted) followed on the practice rather than the practice on the decisions. And if again we are to consider the law as limited by the letter of the decisions which have taken place within any given period of time, we shall evidently arrive at a testamentary power as capricious in regard to the subjects upon which it may be exercised as pure accident can make it, and therefore most unreasonable in its restriction. I cannot readily bring myself to accept so unsatisfactory a guide as this.

Mr. Justice Phear argues that Hindu wills do not date from the commencement of English rule.

The fact is, as far as I can learn, that the right of a Hindu proprietor under the Bengal school of law, to disappoint his heirs by making an alienation of all his property which shall take effect at his death, has been asserted, at least in practice, for a very long time indeed, even if it is not expressly noticed by Hindu expounders of the law. The cases cited by the Advocate-General, commencing with Doe d. Hera Sing *v.* Bolakee Sing, Montriou's Hindu Law Cases, 321, appear to me to show distinctly that wills have been made in Bengal for considerably more than a century past.

He proves that the practice of making willsi deeply rooted throughout Bengal and is an "approved usage" with Hindus.

They also lead me to think that the amount of litigation which has arisen out of the exercise of the testamentary power has been much under-estimated by my learned colleague, Mr. Justice Markby, in the case of Kumara Asima Krishna Deb *v.* Kumara Kumara Krishna Deb,

2 B. L. R., O. C. J., 11. And certainly, if it were open to me to form an opinion upon the matter from the cases which have come under my own notice judicially during the last four and a half years, I should conclude that the practice of alienating property by a testamentary disposition to the disherison of one or more of the heirs is widespread and deeply rooted throughout Bengal. At any rate, having regard to the long line of judicial decisions which have been given with regard to it, I am bound now in this Court to class it as "approved usage," which, according to Menu, forms one of the four elements of "Hindu law." In Bombay, the same doubt as to the existence of wills prevailed, as it was said it was not mentioned in the Shasters. But Westropp, J., ruled in Norottam *v.* Norsandas, 3 Bombay High Court Reports, A. C. J., 8, as follows: "In the Supreme Court the wills of Hindus have been always recognised, and also in the High Court on the Original Side. Whatever questions there may formerly have been as to the right of a Hindu to make a will relating to property in the mofussil, or as to the recognition of wills by the Hindu law, there can be no doubt that testamentary writings are, as returns made within the last few years from the zillah shows, made in all parts of the mofussil of this presidency; but, as might have been expected, much more frequently in some districts than in others, and this Court at its Appellate Side has on several occasions recognised and acted on such documents." The testamentery power now after many decisions and by express legislation extends to all property which the testator may give away during his lifetime. Lord Kingsdown, in the case of Nagalutchmi Ummal *v.* Gopoo Nadaraga Chetty, 6 Moore's I. A., p. 344, held that in Bengal a father as regards all his property and a co-heir as regards his share may dispose of it by will, gift or sale as he likes, whatever may be its nature. This was agreed to by Willes, J., in Tagore *v.* Tagore, 9 B.L.R., 396, and Chief Justice Sir Barnes Peacock, 4 B. L. R., O. C. J., p. 159. With regard to the law of the Mitakshara school, where there is a difference between the power of alienation *inter vivos* over self-acquired property and over a man's interest in ancestral or joint estate, the Judical Committee of the Privy Council observed in the case of Nagalutchmi *v.* Nadaraga, 6 Moore's I. A., 344: "It may be allowed that in the ancient Hindu law, as it was understood

Westropp, C.J., is of the same opinion.

through the whole of Hindustan, testamentary instruments, in the sense affixed by English lawyers to that expression, were unknown, and it is stated by a writer of authority (Sir T. Strange) that the Hindu language has no term to express by what we mean by a will. But it does not necessarily follow that what in effect, though not in form, are testamentary instruments which are only to come into operation and affect property after the death of the maker of the instrument were equally unknown. However this may be, the strictness of the ancient law has long since been relaxed, and throughout Bengal a man who is the absolute owner of property may now dispose of it by will as he pleases, whether it be ancestral or not. * * * * No doubt the law of Madras differs in some respects, and amongst others with respect to wills, from that of Bengal; but even in Madras it is settled that a will of property not ancestral may be good. A decision to this effect has been recognised and acted upon by the Judicial Committee in Mulraz *v.* Chalekany, 2 Moore's I. A., 54, and indeed the rule of law to that extent is not disputed in this case. If then the will does not affect ancestral property it must be, not because an owner of property by the Madras law cannot make a will, but because by some peculiarity of ancestral property it is withdrawn from the testamentary power. It was very ingeniously argued by the respondent's counsel that in all cases where a man is able to dispose of his property by act *inter vivos*, he may do so by will; that he cannot do so when he has a son, because the son immediately on his birth becomes coparcener with his father; that the objection to bequeathing ancestral property is founded on the Hindu notion of an undivided family; but that where there are no males in the family the liberty of bequeathing is unlimited. It laid down that a man who had in other ways provided for his wife and daughters might devise ancestral immovable property as he pleased to their prejudice, but he could not do so as against male descendants."

It is thus manifest that wills have been executed in the three presidencies, Bengal, Bombay and Madras, since a very remote period. Following the one that was referred to by Mr. Justice Phear as having been executed in 1758, the next oldest one is that of the Rajah of Nuddea executed in 1792. It was followed in 1793 by the one which was the subject-matter of suit in Dyal Chand *v.* Kissory, *vide*

F. MacNaghten's Report, 357. The will of Rajah Nobo Kissen was litigated in 1800, whereby the Rajah bequeathed his ancestral talook to his adopted son and the son's brothers, depriving his natural son of all interest in it. The will was upheld, and in 1808 the will of Nemy Churn Mullick, by which he also had completely disinherited one of his sons, was declared valid. In the case of Ramtonu Mullick *v.* Ramgopal Mullick, *vide* F. MacNaghten's report, p. 336, the Privy Council ruled that a Hindu might and could dispose by will of all his property, movable and immovable, whether it be ancestral or not.

As regards ancestral property under the Mitakshara law in Upper India, the Privy Council remarked in the case of Baboo Beer Pertab Sahu *v.* Moharajah Rajender Pertab Sahee, 9 W. R., P. C., p. 15: "It is too late to contend that, because the ancient Hindu treatises make no mention of wills, a Hindu cannot make a testamentary disposition of his property. Decided cases, too numerous to be now questioned, have determined that the testamentary power exists and may be exercised at least within the limits which the law prescribes as to alienation by gift *inter vivos*. Accordingly it has been settled that even in those parts of India which are governed by the stricter law of the Mitakshara, a Hindu, without male descendants, may dispose by will of his separate and self-acquired property, whether movable or immovable, and that one having male descendants may so dispose of self-acquired property if movable, subject perhaps to the restriction that he cannot wholly disinherit any one of such descendants." This is in harmony with the decision in the Madras case of Nagalutchmi *v.* Nandaraga, 6 M. I. A., 344.

According to the law of the Mitakshara, a Hindu without male descendants can dispose of by will his self-acquired property, movable or immovable.

The cases of S. M. Krisnaramani Dasi *v.* Anunda Krishna Bose, which was for the establishment of the will of Sir Rajah Radhakant Deb Bahadoor, 4 B. L. R., O. C., p. 34; Kumara Asina Krishna Deb *v.* Kumara Kumara Krishna Deb, 2 B. L. R., O. C. J., p. 231, which related to Rajah Opoorbo Krishna's will; and Tagore *v.* Tagore, 4 B. L. R., strongly support the fact that a Hindu has power to make testamentary dispositions very much like English wills. A married woman may dispose by will of her stridhan which during her life is under her absolute control, *vide* Venkatarama *v.* Venkatasorya, 2 W. R., Madras (P. C.), 333. She cannot, however, give away

A married woman can dispose by will stridhan absolutely hers.

property which she inherited from males, as her interest in it ceases at her death, and a minor in Bengal—it has been ruled in Cassi Nath Bysack *v.* Horosundary, 2 Morley's Digest, 198, note—cannot at all make a will ; but a bequest or a gift in his favour, and even of an idiot, is valid, *vide* Kooldib Noran *v.* Mussamut Wooma, Marshall's Report, 357. A minor cannot make a will.

The cases cited above show that in Bengal a Hindu by will can dispose of his property in any way he likes, even depriving his immediate heirs. He can also, as held in Tagore *v.* Tagore, 9 B. L. R., 377, P. C., direct what quantity of estate the devisees shall take, the period of time during which it is to be held, and that on the expiration of the time the estate shall pass over wholly or in part to another person. All these settlements should be made according to the principles of the Hindu law, *vide* Sonatun Bysack *v.* S. M. Juggut Sundoree Dassee, 8 Moore's Indian Appeals, p. 85. In Soorjeemoney Dassee *v.* Deno Bundhu Mullick, 9 M. I. A., Lord Justice Knight Bruce said : " Whatever may have formerly been considered the state of the law as to the testamentary power of Hindus over their property, that power has now long been recognised and must be considered as completely established. This being so, we are to say whether there is anything against public convenience, anything generally mischievous, or anything against the general principles of Hindu law, in allowing a testator to give property, whether by way of remainder or by way of executory bequest upon an event which is to happen, if at all, immediately on the close of a life in being. Their Lordships think that there is not; that there would be great general inconvenience and public mischief in denying such power ; and that it is their duty to advise Her Majesty that such a power does exist." These questions were elaborately discussed in the case of Ganendra Mohun Tagore *v.* Jotendra Mohun Tagore, 9 B. L. R., 377. The case arose by the testator wholly depriving his only son of his estate beyond a certain money income, Rs. 7,000 per annum, from a property settled upon him at his marriage. " The will stated that the testator had already provided for his only son, and that he was to take nothing whatever under it. The whole of the property was vested in trustees, apparently with the view that the bulk of the property should neither be diminished nor Tagore *v.* Tagore.

divided. And accordingly the legacies and annuities were provided for by gradual payments out of the income. The trustees whilst holding the property were at the same time to pay the balance of the yearly income to the person entitled to the beneficial enjoyment of the real property. After the payment of all charges upon the estate the trustees were to make over the real estate to the use of the person who should, under the conditions of the will, be entitled to it. The son sued to set aside the will, on the grounds, 1stly, that it was wholly void as to the ancestral estate; 2ndly, that in any case the father was bound to provide him with an adequate maintenance, not according to his wants, but according to the magnitude of the estate; 3rdly, that the will, vesting as it did on a devise to trustees, was void; 4thly, that the life estate to Jotendra was void, as a Hindu testator could bequeath nothing less than what was termed "his whole bundle of rights"; 5thly, that the estates following upon this life estate were void; and, 6thly, as regarded every other thing after the life estate, it was intestate, and the plaintiff as heir-at-law was entitled to it notwithstanding the express words of the will that he was to take nothing under it."

The first four objections were overruled. The Courts ruled, it being held, that the power of a father in Bengal to bequeath all his property of every sort was beyond doubt, and the maintenance allotted was adequate. As regards the third objection, which too was set aside, the Privy Council observed: "It is obvious that property, whether movable or immovable, must for many purposes be vested more or less absolutely in some person or persons for the benefit of other persons, and trusts of various kinds have been recognised and acted on in India in many cases. The distinction between 'legal' and 'equitable' represents only the accident of falling under diverse jurisdictions and not the essential characteristic of a possession in one for the convenience and benefit of another." The fourth was decided against the plaintiff on the principle that "if a testator can disinherit his son by devising the whole of his estate to a stranger, there seems to be no reason why he should not be able to divide his estate by giving particular and limited interests in the whole of the property to different persons in existence, or who may come into existence during his lifetime, to be taken in

succession, as well as by giving his whole interest or bundle of rights in particular portions of land included in his estate to different persons."

The fifth objection was considered valid, it being held that the kind of estate which the testator sought to create was wholly unknown and repugnant to Hindu law. The Judicial Committee remarked: "The power of parting with property once acquired so as to confer the same property upon another must take place either by inheritance or transfer, each according to law. Inheritance does not depend on the will of the individual owner; transfer does. Inheritance is a rule laid down by the State, not merely for the benefit of individuals, but for reasons of public policy. It follows directly from this that a private individual who attempts by gift or will to make property inheritable otherwise than the law directs is assuming to legislate, and that the gifts must fail and the inheritance take place as the law directs." It was held that the life estate to Jotendro was valid, but the estate to successive holders, *viz.*, those not in existence at the death of the testator, and others who, although in existence but would after the first life estate take in order, was void. For, in the first place, "the donee must be a person capable of taking at the time when the gift is made, and must either in fact or in contemplation of law be in existence at the death of the testator," *vide* Ram Goti *v.* Kristo, 20 W. R., 472; Soudaminy Dassi *v.* Jogesh Chunder Dutt, I. L. R., 2 Calc., 262; Mongul Das *v.* Krishnabai, I. L. R., 6 Bombay, 38. These estates in succession being void, it was declared that the plaintiff, the heir-at-law, was entitled to the whole estate after the life of Jotendro.

All dispositions must be according to Hindu Law.

This case clearly establishes the proposition that the power of a Hindu to dispose of property by will is limited, and that all dispositions must be according to Hindu law. Wills containing trusts to accumulate the proceeds of the property have been held invalid, *vide* Kumara Asima *v.* Kumara Krishna, 2 B. L. R., O. C. J., 11; Krishnaramani Dasi *v.* Ananda Krishna Bose, 4 B. L. R. (O. C. J.), 231; Sookmoy Chunder Das *v.* Monohari Dasi, I. L. R., 7 Calc., 269; and Rai Kishori Dasi *v.* Debendra Nath Sircar, I. L. R., 15 Calc., 415. Clauses in a will postponing enjoyment on the part of the owner for any given time are foreign to Hindu law and are

repugnant to the very nature of the property, as the property thus is placed in a position without an owner at all, and this it has been held in Bramamayi Dassi *v.* Jogesh Chunder Dutt, 8 B. L. R., 400, and Rai Kishori Dasi *v.* Debendra Nath Sircar, I. L. R., 15 Calc., 415, could not be sanctioned, on the ground that by Hindu law an estate cannot remain in suspense or without an owner.

Mr. Justice Wilson held that under the Hindu Wills Act only the estate need be ascertained and not the person to whom it can be given.

The Hindu Wills Act, XXI of 1870, it appears from Ananga Monjori Dabee *v.* Sona Monee Dabee, I. L. R., 8 Calc., 151, is calculated to render many of the deductions from the decision in the Tagore case nugatory. The facts were: A Hindu testator by his will, made in 1872, provided that should he never have a son, his daughter's sons, when they come to years of discretion, should receive certain properties in equal shares; and he directed that if his daughter have no sons, or not likely to have sons, then such of his daughters as should reside in the ancestral family dwelling house should receive a certain monthly allowance. The testator died in 1873 leaving his daughters him surviving. In his will there were provisions for the maintenance of the testator's mother, widow and sisters, but there was no clear specification as to the person in whom the beneficial interest in the property reserved for the daughter's sons was vested. The widow sued to be declared entitled to the estate for her life on the ground that the residuary devise to the daughter's sons was invalid. Mr. Justice Wilson observed: "Under the Hindu law in force prior to the Hindu Wills Act it is clear that such a gift to unborn persons could not take effect; but the will in this case was made after the Hindu Wills Act came into operation and is governed by it. And the question whether such a gift is good under that Act has not, so far as I have been able to ascertain, been the subject of judicial decision. * * * * * *

The rule of construction laid down in the case of Jotendra Mohun Tagore *v.* Ganendra Mohun Tagore, 9 B. L. R., 377, does not apply to wills of Hindus made since the passing of Act XXI of 1870. The words "create any interest" in the last proviso to s. 3 of the Hindu Wills Act should be read as referring only to the estate or interest which can be given without reference to the further question to whom it can be given."

Pontifex, J., expressed his disagreement with this opinion

in Cally Nath Naugh Chowdry *v.* Chunder Nath Naugh Chowdry, I. L. R., 8 Calc., 378. It was a case of the testator's directions regarding the postponement of possession and enjoyment of property till five years after his death, and the accumulation of the profits of the estate in the meantime were set aside. The devise to his grandsons being at his death was held valid. The question of the validity of devises to unborn persons was not involved in it. Mr. Justice Pontifex however examined the decision at length. He observed: "The preamble of the Hindu Wills Act, 1870, gives no intimation that it was expedient to give enlarged powers over their estates to Hindu testators. On the contrary it was a restrictive rather than an enabling Act. It does not apply to Hindus in the Madras and Bombay Presidencies outside the Presidency towns, nor to the inhabitants of the North-West Provinces or the Punjab.

Mr. Justice Pontifex expresses his disagreement.

It is scarcely likely, therefore, that the Legislature could have intended to make any radical alteration in Hindu law. It is not even called "an act to amend and define the law of Hindu testamentary succession," but simply "an act to regulate the wills of Hindus." It seems to me, therefore, that in setting up and clothing each dry bone of the inarticulate bundle contained in section 2 of the Hindu Wills Act, we must add either at the beginning or end of each section introduced from the Succession Act the proviso or qualification contained in section 3 of the Hindu Wills Act. If placed at the end of the exceptions to sections 98 and 99, or at the end of sections 100 and 101, it would certainly, according to the Privy Council decision in the Tagore case, make them inoperative so far as Hindus are concerned. But at the time the Act was passed the Legislature was not instructed as to this, for the legal powers of devise among Hindus were still in doubt not having been defined by the first Court of appeal. "Moreover these sections of the Succession Act (sections 98 to 101) have in that Act, or were at all events intended to have, a seriously restrictive effect making the law in India with respect to Europeans far more stringent than heretofore. It would certainly be a most singular result of legislation if that which was originally intended to operate as a restriction should, under the very unsatisfactory method of legislation employed in the Hindu Wills Act, not only operate to create

a power new and theretofore unknown, but also subvert what is referred to by their Lordships of the Privy Council as a fundamental principle of Hindu law. It surely could never have been the intention of the Legislature to make such a radical change in the law." * * * *
"I am unable to agree that the words 'create any interest' in section 3 can be read in the narrower sense as referring only to the estate or interest which can be given without reference to the further question to whom it can be given."

In the present condition of such a complete difference of opinion it cannot be said the point decided by Mr. Justice Wilson is in any way settled.

Rai Kishori Dasi *v* Debendra Nath and the Privy Council ruling in Rai Kissen Chand *v.* Asmaid Koer support Mr. Justice Pontifex's opinion.

The case of Rai Kishori Dasi *v.* Debendra Nath Sircar, I. L. R., 15 Calc., 410 and 416, although not analogous, greatly supports the views of Mr. Justice Pontifex.

Amongst other provisions the will in the case contained a proviso regarding a gift to the grandsons of the testator, some living at his death and some not born then, and it was contended that the gift being to an indefinite class was void. Tottenham and Field, JJ., held that such a case was not before them, but that a gift over to unborn sons of a son is invalid. The case went on appeal to the Privy Council, and the judgment of the High Court was upheld. It can thus be said that the decision in the Tagore case that a gift to unborn sons is invalid still remains good.

A clear expression of opinion of the Privy Council is contained in their judgment in Rai Kissen Chand *v.* Asmaid Koer, I. L. R., 6 All., 560; L. R. 11 I. A., 164. It was not exactly a case of a will, but it decided the question that a gift to unborn persons is void. The term "gift" is a comprehensive one, and certainly includes gifts *inter vivos* or by wills. Lord Hobhouse, in delivering judgment, observed: "There remains a question of some difficulty whether the deed which contemplates benefits to after-born sons can have any operation. This question, although raised in the plaint, is not dealt with by either of the lower Courts. It depends entirely on the view which may be taken of the meaning of the parties to the transaction, for the rule of law on which the plaintiff relies, *viz.*, that gifts cannot be made to persons unborn at the time, is well settled."

By the Hindu Wills Act of 1870, noncupative or oral wills have been abolished. "The testator must execute his

will by signing or affixing his mark to his will or by authorising some other person to sign for him in his presence. Such signature or mark, whether of the testator or of the person who signs for him, must be so placed that it shall appear that it was intended thereby to give effect to the writing as a will. How wills should be executed and attested.

And with reference to attestation it is now the law that a Hindu will, affected by the Hindu Wills Act, must be attested by two or more witnesses, each of whom must have seen the testator duly execute the will by himself or by his deputy, or have received from him a personal acknowledgment of its due execution. The witnesses, however, need not sign in presence of each other, but each of them must sign in presence of the testator. No particular form of attestation is necessary, and it may be revoked in the manner by which it might have been made. The rule of construction in a Hindu will is as it is in an English will, *viz.*, to try and find out the meaning of the testator reading the whole of the document. A devise in general terms without words of inheritance will pass the entire estate of the testator. But clear words and a clearly expressed intention are necessary to pass an absolute estate, where the gift is to a woman, and especially when it is to the prejudice of the testator's issue, *vide* Shamshul *v.* Shewkram, 14 B. L. R., 226. Where, however, the terms of a will are so indistinct that the testator's views cannot be ascertained, it must fail. Similarly if the intention of the testator is to do what is not legal, it will be rejected, and the property sought to be disposed of will go to the heir-at-law, however stringent the instructions of the testator might have been that he should not take. It cannot remain in abeyance and must go to the heir-at-law. Chief Justice Sir Barnes Peacock said in the Tagore case, 4 B. L. R. (O. C. J.) 187: "A mere expression in a will that the heir-at-law shall not take any part of the testator's estate is not sufficient to disinherit him, without a valid gift of the estate to some one else. He will take by descent, and by his right of inheritance whatever is not validly disposed of by the will and given to some other person. On the other hand, it is not necessary that a will should contain an express declaration of a testator's desire or intention to disinherit his heirs if there is an actual and complete gift to some other person capable of taking under it." Effect should be given to the testator's intention. Indistinct and illegal wills are void.