HINDU FAMILY LAW

HINDU FAMILY LAW

AS ADMINISTERED IN BRITISH INDIA.

BY

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HINDU FAMILY LAW.

INTRODUCTION.

What is Hindu law?

HINDU law, as the term is understood by British administrators of justice, consists of the rules of law which are believed to have been generally binding on Hindus in matters to which they relate,[1] at the time of the commencement of the British dominion, with such variations as have been made by British legislation, or by the established custom of any tribe, caste, family, or locality.

Sir H. S. Maine says:[2]—

"Indian[3] law may be in fact affirmed to consist of a very great number of local bodies of usage, and of one set of customs reduced to writing, pretending to a diviner authority than the rest,[4] exercising consequently a great influence over them, and tending, if not checked, to absorb them. You must not understand that these bodies of custom are fundamentally distinct. They are all marked by the same general features; but there are considerable differences of detail."

To use the words of a learned Brahmin judge of the High Court of Bengal,[5] "Hindu law is a body of rules intimately mixed up with religion, and it was originally administered for the most part by private tribunals. The system was highly elastic, and had been gradually growing up by the assimilation of new usages and the modification of ancient text law under the guise of interpretation, when its spontaneous growth was suddenly arrested by the administration of the country passing into the hands of the English, and a degree of rigidity was given to it which it never before possessed."[6]

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[1] *I.e.* the law of *Sastras*, *post*, p. 6, as interpreted by the Digests and Commentaries, *post*, pp. 7–15.

[2] Maine's "Village Communities," pp. 52, 53.

[3] *I.e.* Hindu.

[4] This refers to the law of the Sastras, *post*, p. 6.

[5] Banerjee's "Law of Marriage," 2nd ed., p. 7.

[6] Sir H. S. Maine ("Village Communities," pp. 44, 45) says, "At the touch of the judge of the Supreme Court, who had been trained in the English school of special pleading, and had probably come to the East

Difference from other systems of law.

In three matters Hindu law differs from other systems of law, viz. in the family law, which arises from what is called by English lawyers the joint family system; secondly, in the law of adoption; and thirdly, in the law of succession and inheritance.

Application of Hindu law in British India.

Throughout British India, questions relating to the succession, inheritance, and marriage of Hindus, to caste, and to Hindu religious usages or institutions, are decided according to Hindu law.[1]

Although there is a variation in their language, the several enactments, which prescribe the law to be administered in the Courts established in British India, are in substantial agreement in making this provision.

The following is a list of such enactments—

High Court of Bengal. The High Court of Bengal, in the exercise of its ordinary original civil jurisdiction.	21 Geo. III. c. 70, s. 17, read with the Letters Patent, 1862, s. 18, and the Letters Patent, 1865, s. 19.
High Court of Madras. The High Court of Madras in the exercise of its ordinary original civil jurisdiction.	37 Geo. III. c. 142, s. 13, read with 40 Geo. III. c. 79, s. 5, and Letters Patent, 1862, s. 18.
High Court of Bombay. The High Court of Bombay in the exercise of its ordinary original civil jurisdiction.	37 Geo. III. c. 142, s. 13, read with 4 Geo. IV. c. 71, s. 9.[2]

There is in the above enactments no express reference to questions of marriage, caste, or religious usages and institutions, but the Supreme

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in the maturity of life, the rule of native law dissolved and, with or without his intention, was to a great extent replaced by rules having their origin in English law books. Under the hand of the judges of the Sudder Courts, who had lived since their boyhood among the people of the country, the native rules hardened, and contracted a rigidity which they never had in real practice." See article by Mr. Justice Nair of Madras in *Contemporary Review* for May, 1906.

[1] *I.e.* any usage or institution connected with religious ceremonies; see *post*, p. 4.

[2] See *Mathura Naikin* v. *Esu Naikin* (1880), 4 Bom. 545, at p. 556.

Courts and High Courts have always dealt with such questions according to the personal law of the individuals concerned.[1]

The Presidency Small Cause Courts have to determine all questions according to the law administered by the High Courts in the exercise of their ordinary original civil jurisdiction.[2] Presidency Small Cause Courts.

Bengal (outside Calcutta), the United Provinces, and Assam.	Act XII. of 1887, s. 37.	Bengal, United Provinces and Assam Provincial Courts.
The Courts of the Madras Presidency (outside the town of Madras), except the tracts respectively under the jurisdiction of the agents for Ganjam and Vizagapatam.	Act III. of 1873, s. 16.	Madras Provincial Courts.
The Bombay Presidency (outside the island of Bombay).	Bombay Regulation IV. of 1827, s. 26.	Bombay Provincial Courts.

This section is as follows: "The law to be observed in the trial of suits shall be Acts of Parliament, and Regulations of Government applicable to the case; in the absence of such Acts and Regulations, the usage of the country in which the suit arose; if none such appear, the law of the defendant; and in the absence of specific law, and usage, justice, equity, and good conscience alone."

The Punjab.	Act IV. of 1872, s. 5, as amended by Act XII. of 1878.	Punjab.

This enactment describes the topics of Hindu law to be dealt with by the Courts as "succession, special property of females, betrothal, marriage, divorce, dower, adoption, guardianship,[3] minority,[4] bastardy, family relations, wills, legacies, gifts, partitions, or any religious usage or institution." Although this description is more detailed than is to

[1] See *In re Kahandas Narrandas* (1880), 5 Bom. 154, at pp. 166, 167, 170.

[2] Act XV. of 1882, s. 16.

[3] See Act VIII. of 1890, s. 17

[4] Except in questions of marriage, dower, divorce, and adoption, the age of majority has been fixed by Act IX. of 1875.

be found in the other enactments, the other Courts in practice apply Hindu law to all these cases when the status, act, or right of a Hindu is in question.

Oudh.

Oudh.—Act XVIII. of 1876, s. 3.

This section contains provisions similar to those in force in the Punjab.

Central Provinces.

The Central Provinces.—Act XX. of 1875, s. 5.

In this enactment the topics of Hindu and Mahomedan law are described in the same way as for the Punjab, except that "divorce" is not included. In the few Hindu cases in which the question of divorce arises,[1] the question would probably be held to be included in the expression "marriage."

Burma.

Burma, except the Shan States.—Act XIII. of 1898, s. 13.

British Beluchistan. Ajmere and Merwara.

British Beluchistan.—Reg. III. of 1890, s. 89.

Ajmere and Merwara.—Reg. III. of 1877, s. 4.

The wording of this section corresponds with that of Act IV. of 1872, s. 5.[2]

Caste and religious usages.

Questions of caste and of religious usages and institutions can only be determined by the Civil Courts where their determination is necessary for the purpose of deciding a suit "of a civil nature."

A suit in which the rights to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.[3]

In the Bombay Presidency (outside the Island of Bombay) the Courts are prohibited from deciding caste questions, except in a suit instituted for the recovery of damages on account of an alleged injury to the caste and character of the plaintiff, arising from some illegal act or unjustifiable conduct of the other party.[4]

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[1] *Post*, p. 58.

[2] *Ante*, p. 3.

[3] C. P. C. 1908, s. 9; Act XIV. of 1882, s. 11. See the cases collected in the note to that section in O'Kinealy's "Civil Procedure Code." *Venkatachalapati* v. *Subbarayadu* (1890), 13 Mad. 293; *Krishnasami* v. *Virasami Chetti* (1886), 10 Mad. 133; *Krishnasami Ayyangar* v. *Samaram Singrachariar* (1906), 30 Mad. 158; *Lokenath Misra* v. *Dasarathi Tewari* (1905), 10 C. W. N. 505. See *Sadagopa Chariar* v. *Rama Rao* (1907), 34 I. A. 93; 30 Mad. 185; 11 C. W. N. 585.

[4] Bom. Reg. II. of 1827, s. 21. See *Girdhar* v. *Kalya* (1880), 5 Bom. 83; *Nemchand* v. *Savaichand* (1866), 5 Bom. 84, note.

Contracts and dealings.

The High Courts of Bengal, Madras, and Bombay, in the exercise of their ordinary original civil jurisdiction, are also required to administer the Hindu law in all matters of contract and dealing between Hindus, except where such matters have been the subject of legislative enactment.

So far as it goes, the Indian Contract Act [1] has superseded the Hindu law of contracts; [2] but it may sometimes be necessary to refer to Hindu law as to matters of contract or dealing. For instance, the Hindu law of gifts is to some extent still applied to gifts by Hindus, and it has been held that the law of *dámdupat*, by which no greater arrear of interest can be recovered at any one time than what will amount to the principal sum, applies to the Presidency towns.[3]

When Hindu law applicable.

In some of the enactments above referred to the Courts are required to administer the Hindu law only in cases where the defendant is a Hindu,[4] and in some of them in cases where the parties are Hindus. In either case the question as to whether the Hindu law is to be applied depends rather upon whether the person whose inheritance, succession, etc., is in dispute was a Hindu, or the persons, whose dealing is in question, were Hindus, rather than upon the accident of the arrangement of the parties in the litigation.[5]

As to the application of their personal law to Hindus, apart from legislative enactment, see *In re Kahandas Narrandas* (1880), 5 Bom. 154, at pp. 166, 167, 170.

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[1] IX. of 1872.

[2] *Madhub Chunder Poramanick* v. *Rajcoomar Doss* (1874), 14 B. L. R. 76; 22 W. R. C. R. 370.

[3] *Nobin Chunder Banerjee* v. *Romesh Chunder Ghose* (1887), 14 Calc. 781; *Ramconnoy Audicarry* v. *Johur Lall Dutt* (1880), 5 Calc. 867; *Ganpat Pandurang* v. *Adarji Dadabhai* (1877), 3 Bom. 312. It has been applied in Bombay to cases outside the island of Bombay. *Sundarabai* v. *Jayavant Bhikaji Nadgowda* (1899), 24 Bom. 114; *Sukalal* v. *Bapu Sakaram* (1899), 24 Bom. 305; *Balkrishna Babaji* v. *Hari Govind* (1890), 15 Bom. 84; *Ali Saheb* v. *Shabji* (1895), 21 Bom. 85.

[4] See law to be administered in High Courts in the exercise of their ordinary original civil jurisdiction, *ante*, p. 2.

[5] This seems to be the effect of the following cases. *Azimunnissa Begum* v. *Dale* (1871), 6 Mad. H. C. 455, at pp. 474, 475; *Ali Saheb* v. *Shabji* (1895), 21 Bom. 85; *Lakshmandas Sarupchand* v. *Dasrat* (1880), 6 Bom. 168, at pp. 183, 184; *Sarkies* v. *Prosonomoyee Dossee* (1881), 6 Calc. 794, at pp. 805, 806; 8 C. L. R. 76, at pp. 86, 87.

Sources of Hindu Law.

The sources of Hindu law.

Although in theory Hindu law is ultimately based upon the *Vedas*, which are said to have been of Divine origin, in matters of law the *Vedas* are of no greater authority than the *Smritis* (things heard by the *Rishis*, or sages of antiquity), or codes of revealed law. For all practical purposes it is unnecessary to trace the law earlier than the *Dharma*[1] *Sastras*,[2] which expression, although comprehending both the *Vedas* and the *Smritis*, is technically used to refer only to the *Smritis*.[3]

In modern practice the *Dharma Sastras* are of less authority than the Commentaries and Digests, which are based upon them, and the views expressed in the Commentaries and Digests in their place give way to the decisions of the Judicial Committee of the Privy Council and of the High Courts of British India.

The *Sastras*.

The principal Codes or *Sanhitas* constituting the *Dharma Sastras*[4] are—

1. The Code or Institutes of *Manu*.

This is undoubtedly the most important of the *Dharma Sastras*. Its authorship is unknown, and there is great uncertainty as to its age. It was translated by Sir William Jones, who considered it was written in the thirteenth century B.C. Other authorities have placed it much later, Max Müller going so far as to consider that the work was composed not earlier than the second century B.C.

2. The Code or Institutes of *Yajnavalkya*.

This code is second in importance to that of *Manu*. It was apparently written in one of the early centuries of the Christian era. The *Mitakshara*[5] is a commentary upon this code.

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[1] Law or duty.

[2] Teacher.

[3] In Warren Hastings' plan for the administration of justice it was provided that Hindus should be governed by the laws of their *Shasters*, with regard to inheritance, marriage, caste, and religious usages. Upon this rule are based the several provisions above mentioned, *ante*, pp. 2-4.

[4] For a list of all the Sanhitas (collections or institutes), see Sircar's "Vyavastha Darpana," preface, and Bhattacharya's "Hindu Law," 2nd ed., p. 25.

[5] *Post*, p. 11.

3. The Code or Institutes of *Narada*.

The translator (Dr. Jolly) of this code fixes its earliest possible date at about 400 or 500 A.D.

Commentaries and Digests.

The next step in the development of Hindu law consisted in the composition of a number of Commentaries and Digests based upon the *Smritis*.

The authority of the several commentators necessarily varied in different districts, and thus arose the schools of law, which are operative in different parts of India.[1]

The differences between these schools are said to have arisen in the main from the different views expressed by the commentators who were of authority in the districts which were governed by the schools respectively. Difference of the custom of districts may also have helped to differentiate the schools both directly and indirectly by influencing the opinions of the commentators.

The two principal schools[2] of Hindu law are—

Principal schools of Hindu law.

1. The Mitakshara[3] school, which prevails throughout India, except where the Bengal school prevails.

This is the orthodox system of Hindu law.

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[1] See *Collector of Madura* v. *Mootoo Ramalinga Sathupathy* (1868), 12 M. I. A., 397, at p. 435; 1 B. L. R. P. C. 1, at p. 11; 10 W. R. P. C. 17, at p. 21; G. D. Banerjee's "Law of Marriage," 2nd ed., p. 5. H. T. Colebrooke (Strange's "Hindu Law," i. p. 316) says, "The written law, whether it be *Sruti* or *Smriti*, direct revelation or tradition, is subject to the same rules of interpretation. These rules are collected in the *Mimansa*, which is a disquisition on proof and authority of precepts. It is considered as a branch of philosophy; and is properly the logic of the law. In the eastern part of India, viz. Bengal and Bahar, where the *Vedas* are less read, and the *Mimansa* less studied than in the south, the dialectic philosophy, or *Nyaya*, is more consulted, and is there relied on for rules of reasoning and interpretation on questions of law, as well as upon metaphysical topics." Dr. Jogendranath Bhattacharya ("Hindu Law," 2nd ed., pp. 28, 29) considers that the Commentaries and Digests were the outcome of a desire to reconcile the Smritis at the time when Brahminism had regained its ascendency.

[2] This expression has been objected to, but it was defended by Colebrooke (Strange's "Hindu Law," vol. i. p. 319) who originated it. See G. D. Banerjee's "Law of Marriage," 2nd ed., pp. 6, 7; Rajkumar Sarvadhikari's "Law of Inheritance," pp. 343-346.

[3] So named after the treatise by *Vijnaneshvara* (*post*, p. 11), which is of authority throughout India, except where superseded by other works in Bengal and Western India.

2. The Bengal or Daya-bhaga[1] school, which prevails where the Bengal language is spoken by the inhabitants of the country.[2]

This school was founded by Jimutavahana[3] and Raghunandana[4] in the fifteenth century.

Subdivision of Mitakshara school.

The Mitakshara school is subdivided into four minor schools, viz.—

1. The Benares school.

This school prevails in Behar, in the district of Benares, and in Central and North-western India, and in the whole of Northern India,[5] except that in the Punjab it is considerably modified by customary law.

2. The Dravida or Dravira school.

This school prevails in the Madras Presidency, *i.e.* in the southern portion of the peninsula. It was founded in the thirteenth century by Devananda Bhatta.[6]

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[1] Sometimes called the *Gauriya* school.

[2] That is, the Revenue divisions of the Presidency of Bengal, Rajshaye, Dacca, Burdwan, and Chittagong, Manbhoom, the Assam Valley districts, Sylhet and Cachar.

[3] *Post*, p. 10.

[4] *Post*, p. 10.

[5] Orissa is said, in Morley's "Digest" (Introduction, p. cxc.), to be governed by this school. In a note to *Bishenpirea Munee* v. *Soogunda* (*Ranee*) (1801), 1 Ben. Sel. R. 37, at p. 39, note (2nd ed., 49, at p. 51, note), Mr. Macnaghten states that "the authorities followed in Orissa are the same with those of Bengal"; but the opinions of the pundits in this case were not founded on Bengal authorities, and as Mr. Mayne points out (7th ed., p. 11, note), in another Orissa case mentioned in Macnaghten's "Hindu Law," ii. 306, the opinion of the pundits was founded on the Mitakshara. In *Raghunadha* (*Sri*) v. *Brozo Kishoro* (*Sri*) (1876), 3 I. A. 154; 1 Mad. 69; 25 W. R. C. R. 291, which was a case from Ganjam, which was included in the ancient Hindu kingdom of Orissa, the law of the Dravida school was applied apparently without question. Mr. Mayne ("Hindu Law," 7th ed., p. 11) suggests that the Court applied the system of law with which it was most familiar. In *Raghubanund Doss* v. *Sadhu Churn Doss* (1878), 4 Calc. 425; 3 C. L. R. 534, the Mitakshara law was applied to a case from Orissa. See also *Kalee Pudo Banerjee* v. *Choitun Pandah* (1874), 22 W. R. C. R. 214; *Jogendra Bhupati Hurri Chundun Mahapatra* (*Raja*) v. *Nityanund Mansingh* (1890), 17 I. A. 128; 18 Calc. 151. In *Parbati Kumari Debi* (*Srimati Rani*) v. *Jagadis Chunder Dhabal* (1902), 29 I. A. 82; 29 Calc. 432; 6 C. W. N. 490 the decision of the Court in India showed that Orissa was governed by the Mitakshara, but the question was not decided by the Judicial Committee.

[6] *Post*, p. 12. See *Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (1868), 12 M. I. A. 397, at p. 433; 1 B. L. R. P. C. 1, at p. 10; 10 W. R. P. C. 17, at p. 20.

Mr. Morley[1] says that the Dravida school "may be subdivided into three districts, in each of which some particular law treatises have more weight than others; these districts are: Drávida, properly so called,[2] Karnátaka,[3] and Andhra."[4] Subdivision of Dravida school.

3. The Maharashtra school.

This school prevails where the Mahratta language is spoken as a vernacular.

4. The Mithila school.

This school prevails in what was in ancient times the Province of Mithila, or Tirhoot,[5] and in the adjoining districts. It was founded by Chandeshwar, 1314 A.D., and Vachaspati Misra, who flourished in the fifteenth century.[6]

Sastri Golap Chunder Sircar[7] adds to this enumeration a school which he calls the Punjab School. This school is not recognized by other text writers, and is not referred to in the authorities by that name. There may be many differences between the Hindu law as administered in the Punjab and that which is administered in the other provinces, but such differences arise from the existence of local customs, upon which the law is there based,[8] and do not, as in the case of the other schools[9] arise from differences of opinion as to the true construction of texts. Punjab school.

The geographical limits of these schools cannot be accurately defined.[10] Where there is a dispute as to which school prevails in a particular locality the question must be determined upon evidence.

The redistribution of districts or other arbitrary divisions of land by the Government does not render the inhabitants of the locality dealt with liable to be subject to a different school of law.[11]

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[1] Morley's "Digest," Introduction, p. cxci.

[2] Where the Tamil language is spoken.

[3] Where the Kanarese language is spoken.

[4] Where the Telegu language is spoken. See *Narasammal* v. *Balaramacharlu* (1863), 1 M. H. C. 420, at p. 425.

[5] "The district of Tirhoot, which is a corruption of the Sanskrit name *Tirabhukti*, is, as the name implies, bounded on three sides by three rivers, namely, by the Gandak on the west, the Kosi on the east, and the Ganges on the south." G. C. Sircar's "Law of Adoption," p. 446. See map of ancient Mithila annexed to P. C. Tagore's translation of the Vivada Chintamani.

[6] Bhattacharya's "Hindu Law," 2nd ed., p. 49.

[7] "Hindu Law," 1st ed., p. 24. "Law of Adoption," pp. 228, 254.

[8] See Tupper's "Punjab Customary Law," vol. ii. pp. 82–86.

[9] *Ante*, p. 7.

[10] See Morley's "Digest," Introduction, pp. clxxxix.–cxcii.

[11] *Prithee Singh* v. *Court of Wards* (1875), 23 W. R. C. R. 272. This decision was after remand by the Judicial Committee in *Sheo Soondooree*

Paramount works of authority, Bengal school.

The following are the principal works of authority in the Bengal School:[1]—

1. *Daya-bhaga*,[2] by Jimutavahana.

Nothing is known of the author. He probably lived in Bengal in the fifteenth century.[3] This work was translated by Mr. H. T. Colebrooke. It is the highest authority in Bengal.[4]

2. Raghunandana's *Smritis*.

This author is said to be of the highest authority in Bengal except in matters of inheritance.[5] The portion of the work relating to inheritance (Dayatattwa) in general strictly follows the Daya-bhaga. Raghunandana seems to have flourished in the latter half of the fifteenth century or beginning of the sixteenth century.[6]

3. *Daya-krama Sangraha*, by Sree Krishna Tarkalankar.

This is a treatise on the law of inheritance, following the Daya-bhaga, and apparently written early in the eighteenth century. It was translated by Mr. P. M. Wynch in 1818.

4. Srikrishna's Commentary. A commentary on the Daya-bhaga, by the last-named writer.

5. *Dattaka Chandrika*. A treatise on the law of adoption.

The translator (Mr. Sutherland) ascribed the authorship of this work to Devanda Bhatta, the author of the "Smriti Chandrika,"[7] but it is now taken to be the work of a Bengal Pundit.[8] It has been suggested that this work was forged for the purpose of a particular suit,[9] but the

(*Mussamut*) v. *Pirthee Singh* (1872), 21 W. R. C. R. 891. The judgment of the Judicial Committee seems to show that the burden was upon the person asserting the retention of the law originally applicable to the district, but this view of the judgment was not suggested in the judgment on the High Court on remand, nor was it referred to when the case came again before the Judicial Committee (*Sheo Soondary* v. *Pirthee Singh* (1877), 4 I. A. 147).

[1] See Mitra's "Law of Joint Property," p. 13; Bhattacharya's Hindu Law," 2nd ed., p. 49.

[2] Lit.: Partition of Inheritance.

[3] See Bhattacharya's "Hindu Law," 2nd ed., pp. 33–35, and preface to Colebrooke's translation of "Daya-bhaga."

[4] Bhattacharya's "Hindu Law," 2nd ed., p. 37.

[5] Bhattacharya's "Hindu Law," 2nd ed., p. 36. The portion of his work dealing with inheritance (Dayatattwa) has been translated by G. C. Sircar.

[6] See Sircar's "Vyavastha Darpana," 2nd ed. xvi. note.

[7] *Post*, p. 12.

[8] Mayne's "Hindu Law," 7th ed., pp. 31, 32; V. N. Mandlik, Introd., 73; Bhattacharya's "Hindu Law," 2nd ed., p. 32; Jolly's "Lectures," pp. 22, 23; *Ganga Sahai* v. *Lekhraj Singh* (1886), 9 All. 253, at pp. 323, 324.

[9] Sircar's "Law of Adoption," pp. 124–126; *contrâ*; *Bhagwan Singh* v. *Bhagwan Singh* (1895), 17 All. 294, at p. 313.

Judicial Committee has treated the "Dattaka Chandrika" as of great authority in questions of adoption in Bengal.[1]

The *Mitakshara* is also of high authority in Bengal in matters where it does not conflict with the above-named works.[2]

Mitakshara school.

In the Mitakshara school the guiding authority[3] is the work from which the name of the school has been taken, viz. the *Mitakshara*, which is a commentary on *Yajnovalkya*,[4] by Vijnaneshwara Jogi.

The author is said to have lived at the end of the eleventh century. "Vijnaneshwara's views and opinions are eminently practical. The high authority which his work enjoys almost throughout India is due partly to that reason and partly also to the fact that he was the councillor of the most powerful Hindu king of his time."[5] He lived at Kalyāna (probably the modern Kalyāni in the Nizam's dominions), which was the capital of Vikramāditya VI., or Vikramanka, king of the Chalukya kingdom of the Deccan from 1076 for about half a century.[6]

The schools, which are subdivisions of the Mitakshara school, give preference to certain treatises and commentaries which control and explain passages of the Mitakshara. Thus arise the differences between those subdivisions.[7]

Where there is no consensus of opinion among the commentators or established usage, the doctrines of the Mitakshara prevail.[8]

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[1] *Rungama* v. *Atchama* (1847), 4 M. I. A. 1, at p. 57; 7 W. R. P. C. 57, at p. 59. *Collector of Madura* v. *Mootoo Ramalinga Sathupathy* (1868), 12 M. I. A. 397, at p. 437; 1 B. L. R. P. C. 1, at p. 13; 10 W. R. P. C. 17, at p. 22; *Gurulingaswami* (*Sri Balusu*) v. *Ramalakshmamma* (*Sri Balusu*), *Radhamohun* v. *Hardai Bibi* (1899), 26 I. A. 113, at pp. 131, 132; 22 Mad. 398, at pp. 411; 21 All. 460, at pp. 465, 466; 3 C. W. N. 427, at p. 439; *Bhagwan Singh* v. *Bhagwan Singh* (1898), 26 I. A. 153, at p. 161; 21 All. 412, at p. 419; 3 C. W. N. 454, at p. 457.

[2] Bhattacharya's "Hindu Law," 2nd ed., p. 34. *Bhugwandeen Doobey* v. *Myna Baee* (1867), 11 M. I. A. 487, at p. 507; 9 W. R. P. C. 23, at p. 29.

[3] *Jagannath Prasad Gupta* v. *Runjit Singh* (1897), 25 Calc. 354, at p. 368. *Collector of Madura* v. *Mootoo Ramalinga Sathupathy* (1868), 12 M. I. A. 397, at p. 435; 1 B. L. R. P. C. 1, at p. 11; 10 W. R. P. C. 17, at p. 21. *Krishnaji Vyanktesh* v. *Pandurang* (1875), 12 Bom. H. C. 65.

[4] *Ante*, p. 6.

[5] Bhattacharya's "Hindu Law," 2nd ed., p. 31.

[6] V. A. Smith's "Early History of India," p. 329.

[7] *Bhugwandeen Doobey* v. *Myna Baee* (1867), 11 M. I. A. 487, at pp. 507, 508; 9 W. R. P. C. 23, at p. 29.

[8] See *Raju Gramany* v. *Ammani Ammal* (1906), 29 Mad. 358.

The following are the principal works of authority in those schools:[1]—

Benares school.

In the Benares school.

1. *Vira Mitrodaya.*[2]

This work was written by Mitra Misra, who probably lived in the sixteenth century, for the purpose of refuting the arguments of Jimuta Vahana[3] and the other writers of the Bengal school.[4]

The *Vira Mitrodaya* is of very high authority in the Benares school,[5] but cannot be followed where it conflicts with a clear statement in the *Mitakshara.*[6]

2. *Nirnaya Sindhu.*

This work was written by Kamalakara, and was completed in 1612 A.D.

3. *Dattaka Mimansa.*

This is a treatise on adoption by Nanda Pandita, who lived at Benares in the seventeenth century. It has been translated by Mr. Sutherland. The authority of this work has been emphasized by the Judicial Committee on more than one occasion.[7]

Dravida school.

In the Dravida school.[8]

1. *Smriti Chandrika,* by Devananda Bhut.

The author lived in Southern India about the thirteenth century.[9] The authority of this work is second only to that of the *Mitakshara.*[10] It has been translated by T. Kristnasawmy Iyer.

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[1] Sircar's "Hindu Law," 1st ed., p. 13. Mitra's "Law of Joint Property," p. 1.

[2] See Introduction to G. C. Sircar's translation, pp. xiii., xiv. Bhattacharya's "Hindu Law," 2nd ed., p. 36.

[3] *Ante*, p. 10.

[4] S. C. Sircar's "Vyavastha Chandrika," vol. i., Introduction, p. 17, and note.

[5] *Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (1868), 12 M. I. A. 397, at p. 438; 1 B. L. R. P. C. 1, at p. 14; 10 W. R. P. C. 17, at p. 22; *Gridhari Lall Roy* v. *The Bengal Government* (1868), 12 M. I. A. 448, at p. 466; 1 B. L. R. P. C. 44, at p. 52; 10 W. R. P. C. 32, at p. 34; *Tulshi Ram* v. *Behari Lal* (1889), 12 All. 328, at pp. 340–342; *Suba Singh* v. *Sarafraz Kunwar* (1896), 19 All. 215, at p. 231.

[6] *Jagannath Prasad Gupta* v. *Runjit Singh* (1897), 25 Calc. 354, at pp. 367, 368.

[7] Cases, *ante*, p. 11, note 1. See *Tulshi Ram* v. *Behari Lal* (1889), 12 All. 328, at pp. 341, 342; *Ganga Sahai* v. *Lekhraj Singh* (1886), 9 All. 253, at pp. 322, 323; *Bhagwan Singh* v. *Bhagwan Singh* (1895), 17 All. 294, at p. 311.

[8] See *Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (1868), 12 M. I. A. 397 at p. 437; 1 B. L. R. P. C. 1, at p. 13; 10 W. R. P. C. 17, at p. 22.

[9] Jolly's "Lectures," 20, 21.

[10] Strange's "Manual," 2nd ed., pp. 3, 4. Bhattacharya's "Hindu Law," 2nd ed., p. 32.

2. *Parasara Madhavya.*

This is a commentary on the *Parasara Smriti* by Madhava, who was Prime Minister of Bukka, the third King of Vijayanagara, whose reign commenced about 1361. It is said to be "in high esteem in Benares and in the Southern and Western schools."[1]

3. *Saraswati Vilasa.*[2]

This work was written by Pratapa Rudra Deva, a King of Orissa, early in the sixteenth century. It has been translated by Mr. Foulkes.

4. *Vyavahara Nirnaya.*

This was written by Varadaraja about the end of the sixteenth century. It has been translated by Dr. Burnell.

5. *Dattaka Chandrika.*[3]

The application of this work to Southern India is said to have been due to a mistake made by the translator in attributing the authorship to the author of the *Smriti Chandrika*;[4] but as it has been treated by the Judicial Committee as an authority in Southern India,[5] the effect of this mistake, if it be one, cannot be altered.

The Judicial Committee has also affirmed the *Vira Mitrodaya*[6] to be a work of authority in Southern India,[7] but it is submitted that that work is only of secondary authority elsewhere than in Benares.[8]

In the Maharashtra school.

Maharashtra school.

1. *Vyavahara Mayukha.*

This was composed by Nilkantha Bhatta about the beginning of the seventeenth century. It is of paramount authority in Gujerat,[9] in the Northern Konkan,[10] and in the island of Bombay.[11] In the Mahratta

[1] Bhattacharya's "Hindu Law," p. 31. The portion relating to inheritance (*Daya-vibhaga*) has been translated by Dr. Burnell.

[2] Lit.: the recreations of the goddess of learning.

[3] *Ante*, p. 10.

[4] See Jolly's "Lectures," p. 23.

[5] See cases *ante*, p. 11, note 1.

[6] *Ante*, p. 12.

[7] *Moniram Kolita* v. *Kerry Kolitany* (1880), 7 I. A. 115, at p. 153; 5 Calc. 776, at pp. 788, 789; 6 C. L. R. 322, at p. 332, referring to *Gridhari Lall Roy* v. *The Bengal Government*, 12 M. I. A. 448, at p. 466; 1 B. L. R. P. C. 44, at p. 52; 10 W. R. P. C. 32, at p. 34, which merely states that the work in question is of high authority in Benares.

[8] See *post*, p. 14.

[9] See West and Bühler's "Hindu Law," 2nd ed., p. 3.

[10] *Sakharam Sadashiv Adhikari* v. *Sitabai* (1879), 3 Bom. 353, at pp. 365 *et seq.*

[11] *Vandravan Jekisan* (*Patel*) v. *Manilal Chunilal* (*Patel*) (1890), 15 Bom. 565, at p. 574; *Lallubai Bapubai* v. *Mankuvarbai* (1876), 2 Bom. 388, at p. 418; *Krishnaji Vyankiesh* v. *Pandurang* (1875), 12 Bom. H. C. 65. See *Vijiarangam* v. *Lakshuman* (1871), 8 Bom. H. C. O. C. 244.

country its authority is inferior only to that of the *Mitakshara*.[1] Throughout Western India it is of high authority.[2] It has been translated by Mr. Borradaile, and again by Mr. V. N. Mandlik.

"Questions on the Hindu law of inheritance to property in the island of Bombay are to be determined in accordance with the *Mitakshara*, subject to the doctrine to be found in the *Mayukha*, where the latter differs from it. But as laid down by Telang, J., in *Gojabai* v. *Shrimant Shahajirao Maloji Raje Bhosle*.[3] 'Our general principle should be to construe the *Mitakshara* and the *Mayukha* so as to harmonize with one another wherever and so far as that is reasonably possible.'"[4]

2. *Nirnaya Sindhu*.[5]
3. *Dattaka Mimansa*.[6]
4. *Samskara Kaustaba*.[7]

This work is by Anantadeva. It is said to belong to the same period as the *Nirnaya Sindhu*.

In the introduction to West and Bühler's "Hindu Law"[8] it is stated that the *Viramitrodaya*[9] and the *Dattaka Chandrika*[10] are also authorities in Western India. The latter is an authority in Western India on the subject of adoption,[11] but the former is, it is submitted, rather a Benares than a Bombay authority.[12]

Mithila school.

In the Mithila school.

1. *Vivada Chintamani*.

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[1] *Balkrishna Bapuji Apte* v. *Lakshman Dinkar* (1890), 14 Bom. 605. *Jankibai* v. *Sundra* (1890), 14 Bom. 612; *Krishnaji Vyanktesh* v. *Pandurang* (1875), 12 Bom. H. C. 65.

[2] *Vandravan Jekisan (Patel)* v. *Manilal Chunilal (Patel)* (1890), 15 Bom. 565, at p. 574.

[3] (1892) 17 Bom. 114, at p. 118.

[4] *Kesserbai (Bai)* v. *Hunsraj Morarji* (1906), 33 I. A. 176, at p. 187; 30 Bom. 431, at p. 442; 10 C. W. N. 802, at p. 807.

[5] *Ante*, p. 12.

[6] *Ante*, p. 12. See *Waman Raghupati Bova* v. *Krishnaji Kashirav Bova* (1889), 14 Bom. 249, at p. 259; *Narayan Babaji* v. *Nana Manohar* (1870), 7 Bom. H. C. A. C. 153, at p. 166; *Bayabai* v. *Bala* (1866), 7 Bom. H. C., App. i., at pp. x., xii.; *Pranjeevandas Toolseydas* v. *Dewcooverbace* (1859), 1 Bom. H. C. 130, at p. 131

[7] *Collector of Madura* v. *Mootoo Ramalinga Sathupathy* (1868), 12 M. I. A. 397, at p. 438; 1 B. L. R. P. C. 1, at p. 14; 10 W. R. P. C. 17, at p. 22.

[8] 2nd ed., p. 1.

[9] *Ante*, p. 12.

[10] *Ante*, p. 12.

[11] *Waman Raghupati Bova* v. *Krishnaji Kashiraj Bova* (1889), 14 Bom. 249, at p. 259.

[12] *Dhondu Gurav* v. *Gangabai* (1879), 3 Bom. 369; *Collector of Madura* v. *Mootoo Ramalinga Sathupathy* (1868), 12 M. I. A. 397, at p. 438; 1 B. L. R. P. C. 1, at p. 14; 10 W. R. P. C. 17, at p. 22; *Gridhari Lall Roy* v. *The Bengal Government* (1868), 12 M. I. A. 448, at p. 466; 1 B. L. R. P. C. 44, at p. 52; 10 W. R. P. C. 32, at p. 34; K. K. Bhattacharya's "Law of the Joint Family, p. 199; see *ante*, p. 12.

This work was written by Vachaspati Misra, who flourished in Tirhoot in the beginning of the fifteenth century. It is the work of highest authority in this school. It has been translated by Prosono Coomar Tagore.

The *Vyavahara Chintamani* and the *Dwaita Nirnaya*, both by the author of the *Vivada Chintamani* are also authorities in the Mithila country.

2. *Vivada Ratnakara.*

This is an older compilation, but of less authority than the *Vivada Chintamani*. The writer was Chandesvara Thakkura, Prime Minister of Hara Sinha Deva, King of Mithila. He flourished at the end of the thirteenth or beginning of the fourteenth century. This work has recently been translated by G. C. Sircar and Digamvar Chatterjee.

3. *Dattaka Mimansa.*[1]

Sudhiviveka, by Rudradhara, *Dwaita Parishista*, by Keshav Misra,[2] and *Vivada Chandra*, by Lachmadevi,[3] are also authorities in this school.

Differences between the schools.

The Bengal and the Mitakshara systems differ in two main particulars,[4] viz.—

1. As to the persons who are coparceners, and their rights, as such, in property held in coparcenary, *i.e.* as a joint Hindu family.

Under the Mitakshara system rights in family property are acquired by birth and lapse by death.[5] In Bengal, rights in joint property are acquired by inheritance or will. In consequence of this difference, the law as to the power to alienate differs under the two systems.

2. As to inheritance.

The Mitakshara system prefers agnates to cognates generally. The Bengal school founds rights of inheritance upon the principle of the amount of religious efficacy which the person claiming can give by an offering to the *manes* of the person, whose property is in dispute, or of his ancestor.

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[1] *Ante*, p. 12. *Collector of Madura* v. *Mootoo Ramalinga Sathupathy* (1868), 12 M. I. A. 397, at p. 437; 1 B. L. R. P. C. 1, at p. 13; 10 W. R. P. C. 17, at p. 22.

[2] Bhattacharya's "Hindu Law," 2nd ed., p. 49.

[3] Colebrooke's "Digest," Introduction, p. xix.; see *Rutcheputty Dutt Jha* v. *Rajunder Narain Race* (1839), 2 M. I. A. 133, at p. 147.

[4] See Mayne's "Hindu Law," 7th ed., p. 40.

[5] *Post*, pp. 231, 243, 244.

The subdivisions of the Mitakshara school differ between themselves, and from the Bengal school, as to the right of a widow to adopt a son to her deceased husband,[1] and in certain other matters connected with adoption. They also differ in some questions of inheritance.

The Maharashtra school differs from all other schools in conferring rights of inheritance upon certain female relations, and in giving greater powers to female owners.

Decisions of Courts of Law.

The decisions of English Courts of law have played a considerable part in ascertaining, developing, and sometimes in crystallizing Hindu law. The Courts in India necessarily follow without question the decisions of the Judicial Committee of the Privy Council, and of the High Courts, if any, to which they are subordinate. Now that the volume of reported decisions upon questions of Hindu law has become so large, judicial decisions, in most cases, provide an answer to the questions which arise.

Legislative enactments.

By the following enactments the Legislature has made some alterations in those portions of the Hindu law which the Courts are required to administer :—

1. Act XXI. of 1850 (Freedom of Religion).
2. Act XV. of 1856 (Hindu widows remarriage).
3. Act VII. (Bom. C.) of 1866 (Hindus liability for ancestor's debts).
4. Act XXI. of 1870 (Hindu wills).
5. Act. IX. of 1872 (Contracts).[2]
6. Act IX. of 1875 (Majority).
7. Act IV. of 1882 (Transfer of Property).
8. Act III. (B. C.) of 1904 (Settled Estates Act).

To whom Hindu Law is Applicable.

To what persons Hindu law is applicable.

The expression "Hindus," in the enactments above referred to, includes not only persons who profess what is called the Hindu religion,[3] but also such of their descendants as have not openly abjured that religion.[4]

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[1] *Post*, pp. 120–127.

[2] See *ante*, p. 5.

[3] See *Dagree* v. *Pacotti San Jao* (1895), 19 Bom. 783, at p. 788.

[4] Banerjee's "Law of Marriage," 2nd ed., p. 16.

"In doubtful cases conformity to the manners and observances of the Hindus is a safe guide for concluding that a particular family is to be governed by the Hindu law."[1]

Castes.

Hindus are divided into the following four main divisions, or, as they are usually called, "castes"[2]:—

1. The *Brahmins*, or priestly caste.
2. The *Kshatriyas*, or warrior caste.[3]
3. The *Vaisyas*, or agricultural caste.
4. The *Sudras*.

When caste first originated in the Epic Age, the pure Hindus were members of the first three of these divisions, and the members of those divisions are now styled regenerate, or twice-born, having regard to the ceremonies of initiation which are peculiar to them. Each of these castes is now divided into a number of sub-castes. In the case of the Sudras nearly every occupation has its caste.

Jains and Sikhs.

In the absence of a special custom, Hindu law is applied to Jains[4] and to Sikhs.[5]

Loss of caste.

Degradation from caste,[6] or a departure from orthodoxy in the matter of diet or ceremonial,[7] does not prevent the application of Hindu law.

Change of religion.

Except so far as the Hindu law may be inconsistent

[1] Bhattacharya's "Law of the Joint Family," p. 50.

[2] This word is derived from the Portuguese "casta," race, species.

[3] See *Run Murdun Syn* (*Chuotorya*) v. *Sahub Purhulad Syn* (1857), 7 M. I. A. 18, at p. 46; 4 W. R. P. C. 132, at pp. 135, 136.

[4] *Sheo Singh Rai* v. *Dakho* (*Mussumut*) (1878), 5 I. A. 87; 1 All. 688; S. C. in court below (1874), 6 N. W. P. 382; *Chotay Lall* v. *Chunno Lall* (1878), 6 I. A. 15; 4 Calc. 744; 3 C. L. R. 465; *Ambabai* v. *Govind* (1898), 23 Bom. 257; *Amava* v. *Mahadgauda* (1896), 22 Bom. 416, at p. 418; *Rukhab* v. *Chunilal Ambushet* (1891), 16 Bom. 347; *Mohabeer Pershad* (*Lalla*) v. *Kundun Koowar* (*Mussamut*) (1867), 8 W. R. C. R. 116; *Bhagvandas Tejmal* v. *Rajmal* (1875), 10 Bom. H. C. 241, at p. 258; *Bachebi* v. *Makhan Lal* (1880), 3 All. 55.

[5] *Bhagwan Koer* (*Rani*) v. *Jogendra Chandra Bose* (1903), 30 I. A. 249, at p. 254; 31 Calc. 11, at pp. 30, 31; 7 C. W. N. 895, at p. 901; *Kissen Chunder Shaw* (*Doe dem*) v. *Baidam Beebee* (1815), 2 Morley's "Digest," 220. See 1 Morley's "Digest," p. clxxvii.; *Juggo Mohun Mullick* (*Doe dem*) v. *Saumcoomar Bebee* (1815), 2 Morley's "Digest," 43. Sir Edward Hyde East's evidence before a committee of the House of Lords, referred to in *Lopes* v. *Lopes* (1868), 5 Bom. H. C. O. C. 172, at p. 185.

[6] Act XXI. of 1850.

[7] *Bhagwan Kuar* (*Rani*) v. *Jogendra Chandra Bose* (1903), 30 I. A. 249, at p. 257; 31 Calc. 11, at p. 33; 7 C. W. N. 895, at p. 903.

with the new religion (if any) adopted by persons who have renounced the Hindu religion,[1] such law continues generally applicable to such persons and to their descendants, if they do not elect to abandon their subjection to Hindu law.[2]

Conversion to Mahomedan religion.

But except on proof of a well-established custom, and then only with regard to succession and inheritance, converts to the Mahomedan religion, which in itself regulates the devolution of property, are bound by the Mahomedan law.[3]

Such custom has been fully established in the case of the Khoja Mahomedans[4] the Cutchi Memons,[5] the Suni Borah Mahomedan

[1] As, for instance, persons converted to Christianity cannot retain the practise of polygamy. *In re Millard* (1887), 10 Mad. 218; *Lopez* v. *Lopez* (1885), 12 Calc. 706, at p. 722; *Emperor* v. *Lazar* (1907), 30 Mad. 550.

[2] *Abraham* v. *Abraham* (1863), 9 M. I. A. 199, at pp. 240–242; 1 W. R. P. C. 1, at pp. 5, 6 (a case of conversion to Christianity); *Ponnusami Nadan* v. *Dorasami Ayyan* (1880), 2 Mad. 209 (ditto); *Bhagwan Koer (Rani)* v. *Jogendra Chandra Bose* (1903), 30 I. A. 249, at pp. 256, 257; 31 Calc. 11, at p. 33; 7 C. W. N. 895, at p. 903 (a case of an alleged Brahmo); *Kusum Kumari Roy* v. *Satyaranjan Das* (1903), 30 Calc. 999; 7 C. W. N. 784 (a case of a Brahmo). In *Francis Ghosal* v. *Gabri Ghosal* (1906), 31 Bom. 25, differing from *Tellis* v. *Saldanha* (1886), 10 Mad. 69, it was held that partnership can be a part of the law governing the rights of Christian family, converted from Hinduism. In *Raj Bahadur* v. *Bishen Dayal* (1882), 4 All. 343, at p. 347, it is said, "A Hindu or Mohammedan who becomes a convert to some other faith, is not deprived *ipso facto* of his rights to property by inheritance or otherwise. *Primâ facie* he loses the benefits of the law of the religion he has abandoned, and acquires a new legal status according to the creed he has embraced, if such creed involves with it legal responsibilities and obligations."

[3] *Abraham* v. *Abraham* (1863), 9 M. I. A. 199, at p. 242; 1 W. R. P. C. 1, at p. 5; *Mahomed Sidick* v. *Haji Ahmed* (1885), 10 Bom. 1, at pp. 9, 10; *Raj Bahadur* v. *Bishen Dayal* (1882), 4 All. 343, at p. 347; *Sajan (Musst)* v. *Roop Ram* (1867), 2 Agra. 61. *Surmust Khan* v. *Kadir Dad Khan* (1865), Agra. F. B. 39 (edition 1874, p. 29). See *Jowala Buksh* v. *Dharum Singh* (1866), 10 M. I. A. 511, at pp. 537, 538; *Hakim Khan* v. *Gool Khan* (1882), 8 Calc. 826; 10 C. L. R. 603, doubting *Rup Chand Chowdhry* v. *Latu Chowdhry* (1878), 3 C. L. R. 97. As to caste customs, see *Jina (Bai)* v. *Kharwar Jina* (1907), 31 Bom. 366. When the Hindu law of inheritance applies, converts to Islam take with all the liabilities annexed to the estate, such as the payment of maintenance and debts. *Rashid Karmali* v. *Sherbanoo* (1904), 29 Bom. 85.

[4] See *Ahmedbhoy Hubibbhoy* v. *Cassumbhoy Ahmedbhoy* (1889), 13 Bom. 534, and cases there cited.

[5] *Mahomed Sidick* v. *Haji Ahmed* (1885), 10 Bom. 1, and cases there cited; *Saboo Sidick (Haji)* v. *Ally Mahomed Jan Mahomed* (1904), 30 Bom. 270.

community of the Dhandhuka Taluka in Gujerat,[1] and the Molesalem Girasias.[2]

Illegitimate children.

The illegitimate children of Hindu parents are within the expression "Hindus."

It has been held that the illegitimate children of a Hindu mother by a European father are to be treated as Hindus, if they have been brought up as such,[3] but there is authority that where the mother is a non-Hindu the children cannot be treated as Hindus, even though the father is a Hindu.[4]

Native Christians.

The Indian Succession Act[5] has brought under its provisions all native Christians, whether they have or have not elected to remain subject to the Hindu law,[6] but does not affect rights of survivorship to coparcenary property.[7]

Profession of Hinduism.

The mere circumstance that a man calls himself a Hindu is not sufficient to entitle him to the application of Hindu law,[8] but in some cases, where the parties have followed the rules of Hindu law, that law may be applied as a rule of equity and good conscience.[9]

Who are governed by particular schools of law.

As the Hindu law is a personal law, a Hindu is presumed to be governed by the school of law which governs the locality in which he resides.[10]

Families governed by law of origin.

If a Hindu migrates from one part of the country to another, the presumption is that he retains the laws and customs as to succession and family relations prevailing in

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[1] *Baiji (Bai)* v. *Santok (Bai)* (1894), 20 Bom. 53.

[2] *Fatesangji Jasvatsangji (Maharana Shri)* v. *Harisangji Fatesangji (Kuvar)* (1894), 20 Bom. 181; *Joonas Noorani (Moosa Haji)* v. *Abdul Rahim (Haji)* (1905), 30 Bom. 197.

[3] *Myna Boyee* v. *Ootaram* (1861), 8 M. I. A. 400; 2 W. R. P. C. 4; S. C. on remand (1864), 2 Mad. H. C. 196. See *Tara Chand* v. *Reeb Ram* (1866), 3 Mad. H. C. 50, at p. 53.

[4] *Lingappa Goundan* v. *Esudasan* (1903), 27 Mad. 13.

[5] Act X. of 1865, s. 331.

[6] *Dagree* v. *Pacotti San Jao* (1895), 19 Bom. 783; *Ponnusami Nadan* v. *Dorasami Ayyan* (1880), 2 Mad. 209; *Joseph Vathiar of Nazareth* (1872), 7 Mad. H. C. 121.

[7] *Francis Ghosal* v. *Gabri Ghosal* (1906), 31 Bom. 25; differing from *Tellis* v. *Saldanha* (1886), 10 Mad. 69. See *Jalbhai Ardeshir Shet* v. *Manoel* (1894), 19 Bom. 680, at p. 691.

[8] *Raj Bahadur* v. *Bishen Dayal* (1882), 4 All. 343, at p. 348.

[9] *Ibid.* See also *Abraham* v. *Abraham* (1863), 9 M. I. A. 199, at p. 243; 1 W. R. P. C. 1, at p. 6.

[10] *Ram Das* v. *Chandra Dassia* (1892), 20 Calc. 409; *Jugo Bundhoo Tewaree* v. *Kurum Singh* (1874), 22 W. R. C. R. 341.

the Province, from which he came,[1] at the time of the migration,[2] and is not subject to the particular Hindu law administered in the place to which he migrates, or to the customs prevalent there.[3]

Such presumption may be rebutted by proof that the individual or his ancestors had adopted the law, usages, or religious ceremonies of the country of his residence.[4]

"It is not by looking merely at the performance of occasional local festivals that we can judge by what rule the family is governed. But we must look to the more important rites and ceremonies which are performed by them, namely, to those which attend births, marriages, and deaths in the family."[5]

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[1] *Parbati Kumari Debi* (*Srimati Rani*) v. *Jagadis Chunder Dhabal* (1902), 29 I. A. 82; 29 Calc. 433; 6 C. W. N. 490 (see this case as to evidence supporting this presumption); *Ambabai* v. *Govind* (1898), 23 Bom. 257, at p. 263; *Soorendronath Roy* v. *Heeramonee Burmoneah* (1868), 12 M. I. A. 81; 1 B. L. R. P. C. 26; 10 W. R. P. C. 35; *Gridhari Lall Roy* v. *Bengal Government* (1868), 12 M. I. A. 448, at pp. 458, 459; 1 B. L. R. P. C. 44, at p. 46; 10 W. R. P. C. 31; *Rutcheputty Dutt Jha* v. *Rajunder Narain Rae* (1839), 2 M. I. A. 133, at p. 168; *Pudmavati* (*Rany*) v. *Doolar Singh* (*Baboo*) (1847), 4 M. I. A. 259; 7 W. R. P. C 41; *Lukkea Debea* v. *Gungagobind Dobey*, W. R. 1864, C. R. 56; *Huropershad Roy Chowdhry* v. *Shibo Shunkuree Chowdhrain* (1870), 13 W. R. C. R. 47; *Koomud Chunder Roy* v. *Seetakanth Roy* (1863), W. R. F. B. R. 75; *Sonatun Misser* v. *Ruttun Mallah* (1864), W. R. 1864, C. R. 95; *Ootum Chunder Bhuttacharjee* v. *Obhoychurn Misser* (1862), W. R. F. B. R. 67; S. C. *sub nomine Junaruddeen Misser* v. *Nobin Chunder Perdham*, Marshall, 232; *Ram Bromo Pandah* v. *Kaminee Soondures Dossee* (1866), 6 W. R. C. R. 295; *Mailathi Anni* v. *Subbaraya Mudaliar* (1901), 24 Mad. 650. See *Chandika Bakhsh* v. *Muna Kuar* (1902), 29 I. A. 70; 24 All. 273; 3 C. W. N. 425.

[2] See *Vasudevan* v. *Secretary of State* (1887), 11 Mad. 157, at p. 162.

[3] See *Byjnath Pershad* v. *Kopilmon Singh* (1875), 24 W. R. C. R. 95.

[4] See *Ram Bromo Pandah* v. *Kaminee Soondures Dossee* (1866), 6 W. R. C. R. 295; *Parbati Kumari Debi* (*Srimati Rani*) v. *Jagadis Chunder Dhabal* (1902), 29 I. A. 82; 29 Calc. 433; 6 C. W. N. 490; *Soorendronath Roy* v. *Heeramonee Burmoneah* (1868), 12 M. I. A. 81, at p. 96; 1 B. L. R. (P. C.) 26, at p. 36; 10 W. R. P. C. 35, at p. 38; *Raj Chunder Narain Chowdry* v. *Goculchund Goh* (1801), 1 Ben. Sel. R. 43 (new edition, 56); *Ootum Chunder Bhuttacharjee* v. *Obhoychurn Misser* (1862), W. R. F. B. R. 67; S. C. *sub nomine Junaruddeen Misser* v. *Nobin Chunder Perdham*, Marshall, 232; *Chundro Seekhur Roy* v. *Nobin Soondur Roy* (1865), 2 W. R. C. R. 197; *Ram Bromo Pandah* v. *Kaminee Soondures Dossee* (1866), 6 W. R. C. R. 295.

[5] *Huro Pershad Roy Chowdhry* v. *Shibo Shunkuree Chowdhrain* (1870), 13 W. R. C. R. 47. See *Pudmavati* (*Rany*) v. *Doolar Sing* (*Baboo*) (1847), 4 M. I. A. 259; 7 W. R. P. C. 41; *Login* v. *Princess Victoria Gouramma of Coorg* (1862), 1 Ind. Jur., O. S. 109.

Jains would ordinarily be governed by the Mitakshara school,[1] but it has been held that in the absence of evidence the Hindu law applicable in that part of the country in which they dwell would apparently be applicable.[2] Sastri G. C. Sircar[3] says, "The Jainas of Bengal . . . are governed by the Mitakshara law of the country of their origin, and not by the Dayabhaga school prevailing here." Jains.

CUSTOM.

In administering the Hindu law, the Courts are required to give effect to a custom, *i.e.* to a rule which in a particular family[4] or in a particular caste or class,[5] or in a particular district,[6] has from long usage obtained the force of law.[7] Custom.

"Under the Hindu system of law clear[8] proof of usage will outweigh the written text of the law."[9]

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[1] *Mandit Koer* (*Mussammat*) v. *Phool Chand Lal* (1897), 2 C. W. N. 154.

[2] *Mohabeer Pershad* (*Lalla*) v. *Kundun Koowar* (*Mussamut*) (1867), 8 W. R. C. R. 116, at p. 118.

[3] "Law of Adoption," p. 353.

[4] A family custom is called a *Kolάchár*. See *Urjun Sing* (*Rawut*) v. *Ghunsiam Sing* (*Rawut*) (1851), 5 M. I. A. 169; *Gunesh Dutt Singh* (*Baboo*) v. *Moheshur Singh* (*Maharajah*) (1855), 6 M. I. A. 164; *Chintamun Singh* (*Chowdhry*) v. *Nowlukho Konwari* (*Mussamut*) (1875), 2 I. A. 263; 1 Calc. 153; 24 W. R. C. R. 255; *Nanaji Utput* (*Bhau*) v. *Sundrabai* (1874), 11 Bom. H. C. 249, at pp. 269, 270.

[5] For instance, the customs of the Nambhudri Brahmins; see *Vasudevan* v. *Secretary of State* (1887), 11 Mad. 157.

[6] A local custom is called *Desάchár*. Such custom is only applicable to persons domiciled in the place where it is in force; see *Padam Kumari* v. *Suraj Kumari* (1906), 28 All. 458.

[7] *Hurpurshad* v. *Sheo Dyal* (1876), 3 I. A. 259, at p. 285; 26 W. R. C. R. 55, at p. 70; *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar* (1872), 14 M. I. A. 570, at p. 585; I. A. Sup. vol. 1, at p. 3; 12 B. L. R. 396, at p. 398; 17 W. R. C. R. 553.

[8] In *Narasammal* v. *Balaramacharlu* (1863), 1 Mad. H. C. 420, at p. 424, Holloway, J., said, "A very short experience will suffice to satisfy any judge that a pundit will always overcome a passage of Hindu law too stubborn for other manipulation by the often baseless allegation of custom." He proceeds to say, "And in our judgment no custom, how long soever continued, which has never been judicially recognized, can be permitted to prevail against distinct authority." It is submitted that this last proposition cannot be supported, see *post*, p. 25.

[9] *Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (1868), 12 M. I. A. 397, at p. 436; 1 B. L. R. P. C. 1, at p. 12; 10 W. R. P. C. 17, at p. 21; *Tara Chand* v. *Reeb Ram* (1866), 3 Mad. H. C. 50, at pp. 55–58; *Nanaji Utpat* (*Bhau*) v. *Sundrabai* (1874), 11 Bom. H. C. 249. See "Manu," chap. i. paras. 108, 110; chap. viii. paras. 41, 46; "Mitakshara," chap. i. s. 3, para. 4; "Dayatattwa," chap. i. para. 33;

In the following enactments this principle has been recognized by the Legislature:—

Bom. Reg. IV. of 1827, s. 26; Madras Civil Courts Act (III. of 1873), s. 16; Lower Burma Courts Act (XI. of 1889), s. 4; Central Provinces Laws Act (XX. of 1875), s. 5; Oudh Laws Act (XVIII. of 1876), s. 3; Punjab Laws Act (IV. of 1872), s. 5, as amended by Act XII. of 1878, s. 1.

Conditions of validity of custom.

The Courts cannot give effect to a custom unless it be ancient,[1] definite,[2] continuous,[3] notorious,[4] and reasonable.[5] It is invalid if it be opposed to an express enactment of

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"Mayukha," chap. i. s. 1, para. 13. Dr. J. N. Bhattacharya ("Hindu Law," 2nd ed., pp. 50, 51) contends that according to the true translation of Manu's Code, custom does not prevail against an express provision of law.

[1] *Hurpurshad* v. *Sheo Dyal* (1876), 3 I. A. 259, at p. 285; 26 W. R. C. R. 55, at p. 70; *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar* (1872), 14 M. I. A. 570, at pp. 585, 586; I. A. Sup. vol. 1, at p. 3; 12 B. L. R. 396, at p. 398; 17 W. R. C. R. 553. S. C. in court below; *Sivananja Perumal Sethurayar* v. *Muttu Ramalinga Sethurayar* (1866), 3 Mad. H. C. 75, at p. 77; *Nugendur Narain* (*Rajah*) v. *Rughoonath Narain Dey*, W. R. 1864, p. 20, at p. 23.

[2] Or, as it may be expressed, certain, precise, and conclusive. *Hurpurshad* v. *Sheo Dyal* (1876), 3 I. A. 259, at p. 285; 26 W. R. C. R. 55, at p. 70; *Rajkishen Singh* v. *Ramjoy Surma Mozoomdar* (1872), 1 Calc. 186, at pp. 195, 196; 19 W. R. C. R. 8, at p. 11; *Bhagawan Das* v. *Balgobind Sing* (1868), 1 B. L. R. S. N. ix.; *Doorga Pershad Singh* (*Tekaet*) v. *Doorga Kooeree* (*Tekaetnee*) (1873), 20 W. R. C. R. 154, at p. 157.

[3] In other words, uniform, uninterrupted, invariable. *Nugendur Narain* (*Rajah*) v. *Rughoonath Narain Dey*, W. R. 1864, p. 20, at p. 24; *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar* (1872), 14 M. I. A. 570, at pp. 585, 586; I. A. Sup. vol. 1, at p. 3; 12 B. L. R. 396, at p. 398; 17 W. R. C. R. 553. S. C. in Court below. *Sivananja Perumal Sethurayar* v. *Muttu Ramalinga Sethurayar* (1866), 3 Mad. H. C. 75, at p. 77; *Gopalayyan* v. *Raghupatiayyan* (1873), 7 Mad. H. C. 250, at p. 254; *Soorendronath Roy* v. *Heeramonee Burmoneah* (1868), 12 M. I. A. 81, at p. 91; 10 W. R. P. C. 35, at p. 36; *Rajkishen Singh* (*Rajah*) v. *Ramjoy Surma Mozoomdar* (1872), 1 Calc. 186, at p. 195; 19 W. R. C. R. 8, at p. 11; *Jugmohandas Mangaldas* v. *Mangaldas Nathubhoy* (*Sir*) (1886), 10 Bom. 528, at p. 543. See *Amrit Nath Chowdhry* v. *Gauri Nath Chowdhry* (1870), 6 B. L. R. 232, at p. 238; *Jameelah Khatoon* v. *Pegul Ram* (1864), 1 W. R. C. R. 250; *Vandravan Jekisan* (*Patel*) v. *Manilal Chunilal* (*Patel*) (1891), 16 Bom. 470, at p. 476.

[4] See *Juggomohun Ghose* v. *Manickchund* (1859), 7 M. I A. 263, at p. 282; 4 W. R. P. C. 8, at p. 10; *Gopalayyan* v. *Raghupatiayyan* (1873), 7 Mad. H. C. 250, at p. 254.

[5] *Hurpurshad* v. *Sheo Dyal* (1876), 3 I. A. 259, at p. 285, 26 W. R. C. R. 55, at p. 70; *Lutchmeeput Singh* v. *Sadaulla Nushyo* (1882), 9 Calc. 698, at p. 703; 12 C. L. R. 382, at p. 388.

the Legislature,[1] to morality, to public policy,[2] or to justice, equity, and good conscience.[3] A custom must be established by clear and unambiguous proof,[4] and must be construed strictly.[5]

Ancient.

With the exception of an old decision in Calcutta,[6] by Grey, C.J., which fixed 1773, the date of the Act of Parliament which established the Supreme Court, and 1793 the date when Regulations commenced to be registered as the time for the commencement of legal memory in Calcutta and the Mofussil respectively, there is no decision which has

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[1] As for instance when the dedication of minors as dancing-girls of a pagoda amounts to an offence under ss. 372 and 373 of the Indian Penal Code (Act XLV. of 1860). *Ex parte Padmavati* (1870), 5 Mad. H. C. 415; *Queen Empress* v. *Ramanna* (1889), 12 Mad. 273; *Srinivasa* v. *Annasami* (1892), 15 Mad. 323; *Reg.* v. *Jaili Bhavin* (1869), 6 Bom. H. C. Cr. C. 60.

[2] *Chinna Ummayi* v. *Tegarai Chetti* (1876), 1 Mad. 168. Cases, *post*, p. 25. See also *Sankaralingam Chetti* v. *Subban Chetti* (1894), 17 Mad. 479; *Ghasiti* v. *Umrao Jan* (1893), 20 I. A. 193; 21 Calc. 149; This is expressed by "Manu," chap. viii. para. 41, as "if they be not repugnant to the law of God."

[3] See *Vurmah Valiar* (*Rajah*) v. *Ravi Vurmah Mutha* (1876), 4 I. A. 76; 1 Mad. 235. Oudh Laws Act (XVIII. of 1876), s. 3; Punjab Laws Act (XII. of 1878), s. 1. As to marriage brocage contracts, see *post*, p. 47.

[4] *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar* (1872), 14 M. I. A. 570, at pp. 585, 586; I. A. Sup. vol. 1, at p. 3; 12 B. L. R. 396, at p. 398; 17 W. R. C. R. 553. S. C. in Court below; *Sivananja Perumal Sethurayar* v. *Muttu Ramalinga Sethurayar* (1866), 3 Mad. H. C. 75, at p. 77; *Nugendur Narain* (*Rajah*) v. *Rughoonath Narain Dey*, W. R. 1864, p. 20, at p. 23; *Serumah Umah* v. *Palathan Vitil Marya Coothy Umah* (1871), 15 W. R. P. C. 47; *Luchmun Lall* v. *Mohun Lall Bhaya Gayal* (1871), 16 W. R. C. R. 179; *Shidhojirav* v. *Naikojirav* (1873), 10 Bom. H. C. 228; *Vandravan Jekisan* (*Patel*) v. *Manilal Chunilal* (*Patel*) (1891), 16 Bom. 470. See *Amrit Nath Chowdhry* v. *Gauri Nath Chowdhry* (1870), 6 B. L. R. 232, at p. 238; *Neelkisto Deb Burmono* v. *Beerchunder Thakoor* (1869), 12 M. I. A. 523, at p. 542; 3 B. L. R. (P. C.) 13, at p. 19; 12 W. R. P. C. 21, at p. 24; *Bhagvandas Tejmal* v. *Rajmal* (1873), 10 Bom. H. C. A. C. 241; *Lakshmappa* v. *Ramava* (1875), 12 Bom. H. C. 362, at p. 383.

[5] *Hurpurshad* v. *Sheo Dyal* (1876), 3 I. A. 259, at p. 285; 26 W. R. C. R. 55, at p. 70.

[6] Clarke's "Reports," pp. 113, 114. Sircar's "Vyavastha Darpana," 2nd ed., p. 314. The reason for this decision was that from the dates mentioned the powers of making laws were vested in the British Legislature. Sir G. D. Banerjee ("Law of Marriage," 2nd ed., p. 224), questions the correctness of the above-mentioned decision of Grey, C.J., and adds, "We may at any rate fairly say, that in the Hindu law, not only is it unnecessary to trace back the existence of a custom to any definite date, but even the indefinite condition of being ancient may, in favour of some classes of customs, have to be dispensed with."

professed to define the expression "ancient." That expression is apparently coincident with the expression "from time immemorial."[1]

"What the law requires before an alleged custom can receive the recognition of the Court and so acquire legal force is, satisfactory proof of usage so long and invariably acted upon in practice as to show that it has by common consent been submitted to as the established governing rule of the particular family, class, or district of country."[2] Such proof raises a presumption that the usage was an ancient one.[3]

Discontinuance of custom.

So far as continuity is concerned there seems to be a distinction between a family custom and a local custom. In the former case it is competent to the family to discontinue the custom, or it may have been accidentally discontinued.[4] In the latter case the omission of individuals to follow the custom could not have the effect of destroying it, as it is a part of the *lex loci*, and binds all persons within the local limits in which it prevails.[5]

When the custom has been proved the burden is upon the party alleging the discontinuance to prove that fact.[6]

New grant of property formerly impartible.

A family custom that property should remain impartible, is not necessarily destroyed by a new grant being made by the Government to a member of the family,[7] but where a new tenure is created, and there is nothing in the circumstances under which the new grant was made to lead to the inference that the Government had in view in making the new grant the creation of an impartible zemindari as an exception to the ordinary rule of the Hindu law, the ordinary rules of Hindu law apply.[8]

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[1] See *Luchmun Lall* v. *Mohun Lall Bhaya Gayal* (1871), 16 W. R. C. R. 179; *Umrithnath Chowdhry* v. *Goureenath Chowdhry* (1870), 13 M. I. A. 542, at p. 549; 15 W. R. P. C. 10, at p. 12. S. C. in Court below, 6 B. L. R. 232.

[2] *Sivanananja Perumal Sethurayar* v. *Muttu Ramalinga Sethurayar* (1866), 3 Mad. H. C. 75, at p. 77. S. C. on appeal, *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar* (1872), 14 M. I. A. 570; I. A. Sup. vol. 1; 12 B. L. R. 396; 17 W. R. C. R. 553; *Shidhojirav* v. *Naikojirav* (1873), 10 Bom. H. C. 228, at p. 234.

[3] See *Ramasami* v. *Appavu* (1887), 12 Mad. 9, at p. 14; *Nanaji Utpat* (*Bhau*) v. *Sundrabai* (1874), 11 Bom. H. C. 249.

[4] *Rajkishen Singh* v. *Ramjoy Surma Mozoomdar* (1872), 1 Calc. 186, at p. 195; 19 W. R. C. R. 8, at p. 12; *Sarabjit Partap Bahadur Sahi* v. *Indarjit Partap Bahadur Sahi* (1904), 27 All. 203.

[5] *Rajkishen Singh* v. *Ramjoy Surma Mozoomdar* (1872), 1 Calc. 186, at p. 195; 19 W. R. C. R. 8, at p. 12.

[6] *Sarabjit Partap Bahadur Sahi* v. *Indarjit Partap Bahadur Sahi* (1904), 27 All. 203.

[7] See *Beer Pertab Sahee* (*Baboo*) v. *Rajender Pertab Sahee* (*Maharajah*) (1867), 12 M. I. A. 1; 9 W. R. P. C. 15; *Mutta Vaduganadha Tevar* v. *Dorasinga Tevar* (1881), 8 I. A. 99; 3 Mad. 290; *Jaganatha* v. *Ramabhadra* (1888), 11 Mad. 380; *Kachi Yuva Rangappa Kallakka Thola Udayar* v. *Kachi Kalyana Rangappa Kallakka Thola Udayar* (1901), 24 Mad. 562.

[8] *Merangi, Zemindar of*, v. *Satrucharla Ramabhadra Razu* (*Sri Rajah*) (1891), 18 I. A. 45, at p. 53; 14

A family custom is personal, and does not apply to subsequent owners of the land held by the family.[1]

The following are illustrations of customs which have been held void for immorality:— Immorality.

A custom allowing a woman to remarry during the lifetime of her husband and without his consent.[2]

A custom for dancing-girls to adopt daughters under circumstances which would amount to a traffic in minors as prohibited by ss. 372 and 373 of the Indian Penal Code;[3] but except where the recognition of the rights alleged would countenance such a traffic, or the usage is in itself immoral,[4] the Courts will give effect to the rights of dancing-girls attached to Hindu temples in respect of endowments for their support,[5] and also to the peculiar usages of the dancing-girl and prostitute classes with regard to adoption[6] and succession.[7]

A custom will not be applied unless those following the custom are convinced in conscience that they are acting in accordance with law.[8]

Judicial recognition is not a condition precedent to the validity of a custom,[9] but such recognition may be of great value as evidence of the existence of that custom.[10] Judicial recognition.

In the case of persons governed generally by the Hindu law, the burden of proving a custom derogatory to that law lies upon the person who asserts it.[11] Burden of proof of custom.

Mad. 237, at p. 245; *Venkata Narasimha Appa Row Bahadur (Rajah)* v. *Narayya Appa Row Bahadur (Rajah)* (1879), 7 I. A. 38; 2 Mad. 128; 6 C. L. R. 153.

[1] *Gopal Das Sindh* v. *Nurotum Sindh* (1845), 7 Ben. Sel. R. 195 (2nd ed., 230).

[2] *Post*, p. 30.

[3] Act XLV. of 1860.

[4] *Chinna Ummayi* v. *Tegarai Chetti* (1876), 1 Mad. 168.

[5] *Tara Naikin* v. *Nana Lakshman* (1889), 14 Bom. 90; *Kamalam* v. *Sadagopa Sami* (1878), 1 Mad. 356; *Mathura Naikin* v. *Esu Naikin* (1880), 4 Bom. 545, at p. 565. See *Chinna Ummayi* v. *Tegarai Chetti* (1876), 1 Mad. 168.

[6] *Post*, pp. 165, 166.

[7] *Tara Munnee Dossea* v. *Motee Buneanee* (1846), 7 Ben. Sel. R. 273 (2nd ed., 325); *Sivasangu* v. *Minal* (1889), 12 Mad. 277; *Kamakshi* v. *Nagarathnam* (1870), 5 Mad. H. C. 161.

[8] *Gopalayyan* v. *Raghupatiayyan* (1873), 7 Mad. H. C. 250, at p. 254. See *Vandravan Jekisan (Patel)* v. *Manilal Chunilal (Patel)*, (1891) 16 Bom. 470, at p. 476.

[9] See Mayne's "Hindu Law," 7th ed., pp. 56–58. See *ante*, p. 21, note 8.

[10] See Act I. of 1872, s. 42.

[11] *Bhajwan Singh* v. *Bhagwan Singh* (1899), 26 I. A. 153, at p. 165; 21 All. 412, at p. 423; 3 C. W. N. 454, at p. 459; *Chandika Baksh* v. *Muna Kuar* (1902), 29 I. A. 70; 24 All. 273; 6 C. W. N. 425; *Fanindra Deb Raikut* v. *Rajeswar Dass* (1885), 12 I. A. 72, at p. 81; 11 Calc. 463, at p. 476; *Basava* v. *Lingangauda* (1894), 19 Bom. 428, at p. 473; *Desai Ranchhoddas* v. *Rawal Nathubai* (1895), 21 Bom. 110, at pp. 116, 117; *Bhagvandas Tejmal* v. *Rajmal* (1873), 10 Bom. H. C. 241, at p. 260; *Narayan Babaji* v. *Nana Manohar* (1870), 7 Bom. H. C. A. C. 153, at p. 175; *Mahendra Singh (Rajah)* v.

In the case of a tribe or family which are not originally Hindu, but which has adopted Hinduism, the burden of proving that the family is governed in a particular matter by the Hindu law is upon the person who asserts that it was so governed.[1]

As to the mode of proof of a custom, see Act I. of 1872, ss. 13, 32, 42, 48, 49. *Rama Nand* v. *Surgiani* (1894), 16 All. 221.

As to proof of the devolution of an impartible Raj, see *Mohesh Chunder Dhal* v. *Satrughan Dhal* (1902), 29 I. A. 62; 29 Calc. 343; 6 C. W. N. 459.

As to proof of the customs of Jains, see *Harnabh Pershad* v. *Mandil Dass* (1899), 27 Calc. 379.

Jokha Singh (1873), 19 W. R. C. R. 211; *Jeetnath Sahee Deo* (*Thakoor*) v. *Lokenath Sahee Deo* (1873), 19 W. R. C. R. 239; and cases, *ante*, p. 23, note 4.

[1] As, for instance, the law of adoption, *Fanindra Deb Raikat* v. *Rajeswar Dass* (1885), 12 I. A. 72, at p. 81; 11 Calc. 463, at p. 476.

CHAPTER I.

HUSBAND AND WIFE.

MARRIAGE.

Creation of relationship.

THE relationship of husband and wife is created by a marriage, entered into by two persons, who are each competent, according to Hindu law, to enter into the state of marriage,[1] and who are not debarred by that law from intermarrying,[2] such marriage being performed with the ceremonies prescribed by that law.[3]

Object of marriage.

According to Hindu ideas, marriage has for its object the performance of religious duties. It is a *sanskar*, that is, an essential ceremony, held indispensable to constitute the perfect purification of a Hindu.[4] It is the last of the ten *sanskars* necessary for the regeneration of males of the twice-born classes,[5] and is the only one prescribed for women and for *Sudras*.[6]

Necessity for marriage.

Marriage is essential to a Hindu in order that by begetting a son he may be delivered from the hell called *put*, to which the shades of a sonless man are, according to Hindu ideas, doomed,[7] that he may repay the debt he owes to his forefathers,[8] and that he may be able to perform some of the most important religious acts.[9]

Duty of guardian of girl.

It is the imperative religious duty of a father, or other guardian,[10] to cause a girl to be married, before she attains

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[1] *Post*, pp. 28–32.

[2] *Post*, pp. 32–40.

[3] *Post*, pp. 53–56.

[4] Wilson's "Glossary," p. 463.

[5] Colebrooke's "Digest," vol. iii., p. 104, note.

[6] Colebrooke's "Digest," vol. iii., p. 95. See *Venkatacharyulu* v. *Rangacharyulu* (1890), 14 Mad. 316, at p. 318.

[7] "Manu," chap. ix. para. 138; "Dayabhaga," chap. v. para. 6; "Dattaka Mimansa," chap. i. para. 5; Colebrooke's "Digest," vol. iii. pp. 158, 293, 294.

[8] "Dattaka Mimansa," chap. i. para. 5.

[9] Bhattacharya's "Hindu Law," 2nd ed., p. 81.

[10] As to the persons upon whom the duty devolves, see *post*, pp. 41, 42.

puberty, to a suitable husband, capable of procreating children.[1]

Duty of guardian of boy.

Although the law permits the marriage of boys who have not attained majority,[2] such marriages do not seem to have been contemplated by the sages and early writers on Hindu law.[3] There is not, therefore, any moral or religious obligation upon a parent, or other guardian, to provide a wife for a boy, although there may be a right to provide for his marriage.[4]

WHO MAY MARRY.

Who are competent to marry.

Unless expressly prohibited by a provision of the Hindu law, any male Hindu is competent to marry, and every unmarried Hindu female is competent to be given in marriage.[5]

The Hindu law regards the bridegroom as the person who marries, and the bride as the person who is taken in marriage.[6]

Defects.

Physical and mental defects, even if they be such as to cause exclusion from inheritance,[7] do not invalidate a marriage.[8]

Lunacy.

Unsoundness of mind does not invalidate a marriage.

Pundits both in Bengal[9] and Bombay[10] have given opinions that it does

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[1] *Jumoona Dassya Chowdhrani* v. *Bamasoondarai Dassya Chowdhrani* (1876), 3 I. A. 72, at p. 78; 1 Calc. 289, at pp. 294, 295; 25 W. R. C. R. 235, at p. 236; *Venkatacharyulu* v. *Rangacharyulu* (1890), 14 Mad. 316, at p. 322.

[2] *Post*, p. 29.

[3] "Manu," chap. ix. para. 94; Bhattacharya's "Hindu Law," 2nd ed., pp. 81, 82. See Banerjee's "Law of Marriage," 2nd ed., p. 35.

[4] *Govindarazulu Narasimham* v. *Devarabhotla Venkatanarasayya* (1903), 27 Mad. 206, see *post*, p. 48.

[5] Banerjee's "Law of Marriage," 2nd ed., 33.

[6] Banerjee's "Law of Marriage," 2nd ed., 34; Bhattacharya's "Hindu Law," 2nd ed., 81.

[7] As to the physical defects which cause exclusion from inheritance, see Bhattacharya's "Hindu Law," 2nd ed., 349–351; Sircar's "Hindu Law," pp. 232–235; Mayne's "Hindu Law," 7th ed., pp. 806–809, and cases there cited; *post*, pp. 235–237.

[8] "Manu," chap. ix. para. 203; "Mitakshara," chap. ii. s. 10, paras. 9–11; "Vivada Chintamani" (P. C. Tagore's translation), p. 244; "Vyavahara Mayukha," chap. v. s. 11, para. 11, "Smriti Chandrika," chap. v. para. 32.

[9] See *Venkatacharyulu* v. *Rangacharyulu* (1890), 14 Mad. 316, at p. 318; *Dabychurn Mitter* v. *Radhachurn Mitter* (1817), 2 Morl. Dig. 99.

[10] West and Bühler's "Hindu Law," 2nd ed., p. 274.

not invalidate a marriage. Sir G. D. Banerjee points out that "there are indications in the law from which it would appear that lunatics are considered competent to marry,"[1] but he also says[2] that, as a lunatic is incompetent to accept the gift of a bride, it is not easy to understand how his marriage can be regarded as marriage at all.

Impotence.

The ancient authorities permitted a eunuch to marry on the ground that his wife could raise up a son to him by a man legally appointed,[3] but now that the system of *niyoga*[4] is obsolete, it may be a question whether the Courts will not declare the marriage of an impotent person to be void.[5]

Age for marriage.

Except that in the case of the twice-born classes marriage cannot take place before investiture with the sacred thread,[6] a male Hindu of any age can marry.[7]

A female Hindu of any age can be given in marriage.[8]

The Hindu religion requires a girl to be given in marriage before she attains the age of puberty,[9] but there is nothing in the Hindu law to invalidate the marriage of a woman who has attained puberty.[10]

As to the necessity for the consent of a guardian in the case of the marriage of minors, see *post*, pp. 41–46.

Polygamy.

A Hindu[11] may at his pleasure marry any number of wives, although he has a wife or wives living.[12]

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[1] "Law of Marriage," 2nd ed., p. 36; "Manu," chap. ix. para. 203; "Daya Bhaga," chap. v. para. 18; "Mitakshara," chap. ii. s. 10, paras. 9–11; "Vivada Chintamani" (P. C. Tagore's translation), p. 244; "Smriti Chandrika," chap. v. para. 32; "Vyavahara Mayukha," chap. iv. s. 11. para. 11.

[2] P. 37.

[3] "Manu," chap. ix. para. 203; "Daya Bhaga," chap. v. para. 18.

[4] *Post*, pp. 100, 139.

[5] See Banerjee's "Law of Marriage," 2nd ed., pp. 38, 39. Parasara, quoted in Vidyasagar's "Marriage of Hindu Widows," pp. 4, 7. Steele, p. 167. *Kanahi Ram* v. *Biddya Ram* (1878), 1 All. 549, at p. 551.

[6] The rule is that the investiture of a *Brahmin* should take place in the eighth, that of a *Kshatrya* in the eleventh, and that of a *Vaisya* in the twelfth year from his conception, "Manu," chap. ii. para. 36.

[7] Banerjee's "Law of Marriage," 2nd ed., 35. Bhattacharya's "Hindu Law," 2nd ed., 82. See *Venkatacharyulu* v. *Rangacharyulu* (1890), 14 Mad. 316, at p. 318.

[8] Sir G. D. Banerjee ("Law of Marriage," 2nd ed., 43) says, "Ordinarily the lowest age for marriage is eight years, but Manu allows a girl to be married even before the proper age, if a proper union is secured" ("Manu," chap. ix. para. 88, and note by Kulluka).

[9] *Ante*, p. 27.

[10] Banerjee's "Law of Marriage," 2nd ed., 43.

[11] Even if he has at one time professed Christianity, 3 Mad. H. C. App. vii.

[12] See *Virasvami Chetti* v. *Appasvami Chetti* (1863), 1 Mad. H. C. 375; *Arumugam* v. *Tulukanam* (1883), 7 Mad. 187, at p. 188; *Thapita Peter* v. *Thapita Lakshmi* (1894), 17 Mad. 235, at p. 239; *Huree Bhaee Nana* v. *Nuthoo Koober* (1810), 1 Borr.

No effect can be given to an agreement purporting to avoid a marriage on the taking of a second wife during the lifetime of the first,[1] and apparently an agreement not to enter into such second marriage would be against the policy of the Hindu law.[2]

Contracting a second marriage during the lifetime of the wife is called *adhivedana*, or supersession, but does not in any way imply that the first wife is deserted.[3]

The Hindu writers prescribe that a present (*adhivedanika*) should be given to the wife as compensation for her supersession, but they do not agree as to the amount.[4] Such compensation could not apparently be claimed in a court of law.

Christian.

A Hindu, who has become a Christian, cannot take to himself another wife while his wife is alive.[5]

Bigamy of women.

A woman cannot marry another man while her husband is alive.[6]

Although the Courts will not recognize a custom which permits a wife at her pleasure to desert her husband and marry another man,[7] at any rate where the first husband did not consent to the second marriage,[8] it would apparently give effect to a custom permitting such remarriage on desertion by the husband.[9] A custom authorizing such remarriage

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59; Banerjee, "Law of Marriage," 2nd ed., pp. 39, 40, 128; "Daya Bhaga," chap. ix. para. 6, note; Sircar's "Vyavastha Darpana," p. 672. Polygamy is not permitted to members of the *Brahmo Somaj*. *Sonaluxmi* v. *Vishnuprasad Hariprasad* (1903), 28 Bom. 597.

[1] *Sitaram* v. *Aheeree Heerahnee* (*Mussamut*) (1873), 11 B. L. R. 129; 20 W. R. C. R. 49.

[2] See *ibid.*, per Kemp, J., 11 B. L. R., at p. 135; 20 W. R. C. R., at p. 50. Would it not be, from the Hindu point of view, an agreement in restraint of marriage, and therefore void under s. 26 of the Indian Contract Act (IX. of 1872)?

[3] See "Mitakshara," chap. ii. s. 11, paras. 2 (note) and 35; *Emperor* v. *Lazar* (1907), 30 Mad. 550.

[4] See Banerjee's "Law of Marriage," 2nd ed., p. 130; "Mitakshara," chap. ii. s. 11, para. 35; "Dayakrama Sangraha," chap. vi. para. 31; Colebrooke's "Digest," vol. iii. p. 561.

[5] See *Thapita Peter* v. *Thapita Lakshmi* (1894), 17 Mad. 235. *Ante*, p. 18, note 1.

[6] *Thapita Peter* v. *Thapita Lakshmi* (1894), 17 Mad. 235, at p. 239. "Manu," chap. viii. para. 226; chap. ix. paras. 46, 47, 71. See *Simammal* v. *Administrator-General of Madras* (1885), 8 Mad. 169, at p. 173.

[7] *Narayan Bharthi* v. *Laving Bharthi* (1877), 2 Bom. 140; *Reg.* v. *Sambhu Raghu* (1876), 1 Bom. 347; *Reg.* v. *Karsan Goja* (1864), 2 Bom. H. C. 124; *Uji* v. *Hathi Lalu* (1870), 7 Bom. H. C. A. C. J. 133; *Reg.* v. *Manohar Raiji* (1868), 5 Bom. H. C. Cr. C. 17. See in the matter of *Chamia* (*Musst*) (1880), 7 C. L. R. 354.

[8] See *Khemkor* v. *Umiashankar Ranchhor* (1873), 10 Bom. H. C. 381.

[9] *Virasangappa* v. *Rudrappa* (1885), 8 Mad. 440. See *Sinammal* v. *Administrator-General of Madras* (1885), 8 Mad. 169, at p. 173.

in case of the husband's leprosy might also be valid.[1] No effect could be given to the decision of a *panchayet* or of a caste which authorizes a remarriage,[2] except, perhaps, where by custom a valid divorce could be effected by such decision.[3]

Where divorce is permissible by custom,[4] or where a divorce has been decreed under Act XXI. of 1866,[5] a woman can remarry. Remarriage after divorce.

The marriage of a girl, who has been betrothed[6] (but not married) to another man, is valid.[7] Betrothed girl.

A widow can remarry.[8] Remarriage of widow.

Except in the case of a special custom[9] the remarriage of widows was prohibited by the Hindu law, which was in force at the time of the passing of Act XV. of 1856.[10]

Act XV. of 1856, which empowers Hindu widows to remarry, provides as follows[11]— Forfeiture of property by remarriage.

"All rights and interests which any widow may have in her deceased husband's property by way of maintenance, or by inheritance to her husband or to his lineal successors,[12] or by virtue of any will or testamentary disposition conferring upon her, without express permission to remarry, only a limited interest in such property, with no power of alienating the same, shall, upon her remarriage,[13] cease and determine, as if she had then died, and the next heirs of her deceased husband, or other persons entitled to the property on her death, shall thereupon succeed to the same."

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[1] See *Reg.* v. *Sambhu Raghu* (1876), 1 Bom. 347, at p. 352.

[2] See *Bissuram Koiree* v. *The Empress* (1878), 3 C. L. R. 410, at p. 413. *Reg.* v. *Sambhu Raghu* (1876), 1 Bom. 347.

[3] See *post*, pp. 58, 59.

[4] *Post*, p. 58.

[5] *Post*, p. 60.

[6] *Post*, p. 53.

[7] *Lakhi Priya* v. *Bhairab Chandra Chaudhuri* (1835), 5 Ben. Sel. R. 315 (2nd ed., 369); *Khooshal* v. *Bhugwan Motee* (1813), 1 Borr. 138. See Act XV. of 1856, s. 1.

[8] Act XV. of 1856, s. 1.

[9] Strange's "Hindu Law," vol. ii. p. 400. As to such customs, see Banerjee's "Law of Marriage," 2nd ed., pp. 235–237; Mayne's "Hindu Law," 7th ed., pp. 113–116.

[10] "Manu," chap. v. paras. 157, 161; Strange's "Hindu Law," vol. i. pp. 37, 241, vol. ii. p. 400; Sircar's "Vyavastha Darpana," p. 647. In *Vithu* v. *Govinda* (1896), 22 Bom. 321, at p. 331, Ranade, J., says that the prohibition only extended to the three superior castes.

[11] S. 2.

[12] Thus she forfeits property inherited from a son. *Vithu* v. *Govinda* (1896), 22 Bom. 321.

[13] Whether as a Hindu or otherwise. *Matungini Gupta* v. *Ram Rutton Roy* (1891), 19 Calc. 289, overruling *Gopal Singh* v. *Dhungazee* (1865), 3 W. R. C. R. 206.

A widow does not by remarriage lose her rights to succeed thereafter to her son or other lineal successor of her husband.[1]

There is a conflict of opinion as to whether the above section has any application to the case of widows, who are by the custom of their caste entitled to remarry. The Allahabad High Court[2] considers that it has no such application, but the High Courts at Calcutta,[3] Madras,[4] and Bombay[5] have taken the opposite view.

Moral injunctions.

The Hindu law placed certain restrictions upon marriage by rules, which are now treated as operating only as moral injunctions.

Impurity arising from the birth or death of a relation was treated as a disqualification.[6]

The marriage of a younger brother before an elder brother,[7] or of a younger sister before an elder sister,[8] was prohibited.

For other instances, see Banerjee's "Law of Marriage," 2nd ed., pp. 52, 54; Bhattacharya's "Hindu Law," 2nd ed., pp. 85, 86.

WHO MAY INTERMARRY.

Restrictions on intermarriage.

The following rules[9] as to identity of caste, exogamy, and prohibited degrees have been deduced from texts of the sages by Raghunandana,[10] who is said to be the highest authority in Bengal in all matters excepting inheritance,[11] and are reiterated by Kamalakara Bhatta in the *Nirnaya Sindhu*,[12] which is said to be of authority in the Benares

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[1] *Akora Suth* v. *Borcani* (1868), 2 B. L. R. 199; 11 W. R. C. R. 82; *Basappa* v. *Rayava* (1904), 29 Bom. 91; *Chamar Haru Dalmel* v. *Kashi* (1902), 26 Bom. 388; *Lakshmana Sasamallo* v. *Siva Sasamallayani* (1905), 28 Mad. 425.

[2] *Khuddo* v. *Durga Prasad* (1906), 29 All. 122; *Har Saran Das* v. *Nandi* (1889), 11 All. 330; *Ranjit* v. *Radha Rani* (1898), 20 All. 476.

[3] *Rasul Jehan Begum* v. *Ram Surun Singh* (1895), 22 Calc. 589.

[4] *Murugayi* v. *Viramakali* (1877), 1 Mad. 226.

[5] *Vithu* v. *Govinda* (1896), 22 Bom. 321.

[6] See Banerjee's "Law of Marriage," 2nd ed., p. 101.

[7] Banerjee's "Law of Marriage," 2nd ed., p. 41; Bhattacharya ("Hindu Law, 2nd ed., p. 83) says that this rule is imperative.

[8] Banerjee's "Law of Marriage," 2nd ed., pp. 53, 54.

[9] For a discussion of these rules, see Sircar's "Hindu Law," pp. 57–60.

[10] In his "Udvahatattwa." Raghunandana lived at the end of the fifteenth century A.D.; see Bhattacharya's "Hindu Law," 2nd ed., 36.

[11] Bhattacharya's "Hindu Law," 2nd ed., 36.

[12] Sircar's "Hindu Law," p. 56.

school,[1] in the Bombay Presidency,[2] and in Southern India.[3]

1. Intermarriage between persons not belonging to the same primary caste is void.[4] Identity of caste.

This rule only prevents intermarriage between the four primary castes.[5] It does not prevent marriage between persons belonging to different subdivisions of the same primary caste.[6] Subdivisions of caste.

In the case of the marriage of an illegitimate person, who, strictly speaking, belongs to no caste, he or she must be treated as belonging to the caste the members of which have recognized him or her as a caste fellow.[7] Marriage of illegitimate persons.

[1] *Ibid.*, Bhattacharya's "Hindu Law," 2nd ed., 37.

[2] Mandlik's "Vyavahara Mayukha," Introduction, p. 73; Bhattacharya's "Hindu Law," 2nd ed., 37.

[3] Bhattacharya's "Hindu Law," 2nd ed., 37.

[4] *Padam Kumari* v. *Suraj Kumari* (1906), 28 All. 458; *Melaram Nudial* v. *Thanooram Bamun* (1868), 9 W. R. C. R. 552; Bhattacharya's "Hindu Law," 2nd ed., p. 85; Steele, pp. 26, 29, 30; Colebrooke's "Digest," vol. iii. p. 141; "Vyavastha Darpana," 656; Strange's "Hindu Law," vol. i. 40; "Mitakshara," chap. i. s. 11, para. 2, and note. See *Ram Lal Shookool* v. *Akhoy Charan Mitter* (1903), 7 C. W. N. 619. In that case the judges assumed that *Vaidyas* were Vaisyas. As to the position of Vaidyas, see Bhattacharya's "Hindu Castes and Sects," pp. 159-171; Risley's "Tribes and Castes of Bengal, vol. i. pp. 46-50.

[5] *Ante*, p. 17.

[6] *Inderun Valungypooly Tuver* v. *Ramasawmy Pandia Talaver* (1869), 13 M. I. A. 141, at p. 158; 3 B. L. R. P. C. 1 at p. 4; 12 W. R. P. C. 41, at pp. 42, 43. See S. C. in Court below. *Pandaiya Telaver* v. *Puli Telaver* (1863), 1. Mad. H. C. 478, at p. 483; *Ramamani Ammal* v. *Kulanthai Natchear* (1872), 14 M. I. A. 347; *Upoma Kuchain* v. *Bholaram Dhubi* (1888), 15 Calc. 708. See *Ramamani Ammal* v. *Kulanthai Natchear* (1871); 14 M. I. A. 346; 1 W. R. C. R. 1; Bhattacharya's "Hindu Law," 2nd ed., p. 85; Sarkar's "Hindu Law," pp. 64, 65. A contrary view was expressed in *Melaram Nudial* v. *Thanooram Bamun* (1868), 9 W. R. C. R. 552, and by Mitter, J., in *Narain Dhara* v. *Rakhal Gain* (1875), 1 Calc. 1, at p. 4; 23 W. R. C. R. 334, at p. 335. It is said that in Bengal the practice is in accordance with Mitter, J.'s, view in the above case (Banerjee's "Law of Marriage," 2nd ed., p. 72). As to Bombay, see Steele, pp. 29, 30. As to intermarriage between different sects of Lingayets, see *Fakirgauda* v. *Gangi* (1896), 22 Bom. 277. As to a family custom allowing intermarriage between sub-castes, see *Nugendur Narain (Rajah)* v. *Rughoonath Narain Dey*, W. R. 1864, C. R. 20, at p. 23.

[7] *In the matter of Ramkumari* (1891), 18 Calc. 264. As to the daughter of a bastard, see *Inderun Valungypooly Taver* v. *Ramasawmy Pandia Talaver* (1869), 13 M. I. A. 141; 3 B. L. R. P. C. 1; 12 W. R. P. C. 41; S. C. in Court below. *Pandaiya Telaver* v. *Puli Telaver* (1863), 1 Mad. H. C. 478.

Custom.

Marriages between members of different castes may be recognized by local custom.[1]

Exogamy.

2. A member of one of the twice-born classes cannot marry the daughter of an agnate, *i.e.* of a person belonging to the same *gotra*,[2] or primitive stock, as himself.[3]

This will prevent a marriage between persons who are connected with a common ancestor entirely through males.

In this connection the expression *gotra* "means a family descended from one of the several patriarchs, who are, according to some, twenty-four, and according to others, forty-two in number."

There seems to be no certainty as to what are the gotras at the present day. Apparently there are eight primitive gotras descended from the seven Rishis, Viswamitra, Jamadagni, Bharadwaja, Gotama, Attri, Vasistha, Kasyapa, together with Agastya. The remaining gotras are possibly subdivisions of these eight, but are not all identifiable with them.[4]

"The theory of the gotra, as latterly described by Brahmanic writers, denies that either a Kshatriya, or a Vaisya, or a Sudra has a right to say that he belongs to a special gotra in the proper sense of the term."[5] Kshatriyas and Vaisyas have adopted the gotras of the spiritual guides or family priests of their remote progenitors.[6] It is also said that a man is prohibited from marrying a girl belonging to a gotra having the same pravaras or principal sages as his own."[7]

Prohibited degrees of relationship.

3. A Hindu may not marry[8]—

Descendants of father and

(*a*) A female descendant as far as the seventh degree

[1] See *Ram Lal Shookool* v. *Akhoy Charan Mitter* (1903), 7 C. W. N. 619. As to this case, see 7 C. W. N. pp. ccxxxvii. and ccxxxviii.

[2] Lit. cow-pen, *i.e.* a place in which cows were kept or protected from plundering attacks. Bhattacharya's "Law of the Joint Family," p. 113. For a discussion as to the origin of the term, see Max Muller's "Chips from a German Workshop," vol. ii. p. 28; Banerjee's "Law of Marriage," 2nd ed., pp. 54, 55; Sircar's "Hindu Law," p. 40.

[3] "Manu," chap. iii. para. 5; Steele, p. 160; Colebrooke's "Digest," vol. iii. p. 329; Banerjee's "Law of Marriage," 2nd ed., pp. 54, 55; Bhattacharya's "Hindu Law," 2nd ed., p. 88; Sircar's "Vyavastha Darpana," 2nd ed., p. 657.

[4] See Bhattacharya's "Law of the Joint Family," pp. 111–113; Iswar Chandra Vidyasagur's "Widow Marriage," p. 193.

[5] Bhattacharya's "Law of the Joint Family," p. 111.

[6] *Ibid.*; Banerjee's "Law of Marriage," 2nd ed., p. 55; "Dattaka Mimansa," chap. ii. para. 76.

[7] Banerjee's "Law of Marriage," 2nd ed., p. 54, note 2; Colebrooke's "Digest," vol. iii. p. 329; Bhattacharya's "Hindu Law," 2nd ed., p. 88.

[8] See *Minakshi* v. *Ramanadha* (1887), 11 Mad. 49, at p. 53. These rules are taken from Banerjee's "Law of Marriage," 2nd ed., pp. 64–66. In Bhattacharya's "Hindu Law," 2nd ed., p. 93, diagrams illustrating these rules will be found.

from his father or from one of his father's six ancestors in the male line.[1] paternal ancestors.

Sastri G. C. Sircar, in his "Law of Adoption,"[2] says, "In fact the prohibited degrees for marriage are considered by the Sanskrit writers to constitute *sapindas* for the purpose of marriage, and they are different according to different sages. For instance, Vasishta declares that a man may marry a girl who is *fifth* and *seventh* on the mother's and father's sides respectively, whilst Paithinasi says that a damsel may be espoused who is beyond the *third* on the mother's and *fifth* on the father's side.[3] But seven degrees on both sides appears to be prohibited by Manu, for he declares that a man must not marry a girl who is sapinda to his mother,[4] and lays down generally in another place that sapinda relationship ceases with the seventh ancestor."[5]

(*b*) A female descendant as far as the seventh degree from his father's *bandhus*[6] or from one of their six ancestors, through whom such female is related to him.[7] Descendants from father's *bandhus*, and their ancestors.

These six ancestors would be the *bandhu's* mother, mother's father, mother's father's father, mother's father's father's father, mother's father's father's father's father, and mother's father's father's father's father's father. It does not include mother's mother, &c., as "a line of female ancestors is not regarded as a line in the Hindu law."[8]

(*c*) A female descendant as far as the fifth degree from his maternal grandfather or from one of his maternal grandfather's four ancestors in the male line.[9] Descendants of maternal grandfather, and of his ancestors.

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[1] "Udvahatattwa," Raghunandana's Institutes, vol. ii. p. 65, referred to in Banerjee's "Law of Marriage, 2nd ed., pp. 59, 60. See *Vyas Chimanlal* v. *Vyas Ramchandra* (1899), 24 Bom. 473. As to marriage with a half-sister's daughter, see *Karunabdhi Ganesa Ratnamaiyar* v. *Gopala Ratnamaiyar* (1880), 7 I. A. 173, at p. 177; 2 Mad. 270, at p. 279.

[2] P. 386.

[3] "Mitakshara," chap. i. para. 53.

[4] Chap. iii. para. 5.

[5] Chap. v. para. 60.

[6] A *bandhu* is a *sapinda*, related through females. This expression includes 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. See "Mitakshara," chap. ii. s. 6, para. 1.

[7] "Udvahatattwa," Raghunandana's Institutes, vol. ii. p. 65, referred to in Banerjee's "Law of Marriage," 2nd ed., pp. 59, 60.

[8] Banerjee's "Law of Marriage," 2nd ed., p. 60.

[9] "Udvahatattwa," Raghunandana's Institutes, vol. ii. p. 65, referred to in G. D. Banerjee's "Law of Marriage," 2nd ed., p. 60.

In the Presidency of Madras marriage with the daughter of a maternal uncle or of a paternal aunt is recognized by custom.[1]

According to some authorities a man cannot marry the daughter of an agnate of his maternal grandfather.[2]

Descendants from mother's *bandhus* and their ancestors.

(*d*) A female descendant as far as the fifth[3] degree from his mother's *bandhus*,[4] or from one of their four ancestors through whom such female is related to him.[5]

Where the *bandhu* in question is the son of the mother's maternal or paternal aunt, these four ancestors would be the *bandhu's* mother, mother's father, mother's father's father, and mother's father's father's father, and where the *bandhu* is the son of the mother's maternal uncle the four ancestors would be the father, father's father, father's father's father, and father's father's father's father.[6]

Exceptions.

In spite of the above rules, a man may marry a girl who is removed by three *gotras*[7] from him, although she be related within the above degrees.[8]

"The three *gotras* in the case of the descendants of a *bandhu* are always to be counted from his (the *bandhu's*) own *gotra*. So also in the case of the descendants of the ancestors of a *bandhu*, who is the father's or the mother's maternal uncle's son, they are to be counted from the *bandhu's* own *gotra*. But in the case of the descendants of the ancestors of each of the other *bandhu's*, the *gotras* are to be counted from his (the *bandhu's*) maternal grandfather's *gotra*."[9]

In practice these rules are, apparently, among all classes, not taken to exclude a *sapinda* girl beyond the fifth degree on the father's side, and the third degree on the mother's side,[10] but in strictness this relaxation of the rule is said to

[1] See note by Mr. Anand Charlu, "Calcutta Weekly Notes," vol. vii. pp. lxxxii., xc., xcviii.

[2] "Manu," chap. iii. para. 5. There seems to be a difference of opinion with regard to this note; see Bhattacharya's "Hindu Law," 2nd ed., pp. 91, 92; Sircar's "Vyavastha Darpana," 2nd ed., p. 658.

[3] See *ante*, p. 35.

[4] See *ante*, p. 35, note 6. This includes the son's of his mother's maternal aunt, the sons of his mother's paternal aunt, and the sons of his mother's maternal uncle.

[5] "Udvahatattwa," Raghunandana's Institutes, vol. ii. p. 65, referred to in Banerjee's "Law of Marriage," 2nd ed., p. 60.

[6] Banerjee's "Law of Marriage," 2nd ed., p. 61.

[7] *I.e.* three females have intervened in the line between the man and the girl in question.

[8] Raghunandana's "Institutes," vol. ii. p. 64, referred to in G. D. Banerjees's "Law of Marriage," 2nd ed., p. 61.

[9] G. D. Banerjee's "Law of Marriage," 2nd ed., pp. 61, 62.

[10] Bhattacharya's "Hindu Law," 2nd ed., 91.

be limited to the Kshatriyas in all the forms of marriage, and to the other classes only in the *Asura*,[1] or other inferior forms of marriage.[2]

Origin of rules.

The above rules are enunciated by Sir G. D. Banerjee in his "Law of Marriage and Stridhan." They are based upon the interpretation put by Raghunandana upon the text of Manu. As so interpreted, the text prohibits a man from marrying a girl who is a *sapinda*[3] of his father or of his maternal grandfather.[4] This *sapinda* relationship ceases after the fifth or seventh degree from the mother and father respectively.[5] Yajnavalkya[6] also requires that a man should not marry his *sapinda*. This rule is common to all schools, but there is a diversity between the view entertained by the Mitakshara school[7] and that entertained by the Bengal school[8] as to the meaning of *sapinda* relationship.

Difference between schools.

Mitakshara school.

According to the Mitakshara[9] school a man cannot marry a girl if, their common ancestor being traced through his or her father, such common ancestor is not beyond the seventh[10] in the line of ascent from him or her, or, their common ancestor being traced through their mothers, such common ancestor is not beyond the fifth in the line of ascent from him or her.

Dr. J. N. Bhattacharya says,[11] "I must note also the fact that those who are governed by the Mitakshara school practically exclude, for purposes of marriage, only the four lines[12] that are considered ineligible by the Bengal school."

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[1] *Post*, p. 50.

[2] G. D. Banerjee's "Law of Marriage," 2nd ed., p. 62; Sircar's "Vyavastha Darpana," 2nd ed., pp. 663, 664.

[3] "Manu," chap. iii. para. 5.

[4] See Bhattacharya's "Hindu Law," 2nd ed., 88.

[5] Yama, cited in the "Udvahatattwa," p. 7, referred to in Bhattacharya's "Hindu Law," 2nd ed., 88.

[6] I., 52.

[7] According to the "Mitakshara" all the descendants of a common ancestor are *sapindas*, except that after the fifth ancestor on the mother's side, and after the seventh on the father's side, the relationship ceases. Bhattacharya's "Hindu Law," 2nd ed., 89.

[8] According to the Bengal school the expression means connected by the offering of the funeral cake, but "For purposes relating to marriage, Raghunandana," who is the chief authority in that school on the subject of marriage, "has not given any importance to the definition of the term '*Sapinda*.' He has relied upon express texts to exclude girls within the seventh degree on the father's side, and the fifth degree on that of the mother. There are, however, passages in the 'Udvahatattwa,' in which the term '*Sapinda*' is taken to include in its denotation all agnates and cognates within the aforesaid limits." Bhattacharya's "Hindu Law," p. 91.

[9] See Bhattacharya's "Hindu Law," 2nd ed., p. 90.

[10] In this computation both the common ancestor and the person in question must be taken into consideration.

[11] "Hindu Law," 2nd ed., p. 91.

[12] The first of these lines include girls belonging to the same *gotra*

Custom.

As to local and family customs permitting intermarriage within the prohibited degrees, see Mayne's "Hindu Law," 7th ed., pp. 104–106; Banerjee's "Law of Marriage," 2nd ed., pp. 235-241, Bhattacharya's "Hindu Law," 2nd ed., 98, 99.

Stepmother's relations.

A man cannot marry his stepmother's brother's daughter, or daughter's daughter.[1]

The prohibition is based on a text of Sumantu,[2] which specifies these persons. According to a reading of the text, the Western schools exclude also the stepmother's sisters and their daughters, and some persons hold that *sapinda* relationship in the case of the stepmother is the same as in the case of the natural mother up to the fifth degree.[3]

Sastri G. C. Sircar treats this rule of exclusion of certain of the stepmother's relations as being one of merely moral obligation, and as having no legal force.[4]

Other rules of restriction.

There are other rules of restriction on intermarriage, which are now considered to be of mere moral obligation, and which are not universally observed.

The paternal uncle's wife's sister, and her daughter, and the wife's sister's daughter were excluded.[5] In all of these cases the marriage is valid in law.[6]

In former times a man could not marry the daughter of his spiritual guide or pupil,[7] or a girl bearing his mother's name,[8] or a girl older than him in age.[9]

(*ante*, p. 34). The second includes girls belonging to the *gotra* of the maternal grandfather of the bridegroom (*ante*, p. 35). The two lines are comprised in the above rules.

[1] "Udvahatattwa," Raghunandana's Institutes, vol. ii. p. 66, referred to in G. D. Banerjee's "Law of Marriage," 2nd ed., p. 60.

[2] Bhattacharya's "Hindu Law," 2nd ed., 95. Sumantu was the author of one of the Smritis.

[3] Bhattacharya's "Hindu Law," 2nd ed., 95.

[4] "Hindu Law," p. 56.

[5] Bhattacharya's "Hindu Law," 2nd ed., 95.

[6] See Banerjee's "Law of Marriage," 2nd ed., 64; Bhattacharya's "Hindu Law," 2nd ed., 95; G. C. Sircar's "Hindu Law," 56. As to wife's sister's daughter, see *post*, p. 39.

[7] See Banerjee's "Law of Marriage," 2nd ed., pp. 66, 67; "Manu," chap. ii. para. 171; "Vyavastha Darpana," p. 665, note. Bhattacharya ("Hindu Law," 2nd ed., 96) treats this prohibition as still effectual, but a different view is adopted in Banerjee's "Law of Marriage," 2nd ed., 66, 67, and in Sircar's "Hindu Law," 56. The reason for the rule seems to have ceased, as Vedic instruction is now usually of merely nominal duration.

[8] "Udvahatattwa," referred to in Banerjee's "Law of Marriage," 2nd ed., p. 67.

[9] "Yajnavalkya," i. 52. In practice this rule is never departed from. Banerjee's "Law of Marriage," 2nd ed., p. 67; Steele, 161.

Relationship by marriage does not *per se* operate as an impediment to a marriage. Thus a man can marry any relation of his wife whom he could have validly married if he was then marrying for the first time.[1] Affinity.

A son adopted according to the Dattaka form[2] cannot marry any one of the persons whom he would have been prohibited from marrying if he had remained in his natural family.[3] It is unsettled[4] whether he is also prohibited from marrying any one of the girls, whom he could not have married, had he been a legitimate son of his adoptive father,[5] or whether he is only prohibited from marrying a girl who belongs to the *gotra* of his adoptive father, or is within three degrees of descent from the adoptive father and his two paternal ancestors.[6] Adopted son.

The latter view has been accepted by Nānda Pandita in the "Dattaka Mimansa,"[7] and it is therefore to be supposed that it would be acceptable to the Benares and Mithila schools.[8]

Where an adoption has been made by a widow, or by a wife in conjunction with her husband, an adopted son is prohibited from marrying a girl whom he could not have married had he been a legitimate son of his adoptive mother.[9]

Whether he is prohibited from marrying in the family of a wife of

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[1] See *Ragavendra Rau* v. *Jayaram Rau* (1897), 20 Mad. 283, where it was held that a marriage between a Hindu and the daughter of his wife's sister is valid. Banerjee's "Law of Marriage," 2nd ed., p. 64; G. C. Sircar's "Law of Adoption," p. 319; G. C. Sircar's "Hindu Law," p. 95.

[2] *Post*, Chap. iii.

[3] *Narasammal* v. *Balaramacharlu* (1863), 1 Mad. H. C. 420, at p. 426. Banerjee's "Law of Marriage," 2nd ed., p. 63; G. C. Sircar's "Law of Adoption," 387; Bhattacharya's "Hindu Law," 2nd ed., pp. 95, 96; "Dattaka Chandrika," s. 4, paras. 7-9; "Dattaka Mimansa," s. 6, para. 39; "Vyavahara Mayukha," chap. iv. s. 5, para. 30.

[4] Bhattacharya's "Hindu Law," 2nd ed., pp. 95, 96.

[5] This view is taken in Banerjee's "Law of Marriage," 2nd ed., 63, following the "Dattaka Chandrika," s. 4, paras. 7-9.

[6] This view is taken in G. C. Sircar's "Law of Adoption," 387, following the "Dattaka Mimansa," s. 4, paras. 32-38.

[7] S. vi. paras. 32-38; see "Vyavahara Mayukha," chap. iv. s. 5, para. 30.

[8] *Ante*, pp. 12, 15.

[9] See Banerjee's "Law of Marriage," 2nd ed., p. 63.

his adoptive father, who has not joined in the adoption, seems unsettled.[1]

Remarriage of widows.

As the Hindu law does not recognize the remarriage of widows, there are necessarily no rules providing for the case.

It would seem that a widow cannot marry a person whose relationship to her is such that she could not have married him if she had never been married. It is said[2] that in order to ascertain what relatives of her first husband are forbidden to her in marriage reference should be made to the rules as to penance and appointment (*niyoga*), and to some special texts which pronounce certain relations as equal to mothers.

The rules in "Manu" as to penance would exclude a man from marrying the widow of his father,[3] of his son,[4] and of his *guru*.[5]

The application of the ancient rules of *niyoga* would apparently prevent a man from marrying the widow of his paternal or maternal grandfather, his father's widow, his father's or mother's sister, the widow of his paternal or maternal uncle, his father-in-law's widow, his sister or his daughter, his son's widow or daughter, or the widow of his *guru*.[6]

Vrihaspati[7] pronounces as equal to mothers, the mother's sister, the paternal and maternal uncle's wife, the father's sister, the mother-in-law and the wife of an elder brother.

Jats.

Among the Jats of the North-West Province, marriage between a widow and her husband's brother is allowed.[8]

Void marriage.

A marriage made within the prohibited degrees is void.[9]

The woman is entitled to receive maintenance from the man.[10]

The Hindu law did not permit a woman whose marriage was void on account of identity of gotra, or as being within the prohibited degrees, to marry again, even if the marriage was not consummated.[11]

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[1] *Ibid.*; S. C. Sircar's "Vyavastha Darpana," 2nd ed., p. 890; "Dattaka Mimansa," s. 6, paras. 50–53.

[2] See Bhattacharya's "Hindu Law," 2nd ed., 97. In *Lachman Kuar* v. *Mardan Singh* (1886), 8 All. 143, the Court held that, in the absence of a special custom, the marriage of a Hindu with his cousin's widow was valid.

[3] "Manu," chap. xi. paras. 55, 104–107.

[4] *Ibid.*, chap. xi. para. 59.

[5] *Ibid.*, chap. xi. paras. 49, 252.

[6] See G. C. Sircar's "Law of Adoption," pp. 321, 322.

[7] Cited in "Dayabhaga," chap. iv. s. 3, para. 31.

[8] *Poorunmul* v. *Toolsee Ram* (1868), 3 Agra. 350.

[9] Kullaka Bhatta's commentary on "Manu," chap. iii. paras. 5, 11; Bhattacharya's "Hindu Law," 2nd ed., p. 97; Banerjee's "Law of Marriage," 2nd ed., p. 63.

[10] Texts cited in Bhattacharya's "Hindu Law," 2nd ed., p. 97; Colebrooke's "Digest," vol. iii. p. 329.

[11] See Banerjee's "Law of Marriage," 2nd ed., p. 191; Bhattacharya's "Hindu Law," 2nd ed., 98; Colebrooke's "Digest," vol. ii. p. 477.

Where the marriage was void on account of difference of caste, the Hindu law, according to some authorities, allowed the woman to remarry if the error was discovered before the ceremony of *garbhadana*,[1] but not otherwise.[2] The case is unlikely to occur, but if it did, the Courts might decline to consider that a void marriage is any impediment to a subsequent marriage.[3]

WHO MAY GIVE IN MARRIAGE.

Consent of guardian.

The gift of a female minor in marriage must be by or with the consent of her father or other guardian in marriage. The consent of the guardian is also necessary in the case of the marriage of a male minor.[4]

Where there is a gift by or with the consent of a legal guardian, and the marriage rite is duly solemnized, and where the marriage of a male minor takes place with the consent of such guardian, the marriage is irrevocable.[5]

For the purposes of marriage the age of majority, according to the Bengal school, is the end of the fifteenth year,[6] and according to the schools of law based on the Mitakshara, the end of the sixteenth year.[7] The age of majority for the purpose of marriage is not affected by the Indian Majority Act.[8]

Devolution of guardianship in marriage.

The right, and duty, of giving a boy[9] or a girl in

[1] A ceremony performed on the first appearance of the menses, and popularly called the second marriage.

[2] Banerjee's "Law of Marriage," 2nd ed., 191; Steele, 29, 30, 166.

[3] See Banerjee's "Law of Marriage," 2nd ed., 191. *Aunjona Dasi* v. *Prahlad Chandra Ghose* (1870), 6 B. L. R. 243, at pp. 253, 254; 14 W. R. C. R. 403, at p. 405. If this view be not accepted, then, on the death of the husband, the woman could take advantage of the Hindu widow's remarriage Act (XV. of 1856, *ante*, p. 31).

[4] *Nundlal Bhugwandas* v. *Tapeedas* (1809), 1 Borr. 14; 1 Morl. 287; Steele, p. 26.

[5] *Venkatacharyulu* v. *Rangacharyulu* (1890), 14 Mad. 316, at p. 320. See *Kateeram Dokanee* v. *Gendhenee* (*Mussamut*) (1875), 23 W. R. C. R. 178.

[6] *Lachman Das* v. *Rupchand* (1831), 5 Ben. Sel. Rep., 115, 2nd ed., 136; *Cally Churn Mullick* v. *Bhuggobutty Churn Mullick* (1872), 10 B. L. R. 231; 19 W. R. C. R. 110; *Monsoor Ali* v. *Ramdyal* (1865), 3 W. R. C. R. 50; *Deobomoyee Dossee* v. *Juggessur Hati* (1864), 1 W. R. C. R. 75; *Luckheenarain Mujmodar* v. *Muddhosodun*, Ben. S. D. A., 1853, p. 505; *Sheebsunker Dass* v. *Uluck Chunder Aych*, Ben. S. D. A., 1859, p. 885.

[7] Strange's "Hindu Law," vol. i. p. 72; vol. ii. pp. 76, 77, 80; Macnaghten's "Hindu Law," vol. i. chap. vii. (ed. 1829), p. 103.

[8] Act IX. of 1875, s. 2.

[9] See Macnaghten's "Hindu Law," vol. ii. p. 204.

marriage devolves upon the following persons in succession[1]:—

1. The father.[2]
2. The paternal grandfather.
3. The brother.[3]
4. Other paternal relations up to the tenth degree of affinity[4] in order of proximity.

Right of mother.

According to the Mitakshara school, the right then devolves upon the mother, and, failing her, upon the maternal grandfather, maternal uncle, and other maternal relations in order of proximity. According to the Bengal school, the right of the mother is postponed to that of the maternal grandfather and maternal uncle.[5]

Where a relative, other than the father, seeks to exercise a right to give in marriage, it is his duty to consult the mother, and if her objection be not unreasonable, to allow it.[6]

Stepmother.

A stepmother has no right to give in marriage.[7]

Consent of ward.

A minor cannot be married or given in marriage against his or her will.

Although it would rarely happen that a Hindu girl would be consulted as to the choice of a bridegroom, and although the form of a Hindu

[1] Strange's "Hindu Law," vol. i. p. 36; vol. ii. p. 28; Macnaghten's "Hindu Law," vol. ii. p. 204; "Vyavastha Darpana," 2nd ed., p. 651; West and Bühler, 3rd ed., pp. 272, 673. See *Ram Bunsee Koonwaree (Maharanee)* v. *Soobh Koonwaree (Maharanee)* (1867), 7 W. R. C. R. 321, at p. 323; 2 Ind. Jur. N. S. 193; *Shridhar* v. *Hiralal Vithal* (1887), 12 Bom. 480, at p. 484.

[2] *Nanabhai Ganpatrav Dhairyavan* v. *Janardhan Vasudev* (1886), 12 Bom. 110, at p. 118; *Golamee Gopee Ghose* v. *Juggessur Ghose* (1865), 3 W. R. C. R 193. *Ex p. Jankypersaud Agurwallah* (1859), 2 Boul. 28, 114; *Nundlal Bhugwandass* v. *Tapeedass* (1809), 1 Borr. 14; 1 Morl. 287.

[3] *Ex p. Jankypersand Agurwallah* (1859), 2 Boul. 28, 114. Strange's "Hindu Law," vol. ii. p. 30; Macnaghten's "Hindu Law," vol. ii. p. 204.

[4] As to the right of the paternal uncle, see *Brindabun Chandra Kurmokar* v. *Chundra Kurmokar* (1885), 12 Calc. 140, at p. 142; *Shridhar* v. *Hiralal Vithal* (1887), 12 Bom. 480, at p. 484.

[5] Banerjee's "Law of Marriage," 2nd ed., pp. 43, 44; Bhattacharya's "Hindu Law," 2nd ed., p. 116; "Vyavastha Darpana," 2nd ed., p. 651; Strange's "Hindu Law," vol. ii. p. 28; Macnaghten's "Hindu Law," vol. ii. p. 28. See "Narada Smriti," chap. xii. paras. 20, 21.

[6] See *S. Namasevayam Pillay* v. *Annammai Ummal* (1869), 4 Mad. H. C. 339.

[7] *Ram Bunsee Koonwaree (Maharanee)* v. *Soobh Koonwaree (Maharanee)* (1867), 7 W. R. C. R. 321; 2 Ind. Jur. 193.

marriage contemplates a gift of the girl by her father or other guardian rather than a contract between the parties to the marriage, a bridegroom cannot be forced upon an unwilling bride.[1] The gift is made merely in discharge of the duty of the guardian, and not in exercise of any right of property in the girl.[2]

Delegation of right.

A father can,[3] expressly or by implication,[4] delegate his authority to another person.

It is submitted that no other guardian can delegate his right, except, perhaps, to a person on whom the right might eventually devolve, as in the case of *Ram Bunsee Koonwaree* (*Maharanee*) v. *Soobh Koonwaree* (*Maharanee*),[5] where the nearest male kinsman assented to the paternal grandmother giving the girl in marriage.

Loss of right.

A father or other guardian loses his right to give in marriage when he has neglected to exercise the right for a long time, or has in other ways waived the right.[6]

The conviction of the father for theft does not necessarily destroy his right to give his daughter in marriage.[7]

Remedy of guardian.

A father or other guardian in marriage can enforce his right by suing for an injunction to prevent the marriage of his ward to a person of whom he does not approve,[8] and the Court will in a suitable case grant an injunction *pendente lite* to restrain such marriage.[9]

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[1] See *Shridhar* v. *Hiralal Vithal* (1887), 12 Bom. 480, at p. 486. Colebrooke's "Digest," vol. ii. p. 481.

[2] See *Khushalchand Lalchand* v. *Bai Mani* (1886), 11 Bom. 247, at p. 255.

[3] *Golamee Gopee Ghose* v. *Juggessur Ghose* (1865), 3 W. R. C. R. 193.

[4] *Golamee Gopee Ghose* v. *Juggessur Ghose* (1865), 3 W. R. C. R. 193.

[5] (1867), 7 W. R. C. R, 321; 2 Ind. Jur. 193.

[6] See *Khushalchand Lalchand* v. *Bai Mani* (1886), 11 Bom. 247; *King* v. *Kistnama Naick* (1814), 2 Str. N. C. 89; 1 Norton L. C. 1; *Modhoosoodun Mookerjee* v. *Jadub Chunder Banerjee* (1865), 3 W. R. C. R. 194; *Ghazi* v. *Sukru* (1897), 19 All. 515; *Rulyat* (*Bace*) v. *Jeychund Kewul* (1843), Bellasis, 43; 1 Morl. (N. S.) 181. The fact that the father had given up worldly affairs, and had become a recluse would be evidence that he had waived his rights of guardianship.

[7] See *Nanabhai Ganpatrav Dhairyavan* v. *Janardhan Vasudev* (1886), 12 Bom. 110.

[8] See *In the matter of Kashi Chunder Sen* (1881), 8 Calc. 266, S. C. *Bromhomoyee* v. *Kashi Chunder Sen*, 10 C. L. R. 91; *Khushalchand Lalchand* v. *Mani* (*Bai*) (1886), 11 Bom. 247, at p. 253.

[9] *Nanabhai Ganpatrav Dhairyavan* v. *Janardhan Vasudev* (1886), 12 Bom. 110.

The order of the Court may be subject to restrictions upon the exercise of the rights of the guardian.[1]

Control of guardian by Court.

The Court will restrain a guardian from an improper exercise of his authority; but the Court will not, except in a case of gross misconduct, interfere with the exercise of the discretion by a father.[2]

Guardian appointed by Court.

Where a guardian of the person or property of a minor has been appointed by a High Court, or by a Civil Court acting under the powers contained in Act VIII. of 1890, the rights of the guardian in marriage are subject to the control of the Court appointing a guardian,[3] and such Court can, it is submitted, give all necessary directions with regard to the marriage of the ward.[4]

Ward of Bengal Court of Wards.

Where a minor is a ward of the Bengal Court of Wards, the leave of such Court must be obtained before the marriage.[5]

Madras Court of Wards.

Whoever without the previous consent of the Court of Wards abets the marriage of a minor ward of the Madras Court of Wards is liable on conviction before a Court of Session to a fine not exceeding Rs. 2000, or to imprisonment for a term not exceeding six months, or to both.[6]

When minor girl may select husband for herself.

The Hindu law permits a girl to choose a husband for herself, if there be no available relation having a right to give her in marriage,[7] or if her guardian in marriage has neglected to provide a husband for her for, at any rate, three years after she has attained a marriageable age.[8]

In the former case the Hindu law required the girl to obtain permission from the King before selecting a husband for herself.[9] Although the Law Courts now exercise the functions relating to

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[1] See *Shridhar* v. *Hiralal Vithal* (1887), 12 Bom. 480.

[2] See *Shridhar* v. *Hiralal Vithal* (1887), 19 Bom. 480, at pp. 484, 485.

[3] See Act VIII. of 1890, s. 43.

[4] See Act VIII. of 1890, s. 43; Trevelyan's "Law of Minors (3rd ed.), pp. 176, 177, 291. Doubted in *Diwali* (*Bai*) v. *Moti Karson* (1896), 22 Bom. 509, at p. 513.

[5] Court of Wards Rules, s. viii. (e) rule 5. The only penalty, apparently, for a disobedience of this rule is that the Court might refuse to authorize payment of the expenses of the marriage out of the ward's funds.

[6] Act I. (M. C.) of 1902, s. 67.

[7] "Narada," chap. xii. paras. 20-22. "Yajnavalkya," i. 63.

[8] Strange's "Hindu Law," i. 36. "Manu," chap. ix. paras. 90, 91. Colebrooke's "Digest," vol. ii. p. 387. According to "Gautama" (xviii. 20-23), she need only wait three months. The marriageable age is said to be the completion of the eighth year. Banerjee's "Law of Marriage," 2nd ed., p. 49. See "Manu," ix. 89.

[9] "Narada," xii. 22. "Yajnavalkya," i. 63.

minors, which were formerly exercised by the Sovereign in person, no such application to the Court seems to be contemplated by modern practice.

The case would not be likely to occur, but effect would apparently be given to a marriage entered into by a girl who has no relations entitled to give her in marriage, provided the marriage be in other respects unexceptionable.

In the case of the guardian neglecting to give the girl in marriage, the right of the guardian next in order would apparently accrue,[1] rather than that the girl should be able to select a husband for herself.[2]

It is said that, if a girl chooses a husband for herself, she cannot take with her any ornaments which have been given to her by her father, mother, or brothers.[3]

Effect of absence of consent of guardian in marriage.

A marriage, otherwise legally contracted, and performed with the necessary ceremonies, is not rendered invalid by the mere absence of the consent of the guardian in marriage,[4] or by the circumstance that it was contracted in disobedience of an order of a Civil Court.[5]

Powers of Court.

The Courts have power to declare that a marriage, which has been entered into without the consent of the guardian, is on that account invalid, and would probably do so, at any rate if the marriage has not been consummated, in a case where the interests of the child had been disregarded, and where a person having no pretence of authority had disposed of the child in marriage.[6]

Where the marriage has been induced by force or fraud,[7]

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[1] See *ante*, p. 42.

[2] See Strange's "Hindu Law," i. 36.

[3] "Manu," ix. 92, and other authorities referred to in Mayne's "Hindu Law," 7th ed., p. 109, note (*f*).

[4] *Ghazi* v. *Sukru* (1897), 19 All. 515; *Mulchand Kuber* v. *Bhudia* (1897), 22 Bom. 812; *Diwali* (*Bai*) v. *Moti Karson* (1896), 22 Bom. 509; *Venkatacharyulu* v. *Rangacharyulu* (1890), 14 Mad. 316; *Khushalchand Lalchand* v. *Mani* (*Bai*) (1886), 11 Bom. 247; *Brindabun Chandra Kurmokar* v. *Chandra Kurmokar* (1885), 12 Calc. 140; *Modhoosoodun Mookerjee* v. *Jadub Chunder Banerjee* (1865), 3 W. R. C. R. 194; *Rulyat* (*Baee*) v. *Jeychund Kewul* (1843), Bellasis 43; 1 Morl. Dig. N. S. 181.

[5] *Diwali* (*Bai*) v. *Moti Karson* (1896), 22 Bom. 509.

[6] See *Aunjona Dasi* v. *Prahlad Chandra Ghose* (1870), 6 B. L. R. 243; 14 W. R. C. R. 403; Banerjee's "Law of Marriage," 2nd ed., 50, 51. See, however, *Mulchand Kuber* v. *Bhudhia* (1897), 22 Bom. 812; *Khushalchand Lalchand* v. *Mani* (*Bai*) (1886), 11 Bom. 247.

[7] *I.e.* fraud on the person marrying, or being given in marriage. Mere fraud on the guardian, such as in *Venkatacharyulu* v. *Rangacharyulu* (1890), 14 Mad. 316, where the

it would on that account be declared to be invalid, apart from any question as to the want of consent by the guardian.[1]

There would be great difficulties in setting aside a marriage which had been consummated, and in any case it would be difficult to obtain a bridegroom for a Hindu girl who had already gone through the form of marriage with another person.

Consent to re-marriage of minor widow.

A minor[2] widow whose marriage has not been consummated cannot remarry without the consent of her father, or, if she has no father, of her paternal grandfather; or if she has no such grandfather, of her mother; or, failing all these, of her elder brother; or failing also brother, of her next male relative. Marriages made without such consent may be declared void by a Court of Law, but the consent is to be presumed until the contrary is proved, and no such marriage can be declared void after it has been consummated.[3]

In the case of a widow who is of full age, or whose marriage has been consummated, her own consent is sufficient consent to constitute her marriage valid.[4]

Agreement to pay money to guardian.

It is unsettled whether a father or other guardian can enforce an agreement to recompense him in consideration of the marriage of his child or ward.

The Bombay High Court has refused[5] to enforce such a claim on the ground that it is opposed to public policy, but the Madras High Court has in the case of a marriage in the *asura* form taken a different view.[6]

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mother falsely stated that she had the father's permission would not of itself invalidate the marriage; see *Khushalchand Lalchand* v. *Mani (Bai)* (1886), 11 Bom. 247.

[1] *Venkatacharyulu* v. *Rangacharyulu* (1890), 14 Mad. 311, at p. 320; *Aunjona Dasi* v. *Prahlad Chandra Ghose* (1870), 6 B. L. R. 243, at p. 254; 14 W. R. C. R. 403, at p. 405.

[2] *I.e.* minor according to "Hindu Law," *ante*, p. 41.

[3] Act XV. of 1856, s. 7. This would not interfere with the jurisdiction of the Court to set aside a marriage which had been brought about by force or fraud exercised upon the widow (see *ante*, p. 45).

[4] Act XV. of 1856, s. 7.

[5] *Dholidas Ishvar* v. *Fulchand* (1897), 22 Bom. 658; *Dulari* v. *Vallabdas Pragji* (1888), 13 Bom. 126. See *Pitamber Ratansi* v. *Jagjivan Hansraj* (1884), 13 Bom. 131.

[6] *Visvanathan* v. *Saminathan* (1889), 13 Mad. 83. In that case the father of the bride sued the uncle of the bridegroom on a bond for the amount payable on a marriage in the *asura* form; Wilkinson, J. (at p. 85),

In a Bengal case[1] the judges of the High Court expressed differing views, but the question did not directly arise in that case.

It is submitted that where the marriage is between Brahmins or Kshatriyas such agreement is void.[2] In other cases, such agreement might, it is submitted, be enforced, if it be fair and reasonable, and the marriage be contracted in the interests of the child. The *asura*[3] form of marriage itself contemplates a payment to the guardian.

Payment to bridegroom.

There is no objection to a payment of money by the guardian of a girl to the proposed bridegroom in consideration of the marriage.[4]

The father, or other guardian, can recover money which he has paid as the consideration for a marriage which has not taken place.[5]

Marriage brocage contracts.

A contract, whereby a person undertakes for reward to bring about a marriage, cannot be enforced.[6]

Marriage expenses.

The property of a joint family governed by the Mitakshara school of law is liable for the reasonable[7] expenses of

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said, "In the present state of Hindu society, I am not prepared to hold that the receipt by a Hindu father of money in consideration of his giving his daughter in marriage is in every case without distinction immoral or contrary to public policy. Each case must be decided on its own merits." Approved of in *Baldeo Sahai* v. *Jumna Kunwar* (1901), 23 All. 495. See *Vaithyanatham* v. *Gangarasu* (1893), 17 Mad. 9.

[1] *Ram Chand Sen* v. *Audaito Sen* (1884), 10 Calc. 1054. See *Lallun Monee Dossee* (*Rance*) v. *Nobin Mohun Singh* (1875), 25 W. R. C. R. 32; *Jogeswar Chakrabatti* v. *Panch Kauri Chakrabatti* (1870), 5 B. L. R. 395; 14 W. R. C. R. 154; *Juggernath Persad* v. *Janky Persad* (1859), 2 Boul. 28.

[2] See Bhattacharya's "Hindu Law," 2nd ed., pp. 101, 102. "Manu" says (iii. 51), "Let no father, who knows the law, receive a gratuity, however small, for giving his daughter in marriage, since the man who through avarice takes gratuity for that purpose is a seller of his offspring," but the practice is very common.

[3] *Post*, p. 50.

[4] See Act IX. of 1872, s. 65, illus. (*a*).

[5] *Ramchand Sen* v. *Audaito Sen* (1884), 10 Calc. 1054; *Jogeswar Chakrabatti* v. *Panch Kauri Chakrubatti* (1870), 5 B. L. R. 395, 14 W. R. C. R. 154; *Rambhat* v. *Timmayya* (1892), 16 Bom. 673; *Malji Thakersey* v. *Gomti* (1887), 11 Bom. 412. See Indian Contract Act (IX. of 1872), s. 65.

[6] *Vaithyanatham* v. *Gangarasu* (1893), 17 Mad. 19; *Pitamber Ratansi* v. *Jagjivan Hansraj* (1884), 13 Bom. 131. See *Dulari* v. *Vallabdas Pragji* (1888), 13 Bom. 126, at p. 130; *Jogeswar Chakrabatti* v. *Panch Kauri Chakrabatti* (1870), 5 B. L. R. 395, 14 W. R. C. R. 154.

[7] In *Vaikuntham Ammangar* v. *Kallapiran Ayyangar* (1902), 26 Mad. 497, the Court only allowed the expenses of ceremonies which invariably formed part of the marriage ceremonies, and disallowed the expenses of ceremonies which were usually,

the marriages of the daughters of male members of such family,[1] including the daughters of those who are excluded from inheritance.

The expenses of the marriage of a male member of a family will not justify a sale of property,[2] although they would be properly payable out of income.

In the case of a joint family governed by the Bengal school of law the marriage expenses of, at any rate, the daughters of the co-sharers, and of persons who are excluded from inheritance,[3] and possibly also those of other unmarried female members of the family, such as daughters of adult sons of co-sharers, would apparently be payable out of the family property.[4]

Liability of father.

A father is not, in the absence of a contract, under a legal liability to pay the marriage expenses of any of his children,[5] but after his death the reasonable expenses of the marriages of his daughters are payable out of his estate.[6]

Such expenses create a charge upon the property to the same extent as rights of maintenance create a charge,[7] and to such extent only.

Grandfather.

There is also authority that the estate of a deceased Hindu is liable for the expenses of the marriage of the daughter of a son who predeceased him.[8]

Payment out of infant's property.

Where a ward has separate property a guardian would be entitled to pay thereout the reasonable expenses of his ward's marriage.[9]

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though not invariably, performed. It is submitted that greater latitude would be allowed to a guardian.

[1] See *Vaikuntham Ammangar* v. *Kallapiran Ayyangar* (1900), 23 Mad. 512. Indian Contract Act (IX. of 1872), s. 69.

[2] *Govindarazulu Narasimham* v. *Devarabhotla Venkatanarasayya* (1903), 27 Mad. 206.

[3] They would be maintained out of the funds of the family, and their marriage expenses would apparently be upon the same footing, dissented from in *Sundrabai* v. *Shivnarayana* (1907), 32 Bom. 81.

[4] There is a doubt as to this, see Sircar's "Hindu Law," p. 238.

[5] *Sundari Ammal* v. *Subramania Ayyar* (1902), 26 Mad. 505.

[6] *Preaj Nurain* v. *Ajodhyapurshad* (1848), 7 Ben. Sel. R. 513, 2nd ed., 602; *Gunput Lall* (*Lalla*) v. *Tcorun Koonwar* (*Mussamut*) (1871), 16 W. R. C. R. 52. See *Ramcoomar Mitter* v. *Ichamoyi Dasi* (1880), 6 Calc. 36, at p. 37; 6 C. L. R. 429, at 430.

[7] See *post*, pp. 88–93.

[8] *Ramcoomar Mitter* v. *Ichamoyi Dasi* (1880), 6 Calc. 36; 6 C. L. R. 429.

[9] *Juggessur Sircar* v. *Nilambur Biswas* (1865), 3 W. R. C. R. 217; *Makundi* v. *Surabsukh* (1884), 6 All. 417, at p. 421. See *ante*, p. 47, note 7.

FORMS OF MARRIAGE.

Forms of marriage now recognized.

The only forms of marriage now recognized by the general Hindu law are the *Brahma* form and the *Asura* form. Both forms are now applicable to all classes.

Ancient forms of marriage.

The ancient Hindu law allowed the following eight different forms of marriage.[1] The first four of these were considered approved forms.

1. The *Brahma*.[2]

Brahma.

This form of marriage originally contemplated the gift of the girl by her father to a man learned in the *Vedas*,[3] and was, therefore, peculiar to Brahmins.

It is the only one now left of the four approved forms of marriage, and is now suitable for all classes.[4]

2. The *Daiva*.[5]

Daiva.

In this form, which was peculiar to Brahmins, the maiden was given in marriage to the officiating priest.[6]

3. The *Arsha*.[7]

Arsha.

In this form the father gave his daughter in consideration of one or two pair of oxen.[8] It was peculiar to Brahmins.

4. The *Prajapatya* or *Kaya*.[9]

Prajapatya.

In this form the bridegroom was an applicant for the bride. It was peculiar to Brahmins.[10]

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[1] See "Manu," chap. iii. paras. 21–41. "Yajnavalkya," i. 58–61. "Narada," chap. xii. paras. 39–54. Colebrooke's "Digest," vol. iii. 604. "The different forms of marriage recognized by the Hindu law are probably to be traced historically to the customs of different tribes which afterwards coalesced to form a single community," per West, J., in *Vijiarangam* v. *Lakshuman* (1871), 8 Bom. H. C. O. C. 244, at p. 254.

[2] So called because peculiarly fit for Brahmins. Colebrooke's "Digest," vol. iii. p. 604.

[3] "Manu," chap. iii. para. 27.

[4] *Jaikisondas Gopaldas* v. *Harkisondas Hullochandas* (1876), 2 Bom. 9, at p. 14; *Sivarama Casia Pillay* v. *Bagavan Pillay*, Mad. S. D. for 1859, p. 44, cited in Norton's "Leading Cases," Part I. p. 5.

[5] Lit. divine: so called as being a ceremony proper for the Gods.

[6] "Manu," iii. 28. Colebrooke's "Digest," vol. iii. p. 604.

[7] Lit. scriptural, anything for which a *Rishi* is an authority; Wilson's "Glossary," p. 32.

[8] "Manu," chap. iii. para. 29.

[9] So called as being the ceremony of the *Kas* or *Prajapatis*, the lords of created beings or progenitors of mankind; "Manu," chap. i. para. 34; chap. iii. para. 30.

[10] See Banerjee's "Law of Marriage," 2nd ed., p. 78.

5. The *Asura*.[1]

Asura.

In this form the bridegroom purchased the bride from her father.[2] The only difference between this form and the *Arsha* form is that in this form property other than cattle is taken by the father of the bride.[3] The mere giving of a present to the bride does not render the marriage an *Asura* marriage.[4]

This form of marriage was permissible to *Vaisyas* and *Sudras*, but not to the two highest classes.[5] It is now applicable to all classes,[6] and seems to be commonly practised throughout India. It is said to be, in fact, the most common form of marriage,[7] at any rate among Sudras in Southern India,[8] and members of the Bhandari and other inferior castes in Western India.[9]

6. The *Gandharba*.[10]

Gandharba.

Allowed by custom.

This form depended solely upon the mutual consent of the parties marrying. It was confined to the *Kshatriyas* or military class,[11] and seems to have been effected by mere consummation.[12] Although this form of marriage is not recognized by the general Hindu law, a form of that name is permitted in some cases by family usage. In a case decided by the Bengal Sudder Court in 1817, a marriage by a member of the military class in this form was recognized,[13] and the same Court, in 1853,[14] upheld a similar marriage by a Rajah of Julpigoree, who

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[1] Lit. demoniacal; Wilson's "Glossary," p. 37. "It is called the *Asura* form, as being the ceremony of the *Asuras*, or the aboriginal non-Aryan tribes of India," Banerjee's "Law of Marriage," 2nd ed., p. 79.

[2] "Manu," chap. iii. para. 31.

[3] Bhattacharya's "Hindu Law," 2nd ed., 104.

[4] *Jaikisondas Gopaldas* v. *Harkisondas Hullochandas* (1876), 2 Bom. 9, at p. 15. "Manu," chap. iii. para. 54.

[5] *Jaikisondas Gopaldas* v. *Harkisondas Hullochandas* (1876), 2 Bom. 9, at p. 14. Colebrooke's "Digest," vol. iii. p. 604. Steele, p. 31.

[6] *Viswanathan* v. *Saminathan* (1889), 13 Mad. 83. See *Keshow Rao Diwakur* v. *Naro Junardhun Patunkur* (1821), 2 Borr. 194; *Nundlal Bhugwandas* v. *Tapeedas* (1810), 1 Borr. 14. As to Western India, see *Vijiarangam* v. *Lakshuman* (1871), 8 Bom. H. C. O. C. 244.

[7] Banerjee's "Law of Marriage," 2nd ed., p. 82. Strange's "Hindu Law," i. 43.

[8] See Mayne's "Hindu Law," 7th ed., pp. 99 (note *z*), 100.

[9] *Vijiarangam* v. *Lakshuman* (1871), 8 Bom. H. C. O. C. 244.

[10] The name is taken from that of "a kind of inferior divinity, attendant upon Indra and Kuvera, and distinguished for musical proficiency." Wilson's "Glossary," p. 164.

[11] See "Manu," chap. iii. paras. 32, 41.

[12] Sircar's "Hindu Law," p. 48.

[13] *Hujmu Chul* v. *Bhadoorun* (*Ranee*), referred to in Ben. S. D. A. 1846, p. 340, and 7 Ben. Sel. R. 355 (new edition, pp. 355, 356).

[14] *Mokrund Deb Raekut* v. *Bissessuree* (*Ranee*), Ben. S. D. A. 1853, p. 159.

belonged to an aboriginal tribe, which had to some extent adopted Hindu customs.[1]

This form of marriage is said to still exist in the family of the Tipperah Rajahs,[2] and it was recently asserted to have taken place in a family in Ganjam.[3] A religious ceremony is now as necessary in a marriage in this form as when the marriage takes place in the ordinary forms.[4] The Gandharba form of marriage as now celebrated, and the ancient form seem, therefore, to resemble one another in name only.

7. The *Rakshasa*.[5]

Rakshasa.

This was a marriage by capture,[6] and would in the present day be dealt with by the criminal law.[7] It was peculiar to the Kshatriyas, or warrior class.[8]

8. The *Paisacha*.[9]

Paisacha.

In this form the Hindu law for the sake of the woman and her offspring treated as a marriage a seduction by fraud.

Customary form of marriage.

Where by immemorial and continuous custom[10] a form of marriage, which is not repugnant to the fundamental principles of Hindu law, is invariably practised by a

[1] See *Fanindra Deb Raikat* v. *Rajeswar Das* (1885), 12 I. A. 72; 11 Calc. 463.

[2] See *Chuckrodhuj Thakoor* v. *Beer Chunder Joobraj* (1864) 1 W. R. C. R. 194.

[3] *Brindavana* v. *Radhamani* (1888), 12 Mad. 72. A marriage in this form was also asserted in *Hari Krishna Devi Garu* (*Sri Gajapaty*) v. *Radhika Patta Maha Devi Garu* (*Sri Gajapaty*) (1865), 2 Mad. H. C. 369. S. C. on appeal, *Radhika Patta Maha Devi Garu* (*Sri Gajapathi*) v. *Nilamani Patta Maha Devi Garu* (*Sri Gajapathi*) (1870), 13 M. I. A. 497; 6 B. L. R. 202; 14 W. R. P. C. 33.

[4] *Brindavana* v. *Radhamani* (1886), 12 Mad. 72; *Hari Krishna Devi Garu* (*Sri Gajapaty*) v. *Radhika Patta Maha Devi Garu* (*Sri Gajapaty*) (1865), 2 Mad. H. C. 369, at p. 374. See *Chuckrodhuj Thakoor* v. *Beer Chunder Joobraj* (1864), 1 W. R. C. R. 194; *Bhaoni* v. *Maharaj Singh* (1881), 3 All. 738.

[5] Lit. a fiend-like marriage. See Wilson's "Glossary," p. 436.

[6] "The seizure of a maiden by force from her house while she weeps and calls for assistance, after her kinsmen and friends have been slain in battle or wounded, and their houses broken open, is the marriage styled *Rakshasa*." "Manu," chap. iii. para. 33.

[7] Indian Penal Code (Act XLV. of 1860), s. 366.

[8] *Jaikisondas Gopaldas* v. *Harkisondas Hullochandas* (1876), 2 Bom. 9, at p. 14.

[9] Lit. diabolical. Wilson's "Glossary," p. 389. "When the lover secretly embraces the damsel, either sleeping or flushed with strong liquor, or disordered in her intellect, that sinful marriage called *Paisacha* is the eighth and basest." "Manu," iii. para. 34.

[10] See *Gatha Ram Mistree* v. *Moohita Kochin Atteah Domoonee* (1875), 14 B. L. R. 298; 13 W. R. C. R. 179; "Manu," iii. 35. As to the necessary conditions for the validity of a custom, see *ante*, pp. 22-25.

particular class of persons or family, a marriage in such form is valid.

In the case of a family or race which is not Hindu by origin, but which has gradually, or otherwise, more or less adopted Hindu customs or Hindu law, a custom at variance with Hindu law would be upheld,[1] provided that it were not repugnant to general ideas of morality.

Forms of marriage according to family usages.

The following forms of marriage peculiar to individual families have (amongst others) been recognized by the Courts:—

In the Raj family of Hill Tipperah, marriage takes place in the *Gandharba*[2] or *Santigrihita*[3] form, but the wife married in that form seems to be inferior to a wife married in accordance with the ordinary form.[4]

A Rajah of Orissa can marry a girl of a different caste in what is called the *phulbiha* form, which consists in putting a garland round the neck of the woman, or in an exchange of garlands.[5]

The *Sagai* form,[6] by which widows of the *Nomosudra* caste,[7] and of the *Koiries* and other low castes in Behar,[8] and of the *Hulwaee* caste,[9] remarry.

The *Kurao Dhureecha*, or the marriage of a widow with her deceased husband's brother, is common among Jats[10] and the *Lodh* caste[11] in the North-West.

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[1] See *Fanindra Deb Raikat* v. *Rajeswar Das* (1885), 12 I. A. 72; 11 Calc. 463.

[2] See *ante*, p. 51.

[3] Lit. one who receives holy water.

[4] See *Chuckrodhuj Thakoor* v. *Beer Chunder Joobraj* (1864), 1 W. R. C. R. 194; *Nobodip Chundro Deb Burmun* (*Rajkumar*) v. *Bir Chundra Manikya Bahadoor* (*Rajah*) (1876), 25 W. R. C. R. 404, at pp. 410, 414.

[5] As to the customs of the Urya Rajahs and Chiefs, see the *Pachis Siwal*, or twenty-five questions put by the superintendent of the Tributary Mehals in 1814 to the leading Rajahs in those Mehals. These answers have been recognized by the Courts, *e.g.* see *Prandhur Roy* v. *Ramchender Mongraj*, Ben. S. D. A. 1861, p. 16; *Durrap Sing Deo* v. *Buxurdhun Roy* (1863), 2 Hay. 335; *Rungadhur Nurendra Mardraj Mahapattur* v. *Juggurnath Bhromurbor Roy* (1877), 1 Shome's "Law Reporter," C. R. 92, at p. 95. The substance of the answers is given in Banerjee's "Law of Marriage," 2nd ed., pp. 231, 232.

[6] In this form the main ceremony consists in putting a red or *Sindur* mark on the bride's forehead in the presence of assembled friends and relatives. *Bissuram Koiree* v. *Empress* (1878), 3 C. L. R. 410.

[7] *Hurry Churn Dass* v. *Nimai Chand Keyal* (1883), 10 Calc. 138; 13 C. L. R. 207. See *Jukni* v. *Queen Empress* (1892), 19 Calc. 627.

[8] *Bissuram Koiree* v. *Empress* (1878), 3 C. L. R. 40.

[9] *Kally Churn Shaw* v. *Dukhee Bibee* (1879), 5 Calc. 692.

[10] *Poorunmall* v. *Toolsee Ram* (1868), 3 Agra. 350; *Queen* v. *Bahadur Singh* (1872), 4 N. W. P. 128.

[11] *Kesaree* v. *Samardhan* (1873), 5 N. W. P. 94.

The *Serai Udiki*[1] form, by which wives, deserted by their husbands, can remarry according to the custom of the Lingaits of South Canara.[2]

As to the Sikh form of marriage, see *Juggomohun Mullick* (*Doe dem*) v. *Saumcoomar Bebee* (1815), 2 Morl. Dig. 43.

As to forms of marriage which are recognized by local, tribal, or family custom, see Banerjee's "Law of Marriage," 2nd ed., Lecture VI.; Bhattacharya's "Hindu Law," 2nd ed., pp. 105, 111, 112; Risley's "Tribes and Castes of Bengal"; Crooke's "Tribes and Castes of the North-Western Provinces and Oudh"; Mayne's "Hindu Law," 7th ed., pp. 120-128.

As to the marriage of Hindus domiciled in the Madras Presidency following the Marumakkatayan or the Aliyasantana law of inheritance, see Madras Act IV. of 1896.

New sect. Where "a new Hindu sect comes into existence, and, from religious scruples, adopts a form of marriage somewhat different to the ordinary form, it would be going too far to hold that these marriages are void, and thus to bastardize a whole community, simply because the sect and its practices are of recent origin."[3]

MARRIAGE CEREMONIES.

Betrothal. It is usual, but not necessary, that marriage should be preceded by a betrothal, or formal promise by the father, or other guardian,[4] to give the girl in marriage.[5] Such betrothal is revocable,[6] and is not, in law, any obstacle to a marriage with another man.[7]

Effect of breach of promise. A promise of marriage cannot be enforced by a suit for specific performance,[8] but a refusal to complete a betrothal, or a promise of

[1] Giving a cloth.

[2] *Virasangappa* v. *Rudrappa* (1885), 8 Mad. 440.

[3] Banerjee's "Law of Marriage," 2nd ed., p. 224. As to the marriage of Brahmos, see *ibid.*, pp. 99, 100, 253, and *Sonalusmi* v. *Vishnuprasad Hariprasad* (1903), 28 Bom. 597, where a bigamous marriage of members of the Brahmo Samaj was held to be invalid.

[4] *Ante*, pp. 41, 42.

[5] This is called *vagdana*, or gift by word. Banerjee's "Law of Marriage," 2nd ed., p. 82. Wilson's "Glossary," p. 538.

[6] See *In the matter of Gunput Narain Singh* (1875), 1 Calc. 74; *Umed Kika* v. *Nagindas Narotamdas* (1870), 7 Bom. H. C. (O. C.) 122; Sircar's "Vyavastha Darpana," 2nd ed., pp. 645, 646. Steele, 24, 160. Banerjee's "Law of Marriage," 2nd ed., pp. 51, 84, 85.

[7] *Ante*, p. 31.

[8] Act I. of 1877, s. 21, cl. *b*. See illustration to that section, "A contracts to marry B." See *In the matter*

marriage, by an actual marriage would give to the injured party a right to recover from the person making the promise compensation for the loss, if any, sustained by the breach of promise.[1] In case of such breach, a father, or guardian, would be entitled to recover money properly expended in contemplation of such marriage.[2] Such suits cannot be brought in a Provincial Small Cause Court.[3]

Death of bride.

Should the betrothed damsel die before the marriage, the bridegroom is entitled to recover back the presents given by him to her, subject to paying such expenses as have been incurred.[4]

Necessity for ceremonies.

There can be no valid marriage in any form without a substantial performance of the requisite religious ceremonies.[5]

Even when the *gandharba* form of marriage[6] is permissible by custom the Courts will not recognize it unless religious rites have been performed, although the gift of the bride is in a marriage in that form unnecessary.[7]

Hindu law does not recognize a marriage contracted by a Hindu, otherwise than with Hindu ceremonies, as, for instance, while he is a convert to another religion.[8]

Nature of ceremonies.

The ceremonies vary according to local or family usage. The ceremonies which are usually performed[9] are

of Gunput Narain Singh (1875), 1 Calc. 74; *Umed Kika* v. *Nagindas Narotamdas* (1870), 7 Bom. H. C. (O. C.) 122.

[1] Act IX. of 1872, s. 73. *Purshotamdas Tribhovandas* v. *Purshotamdas Mangaldas Nathubhoy* (1896), 21 Bom. 23; *Mulji Thakersey* v. *Gomti* (1887), 11 Bom. 412; *Umed Kika* v. *Nagindas Narotamdas* (1870), 7 Bom. H. C. (O. C.) 122, at p. 136. See *Nowbut Singh* v. *Lad Kooer* (*Mussumat*) (1873), 5 N. W. P. 102; *In the matter of Gunput Narain Singh* (1875), 1 Calc. 74, at p. 76.

[2] "Mitakshara," chap. ii. s. 11, para. 28; *Rambhat* v. *Timmaya* (1892), 16 Bom. 673; *Jogeswar Chakrabatti* v. *Panch Kauri Chakrabatti* (1870), 5 B. L. R. 395.

[3] Act IX. of 1887, Sched. II., art. 35; *Kali Sunker Dass* v. *Koylash Chunder Dass* (1888), 15 Calc. 833.

[4] "Mitakshara," chap. ii. s. 11, paras. 29, 30.

[5] See Banerjee's "Law of Marriage," 2nd ed., pp. 94, 95, 98, and texts and other authorities there cited. Sircar's "Vyavastha Darpana," 2nd ed., p. 650. Strange's "Hindu Law," vol. i. p. 42.

[6] *Ante*, pp. 51, 52.

[7] *Brindavana* v. *Radhamani* (1888), 12 Mad. 72; *Hari Krishna Devi Garu* (*Sri Gajapaty*) v. *Radhika Patta Mahadevi Garu* (*Sri Gajapaty*) (1865), 2 Mad. H. C. 369, at p. 374. See Strange's "Hindu Law," vol. i. p. 42. Sircar's "Vyavastha Darpana," 2nd ed., p. 650.

[8] (1866) 3 Mad. H. C. App. vii.

[9] These ceremonies are observed whether the marriage be strictly in the *Brahma* form, or whether, in consequence of a payment having been made to the bride's family, the marriage is in the *Asura* form; Banerjee's "Law of Marriage," 2nd ed., p. 87; *Venkatacharyulu* v. *Rangacharyulu* (1890), 14 Mad. 316, at p. 319.

described in detail by H. T. Colebrooke,[1] and in lesser detail in Banerjee's "Law of Marriage"[2] and in Bhattacharya's "Hindu Law."[3] See also Risley's "Tribes and Castes of Bengal," vol. i. pp. 148-152.

Usual ceremonies.

The ceremonies usually commence with the performance of the *nandimukh*, or *vriddi shradda*, by the bride's father in honour of his ancestors,[4] and the ceremonious bathing of the bride. On the bridegroom coming to the house he is ceremoniously received, and certain ceremonies, the most important of which is the gift of the bride to the bridegroom,[5] are observed. On the night of that day, or on the day following, the operative marriage ceremonies are performed by the bridegroom and bride. This is called *panigrahana*, or the acceptance of the bride's hand by the bridegroom. The sacred fire is kindled and oblations are made. The bridegroom takes the bride's hand, she steps on a stone. The bridegroom recites a fixed text. A hymn is chanted. The bride and bridegroom walk round the fire, and then comes the most material of the marriage rites. The bride is conducted by the bridegroom, and directed by him to step successively into seven circles, a text being recited at each step. This is called *Saptapadi*. On the taking of the seventh step, and not until then, the marriage is complete and irrevocable.[6] The bride thenceforth becomes a member of her husband's family.[7]

Other ceremonies which are not essential to the validity of the marriage are subsequently performed.[8]

Conditional marriage.

Sata (exchange) marriage, which, according to the custom of the *Kudwa Kunbi* caste, is conditional upon the bridegroom's father providing a girl to be married to the son of the bride's father, does not take effect until the condition has been performed, although the marriage ceremonies have been completed.[9]

Remarriage of widow.

Whatever words spoken, ceremonies performed, or

[1] Essay III. on the religious ceremonies of the Hindus and of the Brahmins especially, "Asiatic Researches," vol. vii. p. 288.

[2] 2nd ed., p. 90.

[3] 2nd ed., chap. viii.

[4] The performance of this *sradh* is not essential; *Brindabun Chandra Kurmokar* v. *Chundra Kurmokar* (1885), 12 Calc. 140, at p. 142.

[5] This transfers the guardianship of the girl.

[6] *Brindabun Chandra Kurmokar* v. *Chundra Kurmokar* (1885), 12 Calc. 140, at p. 143. See *Venkatacharyulu* v. *Rangacharyulu* (1890), 14 Mad. 316, at p. 318. Colebrooke's "Essay on the Religious Ceremonies of the Hindus, Asiatic Researches," vol. vii. p. 303. Strange's "Hindu Law," vol. i. p. 37. Strange's "Manual," para. 38. "Manu," chap. viii. para. 227. Colebrooke's "Digest," vol. ii. pp. 487, 488.

[7] Bhattacharya's "Law of the Joint Family," pp. 140, 141.

[8] For instance, see *Vaikuntam Ammangar* v. *Kallapiran Ayyangar* (1902), 26 Mad. 497.

[9] *Ugri* (*Bai*) v. *Purshottam Bhudar* (*Patel*) (1892), 17 Bom. 400.

engagements made on the marriage of a Hindu female who has not been previously married, are sufficient to constitute a valid marriage, have the same effect, if spoken, performed, or made on the marriage of a Hindu widow; and no marriage can be declared invalid on the ground that such words, ceremonies, or engagements are inapplicable to the case of a widow.[1]

Consummation.

Although certain ceremonies are usual when the wife attains puberty, consummation is not necessary to the validity of a Hindu marriage.[2]

There may be a custom by which a ceremony is necessary on the wife obtaining puberty.[3]

Force or fraud.

Whatever ceremonies had been performed, force or fraud practised upon one of the parties to induce a marriage would justify a Court, at the instance of the aggrieved party, in declaring the marriage to be void.[4]

DISPUTES AS TO MARRIAGE.

Jurisdiction to determine validity of marriage.

The Courts have power to determine the validity of a marriage either in a suit properly constituted for that purpose, or in a suit or proceeding in which the question incidentally arises.[5]

For instance, the question may arise in a suit for the possession of property, or for the restitution of conjugal rights, or in a proceeding relating to the guardianship of a minor, or as to the right to letters of administration, or in a criminal prosecution for bigamy, or adultery, or for enticing away a married woman.

Suit for jactitation of marriage.

A suit will lie for a declaration that the defendant was not, as he or

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[1] Act XV. of 1856, s. 6.

[2] *Administrator-General of Madras* v. *Anandachari* (1886), 9 Mad. 466, at p. 470; *Dadaji Bhikaji* v. *Rukmabai* (1886), 10 Bom. 301, at p. 311; Strange's "Hindu Law," vol. ii. 32, 33.

[3] *Boolchand Kollta* v. *Janokee* (1876), 25 W. R. C. R. 386.

[4] See *Venkatacharyulu* v. *Rangacharyulu* (1890), 14 Mad. 316, at p. 320; *Aunjona Dasi* v. *Prahlad Chandra Ghose* (1870), 6 B. L. R. 243, at p. 254; 14 W. R. C. R. 403, at p. 405; *Mulchand* v. *Bhudhia* (1897), 22 Bom. 812, at pp. 817, 818. As to fraud on a guardian, see *ante*, p. 45.

[5] See *Aunjona Dasi* v. *Prahlad Chandra Ghose* (1870), 6 B. L. R. 243; 14 W. R. C. R. 403.

she alleged himself or herself to be, the husband, or wife of the plaintiff.[1]

A decision as to the fact or validity of a marriage can only bind the parties to the litigation,[2] and then only if the case complies with the conditions prescribed by s. 11 of the Civil Procedure Code, 1908.[3] Only binds parties.

Where it has been proved that marriage has been celebrated there is a presumption that it is valid in law,[4] and that all the necessary ceremonies were performed.[5] Presumption as to validity of marriage.

It has been held by a Bench of the Bengal High Court[6] that this presumption, although it applies to questions of inheritance, does not apply to a suit for restitution of conjugal rights, and that in such a suit the performance of the ceremonies must be strictly proved, but in an earlier case another Bench of the same Court[7] applied the presumption to a similar suit. It is submitted that there is no valid reason for making this distinction. Evidence of treatment is sufficient to prove a marriage, even in a suit for restitution of conjugal rights, where the parties are not subject to the Indian Divorce Act,[8] which, of course, Hindus are not, so, *à fortiori*, evidence of the marriage having been celebrated would, it is submitted, be sufficient. Suit for restitution of conjugal rights.

This presumption applies also in the case of the remarriage of a widow.[9] Widow.

It has no application when a former valid subsisting marriage has been proved.[10]

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[1] See *Mir Asmat Ali* v. *Mahmud-ul-nissa* (1897), 20 All. 96.

[2] See *Brohmomoyee* v. *Kashi Chunder Sen* (1881), 8 Calc. 266; 10 C. L. R. 91.

[3] Act XIV. of 1882, s. 13. See Evidence Act (I. of 1872), s. 43.

[4] *Inderun Valungypooly Tavee* v. *Ramasawmy Pandia Talaver* (1869), 13 M. I. A. 141, at p. 158; 3 B. L. R. P. C. 1, at pp. 3, 4; 12 W. R. P. C. 41, at p. 42; *Fakirgauda* v. *Gangi* (1896), 22 Bom. 277, at p. 279. As to the proof of a marriage, see *Luchmi Koer* v. *Roghunath Das* (*Chowdhry Mohunt*) (1900), 27 I. A. 142; 27 Calc. 971; 4 C. W. N. 685. Act I. of 1872, s. 50.

[5] *Brindabun Chandra Kurmokar* v. *Chundra Kurmokar* (1885), 12 Calc. 140, at pp. 142, 143. *Administrator-General of Madras* v. *Anandachari* (1886), 9 Mad. 466, at pp. 469, 470. "If the evidence was sufficient to prove the performance of some ceremonies usually observed on such occasions, a presumption is always to be drawn that they are duly completed, until the contrary is shown." *Diwali* (*Bai*) v. *Moti Karson* (1896), 22 Bom. 509, at p. 512.

[6] *Surjyamoni Dosi* v. *Kalikanta Das* (1900), 28 Calc. 37, at p. 50; 5 C. W. N. 195, at pp. 204, 205.

[7] *Brindabun Chandra Kurmokar* v. *Chundra Kurmokar* (1885), 12 Calc. 140, at pp. 142, 143.

[8] Act I. of 1872, s. 50.

[9] *Lachman Kuar* v. *Mardan Singh* (1886), 8 All. 143.

[10] *In re Millard* (1887), 10 Mad. 218, at p. 221.

Presumption as to form of marriage.

There is also a presumption that the marriage was according to one of the approved forms.[1] As the *Brahma* form is the only one remaining of such forms,[2] it follows that there is a presumption that the marriage was in accordance with the *Brahma* form.

Offences relating to marriage.

In prosecutions under ss. 494, 495, 497, and 498 of the Indian Penal Code[3] the fact[4] and validity[5] of the marriage must be strictly proved.[6]

DIVORCE.

Divorce.

Divorce is unknown to the general Hindu law.[7]

Divorce is allowed by custom in certain localities and among certain low castes.[8]

As to the castes and localities in which such custom exists, see Steele's "Law and Custom of Hindu Castes," pp. 168, 169, Risley's "Tribes and Castes of Bengal." Crooke's "Tribes and Castes of the North-Western Provinces and Oudh." Banerjee's "Law of Marriage," 2nd ed., pp. 337–399. Mayne's "Hindu Law," 7th ed., pp. 114–116.

Where it is allowed by custom, a divorce by mutual agreement is recognized by law.[9]

Although matters of divorce are frequently adjudicated upon by a *panchayet*, or assembly of a caste, such *panchayet* has no power to

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[1] *Thakoor Deyhee (Mussumat)* v. *Rai Baluk Ram* (1866), 11 M. I. A. 139, at p. 175; 10 W. R. P. C. 3, at p. 9; *Jagannath Prasad Gupta* v. *Runjit Singh* (1897), 25 Calc. 354, at p. 360; *Gojabai* v. *Maloji Raje Bhosle (Shrimant Shahajirao)* (1892), 17 Bom. 114, at p. 117; *Judoonath Sircar* v. *Bussunt Coomar Roy Chowdhry* (1873), 11 B. L. R. 286, at p. 288; 16 W. R. C. R. 105, at p. 106; *Kaithe* v. *Kulladasi Koundan*, Mad. dec. of 1860, p. 201, Norton L. C. 5.

[2] *Ante*, p. 49.

[3] Act XLV. of 1860.

[4] *Empress* v. *Pitambur Singh* (1879), 5 Calc. 566; 5 C. L. R. 597.

[5] See *Danesh Sheikh* v. *Tafir Mandal* (1902), 7 C. W. N. 143.

[6] Act I. of 1872, s. 50.

[7] *Kudomee Dossee* v. *Joteeram Kolita* (1877), 3 Calc. 305; *Thapita Peter* v. *Thapita Lakshmi* (1894), 17 Mad. 235, at p. 236; "Manu," chap. ix. paras. 46, 101.

[8] See *Kudomee Dossee* v. *Joteeram Kolita* (1877), 3 Calc. 305; *Reg.* v. *Sambhu Raghu* (1876), 1 Bom. 347; *Reg.* v. *Karsan Goja* (1864), 2 Bom. H. C. 124; *Khemkor* v. *Umiashankar Ranchhor* (1873), 10 Bom. H. C. 381; *Rahi* v. *Govinda Valad Teja* (1875), 1 Bom. 97, at p. 114; *Dyaram Doolubh* v. *Umba (Bace)* (1843), Morley's "Digest," vol. 1 N. S. p. 181; *Kasee Dhoolubh* v. *Ruttun Bibee* (1817), 1 Borr. 410.

[9] *Sankaralingam Chetti* v. *Subban Chetti* (1894), 17 Mad. 479. This was a case of members of the potters' caste in Tinnevelly.

declare a marriage void or to give permission to a woman to remarry.[1] In such castes a divorce is generally not effectual, except with the authority of the *panchayet*.[2]

It is incompetent to Hindus at the time of their marriage to arrange that the marriage be void in certain events,[3] whether divorce be or be not permissible in the particular caste.

Except under the circumstances provided for in Act XXI. of 1866, the Courts have no power to decree a divorce.[4]

Adultery.

A dissolution of marriage is not effected by the adultery[5] of the husband or wife.

Remedy of wife.

The only remedy which a blameless wife has against an offending husband is to obtain a decree for her separate maintenance,[6] such decree being practically equivalent to a decree for judicial separation.[7]

Indian Divorce Act

It is unsettled whether the Indian Divorce Act[8] has any application to a Hindu marriage contracted before the conversion of the parties to Christianity. The High Court of Bengal has held that it applies,[9] but the High Courts of Madras[10] and the North-West Provinces[11] have taken a different view. It is submitted that the latter view is correct.

Change of religion.

The change of religion[12] or excommunication from caste[13] of either party does not effect a divorce.

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[1] See *Reg.* v. *Sambhu Raghu* (1876), 1 Bom. 347; *Uji* v. *Hathi Lalu* (1870), 7 Bom. H. C. A. C. 133.

[2] See *Rahi* v. *Govind Valad Teja* (1875), 1 Bom. 97, at p. 114.

[3] *Sitaram* v. *Aheeree Heerahnee* (*Mussamut*) (1873), 11 B. L. R. 129; 20 W. R. C. R. 49.

[4] The Courts seem formerly to have granted divorces. See *Kaseeram Kriparam* v. *Umbaram Hureechund* (1811), 1 Borr. 387.

[5] *Subbaraya Pillai* v. *Ramasami Pillai* (1899), 23 Mad. 171, at pp. 177, 178.

[6] *Post*, p. 76.

[7] See *Sitanath Mookerjee* v. *Haimabutty Dabee* (*Sreemutty*) (1875), 24 W. R. C. R. 377, at p. 379.

[8] IV. of 1869.

[9] *Gobardhan Dass* v. *Jasadamoni Dassi* (1891), 18 Calc. 252.

[10] *Thapita Peter* v. *Thapita Lakshmi* (1894), 17 Mad. 235; *Perianayakam* v. *Pottukanni* (1890), 14 Mad. 382.

[11] *Zuburdust Khan* (1870), 2 N. W. P. 370.

[12] *Government of Bombay* v. *Ganga* (1880), 4 Bom. 330; *Administrator-General of Madras* v. *Anandachari* (1886), 9 Mad. 466; *Perianayakam* v. *Pottukanni* (1890), 14 Mad. 382, at p. 384; *Thapita Peter* v. *Thapita Lakshmi* (1894), 17 Mad. 235, at p. 239; *In re Millard* (1887), 10 Mad. 218; *In the matter of Ram Kumari* (1891), 18 Calc. 264; *Gobardhan Dass* v. *Jasadamoni Dassi* (1891), 18 Calc. 252, at pp. 254, 255; *Contrâ Sinammal* v. *Administrator-General of Madras* (1885), 8 Mad. 169; *Rahmed Bibee* v. *Rokeya Bibee* (1859), 1 Norton's L. C. 12.

[13] See *Queen* v. *Marimuttu* (1881), 4 Mad. 243; *Administrator-General of Madras* v. *Anandachari* (1886), 9 Mad. 466; *Bisheshur* v. *Mata Gholam* (1870), 2 N. W. P. 300; *contrâ Sinammal* v. *Administrator-General of Madras* (1885), 8 Mad. 169.

Divorce at instance of convert to Christianity.

Where a Hindu husband or wife is deserted or repudiated on the ground of his or her conversion to Christianity, a decree for divorce can, under the provisions of Act XXI. of 1866,[1] be made in favour of the person so deserted or repudiated, and the parties can marry again as if the prior marriage had been dissolved by death.[2]

[1] See the procedure provided by that Act.

[2] S. 19 of the Act.

CHAPTER II.

HUSBAND AND WIFE (*continued*).

RECIPROCAL RIGHTS AND DUTIES.

Agreement varying rights, etc.

THE parties to a marriage cannot by arrangement or otherwise[1] vary the rights, duties, and other incidents which the law attaches to the state of marriage. An anti-nuptial agreement, by which the husband agreed never to remove his wife from the parental abode, has been held not to be binding on him.[2] Similarly, no effect can be given to an agreement which provides that, on the husband taking another wife, the first marriage should be void.

RIGHTS TO SOCIETY AND GUARDIANSHIP.

Rights of husband.

A husband is entitled to the society of his wife.[3] He can require her to live with him wherever he may choose to reside,[4] and to submit herself obediently to his authority.[5]

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[1] *Tekait Mon Mohini Jemadai* v. *Basanta Kumar Singh* (1901), 28 Calc. 751; 5 C. W. N. 673; *Paigi* v. *Sheonarain* (1885), 8 All. 78, at pp. 79, 80.

[2] *Sitaram* v. *Aheeree Heerahnee* (*Mussamut*) (1873), 11 B. L. R. 129; 20 W. R. C. R. 49.

[3] *Binda* v. *Kaunsilia* (1890), 13 All. 126; *Gatha Ram Mistree* v. *Moohita Kochin Atteah Domoonee* (1875), 14 B. L. R. 298, at p. 300; 23 W. R. C. R. 179.

[4] *Tekait Mon Mohini Jemadai* v. *Basanta Kumar Singh* (1901), 28 Calc. 751, at p. 760; 5 C. W. N. 673, at p. 680. See *Matangini Dasi* v. *Jogendra Chunder Mullick* (1891), 19 Calc. 84, at pp. 90, 91; *Binda* v. *Kaunsilia* (1890), 13 All. 126; *Sitanath Mookerjee* v. *Haimabutty Dabee* (*Sreemutty*) (1875), 24 W. R. C. R. 377.

[5] *Tekait Mon Mohini Jemadai* v. *Basanta Kumar Singh* (1901), 28 Calc. 751, at p. 760; 5 C. W. N. 673, at p. 680; *Sitanath Mookerjee* v. *Haimabutty Dabee* (*Sreemutty*) (1875), 24 W. R. C. R. 377, at p. 379.

Post-nuptial arrangement for separation.

Effect cannot be given to an arrangement between a husband and wife that they should separate, and that neither of them shall sue for restitution of conjugal rights, unless the agreement indicates a state of circumstances which would be an answer to a suit for restitution of conjugal rights.[1] An arrangement for a separation to commence at a future date would be contrary to public policy.[2]

Guardianship of minor wife.

A husband, even if he has not attained the age of majority,[3] is the lawful guardian of the person of his minor[4] wife,[5] in preference to her parents or other relations, unless, according to the custom of the caste or community to which he belongs, he be precluded from such custody until the wife be fit for marital intercourse.[6]

It is the practice among the Hindu community in the Madras Presidency for a wife to be left with her parents until she attains puberty. The husband is only entitled to the custody of her person when such custody is necessary in her interests.[7]

Guardianship of minor widow.

After the husband's death the guardianship of his minor widow, and the management of her property, devolve upon the husband's heirs generally, or upon those who are entitled to inherit his estate after her death,[8] in preference

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[1] *Rajlukhy Dabee (Sm.)* v. *Bhootnath Mookerjee* (1900), 4 C. W. N. 488. See *Tekait Mon Mohini Jemadai* v. *Basanta Kumar Singh* (1901), 28 Calc. 751, at p. 765; 5 C. W. N. 673, at pp. 683, 684; *Moola* v. *Nundy* (1872), 4 N. W. P. p. 109. As to an ante-nuptial agreement, see *ante*, p. 61.

[2] *Merryweather* v. *Jones* (1863), 4 Giff. 509; 10 Jur. N. S. 90; 10 L. T. 62; referred to in *Tekait Mon Mohini Jemadai* v. *Basanta Kumar Singh* (1901), 28 Calc. 751, at p. 765; 5 C. W. N. 673, at p. 684; *Cartwright* v. *Cartwright* (1853), 3 De G. M. & G. 982; 22 L. J. Ch. 841; 17 Jur. 584; *H.* v. *W.* (1857), 3 Kay & J. 382; *Procter* v. *Robinson* (1866), 35 Beav. 329.

[3] Act VIII. of 1890, s. 21.

[4] *I.e.* minor within the meaning of the Indian Majority Act (IX. of 1875).

[5] Act VIII. of 1890, ss. 19, 41 (*d*). *In the matter of Dhuronidhur Ghose* (1889), 17 Calc. 298; *Kateeram Dokance* v. *Gendhenee* (*Mussamut*) (1875), 23 W. R. C. R. 178. See *Surjyamoni Dasi* v. *Kalikanta Das* (1900), 28 Calc. 37, at p. 45; 5 C. W. N. 195, at p. 201.

[6] *Suntosh Ram Doss* v. *Gera Pattuck* (1875), 23 W. R. C. R. 22; *Bool Chand Kalta* v. *Janokee* (*Mussamut*) (1875), 24 W. R. C. R. 228; S. C. (1876), 25 W. R. C. R. 386.

[7] *Arumuga Mudali* v. *Viraraghava Mudali* (1900), 24 Mad. 255.

[8] Macnaghten's "Hindu Law," ed. 1829, vol. i. chap. vii. p. 104; vol. ii. chap. vii., cases 1, 3. *Kheter Monee Dassee* v. *Kishen Mohun Mitter* (1863), 2 Hay, 196; Marshall, 313; *Bhudiram Mookerjee* v. *Bonwarilal Roy* (1889), 16 Calc. 584; *Kesar* (*Bai*) v. *Ganga* (*Bai*) (1872), 8 Bom. H. C. R., A. C. J. 31; see West and Bühler, 2nd ed., pp. 129, 134, 245, and 556; "Dayabhaga," chap. xi., s. 1, para. 64.

even to her own father.[1] On failure of her husband's heirs the widow's paternal relations are her guardians, and failing them, her maternal kindred.[2]

Restraint of wife.

Having regard to the custom of the country that women, at any rate in the higher positions of life, are secluded in the *zenana*, a Hindu husband would apparently be entitled to exercise, within reasonable limits, a certain amount of restraint upon his wife, even if she be an adult, so as to keep her at home.[3]

Duty of husband to wife.

"The Hindu law, while it enjoins upon the wife the duty of attendance on, obedience to, and veneration for, the husband, inculcates that the husband must honour the wife and treat her with affection and courtesy."[4]

Assault on wife.

In spite of early texts, which give a husband power to correct his wife,[5] it is clear that he is no way justified in chastising or assaulting her. The Indian Penal Code[6] does not exempt a husband from liability for an offence committed against his wife's person, except that it provides[7] that sexual intercourse by a man with his own wife, the wife not being under twelve years of age, is not rape.

Right of wife to society of husband.

A wife is entitled to live with[8] and to be maintained by[9] her husband in his house.

The mere fact that she has been excluded from caste does not make the wife a trespasser when coming to her husband's house.[10] If she has been expelled from his house for proper cause, she might be treated as a trespasser on returning without his leave.

Enforcement of right to society.

The right of a husband to the society of his wife, and that of a wife to the society of her husband, may be

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[1] Macnaghten's "Hindu Law," ed. 1829, vol. ii. chap. vii. case 3, p. 204.

[2] Macnaghten's "Hindu Law," ed. 1829, vol. i. chap. vii. p. 104.

[3] See *Matangini Dasi* v. *Jogendra Chunder Mullick* (1891), 19 Calc. 84, at pp. 90, 91.

[4] *Matangini Dasi* v. *Jogendra Chunder Mullick* (1891), 19 Calc. 84, at p. 90.

[5] "Manu," chap. viii. paras. 299, 300.

[6] Act XLV. of 1860.

[7] S. 375. See *Queen-Empress* v. *Hurree Mohun Mythee* (1890), 18 Calc. 49.

[8] See *Binda* v. *Kaunsilia* (1890), 13 All. 126, at pp. 132, 133; *Gatha Ram Mistree* v. *Moohita Kochin Atteah Domoonee* (1875), 14 B. L. R. 298, at p. 300; 23 W. R. C. R. 179.

[9] See *post*, pp. 75–77.

[10] *Queen* v. *Marimuttu* (1881), 4 Mad. 243.

enforced against the other party to the marriage[1] by a suit for restitution of conjugal rights.[2]

Suit for possession of person of wife.

A suit for the purpose of obtaining possession of the person of a wife will not lie against the wife;[3] but such suit might be treated as in substance one for restitution of conjugal rights.[4]

Grounds for refusing decree.

The circumstances which justify desertion are an answer to a suit for the restitution of conjugal rights.[5]

Defence to suit for restitution.

In *Dadaji Bhikaji* v. *Rukmabai*[6] the Court said, "It may be advisable that the law should adopt stringent measures to compel the performance of conjugal duties; but, as long as the law remains as it is, Civil Courts, in our opinion, cannot, with due regard to consistency and uniformity of practice (except, perhaps, under the most special circumstances), recognize any plea of justification other than a marital offence by the complaining party, as was held to be the only grounds upon which the Divorce Courts in England would refuse relief in *Scott* v. *Scott*."[7]

The circumstances which justify desertion are—

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[1] As to the remedy against a third person for detaining a wife, see *post*, pp. 71, 72.

[2] *Tekait Mon Mohini Jemadai* v. *Basanta Kumar Singh* (1901), 28 Calc. 751; 5 C. W. N. 673, *Surjya Moni Dasi* v. *Kalikanta Das* (1900), 28 Calc. 37, at p. 45; 5 C. W. N. 195, at p. 201; *Dadaji Bhikaji* v. *Rukmabai* (1886), 10 Bom. 301; *Keshavlal Girdharlal* v. *Bai Parvati* (1893), 18 Bom. 327; *Binda* v. *Kaunsilia* (1890), 13 All. 126; *Paigi* v. *Sheonarain* (1885), 8 All. 78; *Jogendronundini Dossee* v. *Hurrydoss Ghose* (1879), 5 Calc. 500; 5 C. L. R. 65; *Gatha Ram Mistree* v. *Moohita Kochin Atteah Domoonee* (1875), 14 B. L. R. 298; 23 W. R. C. R. 179; *Kuroona Moyee Debee* v. *Gunga Dhur Surmah* (1873), 20 W. R. C. R. 50; *Chotun Bebee* v. *Ameer Chund* (1866), 6 W. R. C. R. 105; *Melaram Nudial* v. *Thanooram Bamun* (1868), 9 W. R. C. R. 552. See *Buzloor Ruheem (Moonshee)* v. *Shumsoonissa Begum* (1867), 11 M. I. A. 551, at pp. 606–610; 8 W. R. P. C. 3, at pp. 12, 13.

[3] *Chotun Bebee* v. *Ameer Chund* (1866), 6 W. R. C. R. 105, followed in *Melaram Nudial* v. *Thanooram Bamun* (1868), 9 W. R. C. R. 552.

[4] See *Fakirgauda* v. *Gangi* (1898), 23 Bom. 307, at p. 309.

[5] See *Binda* v. *Kaunsilia* (1890), 14 All. 126, at p. 163.

[6] (1886), 10 Bom. 301, at p. 313. See *Sahadur* v. *Rajwanta* (1904), 27 All. 96, following *Binda* v. *Kaunsilia* (1890), 13 All. 126.

[7] (1864), 34 L. J. P. & M. 23; cf. Act IV. of 1869, s. 33. See, however, *Muchoo* v. *Arzoon Sahoo* (1866), 5 W. R. C. R. 235, at p. 236. It is submitted that this application of a principle of English law leads to difficulties, as a suit for judicial separation is inapplicable to Hindus. The matter must be dealt with by Hindu law (*ante*, pp. 2–4). See *Buzloor Ruheem (Moonshee)* v. *Shumsoonissa Begum* (1867), 11 M. I. A. 551, at p. 614; 8 W. R. P. C. 3, at p. 15.

1. Cruelty, whether physical or moral, in a degree rendering it unsafe for the wife to return to the power of her husband.[1] Cruelty.

Cruelty to a less degree,[2] as, for instance, an unfounded imputation upon the wife's chastity,[3] or taking her jewels from her,[4] or mere unkindness or neglect[5] short of cruelty, would not seem to be an answer to a suit for restitution. In a case where a husband, a Brahmin, having expelled his wife, was living in his house with a low caste prostitute, he was refused restitution.[6]

There seem to be no reported decisions in India on the subject, and it is unlikely that any cases would occur, but there seems to be no reason why cruelty by the wife should not be an answer to a suit by her for restitution of conjugal rights. Cruelty of wife.

2. The fact that the person suing for restitution of conjugal rights is suffering from a loathsome disease.[7] Loathsome disease.

Thus a decree was refused to a husband suffering from leprosy and syphilis.[8] It would follow that the communication of a noxious disease would justify a wife in declining to consort with her husband.[9] Communication of disease.

If the principle laid down in *Dadaji Bhikaji* v. *Rukmabai*[10] be correct, diseases, which are not the result of marital offences, would be excluded from consideration.

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[1] *Dular Koer* v. *Dwarkanath Misser* (1905), 34 Calc. 971; 9 C. W. N. 510; *Yamunabai* v. *Narayan Moreshvar Pendse* (1876), 1 Bom. 164, at p. 173; *Matangini Dasi* v. *Jogendra Chunder Mullick* (1891), 19 Calc. 84; *Binda* v. *Kaunsilia* (1890), 13 All. 126, at p. 184. See *Buzloor Ruheem (Moonshee)* v. *Shumsoonissa Begum* (1867), 11 M. I. A. 551, at p. 615; 8 W. R. P. C. 3, at p. 15.

[2] See *Jogendronundini Dossee* v. *Hurrydoss Ghose* (1879), 5 Calc. 500, at pp. 502, 507, 508; 5 C. L. R. 65, at pp. 71, 72.

[3] *Yamunabai* v. *Narayan Moreshvar Pendse* (1876), 1 Bom. 164, at p. 173.

[4] *Jeebo Dhon Banyah* v. *Sundhoo (Mussamut)* (1872), 17 W. R. C. R. 522.

[5] See *Sitanath Mookerjee* v. *Haimabutty Dabee* (1875), 24 W. R. C. R. 377, at p. 379. As to the ideas of the early Hindu law with regard to the power to correct a wife, see Strange's "Hindu Law," vol. i. pp. 48, 49, referred to in *Yamunabai* v. *Narayan Moreshvar Pendse* (1876), 1 Bom. 164, at p. 173.

[6] *Dular Koer* v. *Dwarkanath Misser* (1905), 34 Calc. 971; 9 C. W. N. 510. See *Dular Koeri* v. *Dwarkanath Misser* (1904), 32 Calc. 234, at p. 239; 9 C. W. N. 270, at p. 274.

[7] See Colebrooke's "Digest," vol. ii. pp. 414, 490.

[8] *Premkuvar (Bai)* v. *Bhika Kallianji* (1868), 5 Bom. H. C., A. C. J. 209. Devala considered phthisis as a disease justifying desertion of a husband. Colebrooke's "Digest," vol. ii. p. 470.

[9] See *Yamunabai* v. *Narayan Moreshvar Pendse* (1876), 1 Bom. 164, at p. 173.

[10] *Ante*, p. 64.

Adultery of wife.

3. Adultery by the wife[1] in a suit by the wife.[2]

As to adultery by a husband, see *post*, p. 68.

Loss of caste.

It is unsettled whether mere loss of caste is an answer to a suit for restitution of conjugal rights.

Under the ancient law a wife could not be compelled to live with an outcast husband.[3] The High Courts at Agra[4] and Allahabad[5] have declined to accept loss of caste as an excuse for refusal to cohabit, but in another Allahabad case[6] the High Court made return to caste a condition precedent to a decree. The right to the society of the wife would, it is submitted, be a right within the meaning of Act XXI. of 1850,[7] but the Court would, it is also submitted, have to inquire into the reasons for the degradation, in order to satisfy itself that a decree would not inflict unnecessary hardship upon the wife. Where the loss of caste is capable of expiation the course adopted in the above case was, it is submitted, correct.[8] Where the loss be such as to involve no moral turpitude, the Court would not treat it as an excuse for desertion.

It is not easy to say, in the present state of Hindu society, what offences justify a degradation from caste.[9]

Change of religion.

It is also unsettled whether the adoption of another religion by the person seeking restitution is an answer to the suit. It would apparently be an answer in most cases.[10]

The matter stands to some extent on the same footing as the case of degradation from caste. It would undoubtedly have been under the ancient law a ground for desertion. In the case of a conversion to

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[1] Colebrooke's "Digest," vol. ii. p. 415.

[2] As to a suit by the husband, see *Surjyamoni Dasi* v. *Kalikanta Das* (1900), 28 Calc. 37, at p. 47; 5 C. W. N. 195, at p. 203.

[3] Colebrooke's "Digest," vol. ii. p. 413.

[4] *Emurtee* (*Mussamut*) v. *Nirmul*, N. W. P. Reps., 1864, p. 583.

[5] *Sahadur* v. *Rajwanta* (1904), 27 All. 96.

[6] *Paigi* v. *Shconarain* (1885), 8 All. 78. See *Surjyamoni Dasi* v. *Kalikanta Das* (1900), 28 Calc. 37, at pp. 47, 48; 5 C. W. N. 195, at p. 203.

[7] Cf. *Muchoo* v. *Arzoon Sahoo* (1866), 5 W. R. C. R. 235.

[8] Cf. *Jina* (*Bai*) v. *Kharwar Jina* (1907), 31 Bom. 366.

[9] See Banerjee's "Law of Marriage, 2nd ed., pp. 185, 186.

[10] See *Muchoo* v. *Arzoon Sahoo* (1866), 5 W. R. C. R. 235, at p. 236. See, however, *In re the wife of P. Strecnevassa*, 1 Norton L. C. 13, where the Court ordered the wife of a converted Brahmin to be restored to him on a writ of *habeas corpus*. If the rule adopted in *Dadaji Bhikaji* v. *Rukmabai* (*ante*, p. 64) be correct, change of religion would be no answer.

Christianity the procedure provided by Act XXI. of 1866 [1] would by implication prevent a Court from forcing cohabitation upon a party refusing it on the ground of the conversion of the person seeking it to Christianity. In the case of a conversion to Mahomedanism it would be impossible to enforce cohabitation. The mere abandonment of Hinduism without any formal exclusion from caste would scarcely be an answer. A return to Hinduism after performance of the prescribed expiation would dispose of an objection to cohabitation on the ground of conversion.

As to the effect of a change of religion upon the marriage tie, see *ante*, p. 59.

Conduct which has been condoned is no answer to a suit for restitution, unless it has been revived by subsequent misconduct.[2] Condonation.

A decree for restitution of conjugal rights cannot be refused on any of the following grounds:—

1. The fact that the marriage has not been consummated.[3] Non-consummation.

2. Minority. Minority.

The minority of the husband can be no answer to a suit by him, as he is ordinarily entitled to be the guardian of his wife's person,[4] and it can scarcely be an answer to a suit against him. The minority of the wife would be no answer to a suit by the husband, except under circumstances which would disentitle him to act as guardian of her person,[5] but it might in some cases be proper to put him upon terms: for instance, that she should be placed by him in charge of a female member of his family.[6] The minority of the wife could be no answer to a suit by her.

3. The unsoundness of mind of the plaintiff, whether it commenced before or after the marriage.[7] The Court would not, however, make a decree, obedience to which might be a danger to the defendant. Insanity.

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[1] Ss. 16–18.

[2] See *Jogendronundini Dossee* v. *Hurry Doss Ghose* (1879), 5 Calc. 500; 5 C. L. R. 65.

[3] *Dadaji Bhikaji* v. *Rukmabai* (1886), 10 Bom. 301, at pp. 310, 311.

[4] *Ante*, p. 62.

[5] *Ante*, pp. 65, 66.

[6] *Surjyamoni Dasi* v. *Kalikanta Das* (1900), 28 Calc. 37; 5 C. W. N. 195; *Kateeram Dokanee* v. *Gendhenee* (*Mussamut*) (1875), 23 W. R. C. R. 178.

[7] See *Binda* v. *Kaunsilia* (1890), 13 All. 126, at p. 155; Sircar's "Vyavastha Chandrika," p. 489, note. Cf. Indian Divorce Act (IV. of 1869), s. 33; *Hayward* v. *Hayward* (1858), 1 Sw. & Tr. 81.

Sir William Macnaghten[1] considered that the insanity of the husband justified his wife in deserting him. He relies on a text of *Manu*,[2] which has been otherwise interpreted.[3] There is a text to the effect that the insanity of the wife is a ground for excluding her from the husband's bed, and from pilgrimage, but from nothing else.[4]

Mental weakness.

Mental infirmity short of insanity can clearly be no answer to a suit for restitution.[5]

Second marriage.

4. A second marriage by the husband.[6]

Adultery.

5. Adultery by the husband.[7]

Where the husband is actually living in adultery,[8] or his conduct has been such as to prevent his wife from returning to him without loss of caste (see *ante*, p. 66) or injury to her self-respect and religious feeling,[9] the Court might refuse a decree.[10]

Impotence.

It is submitted that the impotence of the plaintiff[11] originating after marriage is no answer to a suit for restitution.

Whether it is an answer when it was existing at the time of the marriage would, it is submitted, depend upon whether the Court would set aside the marriage on that account.[12] *Manu*[13] makes no distinction between impotence arising after and impotence arising before marriage,

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[1] "Hindu Law," vol. ii. p. 62. As insanity at the time of marriage does not invalidate the marriage (*ante*, pp. 28, 29), it could not be an answer to a suit for restitution.

[2] "Manu," chap. ix. para. 79.

[3] Gloss of *Culluka*, Colebrooke's "Digest," vol. ii. p. 412; Sircar's "Vyavastha Chandrika, p. 489, note.

[4] Text of *Devala*, Colebrooke's "Digest," vol. ii. p. 414.

[5] *Binda* v. *Kaunsilia* (1890), 13 All. 126, at p. 161.

[6] *Arumugam* v. *Tulukanam* (1883), 7 Mad. 187; *Nathubai Bhailal* v. *Javher Raiji* (1876), 1 Bom. 121, at p. 122; *Jeebo Dhon Banyah* v. *Sundhoo* (*Mussamut*) (1872), 17 W. R. C. R. 522; *Virasvami Chetti* v. *Appasvami Chetti* (1863), 1 Mad. H. C. 375; see *ante*, p. 29.

[7] *Binda* v. *Kaunsilia* (1890), 13 All. 126, at p. 164; *Paigi* v. *Sheonarain* (1885), 8 All. 78, at p. 81; *Gantapalli Appalamma* v. *Gantapalli Yellayya* (1897), 20 Mad. 470; Macnaghten's "Hindu Law," i. 61, 62. See Strange's "Hindu Law," ii. 46, 47.

[8] *Paigi* v. *Sheonarain* (1885), 8 All. 78, at p. 81. See *Dular Koer* v. *Dwarkanath Misser* (1905), 34 Calc. 971; 9 C. W. N. 510, *ante*, p. 65; and *Dular Koeri* v. *Dwarkanath Misser* (1904), 32 Calc. 234, at p. 239; 9 C. W. N. 270, at p. 274.

[9] See *Gabind Prasad* (*Lala*) v. *Doulat Batti* (1870), 6 B. L. R. App. 85; 14 W. R. C. R. 451.

[10] See, however, case No. 457 of 1884, 20 Mad. 474.

[11] The impotence of the defendant is no answer, see *Purshotamdas Maneklal* v. *Mani* (*Bai*) (1896), 21 Bom. 610. Devala permitted a wife to desert her impotent husband. Colebrooke's "Digest," vol. ii. p. 470.

[12] See *ante*, p. 29.

[13] Chap. ix. para. 79.

but the text by which he is said to permit a wife to abandon an impotent husband has been differently interpreted.[1]

Where order would be unjust.

Where it would be manifestly unjust to order restitution of conjugal rights, the Court can refuse to make such order.

For instance, in *Moola* v. *Nundy*,[2] where, in consequence of the misconduct of the husband, a *panchayet* had adjudged a separation, and the parties had lived apart for thirteen years, the Court declined to make an order.

When right of suit arises.

A right of suit for restitution of conjugal rights arises on a refusal, express or implied, to return to cohabitation.

A formal demand, and refusal, to return to cohabitation is not a condition precedent to such suit,[3] but there must be a willingness on the part of the plaintiff to resume cohabitation.

In England a rule of Court[4] prevents a suit being brought for restitution of conjugal rights without a demand before suit to return to cohabitation. There is no such rule in India, although the Limitation Act[5] has assumed that such demand is necessary.

Repetition of refusal.

A second suit for restitution based upon the continued disobedience to the decree in the first suit would apparently be barred by the law of *res judicata*,[6] but a second withdrawal from cohabitation would give a fresh cause of action.[7]

Limitation.

The Limitation Act provides that a suit for the restitution of conjugal rights must be brought within two years from the time when restitution is demanded, and is refused by the husband or wife, being of full age and sound mind.[8]

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[1] See Colebrooke's "Digest," vol. ii. p. 412; Sircar's "Vyavastha Chandrika," 489, note.

[2] (1872), 4 N. W. P. H. C. 109.

[3] *Binda* v. *Kaunsilia* (1890), 13 All. 126, at pp. 139 *et seq.* See *Fakirgauda* v. *Gangi* (1898), 23 Bom. 307, at p. 310. For the purpose of jurisdiction the cause of action is considered to arise at the husband's house. *Lalitagar Keshargar* v. *Suraj* (*Bai*) (1893), 18 Bom. 316.

[4] Rule 175, see Browne and Powles on Divorce, 5th ed., pp. 135, 136.

[5] Act XV. of 1877, Sched. II., art. 35.

[6] The Court declined to decide this question in *Keshavlal Girdharlal* v. *Parvati* (*Bai*) (1893), 18 Bom. 327, at pp. 329, 331.

[7] *Keshavlal Girdharlal* v. *Parvati* (*Bai*) (1893), 18 Bom. 327.

[8] Act XV. of 1877, Sched. II., art. 35. See *Fakirgauda* v. *Gangi* (1898), 23 Bom. 307, at pp. 309, 310.

It has been held by the Allahabad High Court[1] that "in cases where the personal law of the parties does not require antecedent demand, nor deprives minors and persons of unsound mind of the conjugal right of cohabitation, No. 35 of the Limitation Act has no application, nor sec. 34, but that the suit would fall under the general provisions of No. 120 of the Limitation Act." The practical effect of this decision would be to exclude Hindus from the operation of this article. It is submitted that, where there has been a demand and refusal, the article applies. Where there has been no demand or refusal it may be that we have to look elsewhere for a period of limitation, and that there is "a continuing wrong" within the meaning of sec. 23 of the Act.[2]

Where the wife is a minor, or insane, there seems to be no limitation to a suit by the husband for restitution of conjugal rights,[3] although there is such limitation where the suit is brought against another person for recovery to the wife.

Form of decree.

The decree should declare that the plaintiff is entitled to the restitution of conjugal rights, and that the defendant (if the wife) be directed to go to her husband's house.[4] If the defendant be the husband the decree should direct him to restore such rights to his wife.

Conditional decree.

The Court may make a decree for restitution of conjugal rights upon conditions to be fulfilled by the plaintiff. In one case[5] the decree was made subject to the husband being restored to caste. In another case[6]

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[1] *Binda* v. *Kaunsilia* (1890), 13 All. 126, at p. 146. The Court declined to express an opinion on this question in *Fakirgauda* v. *Gangi* (1898), 23 Bom. 307, at p. 311.

[2] See ruling of Punjab Chief Court in Rivaz's "Limitation Act," 3rd ed., p. 134; *Sari (Bai)* v. *Sankla Hirachand* (1892), 16 Bom. 714, which followed *Hemchand* v. *Shiv*, Bom. P. J., 1883, p. 124. The latter case dealt with Act XIV. of 1859, in which there were no provisions similar to arts. 34 and 35 of Sched. II. of Act XV. of 1877.

[3] See *Surjyamoni Dasi* v. *Kalikanta Das* (1900), 28 Calc. 37, at p. 46; 5 C. W. N. 195, at p. 202.

[4] *Furzund Hossein* v. *Janu Bibee* (1878), 4 Calc. 588, at p. 591; *Fakirgauda* v. *Gangi* (1898), 23 Bom. 307, at p. 309; *Chotun Bebee* v. *Ameer Chund* (1866), 6 W. R. C. R. 105, followed in *Koobur Khansama* v. *Jan Khansama* (1867), 8 W. R. C. R. 467. Cf. Form 19 of schedule to Act IV. of 1869.

[5] *Paigi* v. *Sheonarain* (1885), 8 All. 78. In *Surjyamoni Dasi* v. *Kalikanta Das* (1900), 28 Calc. 37, at pp. 47, 48; 5 C. W. N. 195, at p. 203, a husband was required to get his wife restored to caste as a condition of obtaining a decree against her for restitution.

[6] *Jogendronundini Dossee* v. *Hurry Doss Ghose* (1879), 5 Calc. 500, at p. 508; 5 C. L. R. 65, at pp. 72, 73. See *Tekait Mon Mohini Jemadai* v. *Basanta Kumar Singh* (1901), 28 Calc. 751, at pp. 755, 766; 5 C. W. N. 673, at pp. 677, 684.

the Court required "that the house which the husband provides shall be in every respect fit for the reception of a virtuous and respectable wife." The Court might also require proper security to be taken for the protection of the wife.[1]

Execution of decree.

When the party, against whom a decree for restitution of conjugal rights has been made, has had an opportunity of obeying it, and has wilfully failed to obey it, the decree may be enforced by his or her imprisonment,[2] or by the attachment of his or her property, or by both.

When the attachment has remained in force for one year, if the decree has not been obeyed, and the decree-holder has applied to have the attached property sold, the property may be sold, and out of the proceeds the Court may award to the decree-holder such compensation as it thinks fit, and may pay the balance (if any) to the judgment debtor on his or her application. If the judgment debtor has obeyed the decree, and paid all costs of executing the same, which he or she is bound to pay, or if, at the end of one year from the date of the attachment, no application to have the property sold has been made or granted, the attachment should cease to exist.[3] The Court can refuse execution, and may order periodical payments to the wife.

Remedies against third person.

A husband who seeks to recover his wife from a person harbouring or detaining her, may sue such person to recover his wife,[4] and may also sue for damages on account of her detention.

Limitation.

A suit for the recovery of a wife must be brought within two years from the time when possession is demanded and refused.[5]

Execution of decree.

The decree can be enforced by imprisonment and attachment.[6] It cannot be enforced by physically placing the wife in the possession of her husband.[7]

Summary remedies.

Where the wife is within the Presidency towns of

[1] *Buzloor Ruheem* (*Moonshee*) v. *Shumsoonnissa Begum* (1867), 11 M. I. A. 551, at p. 617; 8 W. R. P. C. 3, at p. 16.

[2] Six weeks is the limit of imprisonment; C. P. C. 1908, s. 58. See Act XIV. of 1882, s. 342.

[3] Civil Procedure Code, 1908, Sched. I., ord. xxi., rules 32, 33; Act XIV. of 1882, s. 260.

[4] See Acts XIV. of 1882, s. 259, and XV. of 1877, Sched. II., art. 34. As to the former practice, see *Lall Nath Misser* v. *Sheoburn Pandey* (1873), 20 W. R. C. R. 92.

[5] Act XV. of 1877, Sched. II., art. 34. See *ante*, p. 70.

[6] Civil Procedure Code (Act XIV. of 1882), s. 259; C. P. C. 1908, s. 51.

[7] The old practice was to make such an order, see *Hurka Shunkur* v. *Raeejee Munohur* (1809), 1 Borr. 353; 1 Morley Dig. 288.

Calcutta, Madras, and Bombay, the right of the husband may be enforced by an order of the nature of a *habeas corpus*.[1]

Where the wife is confined under such circumstances that the confinement amounts to an offence, there is also, throughout India, a summary remedy by a magistrate's order.[2]

Guardians and Wards Act.

Where the husband has already had the custody of his minor wife, and she has left, or is removed from, his custody, there is also a remedy under sec. 25 of the Guardians and Wards Act.[3]

Damages.

The husband is also entitled to recover damages from the person harbouring his wife or enticing her away,[4] whether or not for improper purposes, and to obtain an injunction against such person from interfering with his wife rejoining him.

"Every person who receives a married woman into his house, and suffers her to continue there after he has received notice from the husband not to harbour her, is liable to an action for damages, unless the husband has, by his cruelty or misconduct, forfeited his marital rights, or has turned his wife out of doors, or has, by some insult or ill-treatment, compelled her to leave him."[5]

A suit for damages against a person committing adultery with a wife would also apparently lie.[6]

It is not possible to lay down any exact rule as to the measure of damages in these cases. The principles adopted in English cases might, to some extent, be applied. On the one hand, the Court should consider the loss of the wife's society, affection, services and assistance in domestic affairs, and the social injury (if any) which the husband is likely to suffer from the act complained of. On the other hand, the behaviour of the husband towards his wife may be taken into account.

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[1] Criminal Procedure Code (Act V. of 1898), s. 491.

[2] Criminal Procedure Code (Act V. of 1898), s. 100.

[3] VIII. of 1890.

[4] See *Hurka Shunkur* v. *Racejee Munohur* (1809), 1 Borr. 353.

[5] *Yamunabai* v. *Narayan Moreshvar Pendse* (1876), 1 Bom. 164, at pp. 174, 175. See *Surjyamoni Dasi* v. *Kalikanta Das* (1900), 28 Calc. 37, at p. 43; 5 C. W. N. 195, at p. 200; *Lall Nath Misser* v. *Sheoburn Pandey* (1873), 20 W. R. C. R. 92.

[6] *Soodasun Sain* v. *Lokenauth Mullick* (1859), Montriou's cases of Hindu law, p. 619. Strange's "Hindu Law," vol. i. p. 46, vol. ii. p. 41. See *contrâ*, Macnaghten's "Hindu Law," vol. i. p. 61, and opinions of Colebrooke and Ellis, Strange's "Hindu Law," vol. ii. pp. 40–44.

The capacity of the defendant to pay damages is not generally (if ever) a circumstance for consideration.[1]

RIGHTS OVER PROPERTY.

Power of wife over her property.

Except that in times of pressing need he may use his wife's separate property,[2] and that he has in certain cases a right of inheritance, a husband does not by marriage acquire any beneficial interest in his wife's property.[3] A wife is able to deal with what is called her *stridhan* property,[4] whether acquired before, at, or after marriage, in the same way as if she had never been married.[5]

Contract by married woman.

A Hindu wife is competent to contract,[6] but unless she be an agent, either express or implied, of her husband, she does not thereby bind him or his property. She only renders liable the property over which she has a disposing power.[7]

There are cases to the effect that a wife's liability is limited to the extent of her *stridhan*,[8] whether she contracts separately or jointly with her husband,[9] but there seems to be no reason why she should not be as fully liable as a male contractor.[10] This question is not, however,

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[1] See *Kelly* v. *Kelly* (1869), 3 B. L. R. O. C. 67.

[2] See *Mohima Chunder Roy* v. *Durga Monee* (1875), 23 W. R. C. R. 184; "Mitakshara," chap. ii. s. 11, paras. 32, 33; "Dayabhaga," chap. iv. s. 1, paras. 19–25; "Vivada Chintamoni" (Tagore's translation), pp. 264–265; "Vyavahara Mayukha," chap. iv. s. 10, paras. 7–10; "Smriti Chandrika," chap. ix. s. 2, para. 14.

[3] *Sooda Ram Doss* v. *Joogul Kishore Goopto* (1875), 24 W. R. C. R. 274; *Mohima Chunder Roy* v. *Durga Monee* (1875), 23 W. R. C. R. 184.

[4] *I.e.* property over which she has an absolute power of disposal, and includes all property which has come to her otherwise than by inheritance.

[5] See *Ramasami Padeiyatchi* v. *Virasami Padeiyatchi* (1867), 3 Mad. H. C. 272, at pp. 278, 279; *Reg.* v. *Natha Kalyan* (1871), 8 Bom. H. C. Cr. C. 11; *Narbadabai* v. *Mahadeo Narayan* (1880), 5 Bom. 99, at p. 107.

[6] Indian Contract Act (IX. of 1872), s. 11. The Hindu law permitted her to contract, see *Nathubhai Bhailal* v. *Javher Raiji* (1876), 1 Bom. 121, at p. 123; Strange's "Hindu Law," vol. i. p. 276.

[7] See *Nathubhai Bhailal* v. *Javher Raiji* (1876), 1 Bom. 121; *Pusi* v. *Mahadeo Prasad* (1880), 3 All. 122.

[8] Above note 4.

[9] *Nathubhai Bhailal* v. *Javher Raiji* (1876), 1 Bom. 121; *Govindji Khimji* v. *Lakmidas Nathubhoy* (1879), 4 Bom. 318; *Narotam* v. *Nanka* (1882), 6 Bom. 473. *In re the petition of Radhi* (1887), 12 Bom. 229.

[10] See *Nahalchand* v. *Bai Sheva* (1882), 6 Bom. 470.

now of much importance, as a woman is exempt from imprisonment in execution of a money decree.[1]

Necessaries.

Where the wife is living with her husband, or is living apart from him under such circumstances[2] as would justify an order for separate maintenance, the Court would presume an authority to bind the husband for necessaries,[3] but such presumption can be rebutted by evidence that the authority has been revoked.

Suit by or against married women.

A Hindu married woman can sue or be sued in her own name.[4]

There is no presumption of law that transactions which stand in the name of the wife are the husband's transactions,[5] although it may frequently happen that a husband buys property in his wife's name.

Power of husband over his property.

Except so far as she may be entitled to maintenance thereout,[6] to a share on partition,[7] and to rights of inheritance, a wife does not by marriage acquire any interest in her husband's property or any voice in its management.[8]

Debts of re-married widow.

A person who marries a Hindu widow is not, merely by reason of such marriage, liable for any of the debts of a prior deceased husband of such widow.[9]

Suits between husband and wife.

A husband may sue his wife, and a wife may sue her husband, in respect of any cause of action in the same way as if they were independent of one another.[10]

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[1] S. 245A, added to Act XIV. of 1882 by Act VI. of 1888, s. 2; C. P. C. 1908, s. 56.

[2] *Ante*, p. 65.

[3] *Virasvami Chetti* v. *Appasvami Chetti* (1863), 1 Mad. H. C. 375, at p. 377; *Pusi* v. *Mahadeo Prasad* (1880), 3 All. 122; *Nathubhai Bhailal* v. *Javher Raiji* (1876), 1 Bom. 121, at p. 123.

[4] *Bhoyrubchunder Dass* v. *Madhubchunder Paramanic* (1863), 1 Hyde, 281.

[5] *Manada Sundari Dabi* v. *Mahananda Sarnakar* (1897), 2 C. W. N. 367. See *Ran Bijai Bahadur Singh* (*Diwan*) v. *Indarpal Singh* (1899), 26 I. A. 227; 26 Calc. 871; 4 C. W. N. 1; *Chowdrani* v. *Tarini Kanth Lahiry* (1882), 8 Calc. 545; 11 C. L. R. 41 (on appeal this question did not arise, *Dharani Kant Lahiri Chowdhry* v. *Kristo Kumari Chowdhrani* (1886), 13 I. A. 70; 13 Calc. 181); *Narayana* v. *Krishna* (1884), 8 Mad. 214; *contrâ*, *Bindoo Bashinee Debee* v. *Pearee Mohun Bose* (1866), 6 W. R. C. R. 312.

[6] *Post*, p. 75.

[7] *Post*, pp. 329–334.

[8] *Sorolah Dossee* v. *Bhoobun Mohun Neoghy* (1888), 15 Calc. 292, at p. 306. See *Punna Bibee* v. *Radha Kissen Das* (1903), 31 Calc. 476.

[9] See Bom. Act VII. of 1866, s. 4. A different rule was, before the passing of that Act, applied by the Courts in the Mofussil of the Bombay Presidency.

[10] Strange's "Hindu Law," vol. ii. pp. 59, 60; *G.* v. *K.* (1794), 2 Morley's "Digest," 234; Colebrooke's "Digest," bk. iv. chap. i. s. 1. See *Deokoonwur* v. *Umbaram Lala* (1810), 1 Borr. 370, note, p. 371.

There is nothing in the law to prevent a Hindu husband or wife from being convicted of theft of the property of the other, but having regard to the authority which, when husband and wife are living together, would necessarily arise from the married state, it would generally be difficult to prove a dishonest intention. Where the wife is acting in concert with her paramour the intention would be more obvious, as she would not in that case be likely to suppose that she had authority from her husband.[1] Theft.

MAINTENANCE.

A wife is entitled to receive from her husband[2] food, raiment, lodging, and provision for religious or other duties incident to the status in life which she occupies.[3] Maintenance of wife.

As to maintenance out of property belonging to a joint family of which her husband is a member, see *post*, pp. 242, 272; and as to her right to a share on partition in lieu of maintenance, see *post*, pp. 329–334. She has no right to be maintained by her own or by her husband's relations,[4] unless they have property belonging to her husband in their hands.[5]

Except where she has been guilty of infidelity,[6] a husband may be required to maintain his wife, even though she cannot compel him to restore her to other conjugal rights.[7]

Although under the Hindu law the right of a wife to be maintained by her husband does not depend upon the possession of any property by him,[8] a wife would gain nothing by a suit against a penniless husband, and could only force him to maintain her by the fruits of his labour by a proceeding under the Criminal Procedure Code.[9]

In a case where the wife has left her husband, and is Right to pledge husband's credit.

[1] See *Queen-Empress* v. *Butchi* (1893), 17 Mad. 401; *Anonymous* (1870), 5 Mad. H. C. App. xxiii.; Act XLV. of 1860, s. 378, illus. (*n*) and (*o*).

[2] *Sidlingapa* v. *Sidava* (1878), 2 Bom. 624, at p. 628; S. C. 2 Bom. 634; Macnaghten's "Hindu Law," vol. ii. chap. ii. cases i.–iii.; "Dayabhaga," chap. iv. s. 1, para. 25; "Vyavahara Mayukha," chap. xx. s. 1; Colebrooke's "Digest," vol. ii. pp. 420-421.

[3] See *Nittokissoree Dossee* (*Sreemutty*) v. *Jogendro Nauth Mullick* (1878), 5 I. A. 55, at p. 57.

[4] *Iyagaru Soobaroyadoo* v. *Iyagaru Sashama*, Mad. S. R. 1856, p. 22; *Rangayian* v. *Kalyam Ummall*, Mad. S. R. 1860, p. 86, cited in 1 Norton L. C. p. 39.

[5] *Ramabai* v. *Trimbak Ganesh Desai* (1872), 9 Bom. H. C. 283. See *post*, p. 78.

[6] *Post*, p. 77.

[7] See "Manu," chap. xi. para. 189.

[8] *Narbadabai* v. *Mahadeo Narayan* (1880), 5 Bom. 99, at p. 103. See *Jayanti Subbiah* v. *Alamelu Mangamma* (1902), 27 Mad. 45, at p. 48.

[9] *Post*, p. 98.

justified by law in so doing, she may be entitled to pledge his credit for necessaries supplied for her support,[1] but he can always by prohibition prevent her from so doing.

Abandonment of Hinduism.

Although the husband may abandon Hinduism, he cannot thereby destroy his wife's right of maintenance.[2]

Dissolution of marriage.

The Court can award maintenance to a wife whose marriage has been dissolved under the provisions of the Native Converts Marriage Dissolution Act, 1866."[3]

Husband disqualified from inheritance.

Where the husband is excluded from inheritance on the ground of some disqualification,[4] his wife is, if chaste, entitled to maintenance out of the property to which he would have succeeded if he had not been so disqualified.[5] If her sons succeed to the inheritance she has the right of a mother.[6]

Place of maintenance.

A wife would ordinarily be entitled to maintenance in her husband's house,[7] but when he, without excuse,[8] refuses to allow her to reside with him,[9] or when she is justified in residing apart from him,[10] she is entitled to separate maintenance.[11]

Except where there is such refusal or justification, a wife cannot enforce an arrangement for separate maintenance.[12]

Release of right.

A wife cannot release her right of maintenance, but

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[1] See *Virasvami Chetti* v. *Appasvami Chetti* (1863), 1 Mad. H. C. 375, at p. 379; *Pusi* v. *Mahadeo Prasad* (1880), 3 All. 122; Act IX. of 1872, s. 187.

[2] See (1868) 4 Mad. H. C. App. iii.

[3] Act XXI. of 1866, s. 28.

[4] *Post*, pp. 235, 236.

[5] "Mitakshara," chap. ii. s. 10, paras. 14, 15; "Dayabhaga," chap. v. para. 19; "Vyavahara Mayukha," chap. iv. s. 17, para. 12; Tagore's "Vivada Chintamoni," p. 244; "Smriti Chandrika," chap. v. para. 43.

[6] Banerjee's "Law of Marriage," 2nd ed., p. 144. See *post*, p. 78.

[7] *Sitanath Mookerjee* v. *Haimabutty Dabee* (*Sreemutty*) (1875), 24 W. R. C. R. 377; *Virasvami Chetti* v. *Appasvami Chetti* (1863), 1 Mad. H. C. 375.

[8] *Ante*, pp. 65, 66.

[9] *Nitye Laha* v. *Soondaree Dossee* (1868), 9 W. R. C. R. 475. See *Sidlingapa* v. *Sidava* (1878), 2 Bom. 634; *Rampriya* v. *Bhriguram* (1815), 2 Wm. Macn. 109.

[10] See *Gobind Pershad* (*Lalla*) v. *Doulat Batti* (1870), 6 B. L. R. App. 85; 14 W. R. C. R. 451. As to the circumstances which justify her in declining to live with her husband, see *ante*, p. 65.

[11] *Matangini Dasi* v. *Jogendra Chunder Mullick* (1891), 19 Calc. 84; *Sidlingapa* v. *Sidava* (1878), 2 Bom. 634.

[12] *Rajlukhy Dabee* (*Sm.*) v. *Bhootnath Mookerjee* (1900), 4 C. W. N. 488.

an arrangement fixing the amount of her maintenance will, if fair, be upheld.[1]

The right of a Hindu female to maintenance is one peculiarly needing protection.[2]

A wife who without just cause deserts her husband,[3] or refuses to live with him,[4] or is unchaste,[5] loses her right of maintenance. Loss of right

An unchaste wife loses her right of maintenance, even if it has been secured by a decree,[6] or by an agreement.[7]

As to the right of an unchaste wife to what is called "starving maintenance," see *post*, p. 81.

Persons entitled to maintenance do not lose the right by a mere loss of caste.[8]

A widow who succeeds to no property as heir to her husband, is (whether she has or has not a son)[9] entitled to maintenance out of the property in which her husband was interested as owner[10] or coparcener[11] at the time of Maintenance of widow.

[1] *Narbadabai* v. *Mahadeo Narayan* (1880), 5 Bom. 99, at pp. 104–107.

[2] *Ibid.*, at p. 107; *Lakshman Ramchandra Joshi* v. *Satyabhamabai* (1877), 2 Bom. 494, at p. 505; *Comulmoney Dossee* v. *Ramnath Bysack* (1843), 1 Fulton, 189, at p. 203.

[3] *Virasvami Chetti* v. *Appasvami Chetti* (1863), 1 Mad. H. C. 375.

[4] *Ilata Shavatri* v. *Ilata Narayanan Nambudiri* (1863), 1 Mad. H. C. 372, at pp. 373, 374; *Kullyanessuree Debee* v. *Dwarkanath Surmah Chatterjee* (1866), 6 W. R. C. R. 116. She does not lose the right when she leaves him by his consent. *Nitye Laha* v. *Soondaree Dossee* (1868), 9 W. R. C. R. 475.

[5] See *Pirthee Singh* (*Rajah*) v. *Raj Kower* (*Ranee*) (1873), I. A. Sup., vol. 203, at p. 210; 12 B. L. R. 238, at p. 247; 20 W. R. C. R. 21, at p. 24; *Ilata Shavatri* v. *Ilata Narayanan Nambudiri* (1863), 1 Mad. H. C. 372; *Kandasami Pillai* v. *Murugammal* (1898), 19 Mad. 6.

[6] *Nubo Gopal Roy* v. *Amrit Moyee Dossee* (1875), 24 W. R. C. R. 428. See *post*, pp. 88, 90. The decree cannot be altered in execution. There must be a fresh suit. *Ranmalsangji Bhagwatsangji* (*Maharana Shri*) v. *Kundan Kuwar* (*Bai Shri*) (1902), 26 Bom. 707.

[7] See *Nagamma* v. *Virabhadra* (1894), 17 Mad. 392.

[8] Act XXI. of 1850. *Queen* v. *Marimuttu* (1881), 4 Mad. 243.

[9] *Shib Dayee* v. *Doorga Pershad* (1872), 4 N. W. P. 63; *Brinda Chowdhrain* v. *Radhica Chowdhrain* (1885), 11 Calc. 492, at p. 494.

[10] *Brinda Chowdhrain* v. *Radhica Chowdhrain* (1885), 11 Calc. 492, at p. 494; *Narbadabai* v. *Mahadeo Narayan* (1880), 5 Bom. 99, at p. 106; *Bhagabati Dasi* (*Srimati*) v. *Kanailal Mitter* (1872), 8 B. L. R. 225. As to her maintenance out of property which has been divested on adoption, see *Dhurm Das Pandey* v. *Shamasoondri Dibiah* (1843), 3 M. I. A. 229, at p. 243; 6 W. R. P. C. 43, at p. 45.

[11] *Golab Koonwur* (*Mussumat*) v. *Collector of Benares* (1847), 4 M. I. A.

his death, or in which he would have been so interested if he had not been disabled from inheritance.[1]

This applies also to impartible property.[2]

A widow is not entitled to maintenance out of property belonging to her husband which had become forfeited to Government on his conviction for rebellion,[3] but her right would be unaffected by a confiscation on account of the rebellion of her sons, or other heirs of her husband.[4]

Right against relations of husband.

A mother is entitled to be maintained by her son, and after his death out of his property,[5] but with that exception, and also with the exception that a daughter-in-law may enforce a right to maintenance against the property of her father-in-law after his death,[6] a widow has no legal right of maintenance against any of the relatives of her husband, unless they are in possession of property

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246, at p. 258; 7 W. R. P. C. 47, at p. 51; *Devi Persad* v. *Gunwanti Koer* (1895), 22 Calc. 410; *Becha* v. *Mothina* (1900), 23 All. 86; *Savitribai* v. *Luximibai* (1878), 2 Bom. 573, at p. 582, and cases there cited; *Jayanti Subbiah* v. *Alamelu Mangamma* (1902), 27 Mad. 45; *Adhibai* v. *Cursandas Nathu* (1886), 11 Bom. 199; *Manjappa Hegade* v. *Lakshmi* (1890), 15 Bom. 234; *Visalatchi Ammal* v. *Annasamy Sastry* (1870), 5 Mad. H. C. 150; *Subbramania Mudaliar* v. *Kaliani Ammal* (1873), 7 Mad. H. C. 226; *Amrit* (*Bai*) v. *Manik* (*Bai*) (1875), 12 Bom. H. C 79; *Ramabai* v. *Trimbak Ganesh Desai* (1872), 9 Bom. H. C. 283; *Shib Dayee* v. *Doorga Pershad* (1872), 4 N. W. P. 63; *Lalti Kuar* (*Mussammat*) v. *Ganga Bishen* (1875), 7 N. W. P. 261; *Meherban Singh* v. *Sheo Koonwer* (*Mussumat*) (1866), 1 Agra. 106; *Sheo Dyal Tewaree* v. *Judoonath Tewaree* (1868), 9 W. R. C. R. 61, at p. 67; *Hema Koocree* (*Mussamut*) v. *Ajoodhya Pershad* (1875), 24 W. R. C. R. 474. This rule applies to Khoja Mahomedans, *Rashid Karmali* v. *Sherbanoo* (1904), 29 Bom. 85. As to what is coparcenary property, see *post*, pp. 245 *et seq.*

[1] "Mitakshara," chap. ii. s. 10, para. 5; "Dayabhaga," chap. v. paras. 11, 14–16; "Smriti Chandrika," chap. v. paras. 10–14, 20.

[2] *Sivananja Perumal Sethuroyer* v. *Meenakshi Ammal* (1870), 5 Mad. H. C. 377.

[3] *Gunga Baee* v. *Hogg* (1867), 2 Ind. Jur. N. S. 124.

[4] *Golab Koonwur* (*Mussumat*) v. *Collector of Benares* (1847), 4 M. I. A. 246; 7 W. R. P. C. 47; explained in *Gunga Baee* v. *Hogg* (1867), 2 Ind. Jur. N. S. 124; and in *Adhiranee Narain Coomary* v. *Shona Malee Pat Mahadai* (1876), 1 Calc. 365, at pp. 373, 374.

[5] *Subbarayana* v. *Subbakka* (1884), 8 Mad. 236; "Manu," chap. viii. para. 389; Sircar's "Vyavastha Darpana," 2nd ed., pp. 375, 376. She has no such right against her step-son or step-grandson. *Daya* (*Bai*) v. *Natha Govindlal* (1885), 9 Bom. 279. See *Savitribai* v. *Luximibai* (1878), 2 Bom. 573, at pp. 582, 583.

[6] *Post*, p. 215.

which belonged to her husband, or in which he was a coparcener.[1]

In other words, when the husband or his branch is separated from the other members of a family governed by the Mitakshara school of law, or where the husband was governed by the Bengal school of law, the right of the widow to maintenance out of property belonging exclusively to relations of her husband would be confined to the property of her husband's male ascendants in the male line, and of her own male descendants in the male line.

The sale of ancestral property which would have bound her husband if alive, does not give a right against a father-in-law or other coparcener for maintenance.[2]

As to her rights to a share on a partition between her sons or grandsons, see *post*, pp. 329–334.

Although an heir or other person in possession of property may be liable to a widow for her maintenance, he is not liable to other persons on contracts made by her, even on account of her maintenance.[3]

Residence of widow.

A widow is ordinarily entitled to reside in her husband's family dwelling-house.[4]

She cannot be ousted,[5] except by a purchaser who has bought under a decree which binds her, or to whom the property has been sold for the purpose of satisfying claims which are paramount to her right of maintenance,[6] such as for debts incurred for the benefit of the

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[1] *Ganga Bai* v. *Sita Ram* (1876), 1 All. 170, at pp. 174–177; *Khetramani Dasi* v. *Kashinath Das* (1868), 2 B. L. A. C. 15, at p. 35; S. C. *Kasheenath Das* v. *Khetturmonee Dossee* (1868), 9 W. R. C. R. 413, at p. 422; *Ramabai* v. *Trimbak Ganesh Desai* (1872), 9 Bom. H. C. 283; *Visalatchi Ammal* v. *Annasamy Sastry* (1870), 5 Mad. H. C. 150; *Savitribai* v. *Luximibai* (1878), 2 Bom. 573; *Apaji Chintaman Devdhar* v. *Gangabai* (1878), 2 Bom. 632; *Kalu* v. *Kashibai* (1882), 7 Bom. 127; *Kanku (Bai)* v. *Jadav (Bai)* (1883), 8 Bom. 15; *Daya (Bai)* v. *Natha Govindlal* (1885), 9 Bom. 279. See, however, *Timmappa Bhat* v. *Parmeshriamma* (1868), 5 Bom. H. C. A. C. 130, where Gibbs, J., said (p. 132), "Every Hindu widow, whether her husband was divided from the family or not, is entitled, when in needy circumstances, to claim from her husband's relatives."

[2] *Ganga Bai* v. *Sita Ram* (1876), 1 All. 170, at p. 177.

[3] *Ramasamy Aiyan* v. *Minakshi Ammal* (1865), 2 Mad. H. C. 409.

[4] *Venkatammal* v. *Andyappa Chetti* (1882), 6 Mad. 130; *Devkore (Bai)* v. *Sanmukhram* (1888), 13 Bom. 101.

[5] *Dalsukhram Mahasukhram* v. *Lallubhai Motichand* (1883), 7 Bom. 282; *Venkatammal* v. *Andyappa Chetti* (1882), 6 Mad. 130; *Gauri* v. *Chandramani* (1876), 1 All. 262; *Talemand Singh* v. *Rukmina* (1880), 3 All. 353. See *Parvati* v. *Kisansing* (1882), 6 Bom. 567.

[6] *Jayanti Subbiah* v. *Alamelu Mangamma* (1902), 27 Mad. 45; *Manilal* v. *Tara (Bai)* (1892), 17 Bom. 398. See *Mohun Geer* v. *Tota*

family,[1] or perhaps when another suitable residence is found for her.[2]

"The right of residence of Hindu females is ordinarily referable to the family house, and a purchaser may be presumed to have notice of that fact."[3]

An adult widow[4] is not bound to reside with the relatives of her husband, and she does not forfeit her right to property or maintenance merely on account of her residing with her own family, or leaving her husband's residence from any other cause than for unchaste or improper purposes.[5]

Where the husband has expressly directed that his wife's maintenance should be contingent on her residing in the family residence with his relatives,[6] she would only be entitled to maintenance if she resided

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(*Mussumat*) (1872), 4 N. W. P. 153; *Bhikam Das* v. *Pura* (1879), 2 All. 141.

[1] *Ramanadan* v. *Rangammal* (1888), 12 Mad. 260.

[2] *Mangala Debi* v. *Dinanath Bose* (1869), 4 B. L. R. O. C. 72; 12 W. R. O. J. 35.

[3] *Ramanadan* v. *Rangammal* (1888), 12 Mad. 260, at p. 270.

[4] As to a minor widow, see *ante*, p. 62.

[5] *Pirthee Singh* (*Rajah*) v. *Raj Kower* (*Ranee*) (1873), I. A. Sup., vol. 203; 12 B. L. R. 238; 20 W. R. C R. 21; *Narayanrao Ramchandra Pant* v. *Ramabai* (1879), 6 I. A. 114, at p. 119; 3 Bom. 415, at p. 421; *Kasturbai* v. *Shivajiram Devkurna* (1879), 3 Bom. 372 (differing from *Rango Vinayak Dev* v. *Yamunabai* (1878), 3 Bom. 44); *Cossinauth Bysack* v. *Hurrosondry Dossee* (1819), Morley's "Digest," vol. ii. p. 198; Norton, 85; S. C. on appeal (1826), Sircar's "Vyavastha Darpana," 2nd ed., p. 97; Macnaghten's "Considerations of Hindu Law," p. 93; *Mokhada Dossee* v. *Nundo Lall Haldar* (1901), 28 Calc. 278, at p. 287; 5 C. W. N. 297, at p. 299; *Siddessury Dassee* v. *Janardan Sarkar* (1902), 29 Calc. 557; 6 C. W. N. 530 (a case of a widowed daughter-in-law); *Koodee Monee Debea* v. *Tarra Chand Chuckerbutty* (1865), 2 W. R. C. R. 134 (ditto); *Gokibai* v. *Lakmidas Khimji* (1890), 14 Bom. 490; *Visalatchi Ammal* v. *Annasamy Sastry* (1870), 5 Mad. H. C. 150; *Ahollya Bhai Debia* v. *Luckhee Monee Debia* (1866), 6 W. R. C. R. 37; *Chandrabhagabhai* v. *Kashinath Vithal* (1866), 2 Bom. H. C. 341, 2nd ed. 323; *Jadumani Dasi* v. *Kheytramohan Shil* (1854), Sircar's "Vyavastha Darpana," 2nd ed., p. 384; *Shurno Moyee Dassee* v. *Gopal Lall Doss* (1863), Marshall 497; *Umrit Koweree* v. *Kidernath Ghose* (1868), 3 Agra. H. C. 132. In *Raghunada* (*Sri*) v. *Brozo Kishoro* (*Sri*) (1876), 3 I. A. 154, at p. 191; 1 Mad. 69, at p. 81, the Judicial Committee said that it is in the husband's family that in strict contemplation of law the widow ought to reside.

[6] *Mulji Bhaishankar* v. *Bai Ujam* (1888), 13 Bom. 218; *Girianna Murkundi Naik* v. *Honama* (1890), 15 Bom. 236. See *Shurno Moyee Dassee* v. *Gopal Lall Doss* (1863), Marshall, 497; *Pirthee Singh* (*Rajah*) v. *Raj Kower* (*Ranee*) (1873), I. A.

in the house in which her husband required her to be maintained, or if she from just cause abstained from residing in that house.

Where the family property is so small that the family cannot bear the strain of supporting the widow in a separate lodging, though it might be able to provide her with food in the family house, a Court might well in the exercise of its discretion refuse separate maintenance,[1] or, at any rate, in fixing the maintenance might decline to allow any amount on account of the expenses of a residence.[2]

Loss of right.

A widow by unchastity forfeits her right of maintenance,[3] even if such maintenance has been secured by agreement[4] or decree.[5]

Where the agreement for maintenance is made by way of compromise of a claim for something more than maintenance, unchastity would not, in the absence of express provision, destroy the right to maintenance.[6]

"Starving maintenance."

It is unsettled whether an unchaste wife or widow, on returning to a moral life, is entitled to what is called "starving maintenance," that is to say, just sufficient food to keep her alive. It is submitted that she is so entitled. In *Honamma* v. *Timannabhat*[7] the Bombay High Court allowed the right, but it was disallowed by the same Court in *Valu* v. *Ganga*.[8] In *Nagamma* v. *Virabhadra*[9] the Madras High Court

Sup. Vol. 203, at p. 210; 12 B. L. R. 238, at p. 247; 20 W. R. C. R. 21, at p. 24; *Narayanrao Ramchandra Pant* v. *Ramabai* (1879), 6 I. A. 114, at p. 119; 3 Bom. 415, at p. 421; *Gokibai* v. *Lakhmidas Khimji* (1890), 14 Bom. 490, at pp. 496, 497; Sircar's "Vyavastha Darpana," 2nd ed., p. 370.

[1] *Kasturbai* v. *Shivajiram Devkurna* (1879), 3 Bom. 372, at p. 376; *Godavaribai* v. *Sagunabai* (1896), 22 Bom. 52.

[2] See *Ramchandra Vishnu Bapat* v. *Sagunabai* (1879), 4 Bom. 261.

[3] *Nagamma* v. *Virabhadra* (1894), 17 Mad. 392; *Valu* v. *Ganga* (1882), 7 Bom. 84; *Vishnu Shambhog* v. *Manjamma* (1884), 9 Bom. 108; *Roma Nath* v. *Rajonimoni Dasi* (1890), 17 Calc. 674; *Daulta Kuari* v. *Meghu Tiwari* (1893), 15 All. 382; *Visalatchi Ammal* v. *Annasamy Sastry* (1870), 5 Mad. H. C. 150, at p. 160; *Moniram Kolita* v. *Kerry Kolitany* (1880), 7 I. A. 115, at p. 151; 5 Calc. 776, at p. 786; 6 C. L. R. 322, at p. 330; *Kery Kolitany* v. *Moneeram Kolita* (1873), 13 B. L. R. 1, at pp. 72, 73; 19 W. R. C. R. 367, at p. 405; *Muttammal* v. *Kamakshy Ammal* (1865), 2 Mad. H. C. 337; *Sinthayee* v. *Thanakapudayen* (1868), 4 Mad. H. C. 183, at 185; *Bussunt Koomaree* (*Maharanee*) v. *Kummul Koomaree* (*Maharanee*) (1843), 7 Ben. Sel. R. 144, new edition, 168; Macnaghten's "Hindu Law," vol. ii. chap. ii. case 5, pp. 112, 113; Strange's "Hindu Law," vol. i. p. 172, vol. ii. p. 310; "Mitakshara," chap. ii. s. 1, para. 7; "Dayabhaga," chap. xi. s. 1, para. 48.

[4] *Nagamma* v. *Virabhadra* (1894), 17 Mad. 392.

[5] *Vishnu Shambhog* v. *Manjamma* (1884), 9 Bom. 108; *Daulta Kuari* v. *Meghu Tiwari* (1893), 15 All. 382; see *post*, p. 88.

[6] *Bhup Singh* v. *Lachman Kunwar* (1904), 26 All. 321.

[7] (1877), 1 Bom. 559.

[8] (1882), 7 Bom. 84.

[9] (1894), 17 Mad. 392.

held that there was no such right. In an earlier case[1] the same Court considered the question unsettled. In *Romanath* v. *Rajonimoni Dasi*[2] the Bengal High Court was inclined to allow the right. Earlier authority is in favour of the right.[3]

It is clear that she is not entitled even to "starving maintenance," so long as she persists in a vicious life,[4] but it has been held that where "starving maintenance" has been allotted to her by decree, subsequent unchastity does not destroy the right.[5]

Mere loss of caste does not involve a loss of a right of maintenance.[6]

Burden of proof.

Where there is property liable for the maintenance of a widow, it lies upon the parties resisting the claim to separate maintenance to show that the circumstances are such as to disentitle the widow thereto.[7]

For example, they may show that she resides separately from her husband's family for immoral purposes,[8] or that the family property is so small as not reasonably to admit of an allotment to her of a separate maintenance, or that she has other means of maintenance.[9]

Transfer of right.

A wife or widow cannot transfer her rights to maintenance.[10]

Attachment.

A right to future maintenance or an interest in the income of immovable property assigned by way of maintenance[11] cannot be attached in execution of a decree,[12] but there is nothing to prevent the attachment of arrears of maintenance.[13]

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[1] *Visalatchi Ammal* v. *Annasamy Sastry* (1870), 5 Mad. H. C. 150.

[2] (1890), 17 Calc. 674, at p. 679.

[3] Steele, para. xxv. (new edition), p. 36; Strange's "Hindu Law," vol. i. pp. 172, 175, vol. ii. p. 39; "Vyavahara Mayukha," chap. iv. s. 8, para. 9; "Mitakshara," chap. ii. s. 1, paras. 37, 38; Colebrooke's "Digest," vol. ii. pp. 423–425. See Norton's "Leading Cases," vol. i. p. 37.

[4] *Kandasami Pillai* v. *Murugammal* (1895), 19 Mad. 6; *Romanath* v. *Rajonimoni Dasi* (1890), 17 Calc. 674, at p. 679; *Daulta Kuari* v. *Meghu Tiwari* (1893), 15 All. 382; *Muttammal* v. *Kamakshy Ammal* (1865), 2 Mad. H. C. 337.

[5] *Honamma* v. *Timannabhat* (1877), 1 Bom. 559.

[6] Act XXI. of 1850. See *Queen* v. *Marimuttu* (1881), 4 Mad. 243.

[7] See *Saboo Sidick (Haji)* v. *Ayeshabai* (1903), 30 I. A. 127; 27 Bom. 485; 7 C. W. N. 665.

[8] *Kasturbai* v. *Shivajiram Devkurna* (1879), 3 Bom. 372, at p. 381.

[9] See *Gokibai* v. *Lakhmidas Khimji* (1890), 14 Bom. 490, at p. 496.

[10] See *Navbadabai* v. *Mahadeo Narayan* (1880), 5 Bom. 99, at pp. 103, 104.

[11] C. P. C. 1908, s. 60; Act XIV. of 1882, s. 266.

[12] *Gulab Kuar* v. *Bansidhar* (1893), 15 All. 371.

[13] *Ibid.* See *Hoymobutty Debia Chowdhrain* v. *Koroona Moyee Debia Chowdhrain* (1867), 8 W. R. C. R. 41; *Kasheeshwree Debia* v. *Greesh Chunder Lahoree* (1866), 6 W. R. M. R. 64; *Bipro Protab Sahee* v. *Deo Narain Roy* (1865) 3 W. R. M. A. 16, which were decisions under Act VIII. of 1859. *A. P. Rajerao Chandrarao* v. *Nanarav Krishna Jahajirdar* (1887), 11 Bom. 528.

Loss of maintenance by transfer of property.

Unless their rights are secured by an arrangement or by decree,[1] it is submitted that a Hindu can by a transfer for consideration dispose of his property so as to deprive his wife or such other person whom he is legally bound to maintain[2] of any right of maintenance against the property so disposed of,[3] except where such transfer is made with the intention of defeating the right, and the transferee has notice of such intention.[4]

As to an alienation pending suit, see *post*, p. 92.

Gift or will.

Provided he leaves sufficient property for the maintenance of his widow and those whom by law he is legally bound to support, a Hindu can dispose of his property by gift or will, so as to free it from claims to maintenance.[5]

A Hindu cannot by disposing of the whole of his property by will deprive his widow of her right to be maintained out of such property.[6]

Maintenance of concubines.

A concubine, who has been kept by a Hindu up to the time of his death, is entitled to maintenance[7] from

[1] *Kuloda Prosad Chatterjee* v. *Jageshar Koer* (1899), 27 Calc. 194. See *post*, p. 88.

[2] As where the right is to be maintained from coparcenary property, *Jayanti Subbiah* v. *Alamelu Mangamma* (1902), 27 Mad. 45, at p. 49.

[3] See *Sorolah Dossee* v. *Bhoobun Mohun Neoghy* (1888), 15 Calc. 292, at p. 306; *Lakshman Ramchandra* v. *Sarasvatibai* (1875), 12 Bom. H. C. 69; *Ram Kunwar* v. *Ram Dai* (1900), 22 All. 326; *Venkatammal* v. *Andyappa Chetti* (1882), 6 Mad. 130; *Bhagirathi* v. *Anantha Charia* (1893), 17 Mad. 268.

[4] Transfer of Property Act (IV. of 1882), s. 39, *post*, p. 89; *Imam* v. *Balamma* (1889), 12 Mad. 334; *Beharilalji* v. *Rajbai* (*Bai*) (1898), 23 Bom. 342; *Lakshman Ramchandra Joshi* v. *Satyabhamabai* (1877), 2 Bom. 494, at p. 516.

[5] *Debendra Coomar Roy Chowdhry* v. *Brojendra Coomar Roy Chowdhry* (1890), 17 Calc. 886; *Bhoobunmoyee Debia Chowdhrain* v. *Ramkishore Acharj Chowdhry*, Ben. S. D. A., 1860, p. 485, at p. 489; *Sorolah Dossee* v. *Bhoobun Mohun Neoghy* (1888), 15 Calc. 292, at p. 306. See *Razabai* v. *Sadu* (1871), 8 Bom. H. C. A. C. J. 98; *Lakshmi* v. *Subramanya* (1889), 12 Mad. 490, at p. 494; answers of law officers in *Mulraz Lachmia* v. *Chalekany Vencata Rama Jaganadha Row* (1838), 2 M. I. A. 54, at p. 57. The widow's claim to maintenance cannot be defeated merely by implication. *Joytara* v. *Ramhari Sirdar* (1884), 10 Calc. 638; *Conulmony Dossee* v. *Rammanath Bysack* (1843), 1 Fulton, 189, at p. 193. See Act XXI. of 1870, s. 3.

[6] *Narbadabai* v. *Mahadeo Narayan* (1880), 5 Bom. 99; *Jamna* v. *Machul Sahu* (1879), 2 All. 315; *Sorolah Dossee* v. *Bhoobun Mohun Neoghy* (1888), 15 Calc. 292, at p. 306. As to his power to deprive her of a share on partition, see *post*, p. 332.

[7] *Ningareddi* v. *Lakshmawa* (1901), 26 Bom. 163; *Ramanarasu* v. *Buchamma* (1899), 23 Mad. 282, at p. 291.

the property (whether ancestral or self-acquired) of the deceased paramour, whether she have children or not,[1] but loses the right by incontinence.[2]

A woman with whom a Hindu has only had casual intercourse,[3] or one with whom he has carried on an adulterous intrigue,[4] acquires no such right.

A discarded concubine has no right of maintenance against her paramour, or his estate.[5]

Independent means of support.

The right to maintenance cannot be enforced where the wife, or widow, or other person claiming it[6] has full independent means of support.[7] Where there is independent means of support, it must always be taken into account in fixing the amount of maintenance.[8]

Jewels and other property which are unproductive of income need not be taken into account.[9]

A previous provision of maintenance must be taken into account,[10] even though it may have been expended.[11]

It has been held that a widow cannot enforce her right against

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[1] *Yashvantrav* v. *Kashibai* (1887), 12 Bom. 26; *Khemkor* v. *Umiashankar Ranchhor* (1873), 10 Bom. H. C. 381; *Vrandavandas Ramdas* v. *Yamunabai* (1875), 12 Bom. H. C. 229; Macnaghten's "Hindu Law," vol. ii. chap. ii. case 12; Strange's "Hindu Law," vol. i. p. 174; "Mitakshara," chap. ii. s. 1, paras. 7, 27, 28; "Vyavahara Mayukha," chap. iv. s. 8, para. 5.

[2] *Yashvantrav* v. *Kashibai* (1887), 12 Bom. 26. See "Dayabhaga," chap. xi. s. 1, para. 48.

[3] *Sikki* v. *Vencatasamy Gounden* (1875), 8 Mad. H. C. 144.

[4] *Sikki* v. *Vencatasamy Gounden* (1875), 8 Mad. H. C. 144. In *Khemkor* v. *Umiashankar Ranchhor* (1873), 10 Bom. H. C. 381, *ante*, note 1, the connection was apparently an adulterous one.

[5] *Ramanarasu* v. *Buchamma* (1899), 23 Mad. 282.

[6] *I.e.* property in possession capable of providing maintenance, not a mere right of action. See *Gokibai* v. *Lakhmidas Khimji* (1890), 14 Bom. 490.

[7] *Siddessury Dossee* v. *Janardan Sarkar* (1902), 29 Calc. 557, at p. 576; 6 C. W. N. 530, at p. 547; *Chandrabhagabai* v. *Kashinath Vithal* (1866), 2 Bom. H. C., 2nd ed., 323; *Shib Dayee* v. *Doorga Pershad* (1872), 4 N. W. P. 63; *Savitribai* v. *Luximibai* (1878), 2 Bom. 573, at p. 584; Strange's "Hindu Law," vol. i. p. 171, vol. ii. p. 305.

[8] See *Mahesh Partab Singh* v. *Dirgpal Singh* (1899), 21 All. 232.

[9] *Shib Dayee* v. *Doorga Pershad* (1872), 4 N. W. P. 63; Strange's "Hindu Law," vol. ii. p. 305. See *Joytara* v. *Ramhari Sirdar* (1884), 10 Calc. 638.

[10] See *Juttendromohun Tagore* v. *Ganendromohun Tagore* (1872), I. A. Sup. Vol. 47, at p. 82; 9 B. L. R. 377, at p. 413; 18 W. R. C. R. 359, at p. 373.

[11] See *Savitribai* v. *Luximibai* (1878), 2 Bom. 573.

property in which her husband was a coparcener, if the husband's separate property be sufficient for her maintenance.[1] No reasons were given for this proposition.

Amount of maintenance, wife.

The amount which a wife is entitled to receive for her maintenance would ordinarily depend upon the position in life of the husband, the extent of his property, and the claims upon him being taken into consideration.

Yajnavalkya[2] fixed one-third of the husband's property as the proper amount, and this view has been acted upon in Bombay,[3] but the Courts will not now consider themselves bound by any such fixed rule.[4]

Conduct.

The conduct of the claimant to maintenance,[5] and, it is said,[6] the conduct of the husband, may be taken into consideration.

Amount of maintenance, widow.

In fixing the amount of maintenance for a widow, provision must be made for her reasonable wants, namely, for the performance of charities and the discharge of religious obligations, in addition to reasonable provision for her food, raiment, and lodging, having regard to the amount of the estate which is liable for her maintenance, her position in life, and the circumstances of the family.[7]

The proper expenses incident to the death and funeral of her husband,[8] and the expenses of such religious

[1] See *Shib Dayee* v. *Doorga Pershad* (1872), 4 N. W. P. 63, at p. 72.

[2] Colebrooke's "Digest," vol. ii. p. 420; "Vyavahara Mayukha," chap. xx. para. 1; see also Strange's "Hindu Law," vol. ii. pp. 45, 48, 51.

[3] *Ramabai* v. *Trimbak Ganesh Desai* (1872), 9 Bom. H. C. 283.

[4] See Macnaghten's "Hindu Law," vol. ii. case 3; Banerjee's "Law of Marriage," 2nd ed., pp. 143, 144. See cases as to amount of maintenance of widow, *post*, notes 7, 8.

[5] See *Juttendromohun Tagore* v. *Ganendromohun Tagore* (1872), I. A. Sup. Vol. 47, at p. 82; 9 B. L. R. 377, at p. 413; 18 W. R. C. R. 359, at p. 373.

[6] Banerjee's "Law of Marriage," 2nd ed., 144.

[7] *Nittokissoree Dossee* v. *Jogendro Nauth Mullick* (1878), 5 I. A. 55, at pp. 56, 57; *Devi Persad* v. *Gunwanti Koer* (1895), 22 Calc. 410, at p. 418; *Baisni* v. *Rup Singh* (1890), 12 All. 558; *Hurry Mohun Roy* v. *Nyantara (Sreemutty)* (1876), 25 W. R. C. R. 474; *Dalel Kunwar* v. *Ambika Partap Singh* (1903), 25 All. 266, at pp. 269, 270; *Karoonamoyee Dabee (Sm.)* v. *Administrator-General of Bengal* (1890), 9 C. W. N. 651. See *Narhar Singh* v. *Dirgnath Kuar* (1879), 2 All. 407, where it was held that the fact that the widow had had a son made no difference in the amount to which she was entitled; *Comulmoney Dossee* v. *Rammanath Bysack* (1843), 1 Fulton, 189; *Oojul Munnee Dasee* v. *Jygopal Chowdhree*, Ben. S. D. A., 1848, p. 491; *Bheeloo (Mussummaut)* v. *Phool Chund* (1824), 3 Ben. Sel. R. 223, new edition, 298.

[8] See *Dalel Kunwar* v. *Ambika Partap Singh* (1903), 25 All. 266.

ceremonies as by custom it be proper for her to perform,[1] should be provided for.

Principle of allotment of maintenance.

The following has been held[2] to be the principle upon which maintenance is to be allotted to a widow :—

"Where a widow has asked for separate maintenance, you look first at the mode of life of the family during her husband's lifetime and you try to find out what amount will be sufficient to allow the widow to live as far as may be consistently with the position of a widow in something like the same degree of comfort and with the same reasonable luxury of life as she had in her husband's lifetime. Then you see what the husband's estate is, and you also see how far that estate is sufficient to supply her with maintenance on this scale, without doing injustice to the other members of the family who also have their rights as heirs, or their rights to maintenance out of the estate."

There is no general rule as to the amount of maintenance to be allotted to the person entitled thereto. The amount of the property available, the claims of the different persons entitled to maintenance thereout, and the reasonable wants of the claimant for the support of himself and his family in accordance with the position of the family must all be taken into consideration.[3]

"The amount of the property . . . is an element in determining the sufficiency of a maintenance, but it cannot be regarded as the criterion. Other circumstances, and even the position and conduct of the claimant . . . may reduce the maintenance.[4]

The necessities of the claimant are also not the sole criterion.[5]

The life of austerity in which, according to the Shasters, a Hindu widow is required to live, is not to be taken into consideration ;[6] but, on the other hand, a widow is not necessarily entitled to be maintained in such a way that she can live in the same style as she lived in when her husband was alive.[7]

Any saving that she may make by living with her own family is not to be taken into account.[8]

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[1] See *Sundarji Damji* v. *Dahibai* (1904), 29 Bom. 316.

[2] *Karoonamoyee Dabee (Sm.)* v. *Administrator-General of Bengal* (1889), 9 C. W. N. 651, at pp. 652, 653.

[3] See *Mahesh Partab Singh* v. *Dirgpal Singh* (1899), 21 All. 232. The principles applicable to the fixing of the amount of maintenance of a widow apply *mutatis mutandis* to the cases of other claimants for maintenance, see *ibid.*

[4] *Juttendromohun Tagore* v. *Ganendromohun Tagore* (1872), I. A. Sup. Vol. 47, at p. 82 ; 9 B. L. R. 377, at p. 413 ; 18 W. R. C. R. 359, at p. 373.

[5] *Bhugwan Chunder Bose* v. *Bindoo Bashinee Dassee* (1866), 6 W. R. C. R. 286.

[6] *Hurry Mohun Roy* v. *Nyantara (Sreemutty)* (1876), 25 W. R. C. R. 474, at p. 476 ; *Baisni* v. *Rup Singh* (1890), 12 All. 558, at p. 563 ; *Shib Dayee* v. *Doorga Pershad* (1872), 4 N. W. P. 63, at p. 72.

[7] *Kalleepersaud Singh* v. *Kupoor Koowaree* (1865), 4 W. R. C. R. 65.

[8] *Hurry Mohun Roy* v. *Nyantara*

A widow is not entitled to maintenance in excess of the annual proceeds of the share to which her husband would have been entitled on partition if he were living.[1] Limited to husband's share.

If the produce of such share be insufficient for her support, it might be necessary to sell the share, and support her out of the proceeds.

Her funeral expenses[2] are also payable out of the estate chargeable with her maintenance. Funeral expenses.

The maintenance of a wife or widow is postponed to the payment of the debts of the husband, or of the family, as the case may be. Debts have priority.

The right to maintenance does not operate on property which has been sold to pay the debts of the husband or of the family, even if the purchaser had notice of the claim of the widow.[3]

It is not settled whatever debts take precedence of maintenance which is charged upon property by a decree or agreement. In two Allahabad cases,[4] in which the question did not arise, the Court held that debts had such precedence. It is submitted that maintenance charged by a decree is on the same footing as a mortgage, and takes precedence of subsequent charges, and of all simple contract debts[5] created by or entered into by the person against whom the decree is made, or his representatives. Maintenance charged by an agreement Maintenance charged on property.

(*Sreemutty*) (1876), 25 W. A. C. A. 474, at p. 476.

[1] *Mahadrav Keshav Tilak* v. *Gangabai* (1878), 2 Bom. 639; *Adhibai* v. *Cursandas Nathu* (1886), 11 Bom. 199, at p. 209; *Jayanti Subbiah* v. *Alamelu Mangamma* (1902), 27 Mad. 45, at p. 49; *Shib Dayee* v. *Doorga Pershad* (1872), 4 N. W. P. 63, at p. 72.

[2] *Ratanchund* v. *Javherchand* (1897), 22 Bom. 818; *Sadashiv Bhaskar Joshi* v. *Dhakubai* (1880), 5 Bom. 450.

[3] *Jayanti Subbiah* v. *Alamelu Mangamma* (1902), 27 Mad. 45; *Soorja Koer* v. *Nath Buksh Singh* (1884), 11 Calc. 102; *Gur Dayal* v. *Kaunsila* (1883), 5 All. 367; *Ramanadan* v. *Rangammal* (1888), 12 Mad. 260; *Natchiarammal* v. *Gopalakrishna* (1879), 2 Mad. 126; *Lakshman Ramchandra Joshi* v. *Satyabhamabai* (1877), 2 Bom. 494, at pp. 497, 518, 519; *Johurra Bibee* v. *Sreegopal Misser* (1876), 1 Calc. 470. See *Adhiranee Narain Coomary* v. *Shona Malee Pat Mahadai* (1876), 1 Calc. 365, at p. 377; *Kalpagathachi* v. *Ganapathi Pillai* (1881), 3 Mad. 184, at p. 191; *Venkatammal* v. *Andyappa Chetti* (1882), 6 Mad. 130; *post*, p. 91.

[4] *Sham Lal* v. *Banna* (1882), 4 All. 296, at p. 300; *Gur Dayal* v. *Kaunsila* (1883), 5 All. 367.

[5] *Kuloda Prosad Chatterjee* v. *Jageshar Koer* (1899), 27 Cal. 194; *Lakshman Ramchandra Joshi* v. *Satyabhamabai* (1877), 2 Bom. 494, at p. 524. See cases *post*, p. 88, note 4.

would also, it is submitted, when there is no fraud upon creditors, take precedence of the debts of the person entering into the agreement, or his representative, when the agreement complies with the provisions of the Transfer of Property Act.[1] Maintenance charged by a will would not take precedence of the debts of the testator.

Maintenance not a charge.

The maintenance of a wife or widow is in one sense a charge upon the property of the husband, whether ancestral or self-acquired,[2] but it is not a charge in the fullest sense of the term, because it does not necessarily bind any part of the property in the hands of a purchaser.[3] It becomes a complete charge if it be fixed and charged upon such property, or a portion thereof, by a decree or by agreement,[4] or by a will.[5]

Decree against manager of family.

Where a charge for maintenance has been imposed upon family property by a decree in a suit against the representative of the family, as such, a member of the family who was not a party to the suit

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[1] Act IV. of 1882, s. 59. See definition of "mortgage," s. 58.

[2] *Hemangini Dasi* (*Srimati*) v. *Kedarnath Kudu Chowdhry* (1889), 16 I. A. 115; 16 Cal. 758; *Narbadabai* v. *Mahadeo Narayan* (1880), 5 Bom. 99; *Ramanadan* v. *Rangammal* (1888), 12 Mad. 260, at p. 271; *Lakshman Ramchandra Joshi* v. *Satyabhamabai* (1877), 2 Bom. 494.

[3] *Bhartpur State* v. *Gopal Dei* (1901), 24 All. 160, at p. 163; *Sorolah Dossee* v. *Bhoobun Mohun Neoghy* (1888), 15 Calc. 292, at p. 307; *Sham Lal* v. *Banna* (1882), 4 All. 296; *Ram Kunwar* v. *Ram Dai* (1900), 22 All. 326; *Digambari Debi* v. *Dhan Kumari Bibi* (1906), 10 C. W. N. 1074. See *Beer Chunder Manikkya* v. *Nobodeep Chunder Deb Burmono* (*Raj Coomar*) (1883), 9 Calc. 535, at p. 555; 12 C. L. R. 465, at pp. 471, 472; *Narayanrao Ramchandra Pant* v. *Ramabai* (1879), 6 I. A. 114, at p. 118; 3 Bom. 415, at p. 420; *Ramanadan* v. *Rangammal* (1888); 12 Mad. 260, at p. 272; *Jayanti Subbiah* v. *Alamelu Mangamma* (1902), 27 Mad. 45, at p. 49; *Venkatammal* v. *Andyappa Chetti* (1882), 6 Mad. 130; *Lakshman Ramchandra Joshi* v. *Satyabhamabai* (1877), 2 Bom. 494, at p. 521, where West, J., repudiates the distinction made in *Khetranani Dasi* v. *Kashinath Das* (1868), 2 B. L. R. A. C. 15, at 52, between the maintenance of persons excluded from inheritance and that of a daughter-in-law. In *Kalpagathachi* v. *Ganapathi Pillai* (1881), 3 Mad. 184, at p. 191, the right was described as "a mere equity to a provision."

[4] *Mahalakshmamma Garu* (*Sri Maniyam*) v. *Venkataratnamma Garu* (*Sri Maniyam*) (1882), 6 Mad. 83, at p. 86; *Bhagirathi* v. *Ananta Charia* (1893), 17 Mad. 268; *Lakshman Ramchandra* v. *Sarasvatibai* (1875), 12 Bom. H. C. 69, at p. 75, explaining *Heera Lall* v. *Kousillah* (*Mussumat*) (1867), 2 Agra, 42; *Juggernath Sawunt* v. *Odhiranee Narain Koomaree* (1873), 20 W. R. C. R. 126.

[5] See *Beharilalji Bhagwatprasadji* (*Shri*) v. *Rajbai* (*Bai*) (1898), 23 Bom. 342.

cannot dispute the decree.[1] It is otherwise in the case of a decree against the father,[2] or other member of the family personally. A mere personal decree for maintenance does not create a charge.[3]

Right to dispute will.

By virtue of her right to maintenance a widow is entitled to contest the *factum* of her husband's will,[4] or to dispute a contention that property passed by it, but she does not thereby acquire a right to dispute the will of her son.[5]

Transfer of property when claim to maintenance thereout.

The question as to whether a *bonâ fide* purchaser for valuable consideration is bound by a right of maintenance out of the property purchased by him has been the subject of considerable discussion in the Courts.

The 39th section of the Transfer of Property Act[6] is as follows:—

"Where a third person has a right to receive maintenance, or a provision for advancement or marriage, from the profits of immovable property,[7] and such property is transferred with the intention of defeating such right, the right may be enforced against the transferee, if he has notice of such intention or if the transfer is gratuitous; but not against a transferee for consideration and without notice of the right, nor against such property in his hands."

Illustration.

A, a Hindu, transfers Sultánpur to his sister-in-law B, in lieu of her claim against him for maintenance in virtue of his having become entitled to her deceased husband's property, and agrees with her that, if she is dispossessed of Sultánpur, A will transfer to her an equal area out of such of several other specified villages in his possession as she may elect. A sells the specified villages to C, who buys in good faith,

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[1] *Minakshi Achi* v. *Chinnappa Udayan* (1901), 24 Mad. 689; *Subbanna Bhatta* v. *Subbanna* (1907), 30 Mad. 324.

[2] *Muttia* v. *Virammal* (1887), 10 Mad. 283.

[3] *Muttia* v. *Virammal* (1887), 10 Mad. 283; *Karpakambal Ammal* v. *Ganapathi Subbayyan* (1882), 5 Mad. 234; *Bhagirathi* v. *Anantha Charia* (1893), 17 Mad. 268; *Minakshi Achi* v. *Chinnappa Udayan* (1901), 24 Mad. 689, at p. 694; *Adhiranee Narain Coomary* v. *Shona Malee Pat Mahadai* (1876), 1 Calc. 365.

[4] *Brinda Chowdhrain* v. *Radhica Chowdhrain* (1885), 11 Calc. 492.

[5] *Garabini Dassi* v. *Pratap Chandra Shaha* (1900), 4 C. W. N. 602.

[6] IV. of 1882.

[7] This includes coparcenary property: *Jayanti Subbiah* v. *Alamelu Mangamma* (1902), 27 Mad. 45, at p. 49.

without notice of the agreement. B is dispossessed of Sultánpur. She has no claim on the villages transferred to C.

The first portion of this section refers only to transfers made with the intention of defeating the right, but the latter portion, taken with the illustration, shows that it extends to other cases.

The following propositions seem to arise from the Act, and from the decisions:—

1. A purchaser would be bound by a decree charging the property with the maintenance,[1] except where the purchase had been made in execution of a decree, which bound the widow, or which enforced a claim, which under the Hindu law takes precedence of a claim to maintenance.[2]

"When the maintenance has been expressly charged on the purchased property, it will be liable, although it be shown that there is property in the hands of the heirs sufficient to meet the claim."[3]

2. A purchaser would be bound by an agreement for maintenance which satisfies the conditions required for a mortgage under the Transfer of Property Act,[4] or which had been followed by possession.

He would also, it is submitted, be bound by an agreement, which did not satisfy such conditions, but which was enforcible against the transferee, if he had notice of such agreement.[5]

3. When the maintenance is not charged on the property by a decree, or by an agreement equivalent to a mortgage, the purchaser is bound by the right to maintenance if the transfer be made with the intention of defeating the right, and he has notice of such intention.[6]

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[1] See *Kuloda Prosad Chatterjee* v. *Jageshar Koer* (1899), 27 Calc. 194; *Lakshman Ramchandra Joshi* v. *Satyabhamabai* (1877), 2 Bom. 494, at p. 524.

[2] *Shamlal* v. *Banna* (1882), 4 All. 296, at p. 300. Such, perhaps, as a debt incurred before the creation of the charge by the person out of whose property the maintenance is payable.

[3] *Shamlal* v. *Banna* (1882), 4 All. 296, at p. 300.

[4] IV. of 1882, ss. 58, 59, *ante*, p. 88, note 1.

[5] See *post*, p. 91.

[6] Act IV. of 1882, s. 39. See *Lakshman Ramchandra Joshi* v. *Satyabhamabai* (1877), 2 Bom. 494, at p. 524. This involves a fraudulent intention: *Digambari Debi* v. *Dhan Kumari Bibi* (1906), 10 C. W. N. 1074.

4. When the maintenance is not so charged, and there is no such intention, or if there be such intention, the purchaser has no notice thereof, a *bonâ fide*[1] purchaser is not affected by the claim, whether he has notice thereof or not.[2]

In earlier cases it was held that a *bonâ fide* purchaser without notice was not affected by the claim, but that a purchaser with notice of the claim[3] or, at any rate, with notice of the existence of a claim likely to be unjustly impaired by the proposed transaction,[4] or, as it has been put in another case,[5] a notice that the right cannot be satisfied without recourse to the property purchased, was subject to it.

There is also authority that the widow must exhaust her remedies against the heir, or, at any rate, prove that there is no property of the deceased in the hands of the heir before recovering against the purchaser.[6] The inconvenience of this doctrine has been pointed out by the Bombay High Court.[7]

The Hindu law places on the same footing all the so-called charges

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[1] *I.e.* the property must be bought upon a rational and honest opinion that the sale was one which could be effected without any furtherance of wrong: *Lakshman Ramchandra Joshi* v. *Satyabhamabai* (1877), 2 Bom. 494, at p. 524.

[2] *Ram Kunwar* v. *Ram Dai* (1900), 22 All. 326; *Bhartpur State* v. *Gopal Dei* (1901), 24 All. 160. See *Shamlal* v. *Banna* (1882), 4 All. 296; *Soorja Koer* v. *Nath Buksh Singh* (1884), 11 Calc. 102. There are observations in *Amrita Lal Mitter* v. *Maniok Lal Mullick* (1900), 27 Calc. 551, 4 C. W. N. 764, to the contrary effect, but that was a case of a transfer of an undivided share of the whole property, see *post*, p. 297–301.

[3] See *Bhagabati Dasi* (*Srimati*) v. *Kanailal Mitter* (1872), 8 B. L. R. 225; 17 W. R. C. R. 433, note. *Adhiranee Narain Coomary* v. *Shona Malee Pat Mahadai* (1876), 1 Calc. 365, and cases there cited; *Rachawa* v. *Shivayogapa* (1893), 18 Bom. 679; *Lakshman Ramchandra* v. *Sarasvatibai* (1875), 12 Bom. H. C. 69; *Goluck Chunder Bose* (*Baboo*) v. *Ohilla Daye* (*Ranee*) (1876), 25 W. R. C. R. 100; *Heera Lall* v. *Kousillah* (*Mussumat*) (1867), 2 Agra, 42. (In the last case the transfer was in terms subject to a specified sum for the maintenance of the widow.) Any fact which would put the purchaser upon inquiry would amount to notice. Thus possession by the widow of the family dwelling-house or of other property may amount to notice. See *Ramanadan* v. *Rangammal* (1888), 12 Mad. 260, at p. 272; *Imam* v. *Balamma* (1889), 12 Mad. 334.

[4] *Lakshman Ramchandra Joshi* v. *Satyabhamabai* (1877), 2 Bom. 494, at p. 517.

[5] *Ramanadan* v. *Rangammal* (1889), 12 Mad. 260, at p. 269.

[6] *Adhiranee Narain Coomary* v. *Shona Malee Pat Mahadai* (1876), 1 Calc. 365, at p. 377; *Ram Churun Tewaree* v. *Jasooda Koonwer* (1867), 2 Agra. 134; *contrâ Goluck Chunder Bose* (*Baboo*) v. *Ohilla Daye* (*Ranee*) (1876), 25 W. R. C. R. 100.

[7] *Lakshman Ramchandra Joshi* v. *Satyabhamabai* (1877), 2 Bom. 494 at pp. 515, 520.

on the inheritance,[1] as debts,[2] expenses of initiation of sons,[3] and marriage of daughters.[4] It could scarcely be that a *bonâ fide* purchaser, even with notice of the existence of a claim in respect of any one of these so-called charges, should bear the burden of their payment.[5] In a case where the money had been raised by purchase for the purpose of paying any of these charges it would follow that the purchaser would be under no liability.[6] Would it be reasonable in any case, except where the transaction was intended to the knowledge of the purchaser to be a fraud upon the charge, to require a purchaser from an absolute owner to inquire as to the purposes for which the money was being raised? Moreover, the texts give a charge on the inheritance to wives as to widows, but a wife cannot enforce her maintenance against a purchaser from her husband.[7]

"If there is an ample estate out of which to provide for the widow, so that she may get her claim fixed and secured, or if, knowing of the proposed sale, she does not take any step to secure her own interest, no imputation of bad faith, or of abetting it, can be made against the purchaser of a portion of the joint property. If the widow, on the other hand, is not accepting support from the coparcener in satisfaction of her claim; if she lives apart, and the estate is small and insufficient, it is the vendee's duty before purchasing to inquire into the reason for the sale, and not by a clandestine transaction to prevent the widow from asserting her right against the intending vendor."[8]

Transfer pending suit.

A right of maintenance is not affected by a transfer made during the pendency of a suit for maintenance,[9]

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[1] Strange's "Hindu Law," vol. i. chap. viii. In *Bhartpur State* v. *Gopal Dei* (1901), 24 All. 160, at p. 163, the Court said, "In fact, a widow's right to receive maintenance is one of an indefinite character, which, unless made a charge when the property, by agreement or by decree of the Court, is only enforceable like any other liability in respect of which no charge exists."

[2] "Mitakshara," chap. ii. s. 11, para. 24; "Vyavahara Mayukha," chap. v. s. 4, paras. 12, 14, 16, 17, 19.

[3] "Vyavahara Mayukha," chap. iv. s. 4, paras. 38–40; "Mitakshara," chap. i. s. 7, paras. 3–6; Colebrooke's "Digest," bk. v. paras. cxxiii., cxxv., cxxxii.

[4] Colebrooke's "Digest," bk. v. para. cxxiv.

[5] A creditor cannot follow the assets of an estate into the hands of a *bonâ fide* purchaser. See *Lakshman Ramchandra* v. *Sarasvatibai* (1875), 12 Bom. H. C. 69, at p. 78, and cases there cited.

[6] See *Lakshman Ramchandra Joshi* v. *Satyabhamabai* (1877), 2 Bom. 494, at p. 499.

[7] See *Lakshman Ramchandra* v. *Sarasvatibai* (1875), 12 Bom. H. C. 69, at p. 78. *Ante*, p. 83.

[8] *Lakshman Ramchandra Joshi* v. *Satyabhamabai* (1877), 2 Bom. 494, at p. 517.

[9] See Transfer of Property Act (IV. of 1882), s. 52; *Jogendra Chunder Ghose* v. *Fulkumari Dassi* (1899), 27 Calc. 77; S. C. *sub nomine Jogendro Chunder Ghose* v. *Ganendra Nath Sircar*, 4 C. W. N. 254. See *Amrita Lal Mitter* v. *Manick Lal Mullick* (1900), 27 Calc. 551; 4 C. W. N. 764.

unless such transfer be effected for the purpose of paying off a debt, which has priority over the claim for maintenance.[1] Where the suit for maintenance does not seek to charge specific property, the doctrine of *lis pendens* does not apply.[2]

Possession of property by widow.

An heir or coparcener,[3] or devisee,[4] or a purchaser with notice of her claim and possession,[5] cannot oust a widow from property which is liable for her maintenance, without securing her maintenance.

The possession would, it is submitted, be in this case evidence of an arrangement charging the property.[6]

Right against proceeds of sale.

A widow may enforce her right of maintenance against the proceeds of the property in the hands of the heir.[7]

Gift or devise of property.

A right to maintenance cannot be defeated by a gift[8] or devise of all the property, which is subject to the right.[9]

As to the allotment of a share to a mother or grandmother in lieu of her maintenance in case of partition between her sons or grandsons, see *post*, pp. 330 *et seq.*

Suit for maintenance.

A widow may, for the purpose of securing her maintenance, sue to compel the persons in possession of the estate, out of which the maintenance is payable, to give security for the due payment of her maintenance, or to have it made a charge upon the estate, and may, in a proper case, obtain an injunction to restrain them from wasting or alienating the estate.[10]

Suit for arrears.

If she does not wish

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[1] *Dose Thimmanna Bhutta* v. *Krishna Tantri* (1906), 29 Mad. 508.

[2] *Manika Gramani* v. *Ellappa Chetti* (1896), 19 Mad. 271.

[3] *Yellawa* v. *Bhimangavda* (1893), 18 Bom. 452.

[4] *Razabai* v. *Sadu* (1871), 8 Bom. H. C. A. C. J. 98.

[5] *Imam* v. *Balamma* (1889), 12 Mad. 334; *Rachawa* v. *Shivayogappa* (1893), 18 Bom. 679.

[6] *Ante*, p. 88.

[7] See *Venkatammal* v. *Andyappa* (1882), 6 Mad. 130, at p. 135; *Ram Churun Tewaree* v. *Jasooda Koonwer* (1867), 2 Agra, 134; *Lakshman Ramchandra Joshi* v. *Satyabhamabai* (1877), 2 Bom. 494, at p. 519.

[8] Act IV. of 1882, s. 39.

[9] *Becha* v. *Mothima* (1900), 23 All. 86. See *ante*, p. 83.

[10] *Ramanadan* v. *Rangammal* (1889), 12 Mad. 260, at pp. 267, 268; *Mahalakshmamma Garu* (*Sri Maniyam*) v. *Venkataratnamma Garu* (*Sri Maniyam*) (1882), 6 Mad. 83. See *Brinda Chowdhrain* v. *Radhika Chowdhrain* (1885), 11 Calc. 492, at p. 494.

for such charge, she may sue for maintenance already due,[1] or for a declaration that it is payable, or she may combine a claim for arrears with a prayer for a charge or for security.

A decree for arrears is not of right, but is in the discretion of the Court.[2] Where the person claiming maintenance has been supported, without having incurred any expense or liability, the Court might well exercise its discretion by refusing to grant arrears.

Small Cause Court.

A suit relating to maintenance cannot be brought in a Provincial Small Cause Court.[3] A suit for maintenance payable out of immovable property cannot be brought in a Presidency Small Cause Court,[4] but a suit on a bond or other personal contract for maintenance can be brought in such court.[5]

Future maintenance.

The Court should discourage a multiplicity of suits for the maintenance of one person, and should, if possible, where necessary, make a decree for future maintenance.[6]

The widow is not entitled to sue for possession of the property.[7]

A wife, who is entitled to separate maintenance, has apparently similar remedies.

Enforcement of agreement.

When maintenance is fixed by an agreement, which is equivalent to a mortgage, it may be enforced by a suit under the Transfer of Property Act.[8]

Parties to suit.

The widow is entitled to sue all or any of the heirs in possession of property subject to her maintenance.[9]

When the right of maintenance has been made a charge by agreement

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[1] *Pirthee Singh* (*Raja*) v. *Rajkooer* (*Rani*) (1873), I. A. Sup. Vol. 203; 12 B. L. R. 238; 20 W. R. C. R. 21; *Venkopadhya* v. *Kavari Hengusu* (1864), 2 Mad. H. C. 36; *Sakvarbai* v. *Bhavanjee Raje* (1864), 1 Bom. H. C. 194; *Narbadabai* v. *Mahadeo Narayan* (1880), 5 Bom. 99. See *Bhartpur State* v. *Gopal Dei* (1901), 24 All. 160, at p. 163.

[2] *Raghubans Kunwar* v. *Bhagwant Kunwar* (1899), 21 All. 183. See cases, *post*, note 3.

[3] Act IX. of 1887, Sch. II. art. 38. *Amritomoye Dasia* v. *Bhogiruth Chundra* (1887), 15 Cal. 114; *Bhagvantrao* v. *Ganpatrao* (1891), 16 Bom. 267; *Saminatha Ayyan* v. *Mangalathammal* (1896), 20 Mad. 29.

[4] Act. XV. of 1882, s. 19 (9).

[5] *Pokala* v. *Murugappa* (1886), 10 Mad. 114.

[6] See *Lakshman Ramchandra Joshi* v. *Satyabhamabai* (1877), 2 Bom. 494, at pp. 497, 498; *Vishnu Shambhog* v. *Manjamma* (1884), 9 Bom. 108, at p. 110.

[7] *Oomrao Singh* v. *Man Konwer* (*Musst.*) (1867), 2 Agra, 136. As to her right to remain in possession, see *ante*, p. 93.

[8] IV. of 1882, ss. 58, 88, 100.

[9] *Ramchandra Dikshit* v. *Savitribai* (1867), 4 Bom. H. C. A. C. 73, as explained in *Nistarini Dasi* (*S. M.*) v. *Makhanlal Datt* (1872), 9 B. L. R. 11, at p. 27; 17 W. R. C. R. 4.

or decree the claimant may recover the amount from any person holding any portion of the property liable.[1] The person paying it would have a right of contribution against other persons liable therefore.[2]

The right to sue for maintenance commences when there has been a wrongful withholding of payment of the proper amount. When right to sue commences.

This withholding may be proved otherwise than by a claim and refusal.[3] Part non-payment is *primâ facie* evidence of such withholding.[4]

The omission to claim maintenance apart from the effect of the law of liability will not prejudice the claimant when he is obliged from his wants or exigencies to demand it.[5]

A suit for arrears of maintenance must be brought within twelve years from the time when the arrears are payable.[6] Limitation of suit for arrears of maintenance.

Thus past maintenance for twelve years,[7] and no more, can be recovered by suit.

The right to maintenance is one accruing from time to time according to the wants and exigencies of the person entitled to be maintained.[8]

A suit for a declaration of a right to maintenance must be brought within twelve years from the time when the right is denied.[9] Limitation of suit for declaration.

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[1] *Ramchandra Dikshit* v. *Savitribai* (1867), 4 Bom. H. C. A. C. 73, explained in *Lakshman Ramchandra* v. *Saraswatibai* (1875), 12 Bom. H. C. 69, at p. 73, and in *Nistarini Dasi* (*S. M.*) v. *Makhanlal Dutt* (1872), 9 B. L. R. 11, at p. 27; 17 W. R. C. R. 4.

[2] *Ramchandra Dikshit* v. *Savitribai* (1867), 4 Bom. H. C. A. C. 73.

[3] *Mallikarjuna Prasada Naidu* v. *Durga Prasada Naidu* (1894), 17 Mad. 362; *Seshamma* v. *Subbarayadu* (1893), 18 Mad. 403; *Motilal Prannath* v. *Kashi* (*Bai*) (1892), 17 Bom. 45. See *Narayanrao Ramchandra Pant* v. *Ramabai* (1879), 6 I. A. 114, at p. 119; 3 Bom. 415, at p. 421.

[4] *Yarlagadda Mallikarjuna Prasada Nayadu* (*Raja*) v. *Yarlagadda Durga Prasada Nayudu* (*Raja*) (1900), 27 I. A. 151; 24 Mad. 147; 5 C. W. N. 74.

[5] *Siddessury Dossee* v. *Janardan Sarkar* (1902), 29 Calc. 557, at p. 572; 6 C. W. N. 530, at p. 545. See, however, *Abbaku* v. *Ammu Shettati* (1868), 4 Mad. H. C. 137.

[6] Act XV. of 1877, Sch. II., art. 128.

[7] See *Subbramania Mudaliar* v. *Kaliani Ammal* (1873), 7 Mad. H. C. 226; *Venkopadhyaya* v. *Kavari Hengusu* (1864), 2 Mad. H. C. 36.

[8] *Narayanrao Ramchandra Pant* v. *Ramabai* (1879), 6 I. A. 114, at p. 118; 3 Bom. 415, at p. 420; 6 C. L. R. 162, at p. 166.

[9] Act XV. of 1877, Sch. II., arts. 129, 132.

Apparently when the right has been denied, and twelve years has elapsed from such denial, the right to maintenance is barred.[1]

Fixing of amount.

Where the parties do not agree, it is for the Court to fix the rate of maintenance payable in future,[2] and it may, by its decree, award arrears of maintenance.[3]

As to the principles upon which maintenance should be fixed, see *ante*, p. 86.

The Judicial Committee will not interfere with the exercise of the discretion by the Courts in India in fixing maintenance, except where strong grounds exist.[4]

Duty of Court.

The proper course for a Court in ordering maintenance is to make it a charge upon specific property,[5] or to set apart a sum of money sufficient to yield the required allowance, and, if necessary, sell a part of the estate for that purpose.[6] In some cases the Court might be satisfied with security given by the reversioners.

The allowance fixed by the Court for maintenance should cover all necessary expenses for maintenance and house rent.[7]

It is better to fix an annual sum, and not a share of the income of the estate.[8]

It has also been held that "in decrees where maintenance is awarded,

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[1] *Chhaganlal* v. *Bapubhai* (1880), 5 Bom. 68. See *Jivi* v. *Ramji* (1879), 3 Bom. 207.

[2] *Nubo Gopal Roy* v. *Amrit Moyee Dossee* (*Sreemutty*) (1875), 24 W. R. C. R. 428; *Bheeloo* (*Mussummaut*) v. *Phool Chund* (1824), 3 Ben. Sel. R. 223 (new edition, 298); *Nistarini Dasi* (*S. M.*) v. *Makhanlal Dutt* (1872), 9 B. L. R. 11, at p. 28.

[3] *Pirthee Singh* (*Rajah*) v. *Raj Kower* (*Ranee*) (1873), I. A. Sup. Vol. 203, at p. 211; 12 B. L. R. 238, at p. 248; 20 W. R. C. R. 21, at p. 25; *Venkopadhyaya* v. *Kavari Hengusu* (1864), 2 Mad. H. C. 36; *Subbramania Mudaliar* v. *Kaliani Ammal* (1873), 7 Mad. H. C. 226; *Mandodari Debi* v. *Joynarayan Pakrasi* (1833), Sircar's "Vyavastha Darpana, p. 381; Montriou's "Cases of Hindu Law," pp. 408–412. See *ante*, p. 94.

[4] *Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (1868), 12 M. I. A. 397, at p. 447; 1 B. L. R. P. C. 1, at p. 20; 10 W. R. P. C. 17, at p. 25; *Nittokissoree Dossee* (*Sreemutty*) v. *Jogendro Nauth Mullick* (1878), 5 I. A. 55, at p. 56; *Kachi Kaliyana Rengappa Kalakka Thola Udayar* v. *Kachi Yuva Rengappa Kalakka Thola Udayar* (1905), 32 I. A. 261; 28 Mad. 508; 10 C. W. N. 95.

[5] *Mansha Devi* v. *Jiwan Mal* (1884), 6 All. 617, at p. 621; *Mahalakshmamma Garu* (*Sri Maniyam*) v. *VenkataratnammaGaru* (*SriManiyam*) (1882), 6 Mad. 83. See *Vrandavandas Ramdas* v. *Yamunabai* (1875), 12 Bom. H. C. 229.

[6] See *Mundoodaree Dabee* (*Sree Moottee*) v. *Joynarain Puckrasee* (1801), F. Macn. Cons. 60; *Seeb Chunder Bose* v. *Gooroopersaud Bose*, F. Macn. Cons. 63.

[7] *Mansha Devi* v. *Jiwan Mal* (1884), 6 All. 617, at p. 620.

[8] *Jhunna* v. *Ramsarup* (1880), 2 All. 777.

Courts should insert words which would enable them on application to set aside or modify their orders as circumstances might require."[1] Such a course would, it is submitted, invite frequent litigation.

Alteration of order.

The amount of maintenance fixed by a decree may be altered by a decree in a subsequent suit, where the circumstances render an alteration necessary.

Such modification cannot be made in a proceeding in execution of a decree, unless the terms of the decree are such as to permit of such modification.[2]

Maintenance may be cancelled if the wife or widow has become unchaste,[3] or where, in the case of a wife, the circumstances have so changed that she should be called upon to return to her husband's house. The rate of maintenance may be diminished when there has been such a change in the circumstances of the wife or widow, or of the husband, or person liable for the maintenance,[4] such change not arising from any fault of his own.[5] Except where provision is made in the decree for that purpose, an order for maintenance cannot be cancelled or diminished in proceedings in execution.[6]

The rate may be increased if the cost of food has become greater or the profits of the estate of the husband have materially increased.[7]

Where the circumstances have changed, the Court can alter the amount of maintenance fixed by an arrangement.[8]

Where the alteration in circumstances had arisen from "the act of

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[1] *Gopikabai* v. *Dattatraya* (1900), 24 Bom. 386, at p. 389.

[2] *Ranmalsangji Bhagwatsangji* (*Maharana Shri*) v. *Kundankuwur* (*Bai Shri*) (1902), 26 Bom. 707. See *Gopikabai* v. *Dattatraya* (1900), 24 Bom. 386; *Ramkallee Koer* v. *Court of Wards* (1872), 18 W. R. C. R. 474.

[3] *Kandasami Pillai* v. *Murugammal* (1895), 19 Mad. 6; *Vishnu Shambhog* v. *Manjamma* (1884), 9 Bom. 108, at p. 110. See *ante*, p. 81.

[4] *Nubo Gopal Roy* v. *Amrit Moyee Dossee* (*Sreemutty*) (1875), 24 W. R. C. R. 428; *Gopikabai* v. *Dattatraya* (1900), 24 Bom. 386; *Venkanna* v. *Aitamma* (1889), 12 Mad. 183; *Vijaya* v. *Sripathi* (1884), 8 Mad. 94; *Sidlingapa* v. *Sidava* (1878), 2 Bom. 624, at p. 630.; *Ruka Bai* v. *Ganda Bai* (1878), 1 All. 594.

[5] In *Ramkallee Koer* v. *Court of Wards* (1872), 18 W. R. C. R. 474, it was held that the proper course is to apply for a review of judgment, but it is submitted that the provisions of the Civil Procedure Code, 1908, s. 114; Sched. I. order xlvi. rule 1 (Act XIV. of 1882, s. 623), do not permit such application.

[6] *Ranmalsangji Bhagwatsangji* (*Maharana Shri*) v. *Kundankuwur* (*Bai Shri*) (1902), 26 Bom. 307.

[7] *Bangaru Ammal* v. *Vijayamachi Reddiar* (1899), 22 Mad. 175; *Sreeram Bhuttacharjee* v. *Puddomokhee Debia* (1868), 9 W. R. C. R. 152; *Sidlingapa* v. *Sidava* (1878), 2 Bom. 624, at p. 630.

[8] *Rajender Nath Roy* v. *Putto Soondery Dassee* (*S. M. Ranee*) (1879), 5 C. L. R. 18.

God," and not from the fault of the owner, maintenance chargeable on an estate by a will can apparently be reduced.[1]

Execution of decree.

Where a decree directs the payment of future maintenance from time to time, it can be enforced by execution,[2] and for the purposes of limitation the decree is as to each year's annuity to be regarded as speaking on the day upon which from that year it became operative.[3]

A decree which merely declares a right of maintenance is not capable of execution.[4]

A decree declaring a right of maintenance out of property which had been transferred, cannot be executed personally against the transferees after the property had passed from them.[5]

Remedy in Magistrate's Court.

A Hindu wife can also recover maintenance from her husband under the provisions of Chap. XXXVI. of the Criminal Procedure Code.[6] The magistrate's order does not interfere with the jurisdiction of a Civil Court.[7]

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[1] See *Grees Chund Roy (Maharajah)* v. *Sumbhoo Chund Roy* (1835), 5 W. R. P. C. 98.

[2] *Ashutosh Banerjee* v. *Lukhimoni Debya* (1891), 19 Calc. 139.

[3] *Lakshmibai Bapuji Oka* v. *Madhavrav Bapuji Oka* (1887), 12 Bom. 65.

[4] *Venkanna* v. *Aritamma* (1889), 12 Mad. 183.

[5] *Dharam Chand* v. *Janki* (1883), 5 All. 389.

[6] Act V. of 1898.

[7] *Deraje Malinga Naika* v. *Marati Kaveri* (1907), 30 Mad. 400. A suit will not lie to restrain such proceedings. *Ibid.*

CHAPTER III.

RELATIONSHIP OF PARENT AND CHILD, AND ADOPTION.

What are legitimate children.

THE only children now recognized by the general Hindu law as legitimate, are those who are born during the existence of a lawful marriage between their parents,[1] and also sons who have been adopted according to the *dattaka* form.[2]

Presumption as to legitimacy.

"The legal presumption in favour of a child born in his father's house of a mother lodged and apparently treated as a wife, treated as a legitimate child by his father, and whose legitimacy is disputed after the father's death, is one safe and proper to be made, and the opposing case should be put to strict proof."[3]

Illegitimate children.

Children born out of wedlock, although illegitimate, have rights of maintenance,[4] and, if they are not members of one of the three regenerate classes, then the illegitimate sons possess rights of inheritance.

In the country subject to the Mithila school of law, a son may be adopted according to the *Kritima* form.[5]

Palaka putra.

There is nothing to prevent a Hindu from adopting a

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[1] *Pedda Amani* v. *Zemindar of Marungapuri* (1874), 1 I. A. 282, at pp. 292, 293; 14 B. L. R. 115, at pp. 122, 123. See Act I. of 1872, s. 112, which under the guise of a rule of evidence has practically the effect of declaring the law. *Tirlok Nath Shukul* v. *Lachmin Kunwari* (*Musammat*) (1903), 30 I. A. 152; 25 All. 403; 7 C. W. N. 617; *Narendra Nath Pahari* v. *Ram Gobind Pahari* (1901), 29 I. A. 17; 29 Calc. 111; 6 C. W. N. 146. Sir G. D. Banerjee ("Law of Marriage," 2nd ed., pp. 155, 156) contends that the Hindu law only recognizes as legitimate those who are begotten in wedlock, see "Manu," chap. x. para. 166. See "Mitakshara," chap. i. s. 11, para. 2; "Vyavahara Mayukha," chap. iv. s. 9, para. 41. Colebrooke's "Digest," vol. iii. p. 160.

[2] *Rungama* v. *Atchama* (1846), 4 M. I. A. 1, at p. 96; 7 W. R. P. C. 57, at p. 59; *Thukoo Baee Bhide* v. *Ruma Baee Bhide* (1824), 2 Borr. 446, at p. 456.

[3] *Ramamani Ammal* v. *Kulanthai Natchear* (1871), 14 M. I. A. 346, at pp. 365, 367; 17 W. R. C. R. 1, at p. 7.

[4] *Post*, p. 213.

[5] *Post*, pp. 159–161.

son, or even a daughter, in the sense that a son can be adopted by an Englishman, *i.e.* by treating him as a son, and giving or devising property to him, but in that case no rights of inheritance, or of performing religious ceremonies are created by the so-called adoption. The relationship is purely contractual, and is determinable at the option of either of the contracting parties. A son so taken is called a *palaka putra*.[1]

Sons recognized in ancient times.

In ancient times the Hindu law recognized the following descriptions of sons[2] as legitimate sons, viz.:—

1. *Aurasa*, or legitimate son by a wife.

2. *Kshetraja*, or son born of a wife duly appointed to raise issue for a husband on failure of any begotten by him.[3] This was the son begotten under the practice of *niyoga*,[4] by which a relative was appointed to raise up issue by the wife of a childless husband, or one deceased without leaving children.[5]

3. *Putrika putra*, or son of appointed daughter.[6] In ancient times a man could appoint his daughter to raise up issue to him.

4. *Kanina*, or son of an unmarried woman.

5. *Gudhaja*, or secretly born son of an adulterous wife.

6. *Paunarbhava*, or son of a twice married woman. This included not only the son of a woman who had gone through the ceremony of marriage, but also the son of a woman who had connection with a man.

7. *Sahodha*, or son of a pregnant bride.

8. *Nishada*,[7] or son of a member of one of the regenerate castes by a Sudra woman.[8]

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[1] See *Nilmadhub Doss* v. *Bishumber Doss* (1869), 13 M. I. A. 85; 3 B. L. R. P. C. 27; 12 W. R. P. C. 29; *Kalee Chunder Chowdhry* v. *Sheeb Chunder* (1865), 2 W. R. C. R. 281; *Bhimana Gadu* v. *Tayappah*, Mad. Dec. of 1861, p. 124; 1 Norton, L. C. 83; Steele, 184. The equivalent expression in Southern India is apparently *manasuputra*, see *Abhachari* v. *Ramachendrayya* (1863), 1 Mad. H. C. 393, or *abyyamana putrum* (son of affection).

[2] The order in which the several kinds of sons are placed by various authors varies, but necessarily all concur in giving preference to the *aurasa* son.

[3] Wilson's "Glossary," p. 298.

[4] Lit. appointment, a delegated duty or office, Wilson's "Glossary," p. 380.

[5] Wilson's "Glossary," p. 380. This class of son apparently existed in certain places, such as Orissa, by virtue of a local custom. Banerjee's "Law of Marriage," 2nd ed., p. 171; note to *Sutputtee* (*Mussummaut*) v. *Indranund Jha* (1816), 2 Ben. Sel. R. 173 (2nd ed., 221); Macnaghten's "Hindu Law," vol. i. p. 102. This custom seems to be now obsolete, see Sarbadikhari's "Hindu Law of Inheritance," p. 528.

[6] See *Nursingh Narain* v. *Bhuttun Loll*, W. R. 1864, p. 194.

[7] Lit. outcast.

[8] "*Saudra* is the son of a twice-born by a Sudra wife: the names *Nishada* and *Parasava* are applied to

9. *Dattaka*, or son given in adoption.

10. *Kritima*, or son made, *i.e.* where a man without parents accepts a proposal that he should be taken in adoption.

11. *Kritaka*, or son bought.[1]

12. *Apaviddha*, or son forsaken by his parents, and taken in adoption.

13. *Svayandattaka*, or son self-given. The only difference between this son and the *Kritima* son seems to be that in the former case the offer comes from the adoptee, and in the latter case it comes from the adopter.

Of these the only sons that are now recognized by Hindu law are the *Aurasa* son, and the *Dattaka* son. According to the Mithila school a *Kritima* son can be taken in adoption.[2] Adoption in this form is based upon recent works,[3] and is not referable to the ancient practice of taking *Kritima* sons.

ADOPTION ACCORDING TO THE DATTAKA FORM.

Definition of adoption.

An adopted son is a person capable of being adopted,[4] who is given by a person competent to give,[5] to a person competent to receive in adoption,[6] and who has been so given and received in the way prescribed by Hindu law.[7]

Necessity for adoption.

The adoption of a son is a matter of religious obligation to a childless Hindu, who has no prospect of procreating male issue,[8] although it may generally happen that adoptions originate "in the ordinary human desire for perpetuation of family properties and names."[9] It is said that originally the motives for adoption were secular, and that subsequently religious and secular motives were mixed.[10]

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such sons of a Kshatriya and a Brahmana respectively; by some to the latter." Sircar's "Law of Adoption," p. 23.

[1] See *Yuchereddy Chinna Bassavapa* v. *Yachereddy Gowdapa* (1835), 5 W. R. P. C. 114.

[2] *Post*, p. 159.

[3] *Post*, p. 159.

[4] *Post*, pp. 138–149.

[5] *Post*, pp. 134–138.

[6] *Post*, pp. 103 *et seq.*

[7] *Post*, pp. 150–156.

[8] See *Sootroogun Sutputty* v. *Sabitra Dye* (1834), 2 Knapp, 287; 5 W. R. P. C. 109; *Rajendro Narain Lahoree* v. *Saroda Soondure Dabee* (1871), 15 W. R. C. R. 548; *Sarodasoondery Dossee* (*S. M.*) v. *Tincowry Nundy* (1863), 1 Hyde, 223, at p. 249; *Huradhun Mookurjia* v. *Muthoranath Mookurjia* (1849), 4 M. I. A. 414, at pp. 425, 426; 7 W. R. P. C. 71; *Raghunada* (*Sri*) v. *Brozo Kishoro* (*Sri*) (1876), 3 I. A. 154, at p. 177; 25 W. R. C. R. 291, at p. 295.

[9] See *Gurulingaswami* (*Sri Balusu*) v. *Ramalakshmamma* (*Sri Balusu*). *Radha Mohun* v. *Hardai Bibi* (1899), 26 I. A. 113, at p. 135; 22 Mad. 398, at p. 414; 21 All. 460, at p. 477; 3 C. W. N. 427, at p. 442.

[10] See Sircar's "Law of Adoption," pp. 25, 42, 113, 142, 143.

As to the origin of the practice of adoption, see Sircar's "Law of Adoption," Lectures I., II. *Arundadi Ammal* v. *Kuppammal* (1867), 3 Mad. H. C. 283, at p. 284.

Jains.

Jains are governed in matters of adoption by the ordinary rules of Hindu law.[1] The *Dattaka* son is the only adopted son recognized by them,[2] but as they do not accept the Hindu doctrine as to the spiritual efficacy of sons, they are influenced only by secular considerations in adopting.[3]

Motive for adoption.

The motive for the adoption does not affect its validity.[4]

The fact that an adoption is made for the purpose of defeating an alienation will not affect its validity.[5]

As to the motives of a widow for an adoption, see *post*, p. 119.

Custom prohibiting adoption.

A family,[6] or caste,[7] custom prohibiting adoption is valid.

The burden of proving such custom lies on the person alleging its existence.[8]

Agreement not to adopt.

An agreement not to adopt would not apparently invalidate an adoption made in breach of it, but so far as property the subject of such agreement is concerned, it might bind the parties to it. It would not, under any circumstances, bind any one except the actual parties to it.[9]

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[1] *Amava* v. *Mahadgauda* (1896), 22 Bom. 416, at p. 418; *Bhagvandas Tejmal* v. *Rajmal* (1873), 10 Bom. H. C. 241.

[2] See *Lakhmi Chand* v. *Gatto Bai* (1886), 8 All. 319, at p. 321.

[3] See *Bhagvandas Tejmal* v. *Rajmal* (1873), 10 Bom. H. C. 241, at p. 263.

[4] See *Rambhat* v. *Lakshman Chintaman Mayalay* (1881), 5 Bom. 630, at p. 635.

[5] *Ibid.* See *Lakshmana Rau* v. *Lakshmi Ammal* (1881), 4 Mad. 160, at p. 165.

[6] *Funindra Deb Raikat* v. *Rajeswar Das* (1885), 12 I. A. 72; 11 Calc. 463; *Bishnath Singh* (*Rajah*) v. *Ram Churn Mujmoadar*, Ben. S. D. A. 1850, p. 20.

[7] See *Vandravan Jekisan* (*Patel*) v. *Manilal Chunilal* (*Patel*) (1891), 16 Bom. 470; *Verabhai Ajubhai* v. *Hiraba* (*Bai*) (1903), 30 I. A. 234; 27 Bom. 492; 7 C. W. N. 716.

[8] *Verabhai Ajubhai* v. *Hiraba* (*Bai*) (1903), 30 I. A. 234; 27 Bom. 492; 7 C. W. N. 716.

[9] *Surya Rao Bahadur* (*Sri Raja Rao Venkata Mahapati*) v. *Gangadhara Rama Rao Bahadur* (*Sri Raja Rao Venkata Mahapati*) (1886), 13 I. A. 97; 9 Mad. 499. Although this case was governed by the Mitakshara law, and under that law the son of one of the parties had acquired a right to the property by birth, the reason given for the decision that the effect of the terms of the arrangement would be to alter the law of descent would apply equally to a case governed by the Bengal school. See also *Rajender Dutt* v. *Sham Chund Mitter* (1880), 6 Calc. 106.

So far as self-acquired property is concerned, or in cases to which the Bengal school of law is applicable, a father might by a valid gift over, in case of a contemplated adoption by his son, put pressure upon such son to prevent or control his adopting, but the adoption would not be invalidated thereby.[1]

Breach of agreement.

The fact that an adoption was made in breach of an agreement to adopt another boy, which was not carried out, does not render the adoption invalid.[2]

Adoption of girl.

A girl cannot be given or taken in adoption.[3]

Nambudris.

Among the Nambudri Brahmins on the west coast of India, there is in force a practice of giving a daughter in what is called *sarvasvadhanam* marriage, in order that the son born of her should be affiliated as the son of the father giving her.[4] He does not inherit in the family of his father so long as other sons exist.[5]

As to the adoption of daughters by dancing-girls, see *post*, p. 165.

WHO MAY TAKE IN ADOPTION.

Who may adopt.

A male Hindu who has not a legitimate[6] or validly[7] adopted[8] son, son's son, or son's son's son in existence

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[1] See *Hurrosoondery (Ranee)* v. *Kistonauth Roy (Cowar)* (1841), Fulton, 393.

[2] *Siliamedoo Runga Reddy* v. *Achummal* (1808), 2 Strange H. L. 115.

[3] *Gangabai* v. *Anant* (1888), 13 Bom. 690; *Nursingh Narain* v. *Bhuttun Loll*, W. R. 1864, p. 194, commenting (at p. 196) on *Nowab Rai* v. *Bugawuttee Koowar* (1835), 6 Ben. Sel. R. 5 (2nd ed. p. 4); "Vyavahara Mayukha," chap. iv. s. 5, para. 1; W. Macnaghten's "Hindu Law," vol. i. p. 102; Colebrooke's "Digest," vol. iii. p. 493. Nanda Pandita ("Dattaka Mimansa," s. 7, paras. 1, 16, 17, 18–39) argues that daughters can be affiliated, but, as pointed out in Sircar's "Law of Adoption," pp. 144, 145, his views have not been accepted by Hindus.

[4] See *Vasudevan* v. *Secretary of State* (1887), 11 Mad. 157, at pp. 162, 163.

[5] *Kumaran* v. *Narayanan* (1886), 9 Mad. 260.

[6] *Joy Chundro Race* v. *Bhyrub Chundro Race*, Ben. S. D. A. 1849, p. 461; *Rango Balaji* v. *Mudiyeppa* (1898), 23 Bom. 296, at p. 303; *Venkappa Bapu* v. *Jivaji Krishna* (1900), 25 Bom. 306, at p. 311; "Dattaka Mimansa," s. 1, para. 13; "Dattaka Chandrika," s. 1, para. 6.

[7] An invalid adoption cannot influence the validity of a subsequent adoption, which would otherwise be legal, G. C. Sircar's "Law of Adoption," 189.

[8] *Rungama* v. *Atchama* (1846), 4 M. I. A. 1, at p. 102; 7 W. R. P. C. 57, at p. 61; *Ramabai* v. *Raya* (1896), 22 Bom. 482; *Gopee Lall* v. *Chundraolee Buhoojee (Mussamat Sree)* (1872), I. A. Sup. vol. 131; 11 B. L. R. 391; 19 W. R. C. R. 12; *Mohesh Narain Moonshi* v. *Taruck Nath Moitra* (1892), 20 I. A. 30; 20 Calc. 487; *Sudanund Mohaputtur* v. *Bonomallee* (1863), Marsh, 317; 2 Hay, 205.

and capable of inheriting, may take a son in adoption, unless he be mentally incapable of understanding the nature of the act.[1]

The existence of any other descendant is not a bar to an adoption.[2]

Pregnancy of wife.

It is immaterial whether the adoptive father be hopeless of issue or not. The pregnancy of his wife does not, whether he be, or be not, ignorant of it, prevent a Hindu from adopting,[3] and the adoption is not invalidated by the child of which the wife of the adopter is pregnant at the time of the adoption turning out to be a male.[4]

Incapacity of son.

If the son be permanently incapable of performing religious rites by reason of congenital blindness, deafness, dumbness, impotency, lameness, virulent leprosy, insanity, idiocy, or from any other reason, which involves an incapacity to inherit,[5] he may be treated for this purpose as non-existent.[6]

Where son has renounced worldly affairs.

There is authority that when a son absolutely renounces the world and all property, and enters a religious order, as by becoming a *sannyasi*, ascetic, or *fakir*, his existence is not an impediment to an adoption by his father.[7]

It has been suggested[8] that this question may be affected by Act XXI. of 1850, but it is submitted that there is not in this case a question of a "forfeiture of rights or property," or impairing or affecting any right of inheritance "by reason of his renouncing, or having been

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[1] Strange's "Hindu Law," vol. i. p. 78; W. Macnaghten's "Hindu Law," vol. ii. p. 200; "Dattaka Mimansa," s. 1, paras. 13, 14; "Dattaka Chandrika," s. 1, para. 6; Colebrooke's "Digest," vol. iii. pp. 295 *et seq.*

[2] W. Macnaghten's "Hindu Law," vol. i. p. 66, note.

[3] *Nagabhushanam* v. *Seshammagaru* (1881), 3 Mad. 180; *Daulut Ram* v. *Ram Lal* (1907), 29 All. 310.

[4] *Hanmant Ramchandra* v. *Bhimacharya* (1887), 12 Bom. 105. As to the effect of the birth of a son after an adoption, see *post*, p. 189.

[5] *Post*, pp. 235, 236.

[6] Strange's "Hindu Law," vol. i. p. 77; Sircar's "Law of Adoption," p. 196; Sutherland's "Synopsis," p. 212; W. Macnaghten's "Hindu Law," vol. i. p. 66, note; Rattigan on Adoption, p. 10.

[7] Punjab Records, 1875, p. 144. This does not apply to modern Byragees who are not ascetics. *Tesluk Chunder* v. *Shama Churn Prokash* (1864), 1 W. R. C. R. 209; *Jagannath Pal* v. *Bidyanund* (1868), 1 B. L. R. A. C. 114; 10 W. R. C. R. 172; *Khoodeeram Chatterjee* v. *Rookhinee Boistobee* (1871), 15 W. R. C. R. 197.

[8] Sircar's "Law of Adoption, p. 196.

excluded from the communion of any religion, or being deprived of caste."

Loss of caste, etc.

Where a son, natural or adopted, became an outcast, or renounces the Hindu religion, the Hindu law[1] permitted an adoption, but the effect of Act XXI. of 1850 is to prevent the natural or previously adopted son from being ousted from any of his legal rights.[2]

When the question as to the validity of such an adoption shall arise, it may be that "the Courts would refuse to recognize an adoption which could confer no civil rights."[3] Except in the case of an after-born son, to which different considerations apply, the co-existence of a natural son possessing civil rights as such, and an adopted son, does not seem to be in accordance with Hindu law as laid down by the Courts. The difficulty in adjusting the respective rights would lead to great inconvenience, but, on the other hand, it seems hard upon a father that he should be unable to regain the religious benefits, which are lost to him by the conversion, or degradation of his son.

Mr. Mayne[4] says "that the question might become of importance on the death of the natural son without issue," but the subsequent death of the son would not render the adoption valid.[5]

Missing son.

It is submitted that where a son has disappeared, and has not been heard of for many years, an adoption, if made, is not valid unless, at the time when the adoption is in question, it be proved that such son was dead at the date of the adoption.[6]

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[1] Sutherland's "Synopsis" (Stokes' edition), p. 664; W. Macnaghten's "Hindu Law," vol. ii. p. 200, note; Steele 42, 181; Strange's "Hindu Law," vol. i. p. 77.

[2] As, for instance, where he is a coparcener in a joint family governed by the Mitakshara law. Also he would not lose a right to succeed to collaterals, even if his father had disinherited him.

[3] See Mayne's "Hindu Law," 7th ed., p. 137. See Sircar's "Law of Adoption," p. 197.

[4] "Hindu Law," 7th ed., p. 137.

[5] *Post*, p. 106.

[6] See *Rango Balaji* v. *Mudiyeppa* (1898), 23 Bom. 296, at p. 303. Although ss. 107 and 108 of the Indian Evidence Act (I. of 1872) fix rules as to the presumption of death at the time of dispute, there is no presumption as to the time of death, *Dharup Nath* v. *Gobind Saran* (1886), 8 All. 614, at p. 620. As to the rules of Hindu law with regard to the presumption of death, see *Janmajay Mazumdar* v. *Keshab Lal Ghose* (1868), 2 B. L. R. A. C. 134; *Guru Das Nag* v. *Matilal Nag* (1870), 6 B. L. R. App. 16; 14 W. R. C. R. 468; *Parmeshar Rai* v. *Bisheshar Singh* (1875), 1 All. 53; *Dharup Nath* v. *Gobind Saran* (1886), 8 All. 614; and Sircar's "Law of Adoption," pp. 194, 195.

Death of son.

An adoption, which is invalid on account of there being a living son, is not rendered valid by the death of that son.[1]

Consent of son.

It has not been decided whether the assent of a natural or adopted son to a subsequent adoption can validate an adoption during the lifetime of such son,[2] but it is clear that it would not do so unless such assent be completely free, and has been given with a full knowledge of the circumstances.[3]

It is submitted that consent to the adoption would not prevent a son from disputing it,[4] except where his conduct had amounted to an estoppel.[5] Otherwise it would be difficult to adjust the respective rights of the legitimate and adopted son,[6] except where an arrangement had been arrived at with regard to them. Sastri G. C. Sircar[7] treats the judgment in *Rungama* v. *Atchama*[8] as deciding that the consent of the son could render the adoption valid; but it has, it is submitted, no such effect.

Bachelor or widower.

The fact that a man is a bachelor[9] or a widower[10] does not prevent him from taking a son in adoption.

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[1] *Basoo Camummah* v. *Basoo Chinna Vencatasa*, Mad. S. D. A. 1856, p. 20; Norton L. C., vol. i. p. 78; *Veraprashyia* v. *Suntauraja*, Mad. S. D. A. 1860, p. 168; Norton L. C. vol. i. p. 78. This is disputed in Sircar's "Law of Adoption," p. 190, but it seems clear that an adoption, which was, at the time it was made, invalid, cannot be rendered valid by a subsequent event, see *post*, p. 157.

[2] "Dattaka Mimansa," s. 1, para. 12, in explanation of the Vedik story of Sunahsepha Devarata's adoption by Visvamitra, who was already the father of a hundred sons, and whose adoption of another son was ratified by the fifty younger sons. "Vasistha," xvii. 33–35. Sircar's "Law of Adoption," pp. 180, 181.

[3] See *Rungama* v. *Atchama* (1846), 4 M. I. A. 1, at pp. 102, 103; 7 W. R. (P. C.) 57, at pp. 61, 62; *Sudanund Mohapattur* v. *Ponomallee* (1863), Marsh, 317, at pp. 321, 322; 2 Hay, 205.

[4] See *post*, p. 157.

[5] *Post*, p. 174.

[6] See *post*, p. 158.

[7] "Law of Adoption," p. 180.

[8] (1846), 4 M. I. A. 1, at p. 103; 7 W. R. (P. C.) 57, at p. 62.

[9] *Gopal Anant* v. *Narayan Ganesh* (1888), 12 Bom. 329. See *N. Chandvasekharudu* v. *N. Bramhanna* (1869), 4 Mad. H. C. 270, and *Gunnapa Deshpandee* v. *Sunkapa* (1839), Bom. Sel. R. 202; *Monemothonath Dey* v. *Onouthnauth Dey* (1865), 2 Ind. Jur. (N. S.) 24, at p. 43.

[10] *Nagappa Udapa* v. *Subba Sastry* (1865), 2 Mad. H. C. 367; *N. Chandvasekharudu* v. *N. Bramhanna* (1869), 4 Mad. H. C. 270; *Tulshi Ram* v. *Behari Lal* (1889), 12 All. 328, at p. 352; *Monemothonath Dey* v. *Onouthnauth Dey* (1865), 2 Ind. Jur. (N. S.) 24, at p. 43; *Gunnappa Deshpandee* v. *Sunkappa* (1839), Bom. Sel. Rep. 202.

Provided that he has attained the age of discretion, a minor[1] is not incapacitated, as such, from taking a son in adoption, or giving permission to adopt.[2] Adoption by minor.

There does not appear to be any case in the Reports, in which there has been an adoption by a Hindu, who has not attained the age of majority according to Hindu law.

The cases on the subject deal with the capacity to give permission to adopt, but the reasons given in those cases would apply as much to the capacity to receive in adoption, as to the capacity to give permission to adopt. These cases refer to the "age of discretion," which apparently means the age at which a Hindu is competent to perform religious ceremonies,[3] but that age does not appear to be fixed.

Of the cases which are cited as authorities for the above proposition, in *Jumoona Dassya Chowdhrani* v. *Bamasoonderai Dassya Chowdhrani*,[4] the person giving the power had attained the age of majority according to the law to which he was subject[5]; in *Patel Vandravan Jekisan* v. *Patel Manilal Chunilal*,[6] it was held that permission could be given by a person who was within two months of arriving at the age of majority; and in *Rajendro Narain Lahoree* v. *Saroda Soonduree Debia*,[7] the report does not specify the age, but the boy had apparently not completed his fifteenth year, as he was described as a minor.

In considering this question it may be remembered that a minor governed by the Mitakshara school would by adoption be acting to his temporal disadvantage, as he would thereby introduce a new coparcener into the family.[8]

It may be that the age depends upon individual capacity, but such a conclusion would, if possible, be avoided, as it would make the title of the adopted son depend upon an uncertain foundation.

Sastri G. C. Sircar argues that an adoption by a minor is inconsistent with Hindu ideas.[9] He points out that no case of adoption by a minor has as yet arisen.[10] It is very unlikely that the question as to an adoption by a minor would arise. His capacity to give a power

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[1] The Indian Majority Act (IX. of 1875) does not affect the capacity to adopt, s. 2.

[2] *Rajendro Narain Lahoree* v. *Saroda Soonduree Dabee* (1871), 15 W. R. C. R. 548, approved of in *Jumoona Dassya Chowdhrani* v. *Bamasoonderai Dassya Chowdhrani* (1876), 3 I. A. 72, at pp. 83, 84; 1 Calc. 289, at pp. 295, 296; 25 W. R. C. R. 235, at p. 239; *Patel Vandravan Jekisan* v. *Patel Manilal Chunilal* (1890), 15 Bom. 565.

[3] *Rajendro Narain Lahoree* v. *Saroda Soonduree Debia* (1871), 15 W. R. C. R. 548.

[4] (1876), 3 I. A. 72; 1 Calc. 289; 25 W. R. C. R. 235.

[5] This case was governed by the Bengal School of Law.

[6] (1890), 15 Bom. 565, at p. 576.

[7] (1871), 15 W. R. C. R. 548.

[8] As to the religious advantage, see *Rajendro Narain Lahoree* v. *Saroda Soonduree Dabee* (1871), 15 W. R. C. R. 548, and *ante*, p. 101.

[9] "Law of Adoption," pp. 207–212.

[10] P. 212.

of adoption may stand on a different footing, as such power would be for his spiritual benefit, and may become necessary when he is on his deathbed.

In a case governed by the Maharashtra school there seems no reason why the authority of the husband should not be implied, whatever was his age at the time of his death,[1] and in a case governed by the Dravida school the authority of the *sapindas* to authorize an adoption would not apparently be affected by the age of the husband at the time of his death.

Hindu Wills Act.

The Hindu Wills Act[2] provides rules for the execution of wills to which the Act is applicable, and in such cases prevents a minor from disposing of his property by will,[3] but as section 3 of the Act declares that nothing therein contained shall affect any law of adoption, the question as to the capacity of a minor to give authority to adopt is apparently untouched by that Act.[4]

Non-testamentary permission.

It seems now to be impossible for a minor to execute a valid non-testamentary document conferring an authority to adopt, as a registering officer is required to refuse to register a document executed by a person who appears to him to be a minor.[5] The Legislature has not provided for the case of a verbal permission given by a minor.

Ward of Bengal Court of Wards.

No adoption by a ward of the Bengal Court of Wards, or of the Court of Wards of Eastern Bengal and Assam,[6] and no written or verbal permission to adopt given by any ward is valid without the consent of the Lieutenant-Governor, obtained either previously or subsequently to such adoption, or to the giving of such permission on application made to him through the Court of Wards.[7]

Even if the necessary consent be given, a ward of a Court of Wards cannot adopt or give permission to adopt unless he be otherwise competent to do so.[8]

Madras Court of Wards.

A ward of the Madras Court of Wards cannot adopt or

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[1] See *Patel Vandravan Jekisan* v. *Patel Manilal Chunilal* (1890), 15 Bom. 565, at p. 576.

[2] XXI. of 1870.

[3] S. 46 of Act X. of 1865 applied by s. 2 of Act XXI. of 1870 to such Hindu wills as are affected by the Act.

[4] Sastri G. C. Sircar is of a different opinion ("Law of Adoption," p. 236), but if his view is correct, it follows, as he points out, "that an authority to adopt given by a minor to be valid must be given in words and not in writing."

[5] Act III. of 1877, s. 35; see s. 17.

[6] Act IX. (B. C.) of 1879, s. 61.

[7] Act VII. of 1905, s. 3, read with Act IX. (B. C.) of 1879, s. 61.

[8] For example, he cannot adopt unless he has arrived at the age of discretion, *ante*, p. 107.

give a written or verbal permission to adopt without the consent of the Court of Wards.[1]

Ward of Court of Wards of Central Provinces.

No adoption by a ward of the Court of Wards of the Central Provinces, and no written or verbal permission to adopt given by such ward, is valid without the consent of the Chief Commissioner, obtained either previously or subsequently to the adoption, or to the giving of the permission, on application made to him through the Court of Wards.[2]

Ward of Court of Wards of United Provinces.

A ward of the Court of Wards of the United Provinces cannot adopt, or give a written or verbal permission to adopt, without the consent of the Court of Wards, provided that the Court of Wards shall not withhold its consent if the adoption is not contrary to the personal or special law applicable to the ward, and does not appear likely to cause pecuniary embarrassment to the property, or to lower the influence or respectability of the family in public estimation. This restriction has no application to a proprietor who has applied to have his property placed under the superintendence of the Court of Wards.[3]

Punjab.

In the Punjab no ward can without previous sanction in writing of the Court of Wards adopt or give permission to adopt.[4]

Courts of Wards in Bombay and Ajmere.

There is no provision with regard to adoption in the Acts relating to Courts of Wards in Bombay[5] and Ajmere.[6]

Right of person disqualified from inheritance.

It is submitted that, at any rate in the case of Sudras,[7] a person who is disqualified from inheriting by reason of a personal disability, such as congenital blindness,

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[1] Act I. (M. C.) of 1902, s. 34 (c). As to the law before the passing of that Act, see Mad. Reg. V. of 1804, s. 25, which only deals with adoption by a ward. See *Anundmoye Chowdhraine* v. *Sheebchunder Roy*, Ben. S. D. A. 1855, 218, at p. 220, cited in *Jumoona Dassya Chowdhrani* v. *Bamasoonderai Dassya Chowdhrani* (1876), 3 I. A. 72, at p. 88; 1 Calc. 289, at p. 295; 25 W. R. C. R. 235, at p. 239.

[2] Act XVII. of 1885, s. 24.

[3] Act III. (N. W. P.) of 1899, s. 34.

[4] Act II. (Punj. C.) of 1903, s. 15.

[5] Act I. (Bo. C.) of 1905.

[6] Reg. I. of 1888.

[7] In their case no religious ceremonies are necessary, *post*, p. 153.

impotence,[1] or lameness,[2] can nevertheless take a son in adoption.[3]

Sastri G. C. Sircar[4] says that Colebrooke's English translation of a passage[5] in the "Mitakshara" is the only authority for denying to persons excluded from inheritance the right to adopt, and he gives a translation which has not such effect. The "Dattaka Chandrika" recognizes the right,[6] and the same view was taken by Sutherland.[7]

Change of religion and degradation.

Change of religion, or degradation from caste, does not interfere with the capacity to take in adoption.[8]

Where a man has not only renounced Hinduism, but has also adopted another system of religion with a personal law attached to it, such as Mohammedanism, he would lose a right which is alien to the system adopted by him.[9]

Impurity arising from bodily state.

In the case of members of the twice-born classes, a person suffering from virulent leprosy, and possibly one suffering from any other incurable disease,[10] would apparently be incompetent to take in adoption,[11] at any rate until he had performed expiation according to the Shastras.[12] In less serious cases of leprosy, it seems clear that there

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[1] A registered eunuch cannot adopt. Act XXVII. of 1871, s. 29.

[2] *Post*, pp. 235, 236.

[3] See Mayne's "Hindu Law," 7th ed., pp. 138, 139; Sircar's "Law of Adoption," pp. 202, 203, 419; "Punjab Customary Law," vol. ii. p. 154.

[4] Sircar's "Law of Adoption," p. 202.

[5] Chap. ii. s. 10, para. 11.

[6] S. 6, paras. 1–2. According to the "Dattaka Chandrika" (chap. ii. s. 10, paras. 9–11), the son has a right of maintenance. This is disputed by G. C. Sircar, "Law of Adoption," p. 419.

[7] "Synopsis," 664, 671. See W. Macnaghten, i. p. 66, note.

[8] Act XXI. of 1850.

[9] See *ante*, p. 18.

[10] "Dayabhaga," chap. v. paras. 7, 10–13. It would, however, be unlikely that Courts would extend the grounds for exclusion from inheritance beyond the decided cases.

[11] See Sircar's "Law of "Adoption," p. 206. In *Bhagaban Ramanuj Das (Mohunt)* v. *Roghunundun Ramanuj Das (Mohunt)* (1895), 22 I. A. 94, at p. 105, 22 Calc. 843, at p. 858, the Judicial Committee say, "In order to disqualify from making an adoption the leprosy must be of a virulent form." Their lordships in that case were dealing with an appointment by a mohunt of a chela to succeed him, and not with an adoption in the ordinary sense. In all the Courts it seems to have been assumed that incurable leprosy would prevent such appointment.

[12] See *Bhoobunessuree Debia* v. *Gouree Doss Turkopunchanun* (1869), 11 W. R. C. R. 535; 2 W. Macn. 201, 202. As to the power to delegate the performance of ceremonies, see cases, *post*, p. 156, note 6.

is no objection to adoption, at any rate after expiation.[1] In the case of Sudras, leprosy can be no disqualification for taking in adoption.[2]

Ceremonial impurity.

In the case of Sudras, as no religious ceremonies are necessary,[3] an adoption by a person who is in a state of ceremonial impurity from the death or birth of a relation is not on that account invalid.[4]

It is not settled whether among the twice-born classes a person can adopt when he is in a state of impurity arising from the death or birth of a relation,[5] and has not performed the necessary expiation.

This question is not one of great importance, as a person in a state of impurity would be unlikely himself to perform ceremonies which would be of no religious efficacy. He is apparently competent to perform such ceremonies vicariously,[6] and if they are performed the Court will uphold the adoption.[7] There seems no doubt that ceremonial impurity can be removed by expiation. The Courts would probably be disinclined to give effect to a disability which can be cured by expiation.[8]

In *Lakshmibai* v. *Ramchandra*[9] it was said, "There is thus admittedly no authoritative Smriti text on the point, and whatever the efficacy of ceremonial strictness may be, the Courts which administer the law in British India must be guided by what is the received practice and custom of the country or the class to which the parties belong."

The fact that the adoptive father is ceremonially impure does not prevent his receiving in adoption, and he can postpone the religious ceremonies until the pollution has been removed.[10]

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[1] W. Macnaghten's "Hindu Law," vol. ii. pp. 201, 202.

[2] *Sukumari Bewa* v. *Ananta Malia* (1900), 28 Calc. 168.

[3] *Post*, p. 153.

[4] *Thangathanni* v. *Ramu Mudali* (1882), 5 Mad. 358.

[5] In *Ramalinga Pillai* v. *Sadasiva Pillai* (1864), 9 M. I. A. 510; 1 W. R. (P. C.) 25, it was assumed that a person who at the time of the adoption was impure in consequence of the death of a relative could not adopt. See *Ranganayakamma* v. *Alwar Setti* (1889), 13 Mad. 214, where the question was as to the adopting widow's power to adopt. Strange's "Manual," 63, 2nd ed., p. 18.

[6] Sircar's "Law of Adoption," p. 213. See *Lakshmibai* v. *Ramchandra* (1896), 22 Bom. 590; *Jamnabai* v. *Raychand Nahalchand* (1883), 7 Bom. 225; *Vijiarangam* v. *Lakshuman* (1871), 8 Bom. H. C. R. O. C. 244.

[7] *Ravji Vinayakrav Jaggannath Shankarsett* v. *Lakshmibai* (1887), 11 Bom. 381, at p. 395.

[8] *Post*, p. 237.

[9] (1896), 22 Bom. 590, at p. 595.

[10] *Santappayya* v. *Rangappayya* (1894), 18 Mad. 397, at pp. 398, 399.

Adoption by ascetic.

It has been held that a professed ascetic cannot take in adoption.[1]

Although the Hindu codes did not contemplate an adoption by a person, who had renounced the world for the sake of religion, there seems now, having regard to the provisions of Act XXI. of 1850, nothing to prevent a person from emancipating himself from a religious order and taking a son in adoption.[2]

Assent of wife unnecessary.

A husband does not require the assent of his wife to his taking a son in adoption. He may adopt in spite of her express dissent.[3] A wife may, however, join in an adoption by her husband.

There is said to be a practice in Bengal by which a man adopts a son in conjunction with more than one wife.[4] There seems to be no legal objection to this practice, but a question may arise as to whether the son inherits to the relations of the wives concurring in the adoption.[5]

Adoption by woman.

A woman cannot take a child to herself in adoption.[6]

If she goes through the form of doing so, the boy acquires no rights thereby, either in her property or in that of her husband.

A woman can, if she is governed by the Mithila school of law, take to herself a son according to the *Kritima* form of adoption.[7]

Permission to Wife or Widow to Adopt.

Permission to wife to adopt.

A Hindu, who is capable of taking a son in adoption, can give to his wife power to adopt a son, or sons in

[1] "Punjab Records," 1874, p. 83.

[2] In *Mhalsabai* v. *Vithoba Khandappa Gulve* (1862), 7 Bom. H. C. App. xxvi., it was held that there is nothing in the Hindu law books to show that a Vaisya who has undergone the ceremony of *Vibhut Vidá* (a ceremony indicating renunciation of worldly affairs, analogous to "retirement to a forest," in ancient law, Sircar's "Law of Adoption," p. 201) is incapable of adopting a son.

[3] See *Alank Manjari* v. *Fakir Chand Sarkar* (1834), 5 Ben. Sel. R. 356 (new edition, 418); "Dattaka Mimansa," s. 1, para. 22.

[4] See Sircar's "Law of Adoption," pp. 183, 184.

[5] See *post*, p. 184.

[6] *Chowdry Pudum Singh* v. *Koer Oodey Singh* (1869), 12 M. I. A. 350; 2 B. L. R. (P. C.) 101; 12 W. R. (P. C.) 1. In *Peria Ammani* v. *Krishnasami* (1892), 16 Mad. 182, at p. 194. Best, J., expressed the opinion that a Jain widow who succeeded absolutely to her husband's property, could adopt a son to herself, but such expression of opinion was unnecessary for the decision of the case. An interesting discussion as to the capacity of women to adopt is to be found in Sircar's "Law of Adoption," pp. 216–226. As to adoption by dancing-girls, see *post*, p. 165.

[7] *Post*, p. 159.

succession,[1] to him, to be exercised either during his lifetime,[2] or (except he be governed by the Mithila school of law[3]) after his death.[4]

"A man cannot delegate to others, to be exercised after his death, any greater power than he himself possessed in his lifetime."[5]

Existence of son, etc.

The existence of a son, grandson, or great-grandson, who is not permanently incapacitated from performing religious rites,[6] does not of itself invalidate a power, but it prevents the exercise of the power, which remains in suspense.[7] In the event of the son, grandson, or great-grandson dying unmarried, or leaving no son or widow behind him, the power, if it be still in existence,[8] can be exercised.[9]

As to the case where the son, grandson, or great-grandson has renounced worldly affairs, see *ante*, p. 104.

Permission given by person disqualified from adopting.

It is said that when a person is by reason of impurity arising from his bodily state, such as from virulent leprosy, disqualified from adopting,[10] he can nevertheless give to his widow a permission to adopt.[11]

Adoption only by adoptive father or mother.

Under no circumstances can a son be adopted by any one except the man to whom he is adopted, or his widow.[12]

[1] *Sham Chunder* v. *Narayni Dibeh* (1807), 1 Ben. Sel. R. 209 (new edition, 279). For other instances, see *Jumoona Dassya Chowdhrani* v. *Bamasundari Dassya Chowdhrani* (1876), 3 I. A. 72; 1 Calc. 289; *Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry* (1805), 10 M. I. A. 279; 3 W. R. P. C. 15; *Ram Soondur Singh* v. *Surbanee Dossee* (1874), 22 W. R. C. R. 121. As to whether in the absence of a special power sons can be adopted in succession, see *post*, p. 129.

[2] She cannot adopt a son to him during his lifetime without his authority. *Narayan Babaji* v. *Nana Manohar* (1870), 7 Bom. H. C. A. C. 153.

[3] *Post*, p. 127.

[4] *Chowdhry Pudum Singh* v. *Koer Oodey Singh* (1869), 12 M. I. A. 350; 2 B. L. R. (P. C.) 101; 12 W. R. (P. C.) 1; *Vellanki Venkata Krishna Row* (*Rajah*) v. *Venkata Rama Lakshmi Narsayya* (1876), 4 I. A. 1, at p. 9; 1 Mad. 174, at p. 186; *Mutsaddi Lal* v. *Kundan Lal* (1906), 33 I. A. 55; 28 All. 377, and cases, *post*, pp. 114, 119.

[5] *Gopee Lall* v. *Chundraolee Buhoojee* (*Mussamat Sree*) (1872), I. A. Sup. vol. 131, at p. 133; 11 B. L. R. 391, at p. 394.

[6] *Ante*, p. 104.

[7] *Ante*, pp. 103, 104.

[8] See *post*, pp. 130, 131.

[9] *Gavdappa* v. *Girimallappa* (1894), 19 Bom. 331, at p. 337; *Byhant Monee Roy* v. *Kisto Soonderee Roy* (1867), 7 W. R. C. R. 392. See *Vellanki Venkata Krishna Row* (*Rajah*) v. *Venkata Rama Lakshmi Narsayya* (1876), 4 I. A. 1; 1 Mad. 174; 26 W. R. C. R. 21.

[10] See *ante*, p. 110.

[11] Sircar's "Law of Adoption," p. 206.

[12] *Amrito Lal Dutt* v. *Surnomoye Dasi* (1900), 27 I. A. 128, at p. 134; 27 Calc. 996, at p. 1002; 4 C. W. N. 549, at p. 551; *Lakshmibai* v. *Ramchandra* (1896), 22 Bom. 590, at p. 593; *Karsandas Natha* v. *Ladkavahu* (1887), 12 Bom. 185, at p. 199; *Bhagvandas Tejmal* v. *Rajmal* (1873)

Wife alone can be donee of power.

Power to adopt can be given to the wife alone, and to no one else.[1] The inclusion of other persons in the power vitiates it[2]; but the donor of the power may express his desire that in the exercise of the power the wife should consult any named person,[3] and he may make the exercise of the power contingent upon the consent of other persons.[4]

Form of authority.

The authority need not be in any particular form. It may be in writing, or (except in a case to which the Oudh Estates Act applies) it may be oral.[5]

Hindu Wills Act.

If the authority is contained in a will to which the Hindu Wills Act[6] applies, such will must be executed in accordance with the formalities required by that Act.[7]

tamp.

If the instrument giving the authority is not of a testamentary character, it must, if executed after the 1st January, 1870, be engrossed

Registration.

on a stamped paper of ten rupees,[8] and if executed after the 1st of January, 1872, it must be registered.[9]

In cases to which the Oudh Estates Act, 1869,[10] applies, the power must be in writing,[11] but need not be registered.[12]

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10 Bom. H. C. 241, at p. 257; Strange's "Hindu Law," vol. ii. pp. 93, 94.

[1] *Amrito Lal Dutt* v. *Surnomoye Dasi* (1900), 27 I. A. 128, at p. 134; 27 Calc. 996, at p. 1002; 4 C. W. N. 549, at p. 551; *Karsandas Natha* v. *Ladkavahu* (1887), 12 Bom. 185, at p. 199; *Bhagvandas Tejmal* v. *Rajmal* (1873), 10 Bom. H. C. 241.

[2] *Amrito Lal Dutt* v. *Surnomoye Dasi* (1900), 27 I. A. 128; 27 Calc. 996; 4 C. W. N. 549.

[3] See *Surendra Nandan Das* v. *Sailaja Kant Das Mahapatra* (1891), Calc. 385.

[4] *Beem Churn Sen* v. *Heeraloll Seal* (1867), 2 Ind. Jur. N. S. 225. See *Amrito Lal Dutt* v. *Surnomoye Dasi* (1900), 27 I. A. 128, at p. 135; 27 Calc. 996, at p. 1002; 4 C. W. N. 549, at p. 551.

[5] *Soondur Koomaree Debia* v. *Gudadhur Pershad Tewarree* (1858), 7 M. I. A. 54, at p. 64; 4 W. R. (P. C.) 116, at p. 119; *Mutsaddi Lal* v. *Kundan Lal* (1906), 33 I. A. 55; 28 All. 377.

[6] XXI. of 1870.

[7] S. 50 of Act X. of 1865, applied by Act XXI. of 1870, s. 2, to such wills as are subject to the latter Act.

[8] By Act II. of 1899, Sched. I. art. 3, an adoption deed, that is to say, any instrument (other than a will) recording an adoption or conferring or purporting to confer an authority to adopt, requires a stamp of ten rupees. There are similar provisions in Act I. of 1879, Sched. I. art. 38, and Act XVIII. of 1869, Sched. II. art. 31.

[9] Act III. of 1877, s. 17. As to whether in the absence of registration evidence may be given as to the grant of the power, quære, see *Somasundara Mudaly* v. *Duraisami Mudaliar* (1903), 27 Mad. 30.

[10] I. of 1869.

[11] S. 22 (8).

[12] *Bhaiya Rabidat Singh* v. *Indar Kunwar* (*Maharani*) (1888), 16 I. A 53; 16 Calc. 556.

A power of adoption may be revoked, either expressly or by implication. Revocation of power.

An example of a revocation by implication would be where, after giving the power, the man himself took a son in adoption.[1]

The mere birth of a son would not necessarily imply a revocation, but it might, taken with other circumstances, have such effect.[2]

Where the power is contained in a will, to which the Hindu Wills Act[3] applies, it cannot "be revoked otherwise than by another will or codicil, or by some writing declaring an intention to revoke the same and executed in the manner in which an unprivileged will is required to be executed,[4] or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same."[5] Hindu Wills Act.

Where the power is contained in a will, which is not subject to the Hindu Wills Act, the revocation can be effected by parol.[6]

When a power to adopt is given to one of several widows, such widow can adopt without reference to the other widow or widows,[7] and she alone can exercise the power.[8] Several widows

When power is given to the widows jointly, it cannot be acted upon by one of them singly, except on the death of her co-wife.[9]

Where the permission is given to all of the widows

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[1] See *Goureepershaud Rai* v. *Jymala* (*Mussummaut*) (1814), 2 Ben. Sel. R. 136 (new edition, p. 174).

[2] See *Gungaram Bhaduree* v. *Kasheekaunt Roy* (1813), 2 Ben. Sel. R. 44 (new edition, p. 56).

[3] XXI. of 1870.

[4] Act X. of 1865, s. 50, applied by Act XXI. of 1870, s. 2, to such wills as are subject to the latter Act.

[5] Act X. of 1865, s. 57, applied to Hindu wills by Act XXI. of 1870, s. 2.

[6] *Pertab Narain Singh* (*Maharajah*) v. *Subhao Koer* (*Maharanee*) (1877), 4 I. A. 228; 3 Calc. 626; 1 C. L. R. 113. In that case a verbal authority given by a Hindu testator for the destruction of a will, although the will was not in fact destroyed, was held to constitute a revocation of the will.

[7] Colebrooke's remarks in *Chellummal* v. *Munummal* (1803); Strange's "Hindu Law," vol. ii. p. 91.

[8] Mayne's "Hindu Law," 7th ed., pp. 151, 152. An authority given to the "*Maharani Sahiba*" to adopt was held to give power to the elder widow alone. *Indar Kunwar* (*Maharani*) v. *Jaipal Kunwar* (*Maharani*) (1888), 15 I. A. 127; 15 Calc. 725.

[9] See *Venkata Narasimha Appa Row* (*Sri Rajah*) v. *Rangayya Appa Row* (*Sri Rajah*) (1905), 29 Mad. 437, at p. 444. Sir F. Macnaghten ("Considerations," p. 171) considered that there cannot be a joint acceptance, but as it is possible in Western India when no permission has been given (*post*, p. 127), there seems no reason why it should not be possible when permission has been given.

severally, either of them can adopt,[1] unless the husband has signified that preference be given to one of them.

Where the authority contemplates simultaneous adoption by the several widows,[2] or that there should be two adopted sons living at the same time, the power is incapable of being exercised at all.

Permission absolute, contingent, conditional, or restricted.

The permission may be absolute, or its exercise may be contingent upon certain events,[3] or may be subject to lawful conditions, or may be subject to restrictions as to the boy to be adopted, or otherwise.

Contingent on consent of others.

The exercise of the power may be contingent upon the consent of persons named by the husband,[4] and if such consent cannot be obtained the authority cannot be exercised.[5]

A direction to a wife "to adopt a son with the good advice and opinion of the manager," does not make the adoption contingent on the consent of the manager.[6]

Implied condition expressed.

In some cases the contingency which is expressed is one that is implied by the law, as, for instance, a man gives to his wife a power to adopt in case his son dies under age and unmarried.[7]

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[1] See *Mondakini Dasi* v. *Adinath Dey* (1890), 18 Calc. 69. In *Luckinarain Tagore's case*, F. Macnaghten's "Considerations," p. 172, Sircar's "Vyavastha Darpana," 2nd. ed., 842, the claim of the eldest widow was upheld by the Court. For an instance of a power given to the elder widow to adopt three sons successively and thereafter to the younger widow to adopt, see *Akhoy Chunder Bagchi* v. *Kallapahar Haji* (1885), 12 I. A. 198; 12 Calc. 406.

[2] *Surendra Keshav Roy* v. *Doorgasundari Dassee* (1892), 19 I. A. 108; 19 Calc. 513; *Akhoy Chunder Bagchi* v. *Kallapahar Haji* (1885), 12 I. A. 198; 12 Calc. 406, but the Court will, if possible, give to the document a construction which will make a lawful adoption possible.

[3] A condition subsequent, *i.e.* providing that in a certain event the adoption is to become void, would not affect an adoption which has been made.

[4] *Beem Churn Sen* v. *Heeraloll Seal* (1867), 2 Ind. Jur. N. S. 225. See *Amrito Lal Dutt* v. *Surnomoye Dasi* (1900), 27 I. A. 128, at p. 135; 27 Calc. 996, at p. 1002; 4 C. W. N. 549, at p. 551.

[5] See *Beem Churn Sen* v. *Heeraloll Seal* (1867), 2 Ind. Jur. N. S. 225; *Amirthayyan* v. *Ketharamayyan* (1890), 14 Mad. 65, at p. 70; *Tarachurn Chatterjee* v. *Suresh Chunder Mookerji* (1889), 16 I. A. 166 judgment of High Court, at p. 167; *Amrito Lal Dutt* v. *Surnomoye Dasi* (1900), 27 I. A. 128, at p. 134; 27 Calc. 996, at p. 1002; 4 C. W. N. 549, at p. 551.

[6] *Surendra Nandan Das* v. *Sailaja Kant Das Mahapatra* (1891), 18 Calc. 385.

[7] *Vellanki Venkata Krishna Row (Rajah)* v. *Venkata Rama Lakshmi Narsayya* (1876), 4 I. A. 1, at p. 9; 1 Mad. 174, at p. 186; 26 W. R. C. R. 21, at p. 22. See *Bykant Monee Roy* v. *Kisto Soondaree Roy* (1867), 7 W. R. C. R. 392; *Solukhna (Mussummaut)* v. *Ramdolal Pande* (1811), 1 Ben. Sel. R. 324 (new edition, 434).

There is authority that where the power of adoption requires as a condition of its being exercised that particular arrangements should be made with regard to the property, as, for instance, that particular property should be devoted to a charity, effect must be given to such condition.[1] Condition as to property.

The failure of a disposition as to property in a will does not necessarily affect a power of adoption.[2] Failure of disposition.

Where the contingency, upon the happening of which the power is to be exercised, does not occur, the power cannot be exercised. Failure of contingency.

For instance, A, leaving his wife pregnant, makes a will giving her authority to adopt "in case the son to be born shall die." The widow is delivered of a daughter. The power cannot be exercised.[3]

Where the exercise of the power is contingent upon circumstances, which involve an invalid adoption, or is contingent upon illegal, or immoral, or impossible conditions, the power cannot be exercised. Invalid contingency.

In a case where the power was only to be exercised in case of the disagreement of the wife and son, the power was held to be invalid.[4]

A permission to adopt must be strictly construed,[5] and if the permission be acted upon it must be strictly followed.[6] Strict construction.

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[1] *Ganapati Ayyan* v. *Savithri Ammal* (1897), 21 Mad. 10. As to the power of the adoptive father to restrict the adopted son's rights in ancestral property, see *post*, p. 187.

[2] *Bachoo Hurkisondas* v. *Mankorebai* (1907), 34 I. A. 107; 31 Bom. 373; 11 C. W. N. 769.

[3] *Mohendrololl Mookerjee* v. *Rookiney Dabee* (1864), Coryton, 42.

[4] *Solukhna* (*Mussummaut*) v. *Ramdolal Pande* (1811), 1 Ben. Sel. R. 324 (new edition, 434).

[5] *Mohendrololl Mookerjee* v. *Rookiney Dabee* (1864), Coryton, 42. This, and other cases, which lay down the rule that powers of adoption are to be strictly construed are criticized in Sircar's "Law of Adoption," p. 235, where it is advocated that a liberal construction should be given to powers of adoption, see *Suryanarayana* v. *Venkataramana* (1903), 26 Mad. 681, at p. 684.

[6] *Chowdhry Pudum Singh* v. *Koer Oodey Singh* (1869), 12 M. I. A. 350, at p. 356; 12 W. R. (P. C.) 1, at p. 2, where their lordships say, "Of course such a power must be strictly pursued." (In the report of the same case in 2 B. L. R. (P. C.) 101, at p. 104, the words are reported as, "Of course such authority must be strictly proved.") See *Amrito Lal Dutt* v. *Surnomoye Dasi* (1900), 27 I. A. 128; 27 Calc. 996; 4 C. W. N. 549; *Mutsaddi Lal* v. *Kundan Lal* (1906), 33 I. A. 55; 28 All. 377.

If the strict exercise of the power would involve an invalid adoption, then no effect can be given to the power, as, for example, where the donor of the power directs the simultaneous adoption of more than one child,[1] or the adoption of a boy during the lifetime of a living son.[2]

Specification of boy.

Where the husband has specified the boy to be adopted, or the class out of which the child is to be adopted,[3] his direction must be followed. It is not settled whether if a specified boy be unavailable, another boy can be adopted.[4]

In Bombay an authority to adopt a specified child would not, at any rate in the case of that child being unavailable, prevent an adoption of another child, unless the husband has expressly forbidden the adoption of any other child.[5] In an old case[6] a similar rule was applied in Madras, but in a recent case[7] a different view was entertained. It is submitted that except in a case governed by the Maharashtra school of law, an authority to adopt a specified boy cannot be exercised with respect to any other boy. The above-named school permits an adoption by the widow without the express consent of her husband,[8] and will not imply a prohibition to adopt a boy other than the named boy.

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[1] *Surendra Keshav Roy* v. *Doorgasundari Dassee* (1892), 19 I. A. 108; 19 Calc. 513. See *Akhoy Chunder Bagchi* v. *Kalapahar Haji* (1885), 12 I. A. 198; 12 Calc. 406. S. C. in Court below, *Gyanendro Chunder Lahiri* v. *Kallapahar Hajee* (1882), 9 Calc. 50; 11 C. L. R. 297; *Choundawalee Bahoojee* (*Gosaeen Sree*) v. *Girdhareejee* (1868), 3 Agra, 226.

[2] In this case the adoption cannot be made even after the death of the living son. *Joychundro Race* v. *Bhyrobchundro Race*, Ben. S. D. A. 1849, p. 461; *Solukhna* (*Mussummaut*) v. *Ramdolal Pande* (1811), 1 Ben. Sel. R. 324 (new edition, 434).

[3] *Amirthayyan* v. *Ketharamayyan* (1890), 14 Mad. 65.

[4] *Mohendrololl Mookerjee* v. *Rookiney Dabee* (1864), Coryton, 42, at p. 46; *Amirthayyan* v. *Ketharamayyan* (1890), 14 Mad. 65. *Contrâ* opinion of Bengal pundits in *Veerapermall Pillay* v. *Narain Pillay* (1801), 1 Mad. N. C. 78, at p. 98.

[5] See *Lakshmibai* v. *Rajaji* (1897), 22 Bom. 996, approving of the following passage in West and Bühler, vol. ii. p. 965, "It is common for a husband authorizing an adoption to specify the child he wishes to be taken. Should that child die, or be refused by his parents, the authority would still be held, at least, in Bombay, to warrant the adoption of another child, unless, indeed, he had said 'such a child and no other.' The presumption is that he desired an adoption, and by specifying the object merely indicated a preference." See *Ramchandra Baji* v. *Bapu Khandu*, Bom. P. J. 1877, p. 42.

[6] *Veerapermall Pillay* v. *Narain Pillay* (1801), 1 Mad. N. C. 78.

[7] *Amirthayyan* v. *Ketharamayyan* (1890), 14 Mad. 65. See *Suryanarayana* v. *Venkataramana* (1903), 26 Mad. 681, at p. 685.

[8] *Post*, p. 126.

Where the adoption is otherwise valid, a discussion as to the motive of the widow for adopting is immaterial.[1] Motive of widow.

ADOPTION BY WIDOW.

There is a difference of opinion between the schools as to the power of a widow to adopt a son.

Origin of differences between schools.

The difference of doctrine of the several schools of law arises from the interpretations put by the schools upon a text of *Vasishta*.[2] As to this, the Judicial Committee said, in *Collector of Madura* v. *Moottoo Ramalinga Sathupathy*,[3] "All the schools accept as authoritative the text of *Vasishta*, which says, 'Nor let a woman give or accept a son unless with the assent of her lord.' But the *Mithila* school apparently takes this to mean that the assent of the husband must be given at the time of the adoption, and, therefore, that a widow cannot receive a son in adoption, according to the *Dattaka* form, at all. The Bengal school interprets the text as requiring an express permission given by the husband in his lifetime, but capable of taking effect after his death; whilst the *Muyookhu* and *Koosthubha* treatises which govern the *Mahratta* school explain the text away by saying that it applies only to an adoption made in the husband's lifetime, and is not to be taken to restrict the widow's power to do that which the general law prescribes as beneficial to her husband's soul. Thus, upon a careful review of all these writers, it appears that the difference relates rather to what shall be taken to constitute, in cases of necessity, evidence of authority from the husband, rather than to the authority to adopt being independent of the husband."

Bengal school.

Under the *Bengal* school of law a widow cannot adopt a son without the express permission of her husband.[4]

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[1] *Vellanki Venkata Krishna Row (Rajah)* v. *Venkata Rama Lakshmi Narsayya* (1876), 4 I. A. 1, at p. 14; 1 Mad. 174, at p. 190, 191; 26 W. R. C. R. 21, at p. 26; *Ramchandra Bhagavan* v. *Mulji Nanabhai* (1896), 22 Bom. 558. This was a decision of a full bench of the Bombay High Court. The following were previously reported decisions on the same question: *Bhimawa* v. *Sangawa* (1896), 22 Bom. 206; *Mahableswar Fondba* v. *Durgabai* (1896), 22 Bom. 199; *Vithoba* v. *Bapu* (1890), 15 Bom. 110; *Patel Vandravan Jekisan* v. *Patel Manilal Chunilal* (1890), 15 Bom. 565; *Rupchand Hindumal* v. *Rakhmabai* (1871), 8 Bom. H. C. A. C. 114; *Rakhmabai* v. *Radhabai* (1868), 5 Bom. H. C. A. C. 181.

[2] XV. 1–8; Colebrooke's "Digest," vol. iii. p. 242.

[3] (1868), 12 M. I. A. 397, at pp. 435, 436; 1 B. L. R. P. C. 1, at p. 12; 10 W. R. P. C. 17, at p. 21.

[4] *Solukhna (Mussummaut)* v. *Ramdolal Pande* (1811), 1 Ben. Sel. R. 324 (new edition, 434); *Tara Munee Dibia (Musst.)* v. *Devnarayun Rai* (1824), 3 Ben. Sel. R. 387 (new edition, 516); *Janki Dibeh* v. *Suda*

Benares school. The same rule applies under the *Benares* school of law.[1]

It applies even if the deceased husband was a member of a joint undivided family, and his rights had devolved by survivorship upon the other members of the family.[2]

Jains. Among the Jains, the right of a childless widow to adopt is generally co-extensive with the right which was possessed by her husband, and does not depend upon his authority, either express or implied.[3]

Such right, as being derogatory to the ordinary Hindu law, must be specially proved in each case. It has been affirmed in cases of members of the Saraogee, Agarwala sect from Meerut,[4] Aligarh,[5] and Arrah,[6] and in a case of the Oswal sect from Moorshedabad,[7] and also in an old case from Lower Bengal,[8] in which it does not appear to what sect the parties belonged. In a case in Madras,[9] it was held that the custom was not proved.

Dravida school. According to the *Dravida* school, a widow can adopt, either with her husband's express permission,[10] or, if there be no express or implied prohibition by him, with the assent of her husband's kindred.[11]

Sheo Rai (1807), 1 Ben. Sel. R. 197 (new edition, 262); *Kishenkant Goswamee* v. *Purmanund Goswamee* (1810), 2 W. Macn. 175.

[1] *Haimun Chull Sing* (*Raja*) v. *Ghunsheam Sing* (*Koomar*) (1834), 2 Knapp, 203; 5 W. R. P. C. 69. (The decision in this case was limited to the district of Etawah, but it has been accepted as declaratory of the law of the Benares school.) *Chowdhry Pudum Singh* v. *Koer Oodey Singh* (1869), 12 M. I. A. 350; 2 B. L. R. (P. C.) 101; 12 W. R. P. C. 1; *Tulshi Ram* v. *Behari Lal* (1889), 12 All. 328; *Shumshere Mull* (*Raja*) v. *Dilraj Konwur* (*Ranee*) (1816), 2 Ben. Sel. R. 169 (new edition, 216); *Jai Ram Dhami* v. *Musan Dhami* (1830), 5 Ben. Sel. R. 3. See *Parbhu Lal* (*Lala*) v. *Mylne* (1887), 14 Calc. 401, at pp. 415, 416.

[2] See G. C. Sircar's "Law of Adoption," p. 229.

[3] *Sheo Singh Rai* v. *Dakho* (*Mussumut*) (1878), 5 I. A. 87; 1 All. 688; 2 C. L. R. 193.

[4] *Ibid.*; *Manohar Lal* v. *Banarsi Das* (1907), 29 All. 495.

[5] *Lakhmi Chand* v. *Gatto Bai* (1886), 8 All. 319.

[6] *Harnabh Pershad* v. *Mandil Dass* (1899), 27 Calc. 379.

[7] *Manik Chand Golecha* v. *Jagat Settani Prankumari Bibi* (1889), 17 Calc. 518. It was also held in this case that the adoption of orthodox Hinduism does not affect the right.

[8] *Govindnath Ray* (*Maha Rajah*) v. *Gulal Chand* (1833), 5 Ben. Sel. R. 276 (new edition, 322).

[9] *Peria Ammani* v. *Krishnasami* (1892), 16 Mad. 182.

[10] *Vellanki Venkata Krishna Row* (*Rajah*) v. *Venkata Rama Lakshmi Narsayya* (1876), 4 I. A. 1, at p. 9; 1 Mad. 174, at p. 186; 26 W. R. C. R. 21, at pp. 22, 23; *Raghunadha* (*Sri*) v. *Brozokishoro* (*Sri*) (1876), 3 I. A. 154; 1 Mad. 69; 25 W. R. C. R. 291; *Arundadi Ammal* v. *Kuppammal* (1867), 3 Mad. H. C. 283.

[11] *Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (1868), 12 M. I. A. 397; 1 B. L. R. (P. C.) 1; 10 W. R. P. C. 17; *Raghunadha* (*Sri*) v. *Brozokishoro* (*Sri*) (1876), 3 I. A.

Prohibition by husband.

"Inasmuch as the authorities in favour of the widow's power to adopt with the assent of her husband's kinsman proceed in a great measure upon the assumption that his assent to this meritorious act is to be implied whenever he has not forbidden it, so the power cannot be inferred when a prohibition by the husband either has been directly expressed by him, or can be reasonably deduced from his disposition of his property, or the existence of a direct line competent to the full performance of religious duties, or from other circumstances of his family, which afford no plea for a supersession of heirs on the ground of religious obligation to adopt a son in order to complete or fulfil defective religious rights. . . . The same reasons which justify a presumption of authority to adopt in the absence of express permission are powerful to exclude a presumptive prohibition to adopt when on a new and unforeseen occasion the religious duty arises."[1]

Failure of disposition implying prohibition.

Power co-extensive with that of husband.

"In Madras it is established . . . that, unless there is some express prohibition by the husband, the widow's power, at least with concurrence of *sapindas* in cases where that is required, is co-extensive with that of the husband."[2]

The power to adopt with the assent of the husband's kinsmen applies to every case in which a widow might make an adoption under the express authority of her husband.[3]

Thus she can adopt on the death of a natural son,[4] and she can take successive sons in adoption on the death of sons previously adopted, either with the assent of her husband[5] or of his kinsmen.

Nambudri Brahmins.

Among the *Nambudri Brahmins* in *Malabar* in theory the widow's power is as under the *Dravida* school, but in its application the husband's authority is presumed, unless there is an express prohibition,

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154, at p. 191; 1 Mad. 69, at p. 81; 25 W. R. C. R. 291, at p. 302; *Vellanki Venkata Krishna Row* (*Rajah*) v. *Venkata Rama Lakshmi Narsayya* (1876), 4 I. A. 1; 1 Mad. 174; 26 W. R. C. R. 21; *Parasara Bhattar* v. *Rangaraja Bhattar* (1880), 2 Mad. 202; *Arundadi Ammal* v. *Kuppammal* (1867), 3 Mad. H. C. 283.

[1] *Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (1868), 12 M. I. A. 397, at pp. 443, 445; 1 B. L. R. (P. C.) 1, at pp. 17, 18, 19; 10 W. R. P. C. 17, at pp. 24, 25.

[2] *Gurulingaswami* (*Sri Balusu*) v. *Ramalakshmamma* (*Sri Balusu*) (1899), 26 I. A. 113, at p. 128; 22 Mad. 398, at p. 408; 3 C. W. N. 427, at pp. 436, 437.

[3] *Vellanki Venkata Krishna Row* (*Rajah*) v. *Venkata Rama Lakshmi Narsayya* (1876), 4 I. A. 1, at p. 10 1 Mad. 174, at p. 187; 26 W. R. C. R. 21, at p. 23.

[4] *Ibid.*

[5] *Parasara Bhattar* v. *Rangaraja Bhattar* (1880), 2 Mad. 202, at p. 205.

at any rate when the adopting widow is the surviving member of the *illam*.[1]

Consent of what kinsmen sufficient.

Joint family.

"Where the husband's family is . . . undivided, . . . the father of the husband, if alive, might, as the head of the family and the natural guardian of the widow, be competent by his sole assent to authorize an adoption by her."[2]

Where the father is not alive, it was said in the *Ramnad* case[3] that "the consent of all the brothers, who in default of adoption would take the husband's share, would probably be required, since it would be unjust to allow the widow to defeat their interest by introducing a new coparcener against their will," but an adoption with the consent of the manager of the joint family, who is acting *bonâ fide*, would apparently be upheld.[4]

In the latter case, and also probably in the case of a consent by the father, as head of the family, such due consideration of the propriety of the adoption would be necessary,[5] as is required in the case where the family is separate.[6]

"Even in the case of an undivided family, when a widow of a member thereof makes an adoption without the authority of her husband or the assent of her father-in-law, it cannot be taken to be the settled law that the assent of all the then surviving members of the coparcenary is absolutely necessary."[7] The consent of kinsmen is required on account of the incapacity of women to act

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[1] *Vasudevan* v. *Secretary of State* (1887), 11 Mad. 157, at p. 179. In this case the widow was the sole surviving member of the *illam*, so the question whether the consent of the other members was required did not arise (see p. 188).

[2] *Collector of Madura* v. *Mootoo Ramalinga Sathupathy* (1868), 12 M. I. A. 397, at pp. 441, 442; 1 B. L. R. (P. C.) 1, at p. 16; 10 W. R. P. C. 17, at p. 23.

[3] *Ibid.*

[4] See *Raghunada* (*Sri*) v. *Brozokishoro* (*Sri*) (1876), 3 I. A. 154, at p. 191; 1 Mad. 69, at p. 81; 25 W. R. C. R. 291, at p. 302; G. C. Sircar's "Law of Adoption," p. 259.

[5] See *Karunabdi Ganesa Ratnamaiyar* v. *Gopala Ratnamaiyar* (1880), 7 I. A. 173, at pp. 177, 178, 179; 2 Mad. 270, at pp. 279, 280, 281.

[6] *Post*, p. 123.

[7] See *Venkatakrishnamma* v. *Annapurnamma* (1899), 23 Mad. 486, at pp. 487, 488.

rather than to procure the consent of all whose interests will be defeated by the adoption.[1]

Where the joint family consists of several branches, it would seem to be sufficient to obtain the consent of the branch to which the husband belonged.[2]

It is clear that when the family is undivided the requisite authority cannot be sought for outside the family.[3]

Where the widow has taken by inheritance the separate estate of her husband, the consent of every kinsman, however remote, is not essential. The consent of the father-in-law would be sufficient.[4] If the father-in-law be dead, "there should be such proof of assent on the part of the *sapindas* as should be sufficient to support the inference that the adoption was made by the widow, not from capricious or corrupt motives, or in order to defeat the interest of this or that *sapinda*, but upon a fair consideration, by what may be called a family council, of the expediency of substituting an heir by adoption to the deceased husband."[5] Separate.

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[1] *Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (1868), 12 M. I. A. 397, at p. 442; 1 B. L. R. P. C. 1, at p. 17; 10 W. R. P. C. 17, at p. 23; *Narayanasami Naick* v. *Mangammal* (1905), 28 Mad. 315, at p. 319.

[2] G. C. Sircar's "Law of Adoption," p. 259.

[3] *Raghunada* (*Sri*) v. *Brozokishoro* (*Sri*) (1876), 3 I. A. 154, at p. 191; 1 Mad. 69, at p. 81; 25 W. R. C. R. 291, at p. 302, approving of *Ramaswami Iyen* v. *Bhagati Ammal* (1873), 8 Mad. Jur. 58, where it was held by the Sudr Court of Travancore that the assent of certain separate *dayadies* (kinsmen) of the deceased husband was not sufficient to validate an adoption by a widow to which the husband's undivided brother and the head of the undivided family had not assented.

[4] *Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (1868), 12 M. I. A. 397, at p. 442; 1 B. L. R. (P. C.) 1, at pp. 16, 17; 10 W. R. P. C. 17, at p. 23.

[5] *Vellanki Venkata Krishna Row* (*Rajah*) v. *Venkata Rama Lakshmi Narsayya* (1876), 4 I. A. 1, at p. 14; 1 Mad. 174, at pp. 190, 191; 26 W. R. C. R. 21, at pp. 25, 26, explaining *Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (1868), 12 M. I. A. 397, at pp. 442, 443; 1 B. L. R. (P. C.) 1, at p. 17; 10 W. R. P. C. 17, at p. 23. In the latter case the consent of a majority of the *sapindas* was held sufficient. See *Parasara Bhattar* v. *Rangaraja Bhattar* (1880), 2 Mad. 202, at p. 206. In that case the assent of some *sapindas* was held sufficient on its being shown that the consent of the others was refused from interested or improper motives, or without a fair exercise of discretion. See also *Venkatakrishnamma* v.

A widow should give to all the *sapindas* concerned an opportunity to advise her with regard to making an adoption, or against adopting a particular boy.[1]

The omission by the widow to ask the consent of one of two divided brothers of the deceased husband could not be justified by saying that it was known he would refuse. To consult him was essential to the widow's obtaining the mind of the kinsman on the question.[2]

Nature of consent.

The consent of the *sapindas* must be free, and given solely in the due exercise of the discretion confided to them by the law with a view to the selection of a suitable boy for adoption. Thus a consent given on an untrue representation that the widow had received the permission of her husband is of no effect.[3]

Gifts to procure assent.

"Though gifts to procure assent might be powerful evidence to show no adoption needed, they do not in themselves go to the root of the legality of an adoption."[4]

"There is nothing improper in a *sapinda* proposing to give his assent to a widow adopting his own son, if such son be the nearest *sapinda*, and refusing to give his assent to her adopting a stranger or more distant *sapinda*, if there be no reasonable objection to the adoption of his own son,"[5] or in his stipulating that his own share should not be reduced by the adoption.[6]

When the majority of the *sapindas* consent, it will be presumed that their assent was given on *bonâ fide* grounds.[7]

Annapurnamma (1899), 23 Mad. 486, where one *sapinda*, without giving any reason, refused to consent. As to the necessity for a consideration by the *sapindas*, see *Raghunadha (Sri)* v. *Brozokishoro (Sri)* (1876), 3 I. A. 154, at pp. 192, 193; 1 Mad. 69, at pp. 82, 83; 25 W. R. C. R. 291, at pp. 302, 303; *Karunabdhi Ganesa Ratnamaiyar* v. *Gopala Ratnamaiyar* (1880), 7 I. A. 173; 2 Mad. 270. In this case the family was joint. *Subrahmanyam* v. *Venkamma* (1903), 26 Mad. 627.

[1] *Subrahmanyam* v. *Venkamma* (1903), 26 Mad. 627.

[2] *Jonnalagadda Venkamma* v. *Jonnalagadda Subrahmaniam* (1906), 34 I. A. 22; 30 Mad. 50; 11 C. W. N. 345.

[3] *Raghunadha (Sri)* v. *Brozokishoro (Sri)* (1876), 3 I. A. 154, at p. 193; 1 Mad. 69, at p. 82; 25 W. R. C. R. 291, at pp. 302, 303; *Karunabdhi Ganesa Ratnamaiyar* v. *Gopala Ratnamaiyar* (1880), 7 I. A. 173; 2 Mad. 270; *Jonnalagadda Venkamma* v. *Jonnalagadda Subrahmaniam* (1906), 34 I. A. 22; 30 Mad. 50; 11 C. W. N. 345; S. C. in Court below, *Subrahmanyam* v. *Venkamma* (1903), 26 Mad. 627.

[4] *Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (1868), 12 M. I. A. 397, at p. 443; 1 B. L. R. (P. C.) 1, at p. 17; 10 W. R. P. C. 17, at p. 24.

[5] *Subrahmanyam* v. *Venkamma* (1903), 26 Mad. 627, at p. 837.

[6] *Srinivasa Ayyangar* v. *Rangasami Ayyangar* (1907), 30 Mad. 450.

[7] *Venkatakrishnamma* v. *Annapurnamma* (1899), 23 Mad. 486, at p. 488.

The assent must be to an adoption of a specified boy, and not to an adoption generally. It must be acted upon within a reasonable time,[1] and has no operation after the death of the person giving it.[2]

An adoption by the senior widow with the consent of the *sapindas* is valid without the consent of the junior widow.[3] Senior widow.

According to the *Maharashtra* school a widow can adopt either with her husband's express permission[4] or without such permission,[5] if the estate be vested in her[6] and there be no express[7] or implied[8] prohibition by him. Maharashtra school.

[1] See *Suryanarayana* v. *Venkataramana* (1903), 26 Mad. 681, at p. 685.

[2] See *Lakshmibai* v. *Vishnu Vasudev Bele* (1905), 29 Bom. 410.

[3] *Narayanasami Naick* v. *Mangammal* (1905), 28 Mad. 315. See *post*, p. 127. As to a joint adoption, see *ante*, p. 115.

[4] *Dinkar Sitaram Prabhu* v. *Ganesh Shivram Prabhu* (1879), 6 Bom. 505; G. C. Sircar's "Law of Adoption," p. 228.

[5] *Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (1868), 12 M. I. A. 397, at p. 436; 1 B. L. R. (P. C.) 1, at p. 12; 10 W. R. P. C. 17, at p. 21; *Gopal Balkrishna Kenjale* v. *Vishnu Raghunath Kenjale* (1898), 23 Bom. 250; *Ramchandra Bhagavan* v. *Mulji Nanabhai* (1896), 22 Bom. 558, at pp. 566, 568; *Amava* v. *Mahadgauda* (1896), 22 Bom. 416, at 418; *Gavdappa* v. *Girimallappa* (1894), 19 Bom. 331, at p. 337; *Vandravan Jekisan (Patel)* v. *Manilal Chunilal (Patel)* (1890), 15 Bom. 565; *Ramji* v. *Ghamau* (1879), 6 Bom. 498; *Rupchand Hindumal* v. *Rakhmabai* (1871), 8 Bom. H. C. (A. C.) 114; *Rakhmabai* v. *Radhabai* (1868), 5 Bom. H. C. (A. C.) 181, and earlier cases cited therein; "Mayukha," chap. iv. s. 5, paras. 17, 18.

[6] *Ramji* v. *Ghamau* (1879), 6 Bom. 498, at pp. 503, 504; *Dinkar Sitaram Prabhu* v. *Ganesh Shivram Prabhu* (1879), 6 Bom. 505.

[7] *Gopal Balkrishna Kenjale* v. *Vishnu Raghunath Kenjale* (1898), 23 Bom. 250, at p. 256; *Ramchandra Bhagavan* v. *Mulji Nanabhai* (1896), 22 Bom. 558, at p. 566; *Vandravan Jekisan (Patel)* v. *Manilal Chunilal (Patel)* (1890), 15 Bom. 565, at p. 574; *Bayabai* v. *Bala* (1866), 7 Bom. H. C. App. i.; *Rupchand Hindumal* v. *Rakhmabai* (1871), 8 Bom. H. C. (A. C.) 114.

[8] *Gopal Balkrishna Kenjale* v. *Vishnu Raghunath Kenjale* (1898), 23 Bom. 250, at p. 256. In *Vandravan Jekisan (Patel)* v. *Manilal Chunilal (Patel)* (1890), 15 Bom. 565, at p. 574, the Court treated an express prohibition as the only qualification to the power of the widow, but it is submitted that the observations of the Judicial Committee in the *Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (1868), 12 M. I. A. 397, at pp. 443, 445; 1 B. L. R. (P. C.) 1, at pp. 17, 18, 19; 10 W. R. P. C. 17, at pp. 24, 25, *ante*, p. 121, apply equally to a case governed by the *Maharashtra* school. In *Bayabai* v. *Bala* (1866), 7 Bom. H. C. App. i., at p. xx., the husband on his deathbed refused to take a son in adoption. This was held to prevent the widow adopting, and in *Dnyanoba* v. *Radhabai*, Bom. P. J. 1894, p. 22, where the husband had repudiated his wife

If the husband was undivided in estate[1] she cannot adopt without either his express permission[2] or the consent of his coparceners.[3]

Implied authority of husband.

Where she has no express authority, the widow derives her power from authority presumed to have been given to her by her husband.[4] Such authority is implied even when the husband was a minor at the time of his death.[5]

Adoption of only son.

It has been held that the husband's authority would not be presumed in the case of the adoption of an only son, an act which, although not illegal, was considered sinful,[6] but apparently that decision would not now be followed,[7] and it would be held that her authority is co-extensive with that of her husband.

Undivided family.

As under the Dravida school,[8] an assent given by her father-in-law,[9] as the head of the family, and as natural guardian of the widow, to an adoption in his lifetime,[10] would validate an adoption by the widow of a member of the undivided family. The rules as to the nature and

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on account of her misconduct, a prohibition was implied. *Lakshmappa* v. *Ramava* (1875), 12 Bom. H. C. 362.

[1] Whether or not the husband possessed separate property, see *Raghunadha* (*Sri*) v. *Brozokishoro* (*Sri*) (1876), 3 I. A. 154, at pp. 191, 192; 1 Mad. 69, at pp. 81, 82; 25 W. R. C. R. 291, at p. 302.

[2] *Bachoo Hurkisondas* v. *Mankorebai* (1907), 34 I. A. 107; 31 Bom. 373; 11 C. W. N. 769; S. C. in Court below, (1904) 29 Bom. 51.

[3] *Amava* v. *Mahadgauda* (1896), 22 Bom. 416, at p. 418; *Ramji* v. *Ghamau* (1879), 6 Bom. 498; *Dinkar Sitaram Prabhu* v. *Ganesh Shivram Prabhu* (1879), 6 Bom. 505.

[4] *Venkappa Bapu* v. *Jivaji Krishna* (1900), 25 Bom. 306, at p. 311; *Amava* v. *Mahadgauda* (1896), 22 Bom. 416, at p. 418; *Ramchandra Bhagavan* v. *Mulji Nanabhai* (1896), 22 Bom. 558, at p. 567; *Keshav Ramkrishna* v. *Govind Ganesh* (1884), 9 Bom. 94, at p. 97; *Lakshmappa* v. *Ramava* (1866), 12 Bom. H. C. 364; *Rakhmabai* v. *Radhabai* (1868), 5 Bom. H. C. (A. C.) 181, at p. 192. See, however, *Lakshmibai* v. *Saraswatibai* (1899), 23 Bom. 789, at p. 794, 795, 797, 798.

[5] *Vandravan Jekisan* (*Patel*) v. *Manilal Chunilal* (*Patel*) (1890), 15 Bom. 565.

[6] *Lakshmappa* v. *Ramava* (1875), 12 Bom. H. C. 364.

[7] See *Gurulingaswami* (*Sri Balusu*) v. *Ramalakshmamma* (*Balusu*) (1899), 26 I. A. 113, at p. 128; 22 Mad. 398, at p. 408; 3 C. W. N. 427, at p. 437, *post*, pp. 122, 123.

[8] *Ante*, pp. 122, 123.

[9] *Vithoba* v. *Bapu* (1890), 15 Bom. 110; *Gopal Balkrishna Kenjale* v. *Vishnu Raghunath Kenjale* (1898), 23 Bom. 250, at pp. 255, 256. See *Ramji* v. *Ghamau* (1879), 6 Bom. 498, at p. 505. The observations of the Judicial Committee in *Raghunadha* (*Sri*) v. *Brozokishoro* (*Sri*) (1876), 3 I. A. 154, at p. 191; 1 Mad. 69, at p. 81; 25 W. R. C. R. 291, at p. 302, seem applicable to the Maharashtra school as well as to the Dravida school.

[10] *Lakshmibai* v. *Vishnu Vasudev Bele* (1905), 29 Bom. 410.

sufficiency of the consent required for the adoption by a widow governed by the Dravida school[1] apparently apply to the case of adoption in an undivided family governed by the Maharashtra school of law.

Where more than one widow.

Where the family is divided, an elder widow can adopt without the consent of the junior widow;[2] but not so as to devest property which has vested in the younger widow as heir to a son.[3] The junior widow cannot adopt without the consent of the senior widow,[4] unless, perhaps, where the latter be incapacitated, as where she is leading an irregular life.[5]

A joint adoption by the widows seems possible.[6]

Mithila school

According to the *Mithila* school, a widow cannot under any circumstances adopt a son to her husband.[7] She can under that school adopt a son to herself in the *Kritima* form.[8]

Punjab.

In the Punjab the custom varies in different localities.[9]

Adoption by minor widow.

A minor[10] widow, acting under an express power given to her by her husband, can take in adoption,[11] provided, at

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[1] *Ante*, pp. 122, 123.

[2] *Rakhmabai* v. *Radhabai* (1886), 5 Bom. H. C. (A. C.) 181, at p. 192; *Ramji* v. *Ghamau* (1879), 6 Bom. 498, at p. 503.

[3] See *Lakshmibai* v. *Sarasvatibai* (1899), 23 Bom. 789, at p. 794; *Anandibai* v. *Kashibai* (1904), 28 Bom. 461, see *post*, p. 198.

[4] *Padajirav* v. *Ramrav* (1888), 13 Bom. 160.

[5] Steele, 187, 188.

[6] *Indar Kunwar* (*Maharani*) v. *Jaipal Kunwar* (*Maharani*) (1888), 15 I. A. 127, at pp. 144, 145; 15 Calc. 725, at pp. 746, 747. See *ante*, p. 115, note 9.

[7] "Dattaka Mimansa," s. 1, para. 16; "Vivada Chintamani" (Tagore's translation), pp. 74, 75; W. Macnaghten's "Hindu Law," vol. i. pp. 95, 100. See *Jairam Dhami* v. *Musan Dhami* (1830), 5 Ben. Sel. R. 3 (new edition, 3), but that was not a *Mithila* case, and therefore was not decided according to the *Mithila* law, although *Mithila* authorities were cited.

[8] *Post*, p. 159.

[9] Tupper's "Punjab Customary Law," vol. ii. pp. 154, 178, 205; vol. iii. pp. 78 *et seq.*, 87, 89, 90.

[10] *I.e.* who has not attained the age of majority according to Hindu law (*ante*, p. 41).

[11] *Mondakini Dasi* v. *Adinath Dey* (1890), 18 Calc. 69; *Haradhun Rai* v. *Biswanath Rai* (1815), W. Macnaghten's "Hindu Law," vol. ii. p. 180; Sircar's "Vyavastha Darpana," 2nd ed., p. 769. *Contrâ* G. C. Sircar's "Law of Adoption," p. 249. It is there suggested that an adoption by a minor widow is voidable, but it is submitted that, if it be otherwise unobjectionable, it cannot be avoided. The Hindu law does not seem to contemplate a voidable adoption.

any rate, she has attained sufficient maturity of understanding to comprehend the nature of the act.[1] The same rule would apparently also apply to an adoption under the Dravida school with the authority of the *sapindas*,[2] and to a case under the Maharashtra school, where similar authority had been given. It is apparently unsettled whether a minor widow can, in a case governed by the Maharashtra school, act upon the implied authority of her husband.[3]

When widow can adopt.

A widow cannot adopt unless she be the widow of the last full owner,[4] or the estate is vested in her as heir to her son, legitimate or adopted, who has died unmarried, or has left no child or widow surviving him,[5] or (it is submitted) if the circumstances be such that the estate will vest in the adopted son on his adoption.[6]

Competition between mother-in-law and daughter-in-law.

Before the decisions on which the above proposition is based were passed, Sastri G. C. Sircar said, in his "Law of Adoption," "If the

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[1] *Mondakini Dasi* v. *Adinath Dey* (1890), 18 Calc. 69, at p. 72. In this case the widow was 11 or 12 years of age, but, as the boy to be adopted had been designated by her husband, the discretion to be exercised by her was limited. It may be questioned whether in the absence of such limitation a girl of so tender an age would be competent to exercise sufficient discretion in the selection of a boy. See *ante*, p. 107.

[2] See Mayne's "Hindu Law," 7th ed., pp. 150, 151.

[3] Sircar's "Law of Adoption," p. 250.

[4] *Payapa Akkapa Patel* v. *Appanna* (1898), 23 Bom. 327, at p. 329; *Gopal Balkrishna Kenjale* v. *Vishnu Raghunath Kenjale* (1898), 23 Bom. 250; *Vasudeo Vishnu Manohar* v. *Ramchandra Vinayak Modak* (1896), 22 Bom. 551. See also cases, *post*, pp. 130, 131.

[5] *Vellanki Venkata Krishna Row* (*Rajah*) v. *Venkata Rama Lakshmi Narsayya* (1876), 4 I. A. 1; 1 Mad. 174; 26 W. R. C. R. 21; *Gavdappa* v. *Girimallappa* (1894), 19 Bom. 331; *Ravji Vinayakrav Jaggannath Shankarsett* v. *Lakshmibai* (1897), 11 Bom. 381, at p. 397. See *post*, pp. 130, 131.

[6] As was the case in *Deeno Moyee Dossee* (*Sreemutty*) v. *Doorga Pershad Mitter* (1865), 3 W. R. M. A. 6, where a Hindu, governed by the Bengal school of law, left his property to a boy to be adopted by the widow of his son, who had predeceased him. In this case the boy took under the will, but the Court treated the adoption as valid, and in *Deeno Moyee Dossee* (*Sreemutty*) v. *Tarachurn Koondoo Chowdhry* (1865), Bourke A. O. C. 48; 3 W. R. M. A. 7, note, which referred to the same adoption, the Court held that the widow took as heir of the son, so adopted, and thus upheld the adoption. There might also be the case of a woman taking as heir of her son's son.

ancestral estate is vested in the mother-in-law by reason of her son predeceasing his father, it would appear that both the mother-in-law and daughter-in-law are competent to adopt. What has been laid down is that the adoptive father's estate must be vested in the adopting widow, in order that an adoption made by her may be valid. If the daughter-in-law adopts first, then the mother-in-law cannot make an adoption during the life of the son adopted by the daughter-in-law, for the father-in-law cannot under that circumstance be considered as destitute of male issue, there being that grandson by adoption in existence. But if the mother-in-law adopts first, then the daughter-in-law cannot be precluded thereby from making an adoption for the spiritual benefit of her husband who would not be benefitted by his mother's adoption. This distinction would apply to all similar cases in all the schools." It is submitted that having regard to the above-mentioned decisions, the daughter-in-law cannot so adopt.

Time for exercise of power.

In the absence of express direction to the contrary,[1] a power of adoption, whether express or implied,[2] may be exercised at any time, provided it be not exhausted, or be at an end.[3]

Adoptions made twelve,[4] twenty-two,[5] twenty-five,[6] fifty-two,[7] and even seventy-one[8] years after the death of the adoptive father have been upheld.

Successive adoptions.

Except, perhaps, in Bengal, a power, which does not expressly or impliedly prohibit successive adoptions, is not exhausted by having been once exercised.[9]

According to the Bengal authorities, such permission is exhausted by having been once exercised.[10]

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[1] See *Mutsaddi Lal* v. *Kundan Lal* (1906), 33 I. A. 55; 28 All. 377.

[2] F. Macn. 157.

[3] *Post*, p. 130.

[4] Anon. (1814), 2 Morl. Dig. 18.

[5] *Bhasker Bachajee* v. *Narro Raghunath* (1826), Bom. Sel. R. 24.

[6] *Giriova* v. *Bhimaji Raghunath* (1884), 9 Bom. 58.

[7] *Brijbhookunjee Muharaj (Sree)* v. *Gokoolootsaojee Muharaj (Sree)* (1816), 1 Borr. 181 (edition of 1862, p. 217).

[8] *Raje Vyankatrav Anandrav Nimbalkar* v. *Jayavantrav* (1867), 4 Bom. H. C. (A. C.) 191.

[9] *Kannepalli Suryanarayana* v. *Pucha Venkata Ramana* (1906), 33 I. A. 145; 29 Mad. 382; 10 C. W. N. 921. S. C. in Court below, *Suryanarayana* v. *Venkataramana* (1903), 26 Mad. 681. See *Parasara Bhattar* v. *Rangaraja Bhattar* (1880), 2 Mad. 202; *Vellanki Venkata Krishna Row (Rajah)* v. *Venkata Rama Lakshmi Narsayya* (1876), 4 I. A. 1, at p. 10; 1 Mad. 174, at pp. 186, 187; 26 W. R. C. R. 21, at p. 23. An adoption cannot be made during the lifetime of the earlier adopted son, *ante*, p. 103.

[10] *Purmanund Bhuttacharuj* v. *Ooomakunt Lahoree* (1828), 4 Ben. Sel. R. 318 (new edition, 404); *Gournath Chowdhree* v. *Arnopoorna Chowdhrain*, Ben. S. D. A. 1852, p. 332; *Deeno Moyee Dossee (Sreemutty)*

In *Kannepalli Suryanarayana* v. *Pucha Venkata Ramana*,[1] the Judicial Committee in dealing with a Madras case, say that they are unable to attach much weight to *Gournath Chowdhree* v. *Arnopoorna Chowdrain*,[2] and also say, "The more liberal rule had been followed by the High Court of Bombay, as well as in Madras, and was not without support in Bengal (see *Surendra Nandan* v. *Sailaja Kant Das Mahapatra*,[3] and the *Ramnad* case[4])". It is therefore unlikely that, if a Bengal case on this subject were to come before the Judicial Committee, the Bengal authorities would be followed.

Termination of power.

A widow's power to adopt is at an end for all purposes as soon as the estate of her husband is vested in an heir[5] (other than herself[6]), of his natural or adopted[7] son, or of his son's son,[8] or son's son's son who has inherited to him,

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v. *Tarachurn Koondoo Chowdhry* (1865), 1 Bourke (A. O. C.) 48; 3 W. R. M. A. 7, note; *Mohendrololl Mookerjee* v. *Rookiney Dabee* (1864), Coryton, 42, at p. 46; F. Macn. 156, 179. Sir W. Macnaghten (vol. i. pp. 86–90) treats the point as disputed. He says that according to the doctrine of the "Dattaka Mimansa," the second adoption would clearly be illegal; but that Jagannatha holds that it would be valid, the object of the first being defeated.

[1] (1906), 33 I. A. 145; 29 Mad. 382; 10 C. W. N. 921.

[2] Ben. S. D. A. 1852, p. 332.

[3] (1891), 18 Calc. 385. In that case there had been permission to adopt three sons in succession.

[4] *Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (1868), 12 M. I. A. 397, at p. 443; 1 B. L. R. P. C. 1, at pp. 17, 18; 10 W. R. (P. C.) 17, at p. 24. This was a Madras case.

[5] In *Ramkrishna Ramchandra* v. *Shamrao Yeshwant* (1902), 26 Bom. 526, the son had left a son, and in *Annammah* v. *Mabbu Bali Reddy* (1875), 8 Mad. H. C. 108, he had left an adopted son. In the following cases the son had left a widow: *Bhoobun Moyee Debia* (*Mussumat*) v. *Ram Kishore Acharj Chowdhry* (1865), 10 M. I. A. 279, at p. 310; 3 W. R. P. C. 15, at p. 18; *Pudma Coomari Debi* v. *Court of Wards* (1881), 8 I. A. 229, at p. 245; 8 Calc. 302, at p. 309; *Tarachurn Chatterji* v. *Suresh Chunder Mookerji* (1889), 16 I. A. 166; 17 Calc. 122; *Thayammal* v. *Venkatarama Aiyan* (1887), 14 I. A. 67, at pp. 70, 71; 10 Mad. 205, at p. 209; *Amava* v. *Mahadgauda* (1896), 22 Bom. 416; *Keshav Ram Krishna* v. *Govind Ganesh* (1884), 9 Bom. 94; *Manikyamala Bose* v. *Nanda Kumar Bose* (1906), 33 Calc. 1306; 11 C. W. N. 12.

[6] *Vellanki Venkata Krishna Row* (*Rajah*) v. *Venkata Rama Lakshmi Narsayya* (1876), 4 I. A. 1; 1 Mad. 174; 26 W. R. C. R. 21; *Venkappa Bapu* v. *Jivaji Krishna* (1900), 25 Bom. 306, at p. 310; *Gavdappa* v. *Girimallappa* (1894), 19 Bom. 331. See *Payapa Akkapa Patel* v. *Appanna* (1898), 23 Bom. 327, and cases *post*, p. 197, note 5.

[7] See *Bhoobun Moyee Debia* (*Mussumat*) v. *Ram Kishore Acharj Chowdhry* (1865), 10 M. I. A. 279, at p. 310; 3 W. R. P. C. 15, at p. 18; *Manik Chand Golecha* v. *Jagat Settani Prankumari Bibi* (1889), 17 Calc. 517.

[8] In *Faizuddin Ali Khan* v. *Tincowri Saha* (1895), 22 Calc. 565, the son was succeeded by his mother, and in *Drobomoyee Chowdhrain* v. *Shama*

and is not revived by the death of such heir, even when on such death she herself succeeds to the property which was of her husband, and therefore by adopting, devests no estate but her own.[1]

This rule applies, whether there be an express power given by the husband, or such power be implied,[2] as in the Maharashtra school, or the power be exerciseable with the consent of the *sapindas*.[3]

Jains.

It is unsettled whether this rule applies in its entirety to an adoption by a Jain widow, who can adopt without the consent of her husband.[4] It has been so applied in Bombay,[5] but in Calcutta it has been held[6] that a Jain widow in whom the estate was vested can adopt, although her husband's adopted son has died leaving a son as his heir. Although the decision rested on the distinction between the power of a Jain widow and that of the widow of an ordinary Hindu, the Court seems to have acted on the view of the decision in *Bhoobunmoyee's* case,[7] which was accepted by the Calcutta High Court in *Puddo Kumaree Debee* v. *Juggut Kishore Acharjee*,[8] but which was not accepted by the Judicial Committee in the appeal from that decision.[9]

Death of son after attainment of ceremonial capacity.

It has been attempted to extend the rule to the case where the son, although he has left no heir, other than the adopting mother, had attained to full age and

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Churn Chowdhry (1885), 12 Calc. 246, by his grandmother. *Gavdappa* v. *Girimallappa* (1894), 19 Bom. 331.

[1] *Pudma Coomari Debi* v. *Court of Wards* (1881), 8 I. A. 229; 8 Calc. 302, reversing *Puddo Kumaree Debee* v. *Juggut Kishore Acharjee* (1879), 5 Calc. 615. (This case also had the effect of overruling *Bykant Monee Roy* v. *Kistosoonderee Roy* (1867), 7 W. R. 392.) *Thayammal* v. *Venkatarama Aiyan* (1887), 14 I. A. 67, at pp. 70, 71; 10 Mad. 205, at p. 209; *Ramkrishna Ramchandra* v. *Shamrao Yeshwant* (1902), 26 Bom. 526; *Gavdappa* v. *Girimallappa* (1894), 19 Bom. 331, at p. 337; *Krishnarav Trimbak Hasabnis* v. *Shankarrav Vinayak Hasabnis* (1892), 17 Bom. 164.

[2] *Amava* v. *Mahadgauda* (1896), 22 Bom. 416; *Keshav Ram Krishna* v. *Govind Ganesh* (1884), 9 Bom. 94; *Ramchandra* v. *Shamrao* (1902), 26 Bom. 526, at p. 528. See *Anandibai* v. *Kashibai* (1904), 28 Bom. 461.

[3] *Thayammal* v. *Venkatarama Aiyan* (1887), 14 I. A. 67; 10 Mad. 205.

[4] *Ante*, p. 120.

[5] *Amava* v. *Mahadgauda* (1896), 22 Bom. 416.

[6] *Manik Chand Golecha* v. *Jagat Settani Pran Kumari Bibi* (1889), 17 Calc. 518, at pp. 537, 538.

[7] *Bhoobun Moyee Debia* (*Mussumat*) v. *Ram Kishore Acharj Chowdhry* (1865), 10 M. I. A. 277, at p. 310; 3 W. R. P. C. 15, at p. 18.

[8] (1879), 5 Calc. 615.

[9] *Pudma Coomari Debi* v. *Court of Wards* (1881), 8 I. A. 229; 8 Calc. 302.

complete ceremonial capacity,[1] or had been married,[2] but this extension has not been recognized.[3]

Surrender of estate.

It may be a question whether the power to adopt would not be at an end when the widow has devested herself of the estate by surrender, or authorized alienation.[4]

Joint family.

It is submitted that in the case of a joint family governed by the Mitakshara law, the power of a widow to adopt extends until partition.[5]

Remarriage.

A widow by remarriage loses her power to take in adoption.[6]

Unchaste widow.

It is unsettled whether an unchaste widow can adopt.

In *Sayamalal Dutt* v. *Saudamini Dasi*,[7] Norman, J., held that an unchaste widow, who was pregnant by the man with whom she was living in a state of concubinage, and who had not performed any expiation, could not take in adoption. This decision was based upon the alleged necessity for the performance of religious ceremonies, but, as the parties were Sudras, it is clear [8] that no religious ceremonies were necessary, and it is therefore doubtful whether this decision can be viewed as an authority. Where religious ceremonies are unnecessary (and it is by no means clear that in any case religious ceremonies are requisite in the case of adoption by a widow [9]), there seems to be no other authority prohibiting adoption by an unchaste widow. If she be not actually pregnant, she can remove the bar, if it be one, by expiation.[10]

As a widow adopts, not for her own benefit, but for that of her deceased husband, it may seem hard that her want of chastity should deprive him of the benefits which, according to Hindu ideas, accrue to him from an adoption.

Ceremonial impurity.

The question whether a widow, who is in a state of ceremonial impurity from the death or birth of a relation, and who has not performed the necessary expiation, is

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[1] See *Ram Soondur Singh* v. *Surbanee Dossee* (1874), 22 W. R. C. R. 121; *Gavdappa* v. *Girimallappa* (1894), 19 Bom. 331, at p. 337; *Amava* v. *Mahadgauda* (1896), 22 Bom. 416, at p. 421; *Verabhai Ajubhai* v. *Hiraba* (*Bai*) (1903), 30 I. A. 234; 27 Bom. 492; 7 C. W. N. 716.

[2] *Venkappa Bapu* v. *Jivaji Krishna* (1900), 25 Bom. 306, see p. 311.

[3] Cases in notes 1 and 2 above.

[4] See Sircar's "Law of Adoption," p. 416.

[5] See Sircar's "Law of Adoption," pp. 253, 254.

[6] West and Bühler, p. 999, referred to in *Panchappa* v. *Sanganbasawa* (1899), 24 Bom. 89, at p. 94; Sircar's "Law of Adoption," p. 251.

[7] (1870), 5 B. L. R. 362.

[8] *Post*, p. 153.

[9] *Post*, p. 155.

[10] See *Thukoo Baee Bhide* v. *Ruma Baee Bhide* (1824), 2 Borr. 446, at p. 456.

competent to adopt, is apparently the same as the question whether a man can under such circumstances adopt.[1]

If she can, as apparently she can, depute a relation to perform such ceremonies, if any, as may be necessary,[2] there can be no objection to an adoption by her. There is, moreover, a question whether any religious ceremonies are necessary in the case of an adoption by a widow.[3] If none are necessary, her ceremonial impurity cannot affect the adoption.

Adoption only valid if husband could have adopted.

A widow's power of adoption cannot be exercised unless the circumstances are such as would have justified an adoption by her husband, if alive.

Thus she could not adopt a boy whom her husband could not have adopted, and she cannot adopt so long as a son, son's son, son's son of her husband be in existence.[4] During that time her power of adoption is in suspense.[5]

"It follows on principle that a man cannot delegate to others, to be exercised after his death, any greater power than he himself possessed in his lifetime."[6]

No obligation to adopt.

A widow is under no legal obligation to exercise a power of adoption.[7] An express direction by the husband cannot be enforced,[8] even if he directed the adoption of a

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[1] *Ante*, p. 111. See *Ranganayakamma* v. *Alwar Setti* (1889), 13 Mad. 214; *Ravji Vinayakrav Jagannath Shankarsett* v. *Lakshmibai* (1887), 11 Bom. 381, at p. 395.

[2] See *Lakshmibai* v. *Ramchandra* (1896), 22 Bom. 590; *Vijiarangam* v. *Lakshuman* (1871), 8 Bom. H. C. (O. C.) 244; Sircar's "Law of Adoption," p. 213.

[3] *Post*, p. 155.

[4] *Gopeelall* v. *Chundraolee Buhoojee* (*Mussamut Sree*) (1872), I. A. Sup. Vol. 131; 11 B. L. R. 391; 19 W. R. C. R. 12.

[5] *Gavdappa* v. *Girimallappa* (1894), 19 Bom. 331, at p. 337.

[6] *Gopeelall* v. *Chundraolee Buhoojee* (*Mussamut Sree*) (1872), I. A. Sup. Vol. 131, at p. 133; 11 B. L. R. 391, at p. 394, 19 W. R. C. R. 12, at p. 13.

[7] *Bamundoss Mookerjea* v. *Tarinee* (*Mussamut*) (1858), 7 M. I. A. 169, at p. 190; *Mutsaddi Lal* v. *Kundan Lal* (1906), 33 I. A. 55; 28 All. 377; *Uma Sunduri Dabee* v. *Sourobinee Dabee* (1881), 7 Calc. 288; 9 C. L. R. 83; *Pearee Dayee* (*Mussamut*) v. *Hurbunsee Kooer* (*Mussamut*) (1873), 19 W. R. C. R. 127; *Deeno Moyee Dossee* (*Sreemutty*) v. *Doorga Pershad Mitter* (1865), 3 W. R. M. A. 6, at p. 7; *Dino Moyee Chowdhrain* v. *Rehling* (1865), 2 W. R. M. A. 25; *Rajcoomaree* (*Sreemutty*) v. *Nobocoomar Mullick* (1856), 1 Boul. 137; Sev. 641, note; *Dyamoyee Chowdhrain* v. *Rasbeharee Singh*, Ben. S. D. A. 1852, 1001, at p. 1013. See *Shamavahoo* v. *Dwarkudas Vasanji* (1878), 12 Bom. 202.

[8] See *Uma Sunduri Dabee* v. *Sourobinee Dabee* (1881), 7 Calc. 288; 9 C. L. R. 83; *Dino Moyee Chowdhrain* v. *Rehling* (1865), 2 W. R. M. A. 25.

particular boy.[1] The widow does not, by the non-exercise of the power, forfeit any of her rights as widow,[2] or mother.[3]

In a case where the husband has power to deal with property by will there is nothing apparently to prevent him from enforcing the exercise of a power of adoption by a gift over of his property to some one other than the widow, in the event of the power not being exercised within a specified time.

Until she actually adopts, a widow can exercise no rights on behalf of the boy, the adoption of whom she is contemplating.[4]

Agreement not to adopt.

It is unsettled whether a covenant by a widow not to adopt is valid.[5]

Such question might depend upon the nature of the power (if any).[6]

It is submitted that she could not be restrained from exercising a power, which is given to her, not for her own benefit, but for that of her husband.

CAPACITY TO GIVE IN ADOPTION.

Father.

The natural father[7] can give in adoption where there is no dissent by the mother, and, even in case of such dissent, the weight of authority is in favour of the father's power to give his son in adoption.

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[1] See *Prasannamayi Dasi* v. *Kadambini Dasi* (1868), 3 B. L. R. O. C. 85. This question was suggested, but not decided, in *Bamundoss Mookerjea* v. *Tarinee* (*Mussamut*) (1858), 7 M. I. A. 169, at p. 190, and in *Shamavahoo* v. *Dwarkadas Vasanji* (1878), 12 Bom. 202, at p. 215.

[2] *Bamundoss Mookerjea* v. *Tarinee* (*Mussamut*) (1858), 7 M. I. A. 169, at p. 190; *Raman Ammal* v. *Subban Annavi* (1865), 2 Mad. H. C. 399; *Uma Sunduri Dabee* v. *Sourobinee Dabee* (1881), 7 Calc. 288; 9 C. L. R. 83; *Lakshmana Rau* v. *Lakshmi Ammal* (1881), 4 Mad. 160; *Prasannamayi Dasi* v. *Kadambini Dasi* (1868), 3 B. L. R. O. C. 85; *Deeno Moyee Dossee* (*Sreemutty*) v. *Doorga Pershad Mitter* (1865), 3 W. R. M. A 6, at p. 7; *Deeno Moyee Dossee* (*Sreemutty*) v. *Tarachurn Koondoo Chowdhry* (1865), Bourke, A. O. C. 48; 3 W. R. M. A. 7, note; *Dino Moyee Chowdhrain* v. *Rehling* (1865), 2 W. R. M. A. 25.

[3] *Deeno Moyee Dossee* (*Sreemutty*) v. *Tarachund Koondoo Chowdhry* (1865), Bourke, A. O. C. 48; 3 W. R. M. A., 7 note.

[4] *Subudra Chowdrayn* (*Mussamaut*) v. *Goluknath Chowdhry* (1843), 7 Ben. Sel. R. 143 (new edition, 166).

[5] In *Assur Purshotam* v. *Ratanbai* (1888), 13 Bom. 56, the Court refused to issue an *ad interim* injunction restraining the widow from adopting.

[6] See Mayne's "Hindu Law," 7th ed., p. 153.

[7] An adoptive father cannot give in adoption. See *post*, p. 149.

In *Narayanasami* v. *Kuppusami* (1887), 11 Mad. 43, at p. 47, it is said, "Where there is a competition between the father and mother, the former has a predominant interest or a potential voice."

Mr. Mayne says,[1] "It is quite settled that the father alone has absolute authority to dispose of his son in adoption, even without the consent of his wife, though her consent is generally sought and obtained." He cites two cases. In one (*Alank Manjari* v. *Fakir Chand Sarkar* (1834), 5 Ben. Sel. R. 356 (new edition, 418)), the question was as to the adoptive mother's consent, which is a different question from the present one. In the other (*Chitko Raghunath Rajadiksh* v. *Janaki* (1874), 11 Bom. H. C. 199), the question did not arise, but (at p. 202) the Court says, "In the eye of Hindu law, when a man gives his son in adoption, he would seem to exercise a power, more like the power of an absolute proprietor than of a guardian."

Sastri G. C. Sircar[2] contends that the abolition of slavery has impliedly destroyed a Hindu father's absolute dominion over his son, and concludes, "The proper view to take, therefore, seems to be that the father alone is incompetent to give when the mother is opposed to it, and that such gift is not void, but voidable only at the instance of the mother."

Nanda Pandita[3] contends that unless the mother consents, the adoption does not affect the boy's relationship to his maternal relations. It is scarcely likely that this view would now be taken by the Courts.

Mother.

A mother can, during the father's lifetime, with his consent, give her son in adoption.[4]

On the death of the father, or on his being permanently absent from home, or on his entering a religious order, or losing his reason, or otherwise becoming incapable of giving his consent, a mother can give her son in

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[1] "Hindu Law," 7th ed., p. 169. Strange ("Hindu Law," vol. i. p. 81) says, "As in adopting, so in giving in adoption, though the concurrence of parents is desirable, the husband appears, by the weight of authority, to be independent of the wife, the father of the mother." See "Dattaka Mimansa," s. 4, paras. 10, 11, 13–15, 17 (see also s. 1, paras. 15, 16); s. 5, para. 14, and note, and s. 6, paras. 50, 51; "Mitakshara," chap. i. s. 11, para. 9; Colebrooke's "Digest," vol. iii. pp. 244, 254, 257, 261; "Viramitrodaya," chap. ii. part ii. s. 8 (G. C. Sircar's translation), p. 115; "Dattaka Chandrika," s. 1, paras. 31, 32. *Contrâ*, see "Mitakshara," chap. i. s. 11, para. 9, note; Sutherland's "Synopsis," note 9 (p. 224); "Vyavahara Mayukha" (Mandlik's edition), p. 50.

[2] G. C. Sircar's "Law of Adoption," pp. 274, 275.

[3] "Dattaka Mimansa," vi. 50, 51. See *post*, p. 185.

[4] *Lallubhai Bapubhai* v. *Mankuvarbhai* (1876), 2 Bom. 388, at pp. 404, 405; G. C. Sircar's "Law of Adoption," p. 276.

adoption,[1] provided that the father has neither expressly nor impliedly prohibited her from so doing.[2]

Circumstances of parent immaterial.

The power to give in adoption is not limited to a season of distress, nor is it affected by the possession of means by the giver.[3]

No one else can give.

Under no circumstances can any one other than the father or mother give a boy in adoption.[4]

A stepmother,[5] a brother,[6] and a paternal grandfather,[7] have no power to give in adoption.

Delegation of right.

Delegation of act of giving.

The power to give a son in adoption cannot be delegated to any person;[8] but a father or mother may

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[1] *Jogesh Chandra Banerjee* v. *Nrityakali Debi* (1903), 30 Calc. 965. S. C. *sub. nom. Jogesh Chunder Bandopadhya* v. *Jonabali Bepari*, 7 C. W. N. 871; *Rangubai* v. *Bhagirthibai* (1877), 2 Bom. 377, at p. 380; *Mhalsabai* v. *Vithoba Khandappa Gulve* (1862), 7 Bom. H. C. App. xxvi.; *Hurra Soondree Dassee* v. *Chundermoney Dassee*, Sev. 938; *Arnachellum Pillay* v. *Iyasawmy Pillay* (1817), 1 Mad. Sel. Dec. 154; 1 Norton, L. C. 90. (In that case the kinsmen assented, but such assent was not considered necessary in *Narayanasami* v. *Kuppusami* (1887), 11 Mad. 43, at p. 47, or in *Gurulingaswami* v. *Ramalakshmamma* (1894), 18 Mad. 53, at p. 58). "Mitakshara," chap. i. s. 11, para. 9. See "Manu," chap. ix. para. 168.

[2] *Rangubai* v. *Bhagirthibai* (1877), 2 Bom. 377; *Narayanasami* v. *Kuppusami* (1886), 11 Mad. 43, at pp. 47, 48. See *Tarini Charan Chowdhry* v. *Saroda Sundari Dasi* (1869), 3 B. L. R. A. C. 145, at p. 160; 11 W. R. C. R. 468, at p. 476; *Gurulingaswami* (*Sri Balusu*) v. *Ramalakshmamma* (*Balusu*) (1899), 26 I. A. 113, at p. 128; 22 Mad. 398, at p. 408; 3 C. W. N. 427, at pp. 436, 437. See S. C. in Court below, *Gurulingaswami* v. *Ramalakshmamma* (1894), 18 Mad. 53 at pp. 58, 59. Sir G. D. Banerjee ("Law of Marriage," 2nd ed., p. 167) says that except in Southern India a mother can only give in adoption with the consent of her husband, and relies on "Manu," chap. ix. para. 168, "Dattaka Mimansa," s. 1, para. 15, and "Dattaka Chandrika," s. 1, para. 31. See, however, "Dattaka Chandrika," s. 1, para. 32.

[3] The precepts prohibiting a gift except in time of distress are not rules of law. See "Manu," chap. ix. para. 168; "Dattaka Mimansa," s. 4, paras. 19, 20; "Mitakshara," chap. i. s. 11, para. 10.

[4] See "Vasistha," xv. ss. 2, 5; Colebrooke's "Digest," vol. iii. p. 242; "Manu," chap. ix. para. 168; *Lakshmappa* v. *Ramava* (1875), 12 Bom. H. C. 362, at p. 376.

[5] *Papamma* v. *V. Appa Rau* (1893), 16 Mad. 384.

[6] *Tara Munee Dibia* (*Mussummaut*) v. *Dev Narayun Rai* (1824), 3 Ben. Sel. R. 387 (2nd edition, 516); *Moothoosawmy Naidu* v. *Lutchmydavummah*, Mad. Dec. 1852, p. 96; Norton L. C. i. 66 (differing from *Veerapermall Pillay* v. *Narain Pillay* (1801), 1 Mad. N. C. 78, at p. 109); "Vyavastha Darpana," 825.

[7] *Collector of Surat* v. *Dhirsingji Vaghbaji* (1873), 10 Bom. H. C. 235. See *Kenchawa* v. *Ningupa* (1867), 10 Bom. H. C. 265, note.

[8] *Bhagvandas Tejmal* v. *Rajmal* (1873), 10 Bom. H. C. 241; *Bashettiappa* v. *Shivlingappa* (1873), 10 Bom. H. C. 268.

authorize another person to perform the physical act of giving a son in adoption to a named person.[1]

Gift of son by minor.

It is not settled whether a minor father or mother can give his or her son in adoption.

The Hindu law books do not expressly prohibit a minor from giving a son in adoption.[2] This is probably for the reason that the event would be unlikely to occur. The question apparently stands upon the same footing as the capacity to take in adoption,[3] and, at any rate, a father who has not attained the age of discretion[4] would apparently be incompetent to give his son in adoption. As a Hindu minor[5] cannot make a will, and apparently cannot appoint a testamentary guardian, it would seem unlikely that he would have power to dispose of a child, in respect of whose custody after his death he could make no provision.

There seems no reason why an adult father could not give to his minor widow power to dispose of his son in adoption.

Abandonment of Hinduism.

It has been held that a Hindu father, at any rate if he is not a Brahmin, does not lose his capacity to give his son in adoption by reason of his conversion to Mahomedanism.[6]

In this case the child had remained a Hindu. If the child had also become a Mahomedan, the Hindu law of adoption would have been inapplicable. In spite of the above decision, there is a question whether a father, who has by his conversion adopted a system of law which does not recognize the adoption of sons, can retain a portion of the system which he has repudiated.[7] Act XXI. of 1850 merely destroys the effect of any law or usage which inflicts a forfeiture of rights or property upon persons changing their religion. In this case the forfeiture, if it can be so described, does not arise from any law or usage. There is, it is submitted, an abandonment of a right, by virtue of the voluntary assumption of other rights which are inconsistent with such rights. The above decision is based upon authorities which deal with the right of custody, which

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[1] *Shamsing* v. *Santabai* (1901), 25 Bom. 551; *Jamnabai* v. *Raychand Nahalchand* (1883), 7 Bom. 225; *Vijiarangam* v. *Lakshuman* (1871), 8 Bom. H. C. O. C. 244, at p. 257.

[2] G. C. Sircar's "Law of Adoption," 1888, p. 371.

[3] *Ante*, pp. 107, 108.

[4] *Ante*, p. 107.

[5] That is, a minor within the meaning of the Indian Majority Act (IX. of 1875).

[6] *Shamsing* v. *Santabai* (1901), 25 Bom. 551.

[7] See *Jowala Buksh* v. *Dharum Singh* (1866), 10 M. I. A. 511, at p. 537; *Abraham* v. *Abraham* (1863), 9 M. I. A. 199, at p. 243; 1 W. R. P. C. 1, at p. 5.

was a right known both to the system abandoned, and to the system adopted.

A father, who becomes a Brahmo, does not lose his right to give his son in adoption.[1]

Remarriage of widow.

A widow by remarriage loses her power to give her son in adoption, even when she belongs to a caste in which remarriage is customary.[2]

Where the father has expressly authorized his widow to give in adoption, remarriage would not necessarily have the same effect,[3] and apparently it would not affect the authority, where the parties belong to a caste in which remarriage is customary.

WHO MAY BE TAKEN IN ADOPTION.

Identity of class.

The boy must belong to the same primary caste[4] as that of his adoptive father.[5]

For instance, a Brahmin cannot adopt a Kshatriya or a Sudra.

The reason for this rule is that the adoptive father could not have married the natural mother, when a virgin, as she belonged to a different class.[6]

There seems to be nothing to prevent an adoption of a boy belonging to a different subdivision of the Sudra class,[7] as the weight of authority is in favour of the legality of a marriage between persons belonging to different subdivisions of that class.[8]

No preferential right.

No boy has a preferential or any right to be adopted, and there is nothing to prevent the adoption of a stranger, even though there be a near relation qualified for adoption.

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[1] *Kusum Kumari Roy* v. *Satyaranjan Das* (1903), 30 Calc. 999; 7 C. W. N. 784.

[2] *Panchappa* v. *Sanganbasawa* (1899), 24 Bom. 89.

[3] *Ibid.*, at p. 91.

[4] *Ante*, p. 17.

[5] See Mayne's "Hindu Law," 7th ed., pp. 177, 178; "Manu," chap. ix. para. 168; "Mitakshara," chap. i. s. 11, para. 9; "Vyavahara Mayukha," chap. v. s. 5, para. 4; "Dattaka Mimansa," s. 2, paras. 22, 23–25; "Dattaka Chandrika," s. 1, paras. 12–16. See G. C. Sircar's "Law of Adoption," pp. 165, 357, 358.

[6] See *post*, p. 139.

[7] Decision of the Calcutta High Court in Regular Appeals, 274, and 322 of 1886, referred to in G. C. Sircar's "Law of Adoption," p. 165; see also pp. 357, 358, of the same work. See, however, Sutherand's "Synopsis," head. 2, para. 1; "Dattaka Mimansa," s. 2, paras. 35, 74–78, s. 3, paras. 1–3.

[8] *Ante*, p. 33.

The texts which prescribe the preferential adoption of a *sapinda* have not the force of law.[1]

Among the three twice-born classes, no one whose mother, when she was a virgin,[2] the adoptive father (or the husband of a widow taking a boy in adoption), was by reason of propinquity barred from legally marrying, can be adopted.[3]

Relationship of adoptive father to natural mother.

This rule in its present form was first enunciated by Mr. Sutherland in his "Synopsis."[4] He deduced this rule from a rule which had reference to the obsolete practice of *niyoga*, which, when used in this sense, means the appointment of a kinsman to raise up issue by the wife of a childless husband, or of one deceased without leaving children.[5]

A text of Saunaka[6] requires the boy adopted to bear "the reflection of a son." Nanda Pundita[7] in construing this text, held that the resemblance must consist in "the capability to have sprung from (the adopter) himself, through an appointment (to raise up issue on another's wife), and so forth,[8] as (in the case) of the son, of a brother, a near or distant kinsman, and so forth."

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[1] *Uma Deyi (Srimati)* v. *Gokoolanund Das Mahapatra* (1878), 5 I. A. 40; 3 Calc. 587; 2 C. L. R. 51. S. C. in Court below, *Gocoolanund Das* v. *Wooma Daee* (1875), 15 B. L. R. 405; 23 W. R. C. R. 340; *Dharma Dagu* v. *Ramkrishna Chimnaji* (1885), 10 Bom. 80; *Babaji Jivaji* v. *Bhagirthibai* (1869), 6 Bom. H. C. A. C. 70.

[2] See *Sriramulu* v. *Ramayya* (1881), 3 Mad. 15.

[3] *Minakshi* v. *Ramanada* (1887), 11 Mad. 49. (In this case the prohibition was laid down as a general rule of Hindu law without reference to any distinction between the twice-born classes and Sudras, but the judgment is based upon considerations inapplicable to Sudras.) *Gopal Narhar Safray* v. *Hanmant Ganesh Safray* (1879), 3 Bom. 273; *Bhagirthibai* v. *Radhabai* (1879), 3 Bom. 298; *Jivani Bhai* v. *Jivu Bhai* (1865), 2 Mad. H. C. 462. See also judgment of Banerjee, J., in *Bhagwan Singh* v. *Bhagwan Singh* (1895), 17 All. 294; *Haran Chunder Banerji* v. *Hurro Mohun Chuckerbutty* (1880), 6 Calc. 41, at p. 47; 6 C. L. R. 393, at p. 398; *Vyas Chimanlal* v. *Vyas Ramchandra* (1899), 24 Bom. 473.

[4] Stokes' "Hindu Law Books," p. 664. As to the rules of exclusion by reason of propinquity in the case of marriage, see *ante*, pp. 34–38. Where the adopting father has himself been removed from his natural family by marriage this rule would debar him from adopting the son of a woman whom he could not have married before being so removed, and also the son of one whom he could not have married after having been so removed. See Mad. Dec. of 1858, p. 117.

[5] Wilson's "Glossary," p. 380.

[6] "A *rishi* of unquestioned authority."

[7] "Dattaka Mimansa," s. 5, para. 16.

[8] "The phrase 'so forth' is explained to refer to a legal marriage having been possible between the adopter and the mother of the boy fixed for adoption." *Sriramulu* v. *Ramayya* (1881), 3 Mad. 15, at p. 16.

As the practice of *niyoga* is now obsolete,[1] the rules by which it was regulated in respect of the person selected for appointment are not, as such, now used for the purpose of testing the capability of the person to be adopted, but in their place the rules as to the prohibited degrees in the case of marriage have been substituted.

The two sets of rules have been held not to conflict,[2] but they do not appear to completely coincide.[3] "Prohibited connection in the case of marriage has reference to the relationship in which the couple between whom marriage is proposed stand, irrespective of marriage, and when the girl selected for marriage is a maiden. But prohibited connection in the case of *niyoga* has reference to the relationship between a married woman and the person who is appointed to beget a child upon her. . . . The rules of prohibited connection had a common object in both cases, viz. the prevention of incest.

In the case of marriage, there are three prohibitions,[4] viz.—

(i.) The couple between whom marriage is proposed should not be *sapindas*;

(ii.) They should not be *sagotras*; and

(iii.) There should be no *Viraddha Sambandha* or contrary relationship, that is, such relationship as would render sexual connection between them incestuous. This contrary relationship is defined as consisting in the couple being so related to each other that by analogy the one is the father or the mother of the other, as, for instance, the daughter of the wife's sister and the sister of the paternal uncle's wife."[5]

According to the *niyoga* rule, "The relations prohibited for adoption by a man are: the paternal uncle, the maternal uncle, the brother, the four first cousins on paternal and maternal side, the brother-in-law, the sister's son, and the daughter's son."[6]

Of these the father's brother's son, and the mother's son,[7] would not be excluded by the marriage rules.

Whatever may have been the origin of the marriage rule, it has been held in Madras that the Courts cannot now go behind it and test the validity of an adoption by the rules which governed the obsolete system of *niyoga*.[8]

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[1] See *ante*, p. 100.

[2] *Minakshi* v. *Ramanada* (1887), 11 Mad. 49, at p. 54. See also *Bhagwan Singh* v. *Bhagwan Singh* (1895), 17 All. 294, at p. 322. (In the appeal in this case (1899), 26 I. A. 153; 21 All. 412; 3 C. W. N. 454, this view was not disturbed.)

[3] See Bhattacharya's "Hindu Law," 2nd ed., p. 169.

[4] *Ante*, pp. 32–39.

[5] *Minakshi* v. *Ramanada* (1887), 11 Mad. 49, at p. 53. Marriage between a Hindu and the daughter of his wife's sister was held to be valid in *Ragavendra Rau* v. *Jayaram Rau* (1897), 20 Mad. 283.

[6] G. C. Sircar's "Law of Adoption," p. 322, and see preceding pages.

[7] See *Virayya* v. *Hanumanta* (1890), 14 Mad. 459, at p. 461.

[8] *Ibid.*

It remains to be seen whether the Judicial Committee will, when it becomes necessary to lay down a general rule on this subject, accept the rule of prohibited degrees in marriage laid down in India, or will accept the *niyoga* rule, enunciated in the "Dattaka Mimansa," or will confine the prohibitions to the three cases which have hitherto been considered by the Committee,[1] viz. those of the sister's son, daughter's son, and mother's sister's son. These are the only cases specified by the sages Saunaka and Sakala, from whose texts Nanda Pandita, in the "Dattaka Mimansa," based the *niyoga* test of exclusion.

The high authority of the "Dattaka Mimansa"[2] might possibly give a preference to the *niyoga* test of exclusion; but with regard to the analogy between the *Dattaka* form of adoption and this obsolete practice the Judicial Committee has said,[3] "as a ground for judicial decision these speculations are inadmissible, though as explanatory arguments to account for an actual practice they may be deserving of attention."

Special custom.

The burden of proving a special custom to the contrary amongst any members of these three classes, prevalent, either in their caste, or in a particular locality, lies upon him who avers the existence of that custom.[4]

Instances of application of rule.

In the following cases, which fall within the above-mentioned rule, adoptions have been held to be invalid.

(*a*) Daughter's son.[5]

Brahmins in the Tanjore, Trichinopoly, and Tinnevelly districts, by

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[1] *Bhagwan Singh* v. *Bhagwan Singh* (1899), 26 I. A. 153; 21 All. 412; 3 C. W. N. 454.

[2] *Bhagwan Singh* v. *Bhagwan Singh* (1899), 26 I. A. 153, at p. 161; 21 All. 412, at p. 419; 3 C. W. N. 454, at p. 457; *Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (1868), 12 M. I. A. 397, at pp. 435, 437; 1 B. L. R. P. C. 1, at pp. 11, 13; 10 W. R. P. C. 17, at pp. 21, 22; *Waman Raghupati Bova* v. *Krishnaji Kashiraj Bova* (1889), 14 Bom. 249, at p. 259; *Uma Sunker Moitro* v. *Kali Komul Mozumdar* (1880), 6 Calc. 256, at p. 265; 7 C. L. R. 145, at p. 154; *Rajendro Narain Lahoree* v. *Saroda Soondaree Dabee* (1871), 15 W. R. C. R. 518.

[3] *Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (1868), 12 M. I. A. 396, at p. 441; 1 B. L. R. P. C. 7, at p. 16; 10 W. R. P. C. 17, at p. 23; *Raghunadha* (*Sri*) v. *Brozokishoro* (*Sri*) (1876), 3 I. A. 154, at p. 190; 1 Mad. 69, at p. 80; 25 W. R. C. R. 291, at pp. 301, 302.

[4] *Gopal Narhar Safray* v. *Hanmant Ganesh Safray* (1879), 3 Bom. 273, at pp. 296, 297. See *Vayidinada* v. *Appu* (1885), 9 Mad. 44, at pp. 45, 46; *Minakshi* v. *Ramanada* (1887), 11 Mad. 49, at p. 55; *Lali* v. *Murlidhar* (1901), 24 All. 195, at p. 205.

[5] *Bhagwan Singh* v. *Bhagwan Singh* (1899), 26 I. A. 153, at p. 160; 21 All. 412, at p. 418; 3 C. W. N. 454, at p. 456; *Gopal Narhar Safray* v. *Hanmant Ganesh Safray* (1879), 3 Bom. 273; *Bhagirthibai* v. *Radhabai* (1879), 3 Bom. 298; *Jivani Bhai* v. *Jivu Bhai* (1865), 2 Mad. H. C. 462, at pp. 467, 468.

custom, adopt daughter's sons.[1] There seems to be a similar custom among the Nambudri Brahmins of Malabar,[2] and it has been held[3] that in the Southern Mahratta country the prohibition of the adoption of a daughter's son is not universally in force.

(*b*) Sister's son.[4]

By custom, Brahmins in the Tanjore, Trichinopoly and Tinnevelly districts,[5] the Bohra Brahmins of the northern districts of the North-western Provinces,[6] and the Nambudri Brahmins of Malabar,[7] adopt sister's sons. It has also been held that in the Southern Mahratta country the prohibition of the adoption of sister's sons is not universally in force.[8]

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[1] *Vayidinada* v. *Appu* (1885), 9 Mad. 44.

[2] See *Eranjoli Illath Vishnu Nambudri* v. *Eranjoli Illath Krishnan Nambudri* (1883), 7 Mad. 3.

[3] *Nani* (*Bai*) v. *Chunilal* (1897), 22 Bom. 973, at p. 976.

[4] *Bhagwan Singh* v. *Bhagwan Singh* (1899), 26 I. A. 153, at p. 160; 21 All. 412, at p. 418; 3 C. W. N. 454, at p. 456; *Lali* (*Mussammat*) v. *Murli Dhar* (1906), 33 I. A. 97; 28 All. 488; 10 C. W. N. 730; *Narain Das* (*Lala*) v. *Ramanuj Dayal* (*Lala*) (1897), 25 I. A. 46, at p. 52; 20 All. 209, at p. 217; 2 C. W. N. 193, at p. 195; *Sundar* (*Mussammat*) v. *Parbati* (*Mussammat*) (1889), 16 I. A. 186, at p. 193; 12 All. 51, at p. 56. S. C. in Court below, *Parbati* v. *Sundar* (1885), 8 All. 1; *Rajcoomar Lall* v. *Bissessur Dyal* (1884), 10 Calc. 688, at p. 693; *Narasammal* v. *Balaramacharlu* (1863), 1 Mad. H. C. 420; *Gopalayyan* v. *Raghupatiayyan* (1873), 7 Mad. H. C. 250; *Kora Shunko Takoor* (*Doe dem*) v. *Munnee* (*Bebee*) (1815), East's notes, case 20; Morl. Dig. vol. i. p. 18; *Shiblall* v. *Bishumber*, S. D. A. N. W. P. 1866, p. 25. In *Ramalinga Pillai* v. *Sadasiva Pillai* (1864), 9 M. I. A. 510; 1 W. R. P. C. 25, the adoption of a sister's son was upheld. The parties were said in the report to be Vaisyas. The question as to the validity of the adoption was raised, but the case was determined on the ground that the title of the respondent was admitted by the appellant's father. In *Jivani Bhai* v. *Jivu Bhai* (1865), 2 Mad. H. C. 462, at p. 467, it was asserted that the parties to the case of *Ramalinga Pillai* were clearly Sudras. See also *Gopal Narhar Safray* v. *Hanmant Ganesh Safray* (1879), 3 Bom. 273, at pp. 282, 283. In *Ganpatrao Vireshvar* v. *Vithoba Khandappa* (1867), 4 Bom. H. C. A. C. 130, the adoption of a sister's son was upheld, but the parties were evidently Sudras (see *Gopal Narhar Safray* v. *Hanmant Ganesh Safray* (1879), 3 Bom. 273, at p. 282). In *Bhagwan Singh* v. *Bhagwan Singh* (1895), 17 All. 294, at p. 302, it is said that the parties in *Ganpatrav's* case were Vaisyas, but that the Court erred in supposing that the parties in *Ramalinga Pillai's* case were other than Sudras.

[5] *Vayidinada* v. *Appu* (1885), 9 Mad. 44.

[6] *Chain Sukh Ram* v. *Parbati* (1891), 14 All. 53. In an Agra case (*Lali* v. *Murlidhar* (1901), 24 All. 195, at pp. 197, 205), an unsuccessful attempt was made to prove that a Bohra Brahmin could adopt his sister's son.

[7] *Eranjoli Illath Vishnu Nambudri* v. *Eranjoli Illath Krishnan Nambudri* (1883), 7 Mad. 3.

[8] *Nani* (*Bai*) v. *Chunilal* (1897), 22 Bom. 973, at p. 976.

A sister's daughter's son would be inadmissible for adoption.[1]

Such adoption is permissible in the Telegu and Tamil country, where a marriage between a maternal uncle and his niece is allowed.[2]

(*c*) Mother's sister's son.[3]

(*d*) The son of the daughter of a *sagotra*.[4]

Prohibition based upon *niyoga* rule.

It seems that the adoptions of the following are prohibited, not by the marriage rule, which is inapplicable, but by express authority, viz.:—

(i.) Brother.[5]

In the Deccan the adoption of a younger brother is permitted.[6]

(ii.) Stepbrother.[7]

(iii.) Paternal and maternal uncles.[8]

Having regard to the prohibition as to the age[9] of the adopted son, this case is unlikely to occur except, perhaps, in Western India.[10]

Instances where rule does not apply.

It has been held that the adoptions of the following persons are permissible, except in the case where the natural mother of the boy happens to be a person whom, as a virgin, the adoptive father could not lawfully have married.

(*a*) Brother's son's son.[11]

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[1] *Venkata* v. *Subhadra* (1884), 7 Mad. 548, at p. 549. As to a half-sister's daughter's son, see *Karunabdi Ganesa Ratnamaiyar* v. *Gopala Ratnamaiyar* (1889), 7 I. A. 173, at p. 177; 2 Mad. 270, at p. 279.

[2] *Venkata* v. *Subhadra* (1884), 7 Mad. 548, at p. 549.

[3] *Bhagwan Singh* v. *Bhagwan Singh* (1899), 26 I. A. 153; 21 All. 412; 3 C. W. N. 454.

[4] *Minakshi* v. *Ramanada* (1887), 11 Mad. 49. See *Ragavendra Rau* v. *Jayaram Rau* (1897), 20 Mad. 283, at p. 289.

[5] *Sriramulu* v. *Ramayya* (1881), 3 Mad. 15, at p. 16. See *Runjeet Sing* (*Baboo*) v. *Obhye Narain Sing* (1817), 2 Ben. Sel. R. 245 (2nd edition, 315); "Dattaka Mimansa," s. 5, para. 17. The *niyoga* rule (*ante*, p. 140) excluded brothers and step-brothers.

[6] See *Huebut Rao Mankur* v. *Govind Rao Balwunt Rao Mankur* (1821), 2 Borr. 75, at p. 85; Steele, 44.

[7] *Sriramulu* v. *Ramayya* (1881), 3 Mad. 15, at p. 16.

[8] *Haran Chunder Banerji* v. *Hurro Mohun Chuckerbutty* (1880), 6 Calc. 41, at p. 47; 6 C. L. R. 393, at p. 398; "Dattaka Mimansa," s. 5, para. 17; G. C. Sircar's "Law of Adoption," p. 327; Macnaghten's "Hindu Law," vol. i. p. 67.

[9] *Post*, p. 147.

[10] *Post*, p. 148.

[11] *Haran Chunder Banerji* v. *Hurro Mohun Chuckerbutty* (1880), 6 Calc. 41, at p. 48; 6 C. L. R. 393, at p. 400; *Morun Moee Debeah* v. *Bejoy Kishlo Gossamee* (1863), W. R. Sp. No. 121.

(*b*) Paternal uncle's son.[1]

(*c*) Paternal uncle's son's son's son.[2]

There can equally be no objection to the adoption of a paternal uncle's son's son.[3]

(*d*) The son of the mother's father's brother's daughter's daughter.[4]

(*e*) The wife's brother.[5]

(*f*) The wife's brother's son.[6]

(*g*) The wife's sister's son.[7]

Sudras. The rule as to the relationship between the adopting father and the natural mother[8] has no application to Sudras.[9]

Relationship of adopting mother to natural father. Relationship between the adopting widow, or the wife of the adopting father, and the natural father of the boy is no impediment to an adoption.

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[1] *Virayya* v. *Hanumanta* (1891), 14 Mad. 459. An unreported decision of the High Court of Bengal referred to in G. C. Sircar's "Law of Adoption," p. 340. The paternal uncle's son is excluded by the *niyoga* rule of exclusion (*ante*, p. 140).

[2] *Haran Chunder Banerji* v. *Hurro Mohun Chuckerbutty* (1880), 6 Calc. 41, at p. 47; 6 C. L. R. 393, at p. 399.

[3] In *Venkata* v. *Subhadra* (1884), 7 Mad. 548, the boy was the son of the paternal uncle's son, but no objection was made to the adoption on this ground. Such adoption is said even to be commendable. G. C. Sircar's "Law of Adoption," p. 348.

[4] *Venkata* v. *Subhadra* (1884), 7 Mad. 548. In this case, Sastri G. C. Sircar points out ("Law of Adoption," p. 348) that having regard to the Mitakshara system of computation of degrees, the Court was in error in considering that the adopting father could, under the general Hindu law, have married the natural mother. Such marriage seems to have been permissible by a usage to which the parties were subject.

[5] *Krishnaiengar* v. *Vanamalay Iyengar*, Mad. Dec. of 1856, p. 213; *Runganaigum* v. *Nameecvoya Pillay*, Mad. Dec. of 1857, p. 94; *Ruree Bhudr* v. *Roopshunkur Shunkerjee* (1823), 2 Borr. 656.

[6] *Sriramulu* v. *Ramayya* (1881), 3 Mad. 15, at p. 17. See *Nani (Bai)* v. *Chunilal* (1897), 22 Bom. 973, at p. 979.

[7] *Gunga (Baee)* v. *Sheoshunkur (Baee)* (1832), Bom. Sel. R. 73, at p. 76.

[8] *Ante*, p. 139.

[9] See *Bhagwan Singh* v. *Bhagwan Singh* (1899), 26 I. A. 153, at p. 160; 21 All. 412, at p. 418; 3 C. W. N. 454, at p. 452. In *Ramalinga Pillai* v. *Sadasiva Pillai* (1864), 9 M. I. A. 510; 1 W. R. P. C. 95, where the parties were Sudras, an adoption of a sister's son was upheld. The marginal note of the report erroneously describes the parties as Vaisyas (see *Jivani Bhai* v. *Jivu Bhai* (1865), 2 Mad. H. C. R. 462, at p. 467), but it does not appear whether the Judicial Committee were aware that the

This is in accordance with the views now adopted by all the High Courts at Allahabad,[1] Madras,[2] and Bombay.[3] The question does not seem to have been decided by the High Court of Bengal.

Nanda Pandita held that a woman must not adopt her brother's son.[4] His view was accepted in two cases.[5] It is supported by Dr. Jogendronath Bhattacharya, who carries the rule to its logical conclusion, and in the case of an adoption by a woman excludes from adoption the sons of men between whom and her there could be no legal *niyoga* or appointment to raise issue.[6] This is also the opinion of Sastri Gopal Chundra Sircar.[7]

No restriction as to generation.

There is no ground for holding that the adoption of a relation is limited to a particular generation.[8]

Punjab.

In the Punjab no adoption is rendered invalid by any relationship between the adopting and natural parents.[9]

Adoptions of daughter's sons, sister's sons, brother's daughter's sons, and sister's sons, by members of twice-born classes, have been upheld in the Punjab.[10]

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parties were Sudras. *Nunkoo Singh* v. *Purm Dhun Singh* (1869), 12 W. R. C. R. 356; *Jiwan Lal* v. *Kallu Mal* (1905), 28 All. 170; *Rajcoomar Lall* v. *Bissessur Dyal* (1884), 10 Calc. 688, at p. 693; *Vayidinada* v. *Appa* (1885), 9 Mad. 44, at p. 53; *Chinna Nagayya* v. *Pedda Nagayya*, (1875), 1 Mad. 62; *Phundo* v. *Janginath* (1893), 15 All. 327; *Lakshmappa* v. *Ramava* (1875), 12 Bom. H. C. 364.

[1] *Jai Singh Pal Singh* v. *Bijai Pal Singh* (1904), 27 All. 417, differing on this question from *Battas Kuar* (*Musst.*) v. *Lachman Singh* (1875), 7 N. W. P. 117.

[2] *Sriramalu* v. *Ramayya* (1881), 3 Mad. 15.

[3] *Nani* (*Bai*) v. *Chunilal* (1897), 22 Bom. 973 (a case from Gujarat). See *Giriowa* v. *Bhimaji Raghunath* (1884), 9 Bom. 58, which was a case from the Southern Mahratta country, where the prohibition of the adoption of a daughter's or sister's son is not universally in force.

[4] "Dattaka Mimansa," s. 2, paras. 33, 34. See Sutherland's "Synopsis." Stokes' "Hindu Law Books," p. 665.

[5] *Battas Kuar* (*Musst.*) v. *Lachman Singh* (1875), 7 N. W. P. 117. *Dagumbaree Dabee* v. *Taramoney Dabee* (1818), Macnaghten's "Considerations," 170; 1 Morley's "Digest," 19. In the latter case Nanda Pandita's rule was extended to an uncle's son.

[6] "Commentaries on Hindu Law," 2nd ed., 166.

[7] "Law of Adoption," p. 332.

[8] *Haran Chunder Banerji* v. *Hurro Mohun Chuckerbutty* (1880), 6 Calc. 41, at p. 48; 6 C. L. R. 393, at p. 399. It was there contended that a brother's son's son could not be adopted, although a brother's son could be adopted.

[9] See cases referred to in Sircar's "Law of Adoption," pp. 341, 342.

[10] *Ibid.*

Jains.

Jains are apparently not bound by any restrictions as to the relationship between adopter and adopted.[1]

Among Jains a daughter's son may be adopted.[2]

Adoption from adoptive family.

An adopted son cannot adopt from his adoptive family a boy whom he could not have adopted if he had been a natural son of his adoptive father.[3]

Only son.

An only son, or any one of several sons, can be adopted.[4]

A widow can give her only son in adoption.[5]

There was for a long time a conflict in the Indian Courts as to whether an only son could be given in adoption,[6] but in 1899 it was definitely settled that he could be so given. The power to adopt an elder or any one of several sons was settled much earlier.[7]

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[1] Among the Jains adoption is a mere temporal arrangement, and has no spiritual object. *Bhagvandas Tejmal* v. *Rajmal* (1873), 10 Bom. H. C. 241, at p. 262.

[2] *Sheo Singh Rai* v. *Dakho* (*Mussumat*) (1878), 5 I. A. 87; 1 All. 688; 2 C. L. R. 193; *Lakhmi Chand* v. *Gatto Bai* (1886), 8 All. 319; *Hassan Ali* v. *Naga Mal* (1876), 1 All. 288.

[3] Sircar's "Law of Adoption," p. 387.

[4] *Gurulingaswami* (*Sri Balusu*) v. *Ramalakshmamma* (*Sri Balusu*), *Radha Mohun* v. *Hardai Bibi* (1899), 26 I. A. 113; 22 Mad. 398; 21 All. 460; 3 C. W. N. 427; *Vyas Chimanlal* v. *Vyas Ramchandra* (1899), 24 Bom. 367.

[5] *Krishna* v. *Paramshri* (1901), 25 Bom. 537, at p. 542, where it is said, "Now that the recent decisions have established the fact that the gift of an only son is not blamable, the implied effect ceases to be operative, and no restriction can be placed on the widow's power to make a valid gift of an only son." It was not necessary to decide in *Balusu Gurulingaswami's* case whether a widow would have power to give an only son in adoption. In *Somasekhara Raja* v. *Subhadramaji* (1882), 6 Bom. 524, following *Lakshmappa* v. *Ramava* (1875), 12 Bom. H. C. 364, at p. 396, it was held that an authority by the husband to give in adoption, even as a *dvyamushyayana* (*post*, pp. 194, 195), would not be implied in the case of the adoption of an only son. See also *Debee Dial* v. *Hur Hor Singh* (1828), 4 Ben. Sel. R. 320 (new edition, 407). The decision in *Krishna* v. *Paramshri* is supported by the views expressed by the Judicial Committee in *Balusu Gurulingaswami's* case, 26 I. A. at pp. 127, 128; 22 Mad. at pp. 407, 408; 21 All. at pp. 469, 470; 3 C. W. N. at pp. 436, 437.

[6] For a discussion of the earlier cases on this subject, see Mayne's "Hindu Law," 6th ed., pp. 180–189; 5th ed., pp. 153–161; and G. C. Sircar's "Law of Adoption," pp. 298–306. For a discussion of the texts and the views of the commentators and other authorities, see G. C. Sircar's "Law of Adoption," pp. 282–298.

[7] See *Seetaram* v. *Dhunnook Dharee Sahye* (1863), 1 Hay, 260; *Janokee Debea* v. *Gopaul Acharjea* (1877), 2 Calc. 365; *Jamnabai* v. *Raychand Nahalchand* (1883), 7 Bom. 225; *Kashibai* v. *Tatia* (1883), 7 Bom. 221.

Age of boy. Bengal and Benares schools.

According to the Bengal[1] and Benares[2] schools, in the case of the three higher classes the adoption must take place before the boy is invested with the sacred thread;[3] in the case of Sudras it must take place before marriage.[4]

Sudras.

An unmarried Sudra, of any age, who is in other respects qualified, can be adopted according to all the schools.[5]

Madras.

In the Madras Presidency the same rules apply,[6] except that a Brahmin boy of the same *gotra*[7] can be adopted after the thread ceremony has been performed, but before marriage.[8]

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[1] *Bullabakant Chowdree* v. *Kishenprea Dassea Chowdrain* (1838), 6 Ben. Sel. R. 219 (2nd ed., 270). (This was a case of Sudras.) *Ramkishore Acharj Chowdree* v. *Bhoobunmoyee Debea Chowdrain*, Ben. S. D. of 1859, 229, at pp. 236, 237, affirmed on review, Ben. S. D. of 1860, vol. i., 485, at p. 490. On appeal this question did not arise (*Bhoobun Moyee Debia* v. *Ramkishore Acharj Chowdhry* (1865), 10 M. I. A. 279; 3 W. R. (P. C.) 15). See *Kerutnaraen* v. *Bhobinesree* (*Mussummaut*) (1806), 1 Ben. Sel. R. 161, note to p. 162 (2nd ed., 213, note to p. 214). See "Dattaka Mimansa," iv. 22; "Dattaka Chandrika," ii. 25, 30 (Sutherland's note), 31. 1 W. Macnaghten, 73, note. This is disputed by G. C. Sircar ("Law of Adoption," p. 362), who contends that the investiture in the natural family is not a bar to an adoption. As to the effect of an adoption when the ceremony of tonsure has been performed in the natural family, see *post*, p. 196.

[2] *Ganga Sahai* v. *Lekhraj Singh* (1886), 9 All. 253, at p. 328.

[3] As to the age for such investiture, see Colebrooke, note to "Dattaka Mimansa," s. 4, para. 23; Colebrooke's "Digest," vol. iii. p. 104.

[4] *Bullabakant Chowdree* v. *Kishenprea Dassea Chowdrain* (1838), 6 Ben. Sel. R. 219 (2nd. ed., 270); *Nitradaye* (*Ranee*) v. *Bholanath Doss*, Ben. S. D. A. 1853, p. 553; "Dattaka Chandrika," ii. 29, 32; Strange's "Hindu Law," vol. i. p. 91.

[5] See *Papamma* v. *V. Appa Rau* (1893), 16 Mad. 384, at pp. 396, 397, in which case the Court considered that the adoption of an unmarried man of over forty years of age would not be invalid on the mere ground of age.

[6] *Pichuvayyan* v. *Subbayyan* (1889), 13 Mad. 128; *Chetty Colum Prasunna Venoatachella Reddyar* v. *Chetty Colum Moodoo Venoatachella Reddyar*, Mad. S. D. A. 1823, p. 406; *Sevagamy Nachiar* v. *Mooto Vizia Raghoonadha Satoopathy*, *ibid.* p. 101. Strange's "Hindu Law," vol. i. pp. 87–91; cases in vol. ii. at pp. 87, 102, 109, 110; *Sreenevassien* v. *Sashyammal*, Mad. Dec. of 1859, 118; *Veerapermall Pillay* v. *Narain Pillay* (1801), 1 Mad. N. C. 78. See *Vythilinga Muppanar* v. *Vijayathammal* (1882), 6 Mad. 43. As to Sudras, see *Pappamma* v. *V. Appa Rau* (1893), 16 Mad. 384, at p. 396.

[7] As to the meaning of "*gotra*," see *ante*, p. 34.

[8] *Viraragava* v. *Ramalinga* (1883), 9 Mad. 148; *Pichuvayyan* v. *Subbayyan* (1889), 13 Mad. 128. See *P. Venkantesaiya* v. *Venkata Charlu* (1866), 3 Mad. H. C. 28.

Western India.

In Western India there is no objection to the adoption of a married man even if he has children.[1]

It has been held that a married Sudra of a different *gotra* can be adopted,[2] and the adoption of a married Brahmin of a different *gotra*, having children at the date of his adoption has been upheld.[3] When he is of the same *gotra* it follows that there can be no objection.[4]

Difference of age between boy and adopter.

The rule of Hindu law requiring a difference of age between the adoptive father or mother and the boy,[5] is apparently merely directory.[6]

If a boy, eligible in other respects, upon whom the ceremonies of *chudakarma* (tonsure) and *upanayana* (investiture with the sacred thread) have not been performed in his natural family, can be obtained, he should be preferred, but the fact that such ceremonies have been performed does not invalidate the adoption.[7]

Punjab.

In the Punjab there is no limit of age, and the performance of the thread ceremony or of marriage in the family does not invalidate the adoption.[8]

Jains.

Among Jains there is no limit of age,[9] and a married man may be adopted.[10]

Orphan.

An orphan, whether he be a minor or an adult, cannot be adopted.[11]

This follows from the rule that only a father or mother can give in adoption.[12]

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[1] *Mhalsabai* v. *Vithoba Khandappa Gulve* (1862), 7 Bom. H. C. App. xxvi. See *Sadashiv Moreshvar Ghate* v. *Hari Moreshvar Ghate* (1874), 11 Bom. H. C. 190.

[2] *Laksmappa* v. *Ramava* (1875), 12 Bom. H. C. 364. See also *Nathaji Krishnaji* v. *Hari Jagoji* (1871), 8 Bom. H. C. (A. C.), 67.

[3] *Dharma Dagu* v. *Ramkrishna Chimnaji* (1885), 10 Bom. 80. See also *Laksmappa* v. *Ramava* (1875), 12 Bom. H. C. 364, at pp. 371, 373.

[4] See *Brijbhookunjee Muharaj* (*Sree*) v. *Gokoolootsaojee Muharaj* (*Sree*) (1816), 1 Borr. 181, at p. 195, where the adoption of a married Brahmin of 45 years of age belonging to the same *gotra* was upheld.

[5] Steele, pp. 44, 182; V. N. Mandlik, p. 471.

[6] *Gopal Balkrishna Kenjale* v. *Vishnu Raghunath Kenjale* (1898), 23 Bom. 250, at p. 257.

[7] *Dharma Dagu* v. *Ramkrishna Chimnaji* (1885), 10 Bom. 80; *Laksmappa* v. *Ramava* (1875), 12 Bom. H. C. 364, at p. 370.

[8] In *Makhan* v. *Nikka*, Punjab Records of 1868, case No. 37, p. 96, the Chief Court upheld the adoption of a man of the age of 30.

[9] *Govindnath Roy* (*Maharajah*) v. *Gulal Chand* (1833), 5 Ben. Sel. R. 276 (new edition, 322); *Rithcurn Lalla* v. *Soojun Mull Lallah*, 9 Mad. Jur. 21, referred to in *Sheo Singh Rai* v. *Dakho* (*Mussumat*) (1874), 6 N. W. P. 382, at p. 402.

[10] *Manohar Lal* v. *Banarsi Das* (1907), 29 All. 495.

[11] *Subbaluvammal* v. *Ammakutti Ammal* (1864), 2 Mad. H. C. 129; *Balvantrav Bhaskar* v. *Bayabai* (1869), 6 Bom. H. C. O. J. 83; *Bashetiappa* v. *Shivlingappa* (1873), 10 Bom. H. C. 268.

[12] *Ante*, p. 136.

Boy who has been previously adopted.

A boy who has been taken in adoption, cannot be taken again in adoption.[1]

Adoption by two persons.

Two persons, even if they are brothers, cannot take the same person in adoption, either at the same time[2] or at different times.[3]

Personal defects.

Where a boy is disqualified by personal defects from inheriting, it is not settled whether he can be adopted.[4]

A defect which would attach to the boy in consequence of a fault on the part of his parents would not operate as a disqualification.[5]

Brahmo.

There is no objection to the adoption of the Brahmo son of a Brahmo.[6]

Simultaneous adoptions.

The simultaneous adoption of two or more sons is invalid as to all.[7]

The practice of simultaneous adoptions of two or more sons seems to have been prevalent in Bengal after 1846, and to have owed its origin to the ingenuity of Hindu lawyers, who attempted thereby to evade the effect of the decision of the Privy Council in *Rungama* v. *Atchama*,[8] in which an adoption during the lifetime of a previously adopted son was declared void.[9]

It may in some cases be difficult to determine whether the adoptions

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[1] G. C. Sircar's "Law of Adoption," pp. 281, 282. See "Dattaka Mimansa," s. 1, para. 30; s. 2, paras. 40–47.

[2] *Rajcoomar Lall* v. *Bissessur Dyal* (1884), 10 Calc. 688, at pp. 696, 697. W. Macnaghten's "Hindu Law," vol. i. p. 77. Mayne's "Hindu Law," 7th ed., p. 193. "The Hindu law is . . . silent upon the point and contains no rule one way or the other," Sircar's "Law of Adoption," p. 306.

[3] Above, note 1.

[4] Sutherland in his "Synopsis"; Stokes' "Hindu Law Books," p. 665, says, "It is an obvious inference that the person selected should be exempt from any disqualification, which might prevent him fulfilling the purpose of the adoption." This is supported by Nanda Pandita, "Dattaka Mimansa," s. 2, para. 62. See, however, G. C. Sircar's "Law of Adoption," pp. 349, 350.

[5] G. C. Sircar's "Law of Adoption," 1888, p. 350.

[6] *Kusum Kumari Roy* v. *Satyaranjan Das* (1903), 30 Calc. 999; 7 C. W. N. 784.

[7] *Akhoy Chunder Bagchi* v. *Kalapahar Haji* (1885), 12 I. A. 198; 12 Calc. 406; S. C. in Court below *Gyanendro Chunder Lahiri* v. *Kalla Pahar Hajee* (1882), 9 Calc. 50; 11 C. L. R. 297; *Surendrakeshav Roy* v. *Doorgasundari Dassee* (1892), 19 I. A. 108; 19 Calc. 513; S. C. in Court below, *Doorgasundari Dossee* v. *Surendra Keshav Roy* (1886), 12 Calc. 686; *Siddessury Dossee* v. *Doorga Churn Sett* (1865), 2 Ind. Jur. (N. S.) 22; Bourke, O. C. 360. See also *Monemothonath Dey* v. *Onontnath Dey* (1865), 2 Ind. Jur. (N. S.) 24.

[8] (1846), 4 M. I. A. 1; 7 W. R. P. C. 57; *ante*, p. 103.

[9] See Sircar's "Law of Adoption," p. 184.

were simultaneous, and, therefore, both void, or merely successive, in which case the latter only would be void.

In *Siddessory Dassee* v. *Doorgachurn Sett*,[1] Phear, J., said, "But, moreover, on that occasion, the ceremonies for the two boys were carried on, practically speaking, simultaneously, although possibly the beginnings and endings were not absolutely synchronous. If either boy was adopted, both were adopted, and it would be an outrage to common sense to say otherwise than that they were adopted at one and the same time."

ACT OF ADOPTION.

Giving and taking necessary.

There must in every case be an actual corporeal gift and acceptance of the boy in adoption,[2] coupled with an expression of the intention of the one person to give, and of the other to accept, the boy in adoption.[3]

A mere gift by a document transferring the boy,[4] or a constructive gift of an absent boy,[5] or an expression of assent[6] or intention[7] without an actual gift is insufficient.

[1] (1865), 2 Ind. Jur. (N. S.) 22; Bourke, O. C. 360.

[2] *Bireswar Mookerji* v. *Ardha Chunder Roy Chowdhry* (1892), 19 I. A. 101; 19 Calc. 452; *Shosinath Ghose (Mahashoya)* v. *Krishna Soondari Dasi (Srimati)* (1880), 7 I. A. 250; 6 Calc. 381; 7 C. L. R. 313; *V. Singamma* v. *Vinjamuri Venkatacharlu* (1868), 4 Mad. H. C. 165; *Veerapermall Pillay* v. *Narrain Pillay* (1801), 1 Mad. N. C. 76.

[3] *Ranganayakamma* v. *Alwar Setti* (1889), 13 Mad. 214, at pp. 218, 219. See also *Govindayyar* v. *Dorasami* (1887), 11 Mad. 5, at p. 7, where in referring to *Shosinath Ghose (Mahashoya)* v. *Krishna Soondari Dasi (Srimati)* (1880), 7 I. A. 250; 6 Calc. 381; 7 C. L. R. 313, the Court said, "the decision is an authority for the proposition that any overt act is not sufficient, but that there must be corporeal delivery of the child by a person competent to give, to a person competent to take, accompanied by the declaration on the one side, 'I give the child in adoption,' and on the other, 'I take the child in adoption.'" *Kenchawa* v. *Ningupa* (1866), 10 Bom. H. C. 265, note.

[4] See *Shosinath Ghose (Mahashoya)* v. *Krishna Soondari Dasi (Srimati)* (1880), 7 I. A. 250, at pp. 255, 256; 6 Calc. 381, at pp. 388, 389; 7 C. L. R. 313, at pp. 318, 319; *Sreenarain Mitter* v. *Kishen Soondory Dassee (Sreemutty)* (1873), I. A. Sup. Vol. 149; 11 B. L. R. 171; S. C. *sub nomine*, *Nogendro Chundro Mittro* v. *Kishen Soondery Dossee*, 19 W. R. C. R. 133; S. C. in Court below, *Srinarayan Mitter* v. *Krishna Sundari Dasi (Srimati)* (1869), 2 B. L. R. A. C. 279; 11 W. R. C. R. 196; *Mandit Koer (Mussamat)* v. *Phool Chand Lal* (1897), 2 C. W. N. 154.

[5] *Siddessory Dossee* v. *Doorgachurn Sett* (1865), Bourke, O. C. 360; 2 Ind. Jur. N. S. 22.

[6] *Bashetiappa* v. *Shivlingappa* (1873), 10 Bom. H. C. 268, at p. 270; *Kenchawa* v. *Ningupa* (1867), 10 Bom. H. C. 265, note; *Gourbullub* v. *Jugernatpersaud Mitter* (1823), F. Macn. Cons. H. L. 217; 1 Morley's "Digest," 18.

[7] *Bance Pershad (Baboo)* v. *Abdool Hye (Moonshee Syud)* (1876), 25 W. R. C. R. 192.

A deed or other writing in support of the act of adoption is unnecessary,[1] but in cases to which the Oudh Estate Act, 1869,[2] applies, an adoption by a widow must be by a writing executed and attested in manner required in case of a will,[3] and registered.[4] Writing unnecessary. Adoptions in Oudh.

Although it is usual to invite relations to the performance of the ceremonies, and, in the case of large landowners, to represent the fact of the adoption to the Government authorities, the absence of such invitation or representation does not vitiate the adoption.[5] The consent of the ruling authority is not necessary,[6] unless it be a condition of the exercise of a permission to adopt.[7] Invitations, etc.

The person giving in adoption ought not to receive any consideration for the adoption; but it has been held that if he does so the adoption is not void.[8] Consideration or gift in adoption.

A contract to pay money in consideration of giving a son in adoption cannot be enforced.[9]

The receipt of a sum of money by the widow from the natural father does not affect the adoption.[10] As to an arrangement made by a widow to reserve the property of her husband for herself, see *post*, pp. 188, 189.

Where a father actually gives his son in adoption, he Conditional gift in adoption.

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[1] *Bayabai* v. *Bala* (1866), 7 Bom. H. C. App. i., at p. ii.; *Sootroogun Sutputty* v. *Sabitra Dye* (1834), 2 Knapp, 287, at p. 290; 5 W. R. P. C. 109.

[2] I. of 1869.

[3] Act X. of 1865, s. 50, applied to wills under Act I. of 1869 by s. 19 of the latter Act.

[4] S. 22 (8). This would apparently not take the place of the corporeal giving and receiving required by Hindu law. See *Bhaiya Rabidat Singh* v. *Indar Kunwar* (*Maharani*) (1888), 16 I. A. 53, at p. 56; 16 Calc. 556, at p. 561.

[5] See *Alank Manjari* v. *Fakir Chand Sarcar* (1834), 5 Ben. Sel. R. 356 (new edition, 418); *Narhar Govind Kulkarni* v. *Narayan Vithal* (1877), 1 Bom. 607; *Rangubai* v. *Bhagirthibai* (1877), 2 Bom. 377; *Ramchandra Vasudev* v. *Nanaji Timaji* (1870), 7 Bom. H. C. (A. C. J.) 26.

[6] *Bhasker Buchajee* v. *Narro Raghonath* (1826), Bom. Sel. R. 24, at p. 29; *Ramchandra Vasudev* v. *Nanaji Timaji* (1870), 7 Bom. H. C. (A. C. J.) 26; *Narhar Govind Kulkarni* v. *Narayan Vithal* (1877), 1 Bom. 607.

[7] *Rangubai* v. *Bhagirthibai* (1877), 2 Bom. 377.

[8] *Murugappa Chetti* v. *Nagappa Chetti* (1905), 29 Mad. 161. See *Eshan Kishor Acharjee Chowdhry* v. *Haris Chandra Chowdhry* (1874), 13 B. L. R. App. 42; 21 W. R. C. R. 381. G. C. Sircar says ("Law of Adoption," p. 375), "In the majority of cases some sort of valuable consideration is given by the adopter to the natural father for inducing him to give away his son."

[9] See *Eshan Kishor Acharjee Chowdhry* v. *Haris Chandra Chowdhry* (1874), 13 B. L. R. App. 42; 21 W. R. C. R. 381. See *Mahableshvar Fondbha* v. *Durgabai* (1896), 22 Bom. 199, at p. 206.

[10] See *Mahableshvar Fondba* v. *Durgabai* (1896), 22 Bom. 199.

has apparently no power to impose a condition invalidating the adoption on the happening or non-happening of a future event; but in giving to his wife permission to give in adoption, he may subject the exercise of that power to a condition, and unless that condition be substantially fulfilled the gift has no effect.[1]

If the condition be an illegal or immoral one, the gift would be effectual even though the condition be not performed.

It is by no means clear what effect upon the boy's position in his natural family would be caused by an adoption upon a condition which is not fulfilled.

As to conditions with regard to the property made at the time of the adoption, see *post*, pp. 187–189.

As to gifts of property conditional on adoption, see *post*, pp. 209, 210.

Mental capacity of giver and taker.

The person taking[2] and the person giving[3] in adoption must be mentally capable of understanding, and must understand the significance of the act, otherwise there is no valid gift or acceptance, as the case may be.

There may be a question as to whether the amount of mental capacity which is requisite in the case of a will[4] is necessary for the taking a child in adoption,[5] as the taking in adoption is a matter of religious necessity.[6]

Fraud, etc.

If an adoption has been brought about by fraud, coercion,[7] mistake,[8] misrepresentation,[9] undue influence,[10] or

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[1] *Rangubai* v. *Bhagirthibai* (1877), 2 Bom. 377. In this case the previous sanction of Government was the condition required by the natural father.

[2] *Tayammaul* v. *Sashachalla Naiker* (1865), 10 M. I. A. 429 (see this case as to an adoption by a person *in extremis*); *Bullabakant Chowdree* v. *Kishenprea Dassea Chowdrain* (1838), 6 Ben. Sel. R. 219 (2nd edition, 270); *Mandit Koer* (*Mussammat*) v. *Phool Chand Lal* (1897), 2 C. W. N. 154, at p. 156.

[3] *Bireswar Mookerji* v. *Ardha Chunder Roy Chowdhry* (1892), 19 I. A. 101, at pp. 105, 106; 19 Calc. 452, at p. 461.

[4] See Phillips and Trevelyan's "Hindu Wills," pp. 258, 259.

[5] *Banee Pershad* (*Baboo*) v. *Abdool Hye* (*Moonshee Syud*) (1876), 25 W. R. C. R. 192, at p. 195.

[6] *Ante*, p. 101.

[7] *Ranganayakamma* v. *Alwar Setti* (1889), 13 Mad. 214, at pp. 220 to 224. See G. C. Sircar's "Law of Adoption," pp. 205, 431.

[8] *Bayabai* v. *Bala* (1866), 7 Bom. H. C., App. i., at pp. xx., xxi.

[9] See *Bayabai* v. *Bala* (1866), 7 Bom. H. C., App. i., at pp. xx., xxi., xxiii.

[10] *Somasekhara Raja* v. *Subhadramaji* (1882), 6 Bom. 524. See *Bayabai* v. *Bala* (1866), 7 Bom. H. C., App. i., at pp. xx., xxi.

otherwise than by the free consent of the persons giving and taking in adoption, it is voidable.[1] It can be ratified subsequently if no one's interest is prejudicially affected by such ratification.[2]

Where the adopter is a young widow, the Court will require clear evidence that, at the time of adoption, she was fully informed of her rights, and of the effect of adoption.[3] There will, however, be some relaxation of the strictness of this rule where the husband has directed his wife to adopt.[4]

Assent of person adopted.

Where a person who has attained the age of majority[5] is adopted, his assent would apparently be essential to the adoption. In other cases no such assent is necessary.[6]

Religious ceremonies. Sudras.

In the case of Sudras no religious ceremonies are necessary.[7]

An intentional omission to perform even unnecessary ceremonies, with a view to leave the adoption unfinished,[8] or a non-performance of

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[1] *Venkata Narasimha Appa Row (Sri Rajah)* v. *Rangayya Appa Row (Sri Rajah)* (1905), 29 Mad. 437.

[2] *Ibid.*

[3] *Bayabai* v. *Bala* (1866), 7 Bom. H. C., App. i., at pp. xx., xxi. See *Tayammaul* v. *Sashachella Naiker* (1865), 10 M. I. A., at p. 433. There have been a number of cases in which it has been held that if it is sought to make a purdahnasheen woman responsible for acts which are detrimental to her interest, it must be clearly shown that she knew the effect of such acts and had had independent advice, and that no advantage was taken of her.

[4] *Bayabai* v. *Bala* (1866), 7 Bom. H. C., App. i., at pp. xx., xxi.

[5] *I.e.* the age of majority according to Hindu law, *ante*, p. 41. This might be the case in Western India, the Punjab, or among Jains; see *ante*, p. 148.

[6] G. C. Sircar's "Law of Adoption," pp. 280, 281. Strange's "Hindu Law," vol. i. p. 88. The authority there given (*Kullean Sing* v. *Kirpa Sing* (1795), 1 Ben. Sel. R. 9 (2nd ed., p. 11)) was the case of a *Kritima* adoption, where the consent of the person adopted would always be necessary, *post*, p. 161.

[7] *Shosinath Ghose* (*Mahashoya*) v. *Krishna Soondari Dasi* (*Srimati*) (1880), 7 I. A. 250, at p. 255; 6 Calc. 381, at p. 388; 7 C. L. R. 313, at p. 319; *Indromoni Chowdhrani* v. *Beharilal Mullick* (1879), 7 I. A. 24; 5 Calc. 770; 6 C. L. R. 183. See *Govindayyar* v. *Dorasami* (1887), 11 Mad. 5, at p. 6; *Thangathanni* v. *Ramu Mudali* (1882), 5 Mad. 358; *Atmaram* v. *Madho Rao* (1884), 6 All. 276, at p. 281; *Ravji Vinayakrav Jagannath Shankarsett* v. *Lakshmibai* (1887), 11 Bom. 381, at pp. 393, 394; *Nittianand Ghose* v. *Krishna Dyal Ghose* (1871), 7 B. L. R. 1; 15 W. R. C. R. 300; *Perkash Chunder Roy* v. *Dhunmonee Dassea*, Ben. S. D. A. 1853, p. 96.

[8] *Banee Pershad* (*Baboo*) v. *Abdool Hye* (*Moonshee Syud*) (1876), 25 W. R. C. R. 192, at p. 198; *Valubhai* v. *Govind Kashinath* (1899), 24 Bom. 218, at pp. 226, 227.

contemplated ceremonies in consequence of death, or of some other cause, may be evidence to show that the adoption is incomplete.

Twice-born classes.

The performance of the *datta homam*[1] is apparently necessary in the case of the twice-born classes, at any rate where the boy is not of the same *gotra* as the adoptive father.

Boy of same *gotra*.

Where the boy is of the same *gotra* as the adoptive father, as, for instance, where he is a brother's son, according to the law prevalent in the Presidencies of Bombay and Madras, no religious ceremonies are necessary.[2]

Bengal.

In Bengal this distinction has not been made.[3]

There is not very much direct authority on the question whether the absence of religious ceremonies in any case invalidates an adoption among the twice-born classes. In an old case the Judicial Committee said,[4] "Although neither written acknowledgments nor the performance of any religious ceremonials are essential to the validity of adoptions;" but it does not appear that the question as to the necessity of religious ceremonies was raised in that case.

In reference to these remarks the Judicial Committee said in a subsequent case,[5] "It cannot, however, be considered as more than a *dictum*, since the decision was against the adoption in fact."

In a still later case, where the parties were Sudras, the Judicial Committee said,[6] "It is perfectly clear that amongst the twice-born classes there would be no such adoption by deed, because certain

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[1] Oblations of clarified butter to fire, Wilson's "Glossary."

[2] *Valubai* v. *Govind Kashinath* (1899), 24 Bom. 218; *Govindayyar* v. *Dorasami* (1887), 11 Mad. 5, preferring on this point *V. Singamma* v. *Vinjamuri Venkatacharlu* (1868), 4 Mad. H. C. 165, to *Venkata* v. *Subhadra* (1884), 7 Mad. 548; *Ranganayakamma* v. *Alwar Setti* (1889), 13 Mad. 214, at p. 219; *Atmaram* v. *Madho Rao* (1884), 6 All. 276. See *Huebut Rao Mankur* v. *Govind Rao Bulwant Rao Mankur* (1820), 2 Borr. 75, at pp. 85, 87.

[3] A suggestion of a distinction on this ground was made in *Nittianand Ghose* v. *Krishna Dyal Ghose* (1871), 7 B. L. R. 1, at p. 5; 15 W. R. C. R. 300, at p. 301, where the parties were Sudras, and the question was not decided. In *Atma Ram* v. *Madho Rao* (1884), 6 All. 276, at p. 279, Stuart, C.J., considered that the distinction was one of general application. Sastri G. C. Sircar ("Law of Adoption," p. 382) repudiates the distinction.

[4] *Sootroogun Sutputhy* v. *Sabitra Dhye* (1834), 2 Knapp, 287; 5 W. R. P. C. 109.

[5] *Indromoni Chowdhrani* v. *Beharilal Mullick* (1879), 7 I. A. 24, at p. 36; 5 Calc. 770, at p. 774; 6 C. L. R. 183, at p. 191.

[6] *Shosinath Ghose* (*Mohashoya*) v. *Krishna Soondari Dasi* (1880), 7 I. A. 250, at p. 256; 6 Calc. 381, at pp. 388, 389; 7 C. L. R. 313, at p. 319.

religious ceremonies, the *datta homam* in particular, are in their case requisite."

Although it has been considered that this expression of opinion decides the question,[1] "it is doubtful if more was intended than to point out that such religious ceremonies are requisite as part of the purely ceremonial law, not that the validity of an adoption for civil purposes depends on their due observance."[2]

At any rate, so far as the Judicial Committee is concerned, there are only contradictory *dicta* on the subject, with the exception above named.

The High Courts have accepted the view that the performance of the *datta homam* is necessary,[3] but in one case only[4] has a High Court, so far as the writer can ascertain, set aside an adoption on the ground that religious ceremonies had not been performed.

Adoption by twice-born females.

It has been suggested[5] that adoption by a widow perhaps stands on a different footing, as, "according to the sages, the twice-born females hold the same position as Sudras with respect to the performance of religious ceremonies," but this distinction is not made by the cases which hold that religious ceremonies are necessary in the case of an adoption in one of the regenerate classes. In some of those cases[6] the adoption was made by a widow.

Punjab.

In the Punjab no religious ceremonies are necessary.[7]

Jains.

Amongst the Jains no religious ceremonies are necessary.[8]

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[1] *Ranganayakamma* v. *Alwar Setti* (1889), 13 Mad. 214, at p. 220. The parties in this case were Vaisyas, but as there was no effective giving or taking, the decision of this question was not necessary.

[2] *Atma Ram* v. *Madho Rao* (1884), 6 All. 276, at p. 283.

[3] *Ranganayakamma* v. *Alwar Setti* (1889), 13 Mad. 214, at p. 220; *Venkata* v. *Subhadra* (1884), 7 Mad. 548; *Govindayyar* v. *Dorasami* (1887), 11 Mad. 5, at pp. 9, 10; *Chandramala Patta Mahadevi* (*Sri Sri*) v. *Muktumala Patta Mahadevi* (*Sri*) (1882), 6 Mad. 20; *Atmaram* v. *Madho Rao* (1884), 6 All. 276; *Oomrao Singh* (*Thakoor*) v. *Mehtab Koonwer* (*Thakooranee*) (1868), 3 Agra H. C. 103A. See *Ravji Vinayakrav Jagannath Shankarsett* v. *Lakshmibai* (1887), 11 Bom. 381, at pp. 393, 394; "Dattaka Mimansa," v. 36; West and Bühler, 922, 923; Steele, 45.

[4] *Luchmun Lall* v. *Mohun Lall Bhaya Gayal* (1871), 16 W. R. C. R. 179; *post*, p. 156, note 7.

[5] G. C. Sircar, "Law of Adoption," p. 381. See "Dattaka Mimansa," s. 1, para. 27; "Vyavahara Mayukha," s. 1, para. 15.

[6] *Luchmun Lall* v. *Mohun Lall Bhaya Gayal* (1871), 16 W. R. C. R. 179; *Ranganayakamma* v. *Alwar Setti* (1889), 13 Mad. 214; *Ravji Vinayakrav Jaggannath Shankarsett* v. *Lakshmibai* (1887), 11 Bom. 381; *Atmaram* v. *Madho Rao* (1884), 6 All. 276; *Oomrao Singh* (*Thakoor*) v. *Mehtab Koonwer* (*Thakooranee*) (1868) 3 Agra H. C. R. 103A.

[7] Tupper's "Punjab Customary Law," vol. iii. p. 82.

[8] *Lakhmi Chand* v. *Gatto Bai* (1886), 8 All. 319. As to the rites which are usual among Jains, see G. C. Sircar's "Law of Adoption," p. 454.

Nambudri Brahmins.

No ceremonies are necessary in an adoption in the *dwyamushyayana* form among the Nambudri Brahmins.[1]

Time of performance of *homa*.

The *homa* ceremony may be performed at any time after the actual giving and taking, and it does not seem to be necessary that the father should perform it. When the *homa* is necessary, the adoption is not complete until it is performed. Its performance after the death of the natural father,[2] or of the adoptive father,[3] does not invalidate the adoption.

Place of performance.

Although it is usual to perform the *homa* in the dwelling-house of the adopter,[4] it is immaterial where the ceremony is performed.[5]

Delegation of performance of religious ceremonies.

There seems to be nothing to prevent the natural and adoptive parents delegating to others the performance of the *homa* ceremony.[6]

Other religious ceremonies.

Although other religious ceremonies may be usual, it does not appear that the absence of them invalidates an adoption.[7]

Requirements of valid adoption.

Provided the above rules as to the capacity to take in adoption, the capacity to give in adoption, the capacity to be taken in adoption, and as to the act of adoption, are followed, an adoption is valid; otherwise it is void.[8]

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[1] *Shankaran* v. *Kesavan* (1891), 15 Mad. 6. As to this form of adoption, see *post*, pp. 194–196.

[2] *Venkata* v. *Subhadra* (1884), 7 Mad. 549. In this case five years had elapsed. In the interval the natural father died, but the *homa* was performed by one of his sons.

[3] *Subbarayar* v. *Subbammal* (1898), 21 Mad. 497.

[4] G. C. Sircar's "Law of Adoption," pp. 382, 383.

[5] *Oomrao Singh* (*Thakoor*) v. *Mehtab Koonwer* (*Thakooranee*) (1868), 3 Agra H. C. 103A.

[6] See *Subbarayar* v. *Subbammal* (1898), 21 Mad. 497; *Lakshmibai* v. *Ramchandra* (1896), 22 Bom. 590. As to the delegation of the giving and receiving, see *ante*, pp. 133, 136.

[7] In *Luchmun Lall* v. *Mohun Lall Bhaya Gayal* (1871), 16 W. R. C. R. 179, the Court held that the performance of the *putresti jag* (sacrifice for male issue) is essential to the validity of an adoption among the three superior castes. G. C. Sircar ("Law of Adoption," p. 383) suggests that the words "*putresti jag*" were in the judgment in that case by mistake substituted for "*datta homam*," as the *putresti jag* is only necessary when the ceremony of tonsure has been performed in the natural family ("Dattaka Mimansa," s. 4, paras. 32, 49).

[8] See *Ganga Sahai* v. *Lekhraj Singh* (1886), 9 All. 253, at pp. 296, 297. As to the application of the doctrine *factum valet quod fieri non debuit*, see *ibid.* *Gurulingaswami* (*Sri Balusu*) v. *Ramalaksmamma* (*Sri Balusu*), *Radha*

The invalidity of an adoption, or of a power to adopt, cannot be cured by a subsequent event.[1] Subsequent event.

Illustrations.

(*a*) An adoption made during the lifetime of a son is not rendered valid by the death of such son.[2]

(*b*) A power to adopt a son as co-heir to a living son cannot be exercised even after the death of the living son.[3]

(*c*) The death of the son's widow, in whom the property has vested, does not validate an adoption made before her death.[4]

Except in so far as the law in certain cases requires the consent of kinsmen for the purpose of validating an adoption,[5] it is submitted that the consent of the person in whom the estate of the adoptive father is vested, or of the person or persons entitled in reversion, does not validate an adoption which is otherwise invalid.[6] Consent does not validate adoption.

It has been held in Bombay that where the adoption takes place with the full consent of the person in whom the estate is vested by inheritance,[7] the adoption is rendered valid, and the estate vested in the adopted son by such consent;[8] but there

Mohun v. *Hardai Bibi* (1899), 26 I. A. 113, at p. 144; 22 Mad. 398, at p. 423; 21 All. 460, at p. 487; 3 C. W. N. 427, at p. 448, at p. 487; *Uma Deyi (Srimati)* v. *Gokoolanund Das Mahapatra* (1878), 5 I. A. 40, at p. 53; 3 Calc. 587, at p. 601; *Lakshmappa* v. *Ramava* (1875), 12 Bom. H. C. 362, at p. 398; *Gopal Narhar Safray* v. *Hanmant Ganesh Safray* (1879), 3 Bom. 273, at p. 293; *Dharma Dagu* v. *Ram Krishna Chimnaji* (1885), 10 Bom. 80, at p. 86.

[1] As to the postponement of the religious ceremonies, see *ante*, p. 156.

[2] *Basoo Cumumah* v. *Basoo Chinna Venkatasa*, Mad. S. D. A. 1856, p. 20; *Veraprashyia* v. *Santauraja*, Mad. S. D. A., 1860, p. 168.

[3] *Joy Chundro Race* v. *Bhyrub Chundro Race*, Ben. S. D. A. 1849, 461.

[4] *Pudma Coomari Debi* v. *Court of Wards* (1881), 8 I. A. 229.; 8 Calc. 302.

[5] *Ante*, pp. 121–124.

[6] *Annummah* v. *Mabbu Bali Reddy* (1875), 8 Mad. H. C. 108, at p. 112; *Mohendrololl Mookerjee* v. *Rookiney Dabee* (1864), Coryton, 42, at p. 43. See Mayne's "Hindu Law," 7th ed., pp. 255, 256.

[7] Where the estate is vested by survivorship, the assent of the coparceners in whom it is vested is in Western India necessary so far as joint property is concerned (*ante*, p. 126).

[8] *Payapa Akkapa Patel* v. *Appanna* (1898), 23 Bom. 327, at pp. 331, 332; *Babu Anaji* v. *Ratnoji Krishnarav* (1895), 21 Bom. 319; *Gopal Balkrishna Kenjale* v. *Vishnu Raghunath Kenjale* (1898), 23 Bom. 250; *Rupchand Hindumal* v. *Rukhmabai* (1871), 8 Bom. H. C. A. C. J. 114, at p. 122. From any point of view the consent of a minor is not sufficient to validate an adoption. *Vasudeo Vishnu Manohar* v. *Ramchandra Vinayak Modak* (1896), 22 Bom. 551.

is authority to the contrary to be found in decisions of the same Court.[1]

It is submitted, that although the consent may have the effect of estopping the person adopting from denying the adoption,[2] it cannot otherwise affect the validity of the adoption.

In one instance it has been said that consent validates an otherwise invalid adoption. In the "Dattaka Mimansa,"[3] it is said that a second son may be adopted[4] with the sanction of the existing issue, and in *Rungama* v. *Atchama*[5] this seems to have been accepted, although it became unnecessary to decide the question, but the Courts have not in any subsequent case upheld such adoption, and there are great difficulties in the way of giving effect to any such consent, as no provision seems to be made for the division of the property in that event.

As to consent to the devesting of estates on adoption, see *post*, p. 201.

Acquiescence.

Whatever may be the effect of consent to an adoption, active acquiescence may, in certain circumstances, operate as an estoppel,[6] but passive acquiescence cannot alter rights, unless it extend to the period provided by the law of limitation.[7] It may, however, be some evidence of the fact of the adoption.[8]

Cancellation or Renunciation.

An adoption once validly made cannot be cancelled by the natural or adoptive parents,[9] or renounced by the adopted son.[10]

There is nothing to prevent an adopted son renouncing any interest in property which would come to him as such.[11]

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[1] See *Dharnidhar (Shri)* v. *Chinto* (1895), 20 Bom. 250, at p. 258; *Vasudeo Vishnu Manohar* v. *Ramchandra Vinayak Modak* (1896), 22 Bom. 551, at p. 555.

[2] *Post*, p. 174.

[3] S. 1, para. 12.

[4] See *ante*, p. 103.

[5] (1846), 4 M. I. A. 1, at pp. 97, 103; 7 W. R. P. C. 57, at pp. 59, 62.

[6] *Post*, p. 176.

[7] See *Uda Begam* v. *Imam-ud-din* (1875), 1 All. 82; *Taruck Chunder Bhuttacharjee* v. *Hurro Sunkur Sandyal* (1874), 22 W. R. C. R. 267; *Rajan* v *Basuva Chetti* (1865), 2 Mad. H. C. 428; *Ram Rau* v. *Raja Rau* (1864), 2 Mad. H. C. 114; *Peddamuthulaty* v. *N. Timma Reddy* (1864), 2 Mad. H. C. 270.

[8] *Post*, p. 177.

[9] Colebrooke's "Digest," vol. ii. p. 111; Strange's "Hindu Law," vol. ii. p. 108; *Sukhbasi Lal* v. *Guman Singh* (1879), 2 All. 366; *Huebut Rao Mankur* v. *Govind Rao Bulwant Rao Mankur* (1823), 2 Borr. 75.

[10] *Mahadu Ganu* v. *Bayaji Sidu* (1893), 19 Bom. 239; *Ruees Bhudr* v. *Roopshunker Shunkerjee* (1823), 2 Borr. 656, at pp. 665, 671.

[11] *Post*, p. 192.

KRITIMA FORM OF ADOPTION.

In the district of Mithila, or Tirhoot,[1] where it is the prevailing form,[2] and in the adjoining districts,[3] a form of adoption called the *Kritima*[4] is practised, and is recognized by the law. Adoption in *Kritima* form.

This form of adoption is not to be confounded with the adoption of a *Kritima* son according to the Smritis and commentaries. The latter held the same position as a *Dattaka* son, and the ceremonies and conditions were apparently identical in both cases. The *Kritima* form of adoption which prevailed throughout India has long been obsolete.

The modern form of *Kritima* adoption is based upon recent authorities, and is said to owe its origin to the prohibition[5] of adoption by a widow in the Mithila country.[6]

Either a man or a woman can adopt in this form, provided he or she has no son,[7] grandson, or great grandson in existence. Who can adopt.

A wife or widow so adopting does not require the assent of her husband or of his kinsmen,[8] and she cannot adopt a son to her husband in this form, even if she receives his permission.[9]

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[1] See *ante*, p. 9.

[2] *Kullean Sing* v. *KirpaSing* (1795), 1 Ben. Sel. R. 4 (new edition, 11); *Sutputtee* (*Mussummaut*) v. *Indranund Jha* (1816), 2 Ben. Sel. R. 173, note to p. 175 (new edition, 221, note to p. 224); Colebrooke's "Digest," vol. iii. p. 276; Strange's "Hindu Law," vol. ii. p. 204. There is nothing to prevent a *dattaka* adoption in the Mithila district by a man, Sircar's "Law of Adoption," p. 447; but a widow cannot adopt in that form according to the Mithila school.

[3] G. C. Sircar's "Law of Adoption," p. 448. In a note to *Srinath Serma* v. *Radhakaunt* (1796), 1 Ben. Sel. R. 15, at p. 16 (new edition, 19, at p. 21), it is said that this form of adoption "is in use in North Behar, and the contiguous districts of Baglipore (Bhaughulpore) and Purnea."

[4] Factitious. *Kritima putra* means the son made, Wilson's "Glossary," p. 297.

[5] *Ante*, p. 127.

[6] W. Macnaghten's "Hindu Law," vol. i. pp. 95–100.

[7] Sircar's "Law of Adoption," p. 449.

[8] W. Macnaghten's "Hindu Law," vol. ii. pp. 195, 196. *Shibkoeree* (*Mussamut*) v. *Joogun Singh* (1867), 8 W. R. C. R. 155, at p. 157; *Collector of Tirhoot* v. *Huropershad Mohunt* (1867), 7 W. R. C. R. 500.

[9] See answers of pundits in *Sreenarain Rai* v. *Bhya Jha* (1812), 2 Ben. Sel. R. 23, at p. 27 (new edition, 29, at pp. 34, 35).

A husband and wife can adopt jointly, or they may each adopt a separate son under this form.[1]

Who may be adopted.

Except that he must belong to the same class[2] as the person adopting him, there is no restriction as to the person to be adopted.[3]

Relationship.

The relationship of the adopter and the adopted does not, it is submitted, affect the validity of the adoption.

In *Purmessur Dutt Jha* (*Chowdree*) v. *Hunooman Dutt Roy*,[4] the adoption of a sister's son by a Brahmin in the *Kritima* form was upheld, but in an earlier case,[5] the adoption of an elder brother by a younger brother was held invalid.

In *Nunkoo Singh* v. *Purm Dhun Singh*,[6] an adoption of a sister's son in the *Kritima* form was upheld, but on the ground that the parties did not belong to one of the regenerate classes.

According to the Dvaita-Parishishta of Kesaba Misra, a pundit of Mithila, even a father or a brother may be adopted.[7]

Sir William Macnaghten considers that there is no restriction except as to tribe,[8] but Sastri G. C. Sircar[9] contends that the rule as to relationship applicable to an adoption in the *Dattaka* form[10] are equally applicable to an adoption in the *Kritima form*.

Age.

The age of the son adopted in this form is immaterial.[11]

The performance of the initiatory ceremonies in the natural family,[12] or the marriage,[13] does not prevent the adoption.

Consent.

The consent of the adopted son,[14] and the consent (or at

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[1] See *Sreenarain Rai* v. *Bhya Jha* (1812), 2 Ben. Sel. R. 23, at p. 27 (new edition, 29, at p. 34); 1 W. Macn. 101.

[2] *Ante*, pp. 17, 138.

[3] *Purmessur Dutt Jha* (*Chowdree*) v. *Hunooman Dutt Roy* (1837), 6 Ben. Sel. R. 192 (new edition, 235, at p. 246); 1 Macnaghten's "Hindu Law," pp. 75, 76.

[4] (1837), 6 Ben. Sel. R. 192 (new edition, p. 235).

[5] *Runjeet Sing* (*Baboo*) v. *Obhye Narain Sing* (*Baboo*) (1817), 2 Ben. Sel. R. 245 (new edition, 315). Sir Wm. Macnaghten points out ("Hindu Law," vol. i. p. 76, n.) that the authorities cited by the law officers in that case had relation to the *Dattaka* form of adoption.

[6] (1869), 12 W. R. C. R. 356.

[7] *Ooman Dutt* v. *Kunhia Singh* (1822), 3 Ben. Sel. R. 145, at p. 149 (new edition, 192, at p. 199).

[8] *I.e.* caste or class, "Hindu Law," vol. i. pp. 75, 76.

[9] "Law of Adoption," p. 339, "Dattaka Mimansa," s. 5, paras. 47-56.

[10] *Ante*, pp. 139–144.

[11] *Shibkoeree* (*Mussamut*) v. *Joogun Singh* (1867), 8 W. R. C. R. 155, at p. 158; *Ooman Dutt* v. *Kunhia Singh* (1822), 3 Ben. Sel. R. 145 (new edition, 192, at p. 197).

[12] W. Macnaghten's "Hindu Law," vol. ii. p. 196. "Initiation into the family of the adopter is not practised" in this form of adoption, Strange's "Hindu Law," vol. ii. p. 204.

[13] W. Macnaghten's "Hindu Law," vol. i. p. 76.

[14] *Luchmun Lall* v. *Mohun Lall Bhaya Gayal* (1871), 16 W. R. C. R.

any rate the absence of the express dissent) of his parents,[1] if living, is necessary to this form of adoption.

The relationship being one created by contract, the consent of all the necessary parties must coincide. An assent given by the son after the death of the adoptive father to an adoption to which the adoptive father assented before his death will not be sufficient.[2]

No ceremonies are necessary,[3] and no particular form is required to be observed. Ceremonies.

Colebrooke[4] cites from "Rudradhara in the Suddhiviveka," the following:—

"The form to be observed is this. At an auspicious time, the adopter of a son having bathed, addressing the person to be adopted, who has also bathed, and to whom he has given some acceptable chattel, says, 'Be my son.' He replies, 'I am become thy son.' The giving of some chattel arises merely from custom. It is not necessary to the adoption. The consent of both parties is the only requisite; and a set form of speech is not essential."[5]

A *Kritima* adoption, when once validly made, cannot be revoked.[6]

Some other Special and Local Forms of Adoption.

In the district of Gya there is amongst the Gyawal Brahmins a practice of adoption in a form which is similar to the *Kritima* form. It is purely contractual, and does not affect the position of the adopted son in his natural family.[7] Gyawals.

179, at p. 180; *Durgopal Singh* v. *Roopun Singh* (1839), 6 Ben. Sel. R. 271 (new edition, p. 340); Sutherland's "Synopsis," 673; W. Macn., vol. ii. p. 196.

[1] Macnaghten's "Hindu Law," ii. 196.

[2] *Sutputtee* (*Mussumat*) v. *Indramund Jha* (1816), 2 Ben. Sel. R. 173 (new edition, 221).

[3] *Shibkoeree* (*Mussumat*) v. *Joogun Singh* (1867), 8 W. R. 155, at p. 158.

[4] "Mitakshara," chap. i. s. 11, para. 17, note.

[5] Referred to in *Durgopal Singh* v. *Roopun Singh* (1839), 6 Ben. Sel. R. 271, at p. 273 (new edition, 340, at p. 342). See *Kullean Sing* v. *Kirpa Sing* (1795), 1 Ben. Sel. R. 9 (new edition, 11, at p. 12). W. Macnaghten's "Hindu Law," vol. i. p. 98.

[6] W. Macnaghten's "Hindu Law," vol. ii. p. 196.

[7] See *Luchmun Lal Chowdhry* v. *Kanhya Lal Mowar* (1894), 22 I. A. 51; 22 Cal. 609; *Luchmun Lall* v. *Mohun Lall Bhaya Gayal* (1871), 16 W. R. C. R. 179; *Lachmi Dai Mohutain* (*Musst.*) v. *Kissen Lall Pahari Mahaton Gayal* (1906), 11 C. W. N. 147.

Illatom adoption.

Among the Reddi caste[1] it is customary for a man who has no son[2] to affiliate a son-in-law by what is called an *Illatom*[3] adoption.

This custom prevails in the Bellary, Kurnool, Cuddapah, Nellore, and North and South Arcot districts,[4] but not among the Kondarazu caste of the Vizagapatam district.[5]

There is no mention of this form of adoption in the Digests, and there are few decided cases on the subject.[6] It is necessary to determine each case according to the evidence as to the custom, and its effects which may be brought forward.[7]

It is uncertain whether a man having a son can affiliate a son-in-law in this form of adoption,[8] whether the affiliation is affected by the introduction into the family, or requires for its completion marriage with a daughter, and whether, if the father be dead, the right may be exercised by a surviving paternal grandfather.

Effect of *illatom* adoption.

A son-in-law so adopted stands for purposes of inheritance in the place of a son, and in competition with natural born sons,[9] or sons adopted in the *Dattaka* form,[10] takes an equal share.

Inheritance.

He does not lose any of his rights of inheritance in his natural family,[11] nor do the members of his natural family lose their rights of succession to him.[12]

Disposition.

An *illatom* son-in-law can deal with property acquired by him as such in the same way as he can deal with any other self-acquired property. His sons have no right therein by virtue of their birth.[13]

Heirs.

The property received by the *illatom* son-in-law as such passes to his heirs in the same way as self-acquired property.[14] The heirs of the adopter have no right in it.

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[1] The principal caste of Telinga cultivators, a caste of Sudras, Wilson's "Glossary," p. 442.

[2] See *Yachereddy Chinna Bassavapa* v. *Yachereddy Gowdapa* (1835), 5 W R. P. C. 114.

[3] *Illata*, a bride's father having no son, and adopting his son-in-law, Wilson's "Glossary," p. 216.

[4] *Balarami Reddi* (*Sivada*) v. *Pera Reddi* (*Sivada*) (1883), 6 Mad. 267, at p. 269. See also *Hanumantamma* v. *Rami Reddi* (1881), 4 Mad. 272.

[5] *Narasimha Razu* v. *Veerabhadra Razu* (1893), 17 Mad. 287.

[6] See *Hanumantamma* v. *Rami Reddi* (1881), 4 Mad. 272, at p. 275; *Tayumana Reddi* v. *Perumal Reddi* (1862), 1 Mad. H. C. 51.

[7] See *Chinna Obayya* v. *Sura Reddi* (1897), 21 Mad. 226; *Malla Reddi* v. *Padmamma* (1893), 17 Mad. 48, at p. 50.

[8] *Hanumantamma* v. *Rami Reddi* (1881), 4 Mad. 272, at pp. 282, 283.

[9] *Hanumantamma* v. *Rami Reddi* (1881), 4 Mad. 272, at p. 283. This places him in a better position than a *Dattaka* son, see *post*, pp. 189, 190.

[10] See *Chenchamma* v. *Subbaya* (1885), 9 Mad. 114, at p. 116.

[11] *Balarami Reddi* (*Sivada*) v. *Pera Reddi* (*Sivada*) (1883), 6 Mad. 267.

[12] *Ramakristna* v. *Subbakka* (1889), 12 Mad. 442.

[13] *Challa Papi Reddi* v. *Challa Koti Reddi* (1872), 7 Mad. H. C. 25.

[14] *Chenchamma* v. *Subbaya* (1885), 9 Mad. 114; *Challa Papi Reddi* v. *Challa Koti Reddi* (1872), 1 Mad. H. C. 25; *Ramakristna* v. *Subbakka* (1889), 12 Mad. 442. See *Malla Reddi* v. *Padmamma* (1893), 17 Mad. 48, at p. 50.

It is uncertain whether a son-in-law so adopted obtains a right to insist upon partition of ancestral property during the father's lifetime.[1] He apparently cannot do so, as it has been held that there is no right of survivorship between him and an adopted son living in commensality with him,[2] and the interest acquired by the *illatom* son-in-law is to be treated as self-acquired property.[3] Right to partition. Right of survivorship.

The taking of a son-in-law in *illatom* adoption does not prevent the subsequent adoption of a *Dattaka* son.[4]

In Nair families governed by the *Marumakkathayam* rule of inheritance, the right (and perhaps duty) to adopt females into the family or *taravad* is vested in the *karnavan*, or head of a family, but he cannot, in the absence of proof of custom to that effect, adopt either without consulting the co-sharers, or in case it be essential to the preservation of the *taravad*.[5] It cannot be so essential until the last possible *karnavan* has been reached. Malabar law, Marumakkathayam system.

Under the *Aliyasanta* system the last female member of the family cannot adopt a daughter without the consent of her son.[6]

As to the adoption by Nambudri Brahmin's following this law, see *Subramanyan* v. *Paramaswaran* (1887), 11 Mad. 116.

As to the law of adoption in Malabar, see Wigram's "Malabar Law and Customs," pp. 11–14.

In families governed by the *Makkatayam*[7] rule of inheritance, there are three systems of adoption.[8] Makkatayam system.

(*a*) "In the first, ten hands or five persons take part, viz. the adopting parents,[9] the natural parents, and the boy."

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[1] *Hanumantamma* v. *Rami Reddi* (1881), 4 Mad. 272, at p. 283. Like other questions as to the incidents of this form of adoption it must be determined on evidence of custom. *Chinna Obayya* v. *Sura Reddi* (1897), 21 Mad. 226.

[2] *Chenchamma* v. *Subbaya* (1885), 9 Mad. 114. In *Malla Reddi* v. *Padmamma* (1893), 17 Mad. 48, the Court on the evidence decided against a claim of survivorship made by a male member of the family against the daughters of the son of an *illatom* son-in-law.

[3] *Ante*, p. 162.

[4] This was done in *Chenchamma* v. *Subbaya* (1885), 9 Mad. 114, at p. 115.

[5] *Thiruthipalli Raman Menon* v. *Variangattil Palisseri Raman Menon* (1900), 27 I. A. 231; 24 Mad. 73; 4 C. W. N. 810, citing Strange's "Manual," s. 403, which is as follows: "On failure of the sister's progeny, male and female, the head of the family may make adoption. The descent being in the female line, the adoption must be of a female. In view of the probable minority of her offspring at the period when the management may fall in, a male, her brother, may be taken in adoption at the same time with herself, in order to afford provision for the administration of the affairs of the family, and for conduct of the religious rites to be observed therein."

[6] *Chandu* v. *Subba* (1889), 13 Mad. 209; *Cotay Hegaday* v. *Manjoo Kumpty*, Mad. S. D. A. 1859, p. 138.

[7] Inheritance by the male line. Wilson's "Glossary," p. 587.

[8] "Travancore Census of 1891," p. 686; Wigram's "Malabar Law and Custom," p. 4.

[9] Wigram's "Malabar Law and Custom," p. 4.

Wigram says that this form is probably almost identical with the ordinary Hindu adoption.[1] It is called *pattukayyal dattu*.[2]

(*b*) Adoption by *Chamatha*, *i.e.* by burning a piece of sacred grass.[3]

(*c*) The third form is akin to the *Kritima* form. It is "commonly adopted by Brahmin widows and Sudras for the purpose of perpetuating the family when it is in danger of becoming extinct. There is no limit as to age or number of persons adopted. The only limit seems to be that the person or persons adopted should be of the same *vamsham* or tribe as the adopter. Among Sudras the adoption should be of one or more females, but it is frequently accompanied by the adoption of a male for the purpose of providing for the future management of the adopter's property. Sometimes a whole family of adults is adopted."[4]

Nambudris. The practice among Nambudris, that only the eldest marries, necessarily limits the right of adoption to his line.[5] "But if there be any male relative at all, however distant, then he is not entitled to the right of adopting. The nearest and oldest relative must be made to marry, and thus preserve the family continuity. But if there should be no prospect of his brothers getting issue, and if they should give their consent to the act, then he may have recourse to an adoption, to which the consent of the other relatives is not necessary. If, however, he adopts one of his distant relatives, in that case the consent of all his other relations, however distant, will be necessary."[6]

Among the Nambudri Brahmins,[7] a widow can adopt or appoint an heir in order to perpetuate her *illam*,[8] in the absence of *dayadies*,[9] whose relationship is the cause of two or three days' pollution,[10] or with their consent.[11] It is usual, but apparently not indispensable in such case, to require the person so adopted or appointed to marry for the purpose of continuing the *illam*.[12] There is, apparently, no limit of age.[13]

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[1] *Ibid.*

[2] See *Vasudevan* v. *Secretary of State* (1887), 11 Mad. 157, at p. 174.

[3] See *Vasudevan* v. *Secretary of State* (1887), 11 Mad. 157, at p. 182. Mayne's "Hindu Law," 7th ed., p. 271. "Travancore Census of 1891," p. 685.

[4] Wigram's "Malabar Law and Custom," pp. 4, 5.

[5] Mayne's "Hindu Law," 7th ed., p. 271.

[6] "Travancore Census, 1891," p. 685. See Wigram's "Malabar Law and Custom," pp. 13–15. As to the general law of the Nambudris, see *Vasudevan* v. *Secretary of State* (1887), 11 Mad. 157.

[7] As to Nambudri Brahmins who follow the Marumakkathayam system, see *Subramanyan* v. *Paramaswaran* (1887), 11 Mad. 116, *ante*, p. 163.

[8] A family.

[9] Kinsmen.

[10] *Vasudevan* v. *Secretary of State* (1887), 11 Mad. 157, at p. 188. There is no substantial distinction between the power to make a *Kritima* adoption (*ante*, p. 159) and the power to appoint an heir, *ibid.*, at p. 174. See also p. 189.

[11] *Keshavan* v. *Vasudevan* (1884), 7 Mad. 297.

[12] See *Vasudevan* v. *Secretary of State* (1887), 11 Mad. 157, at p. 189.

[13] *Keshavan* v. *Vasudevan* (1884), 7 Mad. 297, at p. 299.

There seems also to have been, or to be, a custom that if a Nambudri widow directs a person to marry to raise up issue for her *illam*, the status of the son in the *illam* for which he is begotten, is that of a son obtained in gift by adoption.[1]

Adoption of daughters by dancing-girls and prostitutes.

It is unsettled whether the Courts will recognize the common practice of dancing-girls and prostitutes to adopt daughters, but except where the child has been taken in such a way as to make her reception punishable by the Criminal law, it is submitted that there is no reason why the Courts should not give effect to such usage.[2]

In cases of adoption, prior to the coming into force of the Indian Penal Code,[3] the Courts in Madras recognized the custom,[4] but declined to extend it by allowing a plurality of adoptions.[5] It was also held that no ceremonies were necessary, and that mere recognition was sufficient.[6] Apparently the adoptive mother cannot adopt if she has a daughter. It is immaterial whether she has a son.[7]

In an old case in Bengal[8] the Court declined to recognize such adoptions, and in a Bombay case,[9] the report of which does not show when the adoption took place, but where apparently it had taken place before the coming into force of the Indian Penal Code, the Court, in declining to recognize the adoption, gave reasons which are as applicable to cases before that Act came into force as thereafter.

In a later Bombay case, effect was given to an adoption effected by a dying prostitute for the purpose of providing for the performance of her funeral ceremonies, and the inheritance of her property.[10]

In cases where a minor under the age of sixteen years has been sold or otherwise disposed of, or received with intent that she shall be employed or used for the purpose of prostitution (and this generally happens in the cases of so-called adoptions by dancing-girls[11]) the disposition or reception of the girl is punishable by the Penal Code,[12]

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[1] *Tottakara Alluttar Manakal Narrain Nambudripad* v. *Puvally Manikal Trivikrama Nambudripad*, Mad. S. D. A. 1855, p. 125, referred to in *Vasudevan* v. *Secretary of State* (1887), 11 Mad. 157, at pp. 175, 176.

[2] See *Manjamma* v. *Sheshgirirao* (1902), 26 Bom. 491, at p. 495. See *ante*, p. 25.

[3] Act XLV. of 1860, which came into force on the 1st of May, 1861.

[4] See *Venkatachellum* v. *Venkataswamy*, Mad. dec. of 1856, p. 65; *Venku* v. *Mahalinga* (1888), 11 Mad. 393; *Muttukannu* v. *Paramasami* (1888), 12 Mad. 214; *Chalakondu Akasani* v. *Chalakondu Ratnachalam* (1864), 2 Mad. H. C. 56; Steele, 185, 186; Strange's "Manual," paras. 98, 99.

[5] *Venku* v. *Mahalinga* (1888), 11 Mad. 393; *Muttukannu* v. *Paramasami* (1888), 12 Mad. 214.

[6] *Venkatachellum* v. *Venkataswamy*, Mad. dec. of 1856, p. 65.

[7] Strange's "Manual," para. 99.

[8] *Hencower Bye* (*Doe dem*) v. *Hanscower Bye* (1818), 2 Morl. Dig. 133.

[9] *Mathura Naikin* v. *Esu Naikin* (1880), 4 Bom. 545.

[10] *Manjamma* v. *Sheshgirirao* (1902), 26 Bom. 491, at p. 495.

[11] See *Mathura Naikin* v. *Esu Naikin* (1880), 4 Bom. 545, at p. 570.

[12] Act XLV. of 1860, ss. 372, 373. See *Queen-Empress* v. *Ramanna* (1889), 12 Mad. 273.

and therefore, as being prohibited by law, no effect can be given to it by the Court.[1]

In *Venku* v. *Mahalinga*,[2] Muttusami Ayyar, J., said, "We may set aside or decline to enforce a contract or disposition which has for its immediate object the prostitution of a minor during her minority so as to leave her no choice of married life when she is over sixteen years. The policy of the Penal Code, as it seems to me, is not to obliterate altogether the line of distinction between the province of ethics and that of law, but to protect the chastity of minors and to assume to them the freedom of choosing married life when they attain their age, whether they are the natural or adopted daughters of dancing women, and to leave otherwise the incidents of their legal *status* as daughters untouched, whether the parties concerned are dancing women or ordinary Hindus."

Effect was given to an adoption by a prostitute dancing-girl in *Narasanna* v. *Gangu*.[3]

DISPUTES AS TO ADOPTION.

Suits in which question of adoption arises.

A question as to the factum or validity of an adoption would arise in a suit or other proceeding in which the alleged adopted son is asserting his title as such, or in a suit brought against him for the purpose of disputing his title as an adopted son, or in a suit to recover property held by him by virtue of such alleged title, or in a suit for the purpose of preventing him from acting as adopted son.[4]

Who is entitled to dispute adoption.

An alleged adoption may be disputed by any person whose interests are affected by it.[5]

Adoption by widow.

A suit to declare the invalidity of an adoption by a widow can only, as a general rule, be brought by the presumptive reversionary heir.[6] Such a suit may be brought by a more distant reversioner, if those nearer in succession are in collusion with the widow or have

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[1] *Sanjivi* v. *Jalajakshi* (1899), 21 Mad. 229; *Kamalakshi* v. *Ramasami Chetti* (1895), 19 Mad. 127.

[2] (1888), 11 Mad. 393, at p. 402.

[3] (1889), 13 Mad. 133.

[4] In *Kalova* v. *Padapa Valad Bhujangrav* (1876), 1 Bom. 248, it was held that a suit would lie to obtain an injunction restraining a person from performing the *Shraddh* or other ceremonies as an adopted son, or assuming the status of such adopted son.

[5] See Act I. of 1877, s. 42, *post*, p 167.

[6] See Act I. of 1877, s. 42, illus. *f*, *post*, p. 168, and cases, *post*, p. 167, note 1.

precluded themselves from interfering,[1] or refuse, without sufficient cause, to take steps,[2] or where the next reversioner has only a limited estate.[3]

The nearer reversioner would apparently be a necessary party to a suit brought by a more distant reversioner.[4]

Adoption by adoptive father.

In case of an adoption by the husband the widow or other heir may sue, at any rate after the death of the adoptive father.

In case of the widow, or other limited heir,[5] colluding, or being precluded from interfering, the presumptive reversionary heir may sue, and possibly in case such presumptive reversionary heir is also colluding, a more distant reversioner may sue.[6]

Suit by adopter.

Except in a case where he is estopped from so doing,[7] a suit seeking to declare an alleged adoption to be invalid may be brought by the person making the adoption.[8]

Declaratory decree.

A declaratory decree will not be made as of right. Sec. 42 of the Specific Relief Act[9] is as follows:—

Discretion of Court as to declarations of status or right.

"Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may, in its discretion, make therein a declaration that he is so entitled, and the plaintiff need not, in such suit, ask for any further relief.

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[1] *Anund Koer (Rani)* v. *Court of Wards* (1880), 8 I. A. 14, at pp. 22, 23; 6 Calc. 764, at pp. 772, 773; 8 C. L. R. 381, at pp. 385, 386; *Bhikuji Apaji* v. *Jagannath Vithal* (1873), 10 Bom. H. C. 351; *Brojo Kishorec Dassee* v. *Sreenath Bose* (1868), 9 W. R. C. R. 463; *Tarini Charan Chowdhry* v. *Saroda Sundari Dasi* (1869), 3 B. L. R. A. C. 145, at p. 157; 11 W. R. C. R. 468, at p. 470.

[2] *Gurulingaswami* v. *Ramalakshmamma* (1894), 18 Mad. 53.

[3] Cf. *Abinash Chandra Mazumdar* v. *Harinath Shaha* (1904), 32 Calc. 62; 9 C. W. N. 25.

[4] See *Anund Koer (Rani)* v. *Court of Wards* (1880), 8 I. A. 14, at p. 23; 6 Calc. 764, at p. 772; 8 C. L. R. 381, at pp. 385, 386; *Gurulingaswami* v. *Ramalakshmamma* (1894), 18 Mad. 53, at p. 58.

[5] Such as a daughter.

[6] *Ante*, p. 166.

[7] *Post*, p. 174.

[8] As, for instance, where the adoptor has been induced to adopt by misrepresentation or coercion (*ante*, pp. 152, 153).

[9] I. of 1877. The right to bring a suit to declare an adoption to be invalid independently of a claim to property has been incidentally recognized by the Legislature. See Court Fees Act (VII. of 1870, s. 2, art. 17, cl. 5) and in Limitation Acts (IX. of 1871, Sched. II., art. 129; XV. of 1877, Sched. II., art. 118).

Bar to such declaration.

Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

Explanation.—A trustee of property is a person interested to deny a title adverse to the title of some one who is not in existence, and for whom, if in existence, he would be a trustee.

Illustration.

A Hindu widow in possession of property adopts a son to her deceased husband. The person presumptively entitled to possession of the property on her death without a son may, in a suit against the adopted son, obtain a declaration that the adoption was invalid.

Suit to determine right to take in adoption.

It is unsettled whether, in exercise of the discretion given to it by the Specific Relief Act,[1] the Court can determine a right to take in adoption before the adoption has taken place.

The High Court of Bengal has held in an unreported case that a suit will lie for a declaration that a permission set up by a widow is false.[2] The same Court decided in a case under the law before the Specific Relief Act came into force that such suit will not lie,[3] relying on the decision of the Judicial Committee in *Sree Narain Mitter* v. *Kishen Soondory Dassee* (*Sreemutty*),[4] but in the last-named case the suit was merely to set aside certain deeds of gift and acceptance in adoption, under which the defendant took no interest. It may in many cases be desirable that the question should be determined in order to save the parties expense, to save the boy from the peril of his adoption being declared invalid, and to save the estate from the expense of maintaining the boy if the adoption be declared invalid.[5] On the other hand, the boy would not be bound by the decree, as he could not be a party to such suit.

Injunction.

There seems to have been no case in which an

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[1] S. 42, above.

[2] *Rajputty Koeri* (*Mussummat*) v. *Nripabati* (*Mussummat*), A. O. D. 4 of 1887, referred to in Sircar's "Law of Adoption," p. 434.

[3] *Run Bahadoor Singh* v. *Lucho Coowar* (*Musst.*) (1879), 4 C. L. R. 270. See also *Rajcoomaree Dossee* (*Sreemutty*) v. *Noboocoomar Mullick* (1856), Boul. 137; *Pearee Dayee* (*Mussamut*) v. *Hurbunsee Kooer* (*Mussamut*) (1873), 19 W. R. C. R. 127; *Subudra Chowdrayn* (*Mussamut*) v. *Goluknath Chowdhry* (1843), 7 Ben. Sel. R. 143 (new edition, 166).

[4] (1873), I. A. Sup. Vol. 149; 11 B. L. R. 171. S. C. *sub nomine, Nogendro Chundro Mitro* v. *Kishen Soondery Dossee* (*Sreemutty*), 19 W. R. C. R. 133.

[5] See *post*, pp. 207, 208.

injunction has been granted to restrain the performance of an adoption,[1] but provided the application be made in due time, and there be no objection on the merits, there seems no reason why a Court should not be justified in issuing such injunction.

There is authority that an *interim* injunction will not be granted to restrain the carrying out of an adoption.[2]

Specific performance of agreement.

The Courts will not decree specific performance of an agreement to give or take in adoption,[3] but the breach of such agreement would apparently give a right to damages.[4]

Res judicata.

A decision as to the *factum* or validity of an adoption will only bind the persons who are parties to such decision and those claiming under them.[5]

It is unsettled whether a decision as to the fact, or the validity of an adoption in a suit between the alleged adopted son and a person who is, during the lifetime of the widow, the then immediate reversioner, will bind another person who may succeed to the reversion.[6] The Madras High Court has held that he is bound,[7] but this is not in accordance with the views of the other High Courts.

When the question is decided, after the death of the widow, in a suit between the adopted son and the person who would in the absence of the adopter be entitled to the reversion after her death, such decision would bind all persons subsequently interested in the estate as they would take through the person then entitled.

A decision in a litigation which has been *bonâ fide* instituted and

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[1] See *Assur Purshotam* v. *Ratanbai* (1888), 13 Bom. 56.

[2] *Ibid.*

[3] Act I. of 1877, s. 21*b*.

[4] See *Sree Narain Mitter* v. *Kishen Soondoree Dossee* (1873), I. A. Sup. Vol. 149, at p. 160; 11 B. L. R. 171, at p. 188.

[5] See Civil Procedure Code, 1908, s. 11; Act XIV. of 1882, s. 13.

[6] See *Bhagwanta* v. *Sukhi* (1899), 22 All. 33; *Chhiddu Singh* v. *Durga Dei* (1900), 22 All. 382. This question was left undecided in *Brojokishoree Dassee* v. *Sreenath Bose* (1868), 9 W. R. C. R. 463, and in *Jumoona Dassya Chowdhrani* v. *Bamasoonderai Dassya Chowdhrani* (1876), 3 I. A. 72, at p. 84; 1 Calc. 289, at p. 296; 25 W. R. C. R. 235, at p. 239. The fact that a previous suit by a reversioner has been unsuccessful may be a reason for refusing a mere declaratory decree (see *ante*, p. 167) at the suit of another reversioner. The idea that a decision in a question of adoption had the effect of a judgment *in rem* was disposed of in *Kanhya Lall* v. *Radha Churn* (1867), B. L. R. F. B. R. 662; 7 W. R. C. R. 338. The matter is now dealt with by the Evidence Act (I. of 1872), s. 43.

[7] *Chiruvolu Punnamma* v. *Chiruvolu Perrazu* (1906), 29 Mad. 390.

conducted between the alleged adopted son and the widow in whom the property was vested would, in the case where the adoption was alleged to be made by the widow's husband, bind the reversioners. Probably it would also have the same effect where the adoption is said to have been made by the widow,[1] but she denies it.

A decision against one person claiming to be an adopted son would not bind another person claiming under another act of adoption.[2]

Under the Specific Relief Act,[3] a declaration is only binding on the parties to the suit, persons claiming through them respectively, and where any of the parties are trustees, on the persons for whom, if in existence at the date of the declaration, such parties would be trustees. As these expressions do not include the case of a subsequent reversioner, it seems clear that a declaration, or the refusal to grant one, in a suit by one reversioner does not bind another reversioner.

Limitation of suit to declare adoption invalid.

A suit "to obtain a declaration that an alleged adoption is invalid, or never, in fact, took place," must be brought within "six years" from the time "when the alleged adoption becomes known to the plaintiff."[4]

This provision is confined to declaratory suits, and does not alter the limitation for suits for possession of property.[5]

There was a conflict of authority as to whether the effect of this provision is to bar suits for possession of property against a person holding under an alleged adoption which are brought more than six years after the alleged adoption becomes known to the plaintiff, or whether it is confined to cases where a declaration only can be obtained, and there is no present right to substantive relief.[6]

The Madras[7] and Bombay[8] High Courts held that it has the

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[1] See *Katama Natchiar* v. *Rajah of Shivagunga* (1864), 9 M. I. A. 543, at p. 608; 2 W. R. P. C. 31, at p. 37.

[2] See *Anundmoyee Chowdhoorayan* (*Mussumauth*) v. *Sheeb Chunder Roy* (1862), 9 M. I. A. 291, at p. 306; 2 W. R. P. C. 19, at p. 21; Marsh, 455, at p. 460.

[3] I. of 1877, s. 43.

[4] Act XV. of 1877, Sched. II., art. 118. "'Plaintiff' includes also any person from or through whom a plaintiff derives his right to sue," s. 3.

[5] *Tirbhuwan Bahadur Singh* (*Thakur*) v. *Rameshar Baksh Singh* (*Raja*) (1906), 33 I. A. 156; 28 All. 727; 10 C. W. N. 1065.

[6] As where the widow is alive, and the reversioner seeks to have it declared that the adoption made by her is not valid. See Specific Relief Act (I. of 1877), s. 42, *ante*, p. 167. This question was raised, but not determined, in *Luchmun Lal Chowdhry* v. *Kanhya Lal Mowar* (1894), 22 I. A. 51; 22 Calc. 609.

[7] *Parvathi Ammal* v. *Saminatha Gurukal* (1896), 20 Mad. 40. Cf. *Ratnamasari* v. *Akilandammal* (1902), 26 Mad. 291.

[8] *Shrinivas Murar* v. *Hanmant*

former effect, but in Calcutta[1] and Allahabad[2] a contrary view was expressed.

The Madras decision was based upon two judgments of the Judicial Committee[3] with reference to the construction of Act 129 of the 2nd Schedule of an earlier Limitation Act (IX. of 1871). That article provided a limitation for suits to "set aside an adoption," and was held to be equally applicable to suits seeking a mere declaration that the adoption was invalid, and to suits which sought the possession of property held under colour of an alleged adoption. Although the phraseology of that article differs from that of the article now in force, which in terms contemplates only a declaratory suit,[4] there are observations of the Judicial Committee which were held to be equally applicable to the present law.[5]

This rule of limitation has no application to a case where the proceeding or document is on its face no obstacle to the title of the heir, as, for instance, where a woman adopts to herself and not to her husband.[6]

If the right of the nearest reversioner for the time being to contest an adoption by the widow is allowed to become barred by limitation as against him, this will not bar the similar rights of the subsequent reversioners.[7]

The right to bring such suit would be barred where Adverse possession.

Chavdo Deshapande (1899), 24 Bom. 260, overruling *Harilal Pranlal* v. *Bai Rewa* (1895), 21 Bom. 376; *Funnyamma* v. *Manjaya Hebbar* (1895), 21 Bom. 159, and *Padajirav* v. *Ramrav* (1888), 13 Bom. 160, which last case was decided under Art. 119 of the Schedule (*post*, p. 172). *Ramchandra Vinayak Kulkarni* v. *Narayan Babaji* (1903), 27 Bom. 614; *Barot Naran* v. *Barot Jesang* (1900), 25 Bom. 26.

[1] *Ram Chandra Mukerjee* v. *Ranjit Singh* (1899), 27 Calc. 242, at pp. 253–255; 4 C. W. N. 405, at pp. 411–413; *Parbhu Lal* (*Lala*) v. *Mylne* (1887), 14 Calc. 401; *Baikanta Chandra Roy Chowdhury* v. *Kali Charan Roy Chowdhury* (1904), 9 C. W. N. 222. Cf. *Jagannath Prasad Gupta* v. *Runjit Singh* (1897), 25 Calc. 354.

[2] *Lali* v. *Murlidhar* (1901), 24 All. 195; *Natthu Singh* v. *Gulab Singh* (1895), 17 All. 167; *Basdeo* v. *Gopal* (1886), 8 All. 644; *Ganga Sahai* v. *Lekhraj Singh* (1886), 9 All. 253, at pp. 267–269. *Contrâ Inda* v. *Jehangira*, All. Weekly Notes, 1890, p. 241.

[3] *Jagadamba Chowdhrani* v. *Dakhina Mohun* (1886), 13 I. A. 84; 13 Calc. 308; *Mohesh Narain Moonshee* v. *Taruck Nath Moitra* (1892), 20 I. A. 30; 20 Calc. 487.

[4] Cf. Art. 119, *post*, p. 172, which also speaks of a suit for a declaration, but apparently contemplates substantive relief on the ground of the plaintiff's rights being interfered with.

[5] *Jagadamba Chowdhrani* v. *Dakhina Mohun* (1886), 13 I. A. 84, at p. 95; 13 Calc. 308, at pp. 320, 321.

[6] *Raj Bahadoor Singh* v. *Achumbit Lal* (1879), 6 I. A. 110; 6 C. L. R. 12; *Luchmun Lal Chowdhry* v. *Kanhya Lal Mowar* (1894), 22 I. A. 51; 22 Calc. 609.

[7] *Bhagwanta* v. *Sukhi* (1899), 22 All. 33. Cf. *Abinash Chandra Mazumdar* v. *Harinath Shaha* (1904), 32 Calc. 62; 9 C. W. N. 25. See *ante*, p. 169.

the person claiming under an alleged adoption had held the property for more than twelve years adversely to the widow of his adoptive father[1] or to the plaintiff.

Limitation of suit to declare adoption valid.

A suit "to obtain a declaration that an adoption is valid" must be brought within "six years" from the time "when the rights of the adopted son as such[2] are interfered with."[3]

It has been held by the High Courts of Bengal[4] and the North-west Provinces[5] that this article does not prevent a suit for possession by a person claiming as an adopted son, even though it be brought more than six years after his rights have been interfered with.[6]

A different view has been accepted in Bombay.[7] In Madras the High Court has differed on this question.[8] The section clearly does not bar a suit in which the plaintiff claims to succeed independently of the alleged adoption.[9]

Adverse possession.

Where time has begun to run before the adoption as in the case of the widow being dispossessed, the adopted son may be barred by adverse possession,[10] but in a suit claiming property alienated by the widow before the adoption, time does not begin to run before the adoption.[11]

Election.

Where a person, entitled to dispute an adoption, is benefitted in the same character by a will, or other disposition of property, which benefits the person adopted, he must elect whether to take under the will, or other disposition, or against it.

"A principle not peculiar to English law, but common to all law, which is based on the rules of justice, namely . . . that a party shall not, at the same time, affirm and disaffirm the same transaction—affirm

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[1] Act XV. of 1877, Sched. II., art. 144; *Ghandarap Singh* v. *Lachman Singh* (1888), 10 All. 485.

[2] See *Gangabai* v. *Tarabai* (1902), 26 Bom. 720.

[3] Act XV. of 1877, Sched. II., art. 119.

[4] *Jagannath Prasad Gupta* v. *Runjit Singh* (1897) 25 Calc. 354.

[5] *Lali* v. *Murlidhar* (1901), 24 All. 195; *Chandania* v. *Saligram* (1903), 26 All. 40.

[6] See notes to art. 118 of the schedule, *ante*, pp. 170, 171.

[7] See *Shrinivas Murar* v. *Hanmant Chavdo Deshapande* (1899), 24 Bom. 260, differing from *Padajirav* v. *Ramrav* (1888), 13 Bom. 160; *Laxmana* v. *Ramappa* (1907), 32 Bom. 7.

[8] *Ratnamasari* v. *Akilandammal* (1902), 26 Mad. 291.

[9] See *Gangabai* v. *Tarabai* (1902), 26 Bom. 720.

[10] *Gobind Chandra Sarma Mazoomdar* v. *Anand Mohan Sarma Mazoomdar* (1869), 2 B. L. R. A. C. 313.

[11] *Moro Narayan Joshi* v. *Balaji Raghunath* (1894), 19 Bom. 809.

it as far as it is for his benefit, and disaffirm it as far as it is to his prejudice."[1]

Burden of proof.

A person, whose title depends upon an adoption, must, in a contest between him and the person who would succeed in the absence of such adoption, prove the fact of the adoption,[2] the performance of the ceremonies[3] (if any) which may be necessary,[4] and such facts as are necessary to establish its validity.[5] If the adoption was by a widow, who could not adopt without permission, he must prove the fact of such permission having been given.[6]

The burden of proving the adoption is on the person alleging it, in the unusual case of the adoption being denied by the person alleged to be adopted.[7]

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[1] *Rungama* v. *Atchama* (1846), 4 M. I. A. 1, at p. 103; 7 W. R. (P. C.), 57, at p. 62. See Act X. of 1865, ss. 167-177, applied to certain Hindu wills by Act XXI. of 1870, s. 2.

[2] See Indian Evidence Act (I. of 1872), ss. 101-103; *Sootroogun Sutputty* v. *Subitra Dye* (1834), 2 Knapp, 287; 5 W. R. P. C. 109; *Chowdry Pudum Singh* v. *Koer Oodey Singh* (1869), 12 M. I. A. 350, at pp. 356, 357; 2 B. L. R. (P. C.), 101, at p. 104; 12 W. R. P. C. 1, at pp. 2, 3; *Ramprotab Misser* v. *Abhilak Misser* (1878), 3 C. L. R. 170, at p. 174; *Hur Dyal Nag* v. *Roy Krishto Bhoomick* (1875), 24 W. R. C. R. 107; *Tarini Charan Chowdhry* v. *Saroda Sundari Dasi* (1869), 3 B. L. R. (A. C.) 145, at pp. 158, 159, 11 W. R. C. R. 468, at p. 474; *Bissessur Chuckerbutty* v. *Ram Joy Mojoomdar* (1865), 2 W. R. C. R. 326, at p. 328; *Roopmonjooree Chowdranee* v. *Ramlall Sircar* (1864), 1 W. R. C. R. 145, at p. 147; *Kenchawa* v. *Ningupa* (1867), 10 Bom. H. C. 265, note.

[3] *Oomrao Singh* (*Thakoor*) v. *Mehtab Koonwer* (*Thakooranee*) (1868), 3 Agra, 103A. See *ante*, pp. 150, 153, 154.

[4] See *ante*, pp. 153, 154.

[5] *Oomrao Singh* (*Thakoor*) v. *Mehtab Koonwer* (*Thakooranee*) (1868), 3 Agra, 103A. In *Rango Balaji* v. *Mudieyppa* (1898), 23 Bom. 296, at p. 303, it was held that the person setting up an adoption was required to establish the death of the natural son of his adoptive father at the time of the adoption.

[6] *Chowdry Pudum Singh* v. *Koer Oodey Singh* (1869), 12 M. I. A. 350, at p. 356; 2 B. L. R. (P. C.) 101, at p. 104; 12 W. R. (P. C.) 1, at pp. 2, 3; *Hur Dyal Nag* v. *Roy Krishto Bhoomick* (1875), 24 W. R. C. R. 107; *Tarini Charan Chowdhry* v. *Saroda Sundari Dasi* (1869), 3 B. L. R. (A. C.) 145, at pp. 158, 159; 11 W. R. C. R. 468, at p. 474; *Kripa Moyee Debia* v. *Goluck Chunder Roy* (1865), 4 W. R. C. R. 78; *Roopmonjooree Chowdranee* v. *Juggut Chunder Sircar* (1864), 1 W. R. C. R. 145, at p. 147; *Oomrao Singh* (*Thakoor*) v. *Mehtab Koonwer* (*Thakooranee*) (1868), 3 Agra, 103A; *Har Shankar Partab Singh* v. *Lal Raghuraj Singh* (1907), 34 I. A. 129; 29 All. 519; 11 C. W. N. 841.

[7] *Chandra Kunwar* (*Rani*) v. *Narpat Singh* (*Chaudhri*) (1906), 34 I. A. 27; 29 All. 184; 11 C. W. N. 321; *Har Shankar Partab Singh* v. *Lal Raghuraj Singh* (1907), 34 I. A. 129; 29 All. 519; 11 C. W. N. 841.

Where the plaintiff claims property as heir, and is unable to establish his relationship, it is unnecessary for the defendant to prove his adoption.[1]

In certain summary proceedings a *de facto* adoption might be acted upon until set aside in a properly constituted suit.[2]

Where the fact of the adoption is admitted, and it is alleged that the natural father has lost his right to give in adoption, the burden of proving such loss is upon the person alleging it.[3]

There is authority that in a suit which merely seeks to declare invalid an adoption which in fact took place, the burden of proof is upon the person seeking to obtain such declaration.[4]

Estoppel.

A person entitled to dispute an adoption may be estopped from disputing it, although the same adoption may be liable to be disputed by other persons who are not so estopped.

Evidence Act, s. 115.

The Indian Evidence Act,[5] s. 115, enacted as follows:—

"Where one person has, by his declaration, act, or omission, intentionally caused or permitted another person to believe a thing to be true, and to act upon such belief,[6] neither he nor his representative[7] shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."

For instance, a widow representing to the natural father that she had a power to adopt, and thereby inducing him to give his son in adoption, would be estopped from thereafter denying the power.[8]

Allowing the thread ceremony and marriage to be performed in the

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[1] *Kalikishore Dutt Gupta Mozoomdar* v. *Bhusan Chunder* (1890), 18 Calc. 201.

[2] See *Nunkoo Singh* v. *Purm Dhun Singh* (1869), 12 W. R. C. R. 356, which was a case under the Certificate Act (XXVII. of 1860). See *Ramprotab Misser* v. *Abhilak Misser* (1878), 3 C. L. R. 170, at p. 173.

[3] *Kusum Kumari Roy* v. *Satya Ranjan Das* (1903), 30 Calc. 999; 7 C. W. N. 784.

[4] *Brojo Kishoree Dassee* v. *Sreenath Bose* (1868), 9 W. R. C. R. 463, at p. 467; *Gooroo Prosunno Singh* v. *Nil Madhub Singh* (1873), 21 W. R. C. R. 84.

[5] Act I. of 1872.

[6] *Yashvant Puttu Shenvi* v. *Radhabai* (1889), 14 Bom. 312.

[7] This would not include an auction purchaser at a sale of property belonging to the person estopped. *Parbhu Lal* (*Lala*) v. *Mylne* (1887), 14 Calc. 401.

[8] *Kannammal* v. *Virasami* (1892) 15 Mad. 486.

adoptive family, and otherwise allowing the youth to act as an adopted son, would amount to an estoppel.[1]

Active participation in the adoption may also operate as an estoppel.[2]

A person may be so estopped, although he was acting in good faith, or without a full knowledge of the circumstances, or was under a mistake or misapprehension.[3] Good faith.

Mere acquiescence in, or presence at, an adoption is not sufficient to create an estoppel.[4]

The person taking in adoption would generally, in the absence of fraud or coercion, be estopped from denying the adoption,[5] but where there has been no mis-statement,[6] or conduct equivalent thereto, or where the mis-statement has not been acted upon,[7] there can be no estoppel.

A person is not estopped from denying an adoption merely because he had previously secured succession to properties by setting up that adoption, when it appears that his claim as adopted son was not opposed by the person as against whom he is said to be estopped.[8]

The acts of a Hindu female, who "is acting without the guidance of a disinterested adviser, cannot prejudice her."[9]

The misrepresentation to operate as an estoppel must apparently be of a matter of fact. An erroneous expression of opinion that an adoption was valid in law could not apparently lead to an estoppel, nor could a person apparently be estopped from asserting the state of the law.[10] Matters of law.

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[1] *Santappayya* v. *Rangappayya* (1894), 18 Mad. 397.

[2] *Sadashiv Moreshvar Ghate* v. *Hari Moreshvar Ghate* (1874), 11 Bom. H. C. 190; *Vyas Chimanlal* v. *Vyas Ramchandra* (1899), 24 Bom. 473, at p. 481; *Chintu* v. *Dhondu*, 11 Bom. H. C. 192, note.

[3] *Sarat Chunder Dey* v. *Gopal Chunder Laha* (1892), 19 I. A. 203, at p. 215; 20 Calc. 296, at p. 310, overruling *Ganga Sahai* v. *Hira Singh* (1880), 2 All. 809, and *Vishnu Nambudri* (*Eranjoli Illath*) v. *Krishnan Nambudri* (*Eranjoli Illath*) (1883), 7 Mad. 3.

[4] *Gurulingaswami* v. *Ramalakshmamma* (1894); 18 Mad. 53, at p. 60; *Papamma* v. *Appa Rau* (1893), 16 Mad. 384, at p. 391.

[5] See *Ravji Vinayakrav Jagannath Shankarsett* v. *Lakshmibai* (1887), 11 Bom. 381, at p. 396; *Sukhbasi Lal* v. *Gunan Singh* (1879), 2 All. 366; *Chintu* v. *Dhondu* (1873), 11 Bom. H. C. p. 192, note; *Chitko Raghunath Rajadiksh* v. *Janaki* (1874), 11 Bom. H. C. 199.

[6] See *Surendrakeshav Roy* v. *Doorgasundari Dassee* (1892), 19 I. A. 108, at p. 128; 19 Calc. 513, at p. 532; *Tayammaul* v. *Sashachalla Naiker* (1865), 10 M. I. A. 429, at pp. 433, 434.

[7] See *Kuverji* v. *Babai* (1890), 19 Bom. 374; *Parvatibayamma* v. *Ramakrishna Rau* (1894), 18 Mad. 145, at p. 149.

[8] *Har Shankar Partab Singh* v. *Lal Raghuraj Singh* (1907), 34 I. A. 129; 29 All. 519; 11 C. W. N. 841.

[9] *Tayammaul* v. *Sashachalla Naiker* (1865), 10 M. I. A. 429, at p. 433. See *ante*, p. 153, note 3.

[10] See *Gopee Lall* v. *Chundraolee Buhoojee* (*Mussamat Sree*) (1872), I. A. Sup. Vol. 131, at p. 133; 11 B. L. R. 391, at p. 395; 19 W. R. C. R.

In *Parvatibayamma* v. *Ramakrishna Rau*,[1] it was laid down on the authority of *Gopalayyan* v. *Raghupatiayyan*,[2] that "the claimant has to show that by a course of conduct long continued on the part of the family which has purported to affiliate him, his situation in his original family has been altered so that it would be impossible to restore him to it." This limitation to the doctrine of estoppel is not, it is submitted, justified by the terms of sec. 115 of the Evidence Act. There seems to have been no estoppel in that case, as the representation, if made, was neither believed nor acted upon.

Mode of proof.

The fact of the adoption, and of the power (if any), and of the circumstances necessary to establish the validity of the adoption, must be proved in the same way as any other fact. There are no special rules of evidence applicable.

The Court must carefully and strictly examine the evidence as to the completion of the act of adoption, and as to the facts which are necessary to validate it.[3]

Acquiescence by the person entitled to dispute an adoption, or by other members of the family, is some evidence of the fact of the adoption. Its value as such must depend upon the circumstances. Where it has arisen from an imperfect knowledge of the facts it can be of no value.[4]

A statement as to the existence of the power by the person alleged to have given it is evidence in support of it.[5]

As to statements by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, when these statements relate to the existence of relationship by adoption, see the Indian Evidence Act I. of 1872, sec. 32 (5), (6).

A statement amounting to an admission by the person alleged to have been adopted will be evidence against him requiring explanation.[6]

12, at p. 13; *Kuverji* v. *Bai* (1890), 19 Bom. 374, at pp. 390, 391. See *Rajnarain Bose* v. *Universal Life Assurance Company* (1881), 7 Calc. 594.

[1] (1894), 18 Mad. 145, at p. 148 (see also pp. 151, 152).

[2] (1873), 7 Mad. H. C. 250.

[3] *Imrit Konwur* v. *Roop Narain Singh* (1880), 6 C. L. R. 76, at p. 823; *Kenchava* v. *Ningapa* (1867), 10 Bom. H. C. 265, note. See *Roopmonjooree Chowdranee* v. *Ramlall Sircar* (1864), 1 W. R. C. R. 145; *Sootroogun Sutputhy* v. *Sabitra Dye* (1835), 2 Knapp, 287; 5 W. R. P. C. 109; *Huradhun Mookurjia* v. *Muthoranath Mookurjia* (1849), 4 M. I. A. 414, at p. 425; 7 W. R. P. C. 71.

[4] See *Rungama* v. *Atchama* (1846), 4 M. I. A. 1, at p. 103; 7 W. R. P. C. 57, at p. 62. See Act I. of 1872, s. 50.

[5] Indian Evidence Act (I. of 1872), ss. 21, 32 (5), *Kishen Sunker Dutt* v. *Moha Mya Dossee*, W. R. 1864, C. R. 210.

[6] See *Chandra Kunwar* (*Rani*) v. *Narpat Singh* (*Chaudhri*) (1906), 34 I. A. 27; 29 All. 184; 11 C. W. N. 320.

An ancient report of a *panchayet* as to the pedigree of a family has been held to establish an adoption which was not then disputed.[1]

A tradition in a *wajib-ul-arz* has been acted upon by the Judicial Committee.[2]

"It may be desirable carefully to examine cases of possible fraud, yet . . . instruments which are proved by all the attesting witnesses, and against which there is no evidence on the other side, ought not to be set aside and treated as nothing, on a mere suspicion of perjury and forgery."[3]

After such a lapse of time as makes it impossible, or difficult, to obtain direct evidence of the adoption, or of the performance of the necessary ceremonies, or of the giving of the necessary permission, evidence of recognition by the adoptive parents, or by other members of the family, or of treatment as an adopted son by permitting him to perform the family worship, or to share in the inheritance, or otherwise, may be sufficient to establish an adoption, or, at any rate, to render slight evidence sufficient,[4] and in any case will, it is submitted, be admissible in support of the adoption,[5] but such evidence cannot establish an adoption which is in law invalid.

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[1] *Ajabsing* v. *Nanabhau Valad Dhansing Raul* (1898), 26 I. A. 48; 3 C. W. N. 130.

[2] *Achal Ram* (*Lal*) v. *Kazim Husain Khan* (*Raja*) (1905), 32 I. A. 113; 27 All. 271; 9 C. W. N. 477.

[3] *Kalichandra Chowdhry* v. *Shibchandra Bhaduri* (1870), 6 B. L. R. 501, at p. 508; 15 W. R. P. C. 12, at p. 14. See *Chundernath Roy* (*Rajah*) v. *Gobindnath Roy* (*Kooar*) (1872), 11 B. L. R. 86, at p. 98; 18 W. R. 221, at pp. 222, 223.

[4] See *Rajendro Nath Holdar* v. *Jogendro Nath Banerjee* (1871), 14 M. I. A. 67, at pp. 76, 77; 7 B. L. R. 216, at pp. 227, 228; 15 W. R. P. C. 41, at pp. 44, 45; *Rungama* v. *Atchama* (1846), 4 M. I. A. 1, at p. 105; 7 W. R. P. C. 57, at p. 62; *Vyas Chimanlal* v. *Vyas Ramchandra* (1899), 24 Bom. 473; *Ramalinga Pillai* v. *Sadasiva Pillai* (1864), 9 M. I. A. 510, at p. 519; 1 W. R. P. C. 25, at p. 26; *Anandrav Sivaji* v. *Ganesh Eshvant Bokil* (1863), 7 Bom. H. C. App. xxxiii.; *Sabo Bewa* v. *Nahagun Maiti* (1869), 2 B. L. R. App. 51; 11 W. R. C. R. 380; *Nittianand Ghose* v. *Krishna Dyal Ghose* (1871), 7 B. L. R. 1; 15 W. R. C. R. 300; *Perkash Chunder Roy* v. *Dhunmonnee Dassea*, Ben. S. D. of 1853, p. 96; *Hur Dyal Nag* v. *Roy Krishto Bhoomick* (1875), 24 W. R. C. R. 107; *Chowdhry Herasutollah* v. *Brojo Soondur Roy* (1872), 18 W. R. C. R. 77, at p. 80; *Tincourie Chatterjee* v. *Denonath Banerjee*, W. R. 1864. C. R. 155; *Roopmonjooree Chowdranee* v. *Ramlall Sircar* (1864), 1 W. R. C. R. 145; *Mohendro Lall Mookerjee* v. *Rookiney Dabee* (1864), Coryton, 42, at p. 46.

[5] See Indian Evidence Act (I. of 1872), s. 50. In that section "it will be noted that the words 'by blood marriage and adoption' have not been inserted after the word 'relationship' by Act XVIII. of 1872, as in the case of s. 32, cls. (5) and (6). Illustration (*a*) refers to the case of marriage, but relationship is not mentioned," Ameer Ali and Woodroffe's "Law of Evidence," 1st ed., p. 360. This would seem to show that the conduct of relations would not be admissible as evidence in the case of adoption, but the Indian Courts have undoubtedly been

A person who asks the Court to presume that an adoption did take place, must establish an initial probability that the adoption was likely to have been validly made and that the conduct of the partners cognizant of the facts had been at least consistent with such an hypothesis.[1]

Probabilities. Where there is conflicting evidence upon the fact of an adoption, much must depend upon the probabilities of the case to be collected from the admitted or proved facts, but such probabilities do not take the place of evidence.

Aged adopter. The fact that the person alleged to have adopted was childless, and advanced in years, and had despaired of having male issue;[2] or the fact

Solicitude as to future state. that he was anxious to deliver himself from *Put*,[3] give rise to a probability that he wished to adopt.

Enmity with heir. The fact that the alleged adoptive father or mother was at enmity with the reversioner might also render an adoption probable.[4]

Religious duty. The religious duty to adopt a son, which is said to be incumbent upon every childless Hindu,[5] is also a circumstance to be taken into consideration,[6] but by itself it has not much force, having regard "to the fact that childless Hindus die daily without having fulfilled this obligation, or made provision for its fulfilment after their death."[7]

Absence of notices and ceremonials. On the other hand, the absence of notices to relations and of ceremonials may be evidence against the probability of the fact of adoption.

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in the habit of admitting such evidence. With two exceptions (*Hur Dyal Nag* v. *Roy Krishto Bhoomick* and *Vyas Chimanlal* v. *Vyas Ramchandra*), the decisions in note 4 above were given before the passing of the Indian Evidence Act.

[1] *Har Shankar Partab Singh* v. *Lal Raghuraj Singh* (1907), 34 I. A. 129; 29 All. 519; 11 C. W. N. 841.

[2] *Huradhun Mookurjia* v. *Muthoranath Mookurjia* (1849), 4 M. I. A. 414, at p. 425; 7 W. R. P. C. 71. See *Roopmonjooree Chowdranee* v. *Ramlall Sircar* (1864), 1 W. R. C. R. 144, at p. 150; *Bistooprea Patwahadea* (*Rance*) v. *Basoodeb Dull Bewartee Patnaik* (1865), 2 W. R. C. R. 232, at p. 235.

[3] *Huradhun Mookurjia* v. *Muthoranath Mookurjia* (1849), 4 M. I. A. 414, at pp. 425, 426; 7 W. R. P. C. 71.

[4] *Soondur Koomaree Debbeea* v. *Guladhur Pershad Tewarree* (1858), 7 M. I. A. 54, at pp. 64, 67; 4 W. R. P. C. 116, at pp. 119, 120; *Raghunada* (*Sri*) v. *Brozo Kishoro* (*Sri*) (1876), 3 I. A. 154, at p. 177; 25 W. R. C. R. 291, at p. 295.

[5] *Ante*, p. 101.

[6] See *Raghunada* (*Sri*) v. *Brozo Kishoro* (*Sri*) (1876), 3 I. A. 154, at p. 177; 25 W. R. C. R. 291, at p. 295; *Roopmonjoree Chowdranee* v. *Ramlall Sircar* (1864), 1 W. R. C. R. 145, at pp. 150, 151; *Sarodasoondery Dossee* (*S. M.*) v. *Tincowry Nundy* (1863), 1 Hyde, 223, at p. 249.

[7] *Nilmadhub Doss* v. *Bishumber Doss* (1869), 13 M. I. A. 85, at p. 100; 3 B. L. R. (P. C.) 27, at p. 32; 12 W. R. P. C. 29, at p. 31. See *Gurulingaswami* (*Sri Balusu*) v. *Ramalakshmamma* (*Sri Balusu*), *Radhamohun* v. *Hardai Bibi* (1899), 26 I. A. 113, at p. 135; 23 Mad. 398, at p. 414; 21 All. 460, at p. 477; 3 C. W. N. 427, at p. 442.

In *Sootroogun Sutputty* v. *Sabitra Dye*,[1] the Judicial Committee say, "But although neither written acknowledgments, nor the performance of any religious ceremonials, are essential to the validity of adoptions, such acknowledgments are usually given, and such ceremonies observed, and notices given of the times when adoptions are to take place, in all families of distinction, as those of zemindars or opulent Brahmins, that wherever these have been omitted, it behoves the Court to regard with extreme suspicion the proof offered in support of an adoption. I would say, that in no case should the rights of wives and daughters be transferred to strangers, or more remote relations, unless the proof of adoption by which that transfer is effected be proved by evidence free from all suspicion of fraud, and so consistent and probable as to give no occasion for doubt of its truth."

Youth.

The youth,[2] or vigour,[3] of the alleged adopting father, and the consequent probability of male issue, may also be a circumstance rendering the adoption improbable.

Position of parties, and motives.

"In considering the validity of" powers to adopt, "it is of great importance, in the first place to ascertain the position of the parties at the time when the instruments are alleged to have come into existence, and the motives which may have led to the execution of them."[4]

Presumption as to permission.

A permission to give in adoption may be presumed,[5] but no such presumption may be made with reference to a permission to take in adoption.[6]

Proof of performance of ceremonies.

It has been held[7] that "when the Court is satisfied that the authority to adopt really was given, it will require comparatively slight proof of the performance of the ceremonies by which the adoption is completed. But

[1] (1835), 2 Knapp, 287, at p. 290; 5 W. R. P. C. 109. See also *Ondy Kadarun* v. *Aroonachella*, Mad. dec. 1857, p. 93; *Bistooprea Patmohadea (Ranee)* v. *Basoodeb Dull Bewartee Patnaik* (1865), 2 W. R. C. R. 232.

[2] *Sootroogun Sutputty* v. *Sabitra Dye* (1835), 2 Knapp, 287; 5 W. R. P. C. 109.

[3] In *Sarodasoondery Dossee* (*S. M.*) v. *Tincowry Nundy* (1863), 1 Hyde, 223, at p. 250, the Court said, "We agree . . . that a Hindu does not adopt in his lifetime, unless he is prepared to acknowledge that he has lost the power of procreation; for, if his wife is sterile, he may marry another wife, and is enjoined to do so after the lapse of a certain time."

[4] *Soondur Koomaree Debbeea* v. *Gudadhur Pershad Tewarree* (1858), 7 M. I. A. 54, at p. 64; 4 W. R. P. C. 116, at p. 119.

[5] "Dattaka Chandrika," s. 1, para. 32.

[6] *Tarini Charan Chowdhry* v. *Saroda Sundari Dasi* (1869), 3 B. L. R. A. C. 145; 11 W. R. C. R. 468.

[7] *Radhamadhub Gossain* v. *Radhabullub Gossain* (1862), 1 Hay, 311; 2 Ind. Jur. O. S. 5. See also *Mohendro Lall Mookerjee* v. *Rookiney Dabee* (1864), Coryton, 42, at pp. 45, 46, where a similar observation was made, "When many years have passed and the person whose adoption is questioned has always been recognized as a son."

the Court will not presume that permission was given merely because it is shown that the usual ceremonies were duly performed."

There may be a presumption that a widow does not adopt while in a condition of ceremonial impurity.[1]

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[1] See *Ranganayakamma* v. *Alwar Setti* (1889), 13 Mad. 214, at p. 222.

CHAPTER IV.

PARENT AND CHILD (*continued*).

RESULTS OF DATTAKA ADOPTION.

Adoption operates as affiliation.

ADOPTION in the *Dattaka* form completely transfers the boy from the family of his natural father to that of his adoptive father, and, except as specially provided by the law,[1] he acquires, as from the date of the adoption,[2] all the rights, privileges, duties, and obligations of a son born to his adoptive father.[3]

When he has been adopted by a widow, his rights do not date back to the death of his adoptive father.[4]

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[1] As to the effect of the birth of a legitimate son after the adoption, see *post*, pp. 189, 190. As to the restrictions placed upon an adopted son with regard to marriage and adoption in his natural family, see *ante*, p. 39, and *post*, p. 205.

[2] *Harek Chand Babu* v. *Bejoy Chand Mahatab* (1905), 9 C. W. N. 795, at p. 798; *Moro Narayan Joshi* v. *Balaji Raghunath* (1894), 19 Bom. 809, at p. 814; *Rambhat* v. *Lakshman Chintaman Mayalay* (1881), 5 Bom. 630, at p. 637; *Sudanund Mohapattur* v. *Soorjo Monee Debee* (1867), 8 W. R. C. R. 455; S. C. (1869), 11 W. R. C. R. 436. On appeal in this case this question did not arise, *Soorjomonee Dayee* v. *Suddanund Mohapatter*, I. A. Sup. Vol. 212; 12 B. L. R. 304; 20 W. R. C. R. 377; 8 Mad. Jur. 466; *Narain Mal* v. *Kooer Narain Mytee* (1879), 5 Calc. 251.

[3] *Pudma Coomari Debi* v. *Court of Wards* (1881), 8 I. A. 229, at p. 246; 8 Calc. 302, at p. 311. S. C. in Court below, *Puddo Kumaree Debee* v. *Jugutkishore Acharjee* (1879), 5 Calc. 615; *Joykishore Chowdhry* v. *Panchoo Baboo* (1879), 4 C. L. R. 538; *Kali Komul Mozoomdar* v. *Uma Shunkur Moitra* (1883), 10 I. A. 138, at p. 149; 10 Calc. 232, at p. 237; 13 C. L. R. 379, at p. 381; S. C. in Court below, 6 Calc. 256, and 7 C. L. R. 145; *Rambhat* v. *Lakshman Chintaman Mayalay* (1881), 5 Bom. 630, at p. 637; *Teencowree Chatterjee* v. *Denonath Banerjee* (1865), 3 W. R. C. R. 49; *Juggurnath Sahaie* (*Maharajah*) v. *Mukhun Koonwur* (*Musst.*) (1865), 3 W. R. C. R. 24.

[4] *Lakshmana Rau* v. *Lakshmi Ammal* (1881), 4 Mad. 160. See *Bamundoss Mookerjea* v. *Tarinee* (*Mussamut*) (1858), 7 M. I. A. 169, at p. 184; *Ganapati Ayyan* v. *Savithri Ammal* (1897), 21 Mad. 10, at p.

An adoption *pendente lite* has the same effect as a birth *pendente lite*.[1]

As to an adopted son's impurity on deaths and births, and as to his competency to perform Sraddha rites,[2] see G. C. Sircar's "Law of Adoption," p. 388.

Right of guardianship.

The right of guardianship of an adopted son passes by the adoption from the natural parents to the adoptive parents.[3]

Rights of survivorship.

A son adopted by a Hindu governed by the Mitakshara school of law acquires the same rights in ancestral property on adoption[4] as would be possessed on birth by a natural son born to his adoptive father.[5]

Inheritance *ex parte paterna*.

Except where a son is born to his adoptive father subsequent to the adoption,[6] an adopted son inherits to his adoptive father,[7] and to the relations, whether lineal or collateral, of his adoptive father, to the same extent as he would have inherited if he had been born as a son to his adoptive father.[8]

16; *Narain Mal* v. *Kooer Narain Mytee* (1879), 5 Calc. 251; *Moro Narayan Joshi* v. *Balaji Raghunath* (1894), 19 Bom. 809, at p. 814; cases collected in Morley's "Digest," vol. iii. 186.

[1] *Rambhat* v. *Lakshman Chintaman Mayalay* (1881), 5 Bom. 630, at p. 637.

[2] See "Dattaka Mimansa," s. 6, para. 50; "Dattaka Chandrika," s. 1, para. 25; s. 3, para. 17.

[3] *Sree Narain Mitter* v. *Kishensoondory Dassee* (*Sreemutty*) (1873), I. A. Sup Vol. 149, at p. 163; 11 B. L. R. 171, at p. 191; S. C. *sub nomine Nogendro Chundro Mittro* v. *Kishensoondery Dossee* (*Sreemutty*), 19 W. R. C. R. 133, at p. 139; *Lakshmibai* v. *Shridhar Vasudev Takle* (1878), 3 Bom. 1. As to rights of guardianship, see *ante*, pp. 42–44, and *post*, pp. 218–223.

[4] See *Rungama* v. *Atchama* (1846), 4 M. I. A. 1, at p. 103; 7 W. R. P. C. 57, at p. 67; *Sudanund Mohapattur* v. *Bonomallee* (1863), Marsh, 317; 2 Hay, 205; *Sudanund Mohapattur* v. *Soorjo Monee Debee* (1867), 8 W. R. C. R. 455; S. C. after remand (1869), 11 W. R. C. R. 436. On appeal this question did not arise, *Soorjomonee Dayee* v. *Suddanund Mohapatter* (1873), L. A. Sup. Vol. 212; 12 B. L. R. 304; 20 W. R. C. R. 377; 8 Mad. Jur. 466.

[5] See *post*, pp. 231, 232; *Heera Singh* v. *Buryar Singh* (1866), 1 Agra, 256.

[6] See *post*, pp. 189, 190.

[7] *Raje Vyankatrav Anandrav Nimbalkar* v. *Jayavantrav* (1867), 4 Bom. H. C. A. C. 191.

[8] *Pudma Coomari Debi* v. *Court of Wards* (1881), 8 I. A. 229; 8 Calc. 302; S. C. in Court below, *Puddo Kumaree Debee* v. *Jugguthishore Acharjee* (1879), 5 Calc. 615; *Joykishore Chowdhry* v. *Panchoo Baboo* (1879), 4 C. L. R. 538; *Sumbhoochunder Chowdry* v. *Naraini Debia* (1835), 2 Knapp, 55; 5 W. R. (P. C.) 100; *Lakmi Chand* v. *Gatto Bai* (1886), 8 All. 319; *Mokundo Lall Roy* v. *Bykunt Nath Roy* (1880), 6 Calc. 289;

As to the devesting of estates on adoption, see *post*, pp. 197–202.

The right of the adopted son and of his heirs to inherit to the following relations by adoption has been established:—

1. Paternal grandfather.[1]
2. Paternal uncle.[2]
3. First cousin of his father.[3]
4. First cousin of his grandfather.[4]
5. Father's brother's son.[5]
6. Father's daughter's son.[6]
7. Father's third cousin.[7]
8. The adopted son of the son of the brother of the man to whom the father of the claimant was adopted.[8]

Where an adopted son ousts his adoptive father's widow, who has taken possession in ignorance of the adoption, he is entitled to receive such rents and profits which have been received, or might with due diligence have been received, between the death of his adoptive father and his getting possession, credit being given for the maintenance of the widow, funeral expenses, and all such expenditure as she might properly have made as widow, subject to any question as to limitation.[9] **Rights on attaining possession.**

Conversely the relations of the adoptive father will inherit to the adopted son in the same way as if he had been a son born to his adoptive father.

An hereditary title or honour passes to an adopted son, and his descendants, in the same way as to a legitimate son, or his descendants. **Title.**

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7 C. L. R. 478; *Dinonath Mukerjee* v. *Gopal Churn Mukerjee* (1881), 9 C. L. R. 379; 8 C. L. R. 57; *Tara Mohun Bhuttacharjee* v. *Kripa Moyee Debia* (1868), 9 W. R. C. R. 423; *Rajé Vyankatrav Anandrav Nimbalkar* v. *Jayavantrav* (1867), 4 Bom. H. C. A. C. 191; *Gourhurree Kubraj* v. *Rutnasuree Debia* (*Mussummut*) (1837), 6 Ben. Sel. R. 203 (new edition, 250); *Gooroopershad Bose* v. *Rashbehary Bose*, Ben. S. D. A. 1860, p. 411.

[1] *Gourbullub* v. *Juggernath Persaud Mitter* (1824), Sir F. Macnaghten's "Considerations," p. 151.

[2] In *Sumbhoochunder Chowdry* v. *Naraini Debia* (1835), 3 Knapp, 55; 5 W. R. P. C. 100, it was held that the adopted son of the brother of the whole blood was entitled to inherit in preference to the son of a brother of the half-blood. *Kishennath Roy* v. *Hureegobind Roy*, Ben. S. D. A. 1859, p. 18.

[3] *Dinonath Mukerjee* v. *Gopal Churn Mukerjee* (1881), 6 C. L. R. 379; 8 C. L. R. 57.

[4] *Tara Mohun Bhuttacharjee* v. *Kripa Moyee Debia* (1868), 9 W. R. 423.

[5] *Lokenath Roy* v. *Shamasoonduree*, Ben. S. D. A. 1858, p. 1863.

[6] *Pudma Coomari Debi* v. *Court of Wards* (1881), 8 I. A. 229; 8 Calc 302.

[7] *Mokundo Lall Roy* v. *Bykunt Nath Roy* (1880), 6 Calc. 289; 7 C. L. R. 478.

[8] *Gourhurree Kubraj* v. *Rutnasuree Debia* (*Mussummut*) (1837), 6 Ben. Sel. R. 203 (new edition, 350).

[9] See *Dalel Kunwar* v. *Ambika Partap Singh* (1903), 25 All. 266.

Inheritance *ex parte materna.*

Where the adoption is by a husband alone,[1] or in association with his wife, or one of his wives, or where it has been made to him by his wife with his concurrence, or after his death, the son inherits to the wife,[2] and to her relations,[3] in the same way as if he had been a son born to such wife.

The right of the adopted son to inherit to the brother,[4] and father,[5] of the adoptive mother has been upheld.

The adoptive mother[6] and her relatives[7] inherit to the adopted son in the same way as if she had been his natural mother.

Where an adoption is made by a husband in conjunction with one only of several wives, or after his death by one of several wives, the adopted son[8] inherits only to that wife and her relations, his relationship to the other wives being that of a step-son.

It is unsettled whether, when a man adopts in conjunction with more than one wife,[9] or where two or more widows adopt in accordance with a joint power,[10] or where two or more widows adopt in Western India

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[1] See *Sham Kuar* v. *Gaya Din* (1876), 1 All. 255, at p. 257; "Dattaka Mimansa," s. 1, para. 22.

[2] *Teencowree Chatterjee* v. *Denonath Banerjee* (1865), 3 W. R. C. R. 49; *Raje Vyankatrav Anandrav Nimbalkar* v. *Jayavantrav* (1867), 4 Bom. H. C. A. C. 191.

[3] *Kali Komul Mozoomdar* v. *Uma Shunkur Moitra* (1883), 10 I. A. 138; 10 Calc. 232; 13 C. L. R. 379. This decision in effect overruled *Morun Moee Debeah* v. *Bejoy Kishto Gossamee* (1863), W. R. Sp. No. 121 (so far as this question is concerned), and *Chinnaramakristna Ayyar* v. *Minatchi Ammal* (1873), 7 Mad. H. C. 245. *Sham Kuar* v. *Gaya Din* (1876), 1 All. 255; *Surjokant Nundi* v. *Mohesh Chunder Dutt* (1882), 9 Calc. 70; *Radha Prasad Mullick* v. *Ranee Mani Dassee* (1906), 33 Calc. 947; 10 C. W. N. 695.

[4] *Kali Komul Mozoomdar* v. *Uma Shunkur Moitra* (1883), 10 I. A. 138; 10 Calc. 232; 13 C. L. R. 379.

[5] *Sham Kuar* v. *Gaya Din* (1876), 1 All. 255; *Surjokant Nundi* v. *Mohesh Chunder Dutt* (1882), 9 Calc. 70.

[6] See *Ramasawmi Aiyan* v. *Venkataramaiyan* (1879), 6 I. A. 196; 2 Mad. 91; *Annapurni Nachiar* v. *Forbes* (1899), 26 I. A. 246; 23 Mad. 1; 3 C. W. N. 730; *Jatindra Nath Chaudhuri (Rai)* v. *Amrita Lal Bagchi* (1900), 5 C. W. N. 20; *Lakhmi Chand* v. *Gatto Bai* (1886), 8 All. 319.

[7] *Gungapersad Roy* v. *Brijessuree Chowdhrain*, Ben. S. D. A. 1859, p. 1091.

[8] *Annapurni Nachiar* v. *Forbes* (1899), 26 I. A. 246; 23 Mad. 1; 3 C. W. N. 730. S. C. in Court below, (1895), 18 Mad. 277; *Kasheeshuree Debia* v. *Greeschunder Lahoree*, W. R. 1864, p. 71.

[9] See *ante*, p. 112.

[10] See *ante*, p. 115.

jointly,[1] the adopted son inherits to all the widows so adopting and their relatives. It is submitted that this question depends upon whether such joint adoption is authorized by the law.[2] The mere concurrence by a widow in an adoption by her co-widow would not, it is submitted, confer upon the adopted son any rights of inheritance to her or her relations.

It seems also to be unsettled whether, when a husband adopts in spite of his wife's express dissent, the son inherits to her and to her relations.[3]

Adopted son of disqualified man.

A son adopted by a man who is disqualified from inheritance by reason of a personal disability, such as congenital blindness, impotence, or lameness,[4] cannot acquire greater rights than his adoptive father, and therefore cannot inherit to any one from whom the adoptive father was disqualified from inheriting.[5]

There is, it is submitted, nothing to prevent his inheritance from his adoptive father[6] and from his adoptive mother and her relations. According to the "Dattaka Chandrika"[7] he is entitled to maintenance.

Descendants of adopted son.

The descendants of an adopted son have the same rights of inheritance as the descendants of a legitimately begotten son.[8]

Rights no greater than those of son born.

An adopted son does not, as such, acquire any rights greater than those of a begotten son.[9]

Adoption does not alter father's powers over property.

The adoption of a son does not interfere with the powers of the adoptive father to dispose of[10] the property over which he has a power of disposition.

An adoptive father can defeat the rights of inheritance of his

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[1] See *ante*, p. 127.

[2] See *ante*, p. 115, note 9.

[3] See Sircar's "Law of Adoption," p. 215.

[4] *Ante*, pp. 109, 110, and *post*, pp. 235, 236.

[5] Mayne's "Hindu Law," 7th ed., pp. 138, 139; Sircar's "Law of Adoption," pp. 202, 203, 419.

[6] Sutherland's "Synopsis," Stokes' "Hindu Law Books," pp. 664, 671; Mayne's "Hindu Law," 7th ed., p. 139.

[7] Chap. ii. s. 10, paras. 9–11. This is disputed in Sircar's "Law of Adoption," p. 419.

[8] *Kishennath Roy* v. *Hurreegobind Roy*, Ben. S. D. A. of 1859, p. 18; *Gourhurree Kubraj* v. *Rutnasuree Debia* (*Mussummut*) (1837), 6 Ben. Sel. R. 203 (new edition, 250).

[9] *Venkata Surya Mahipati Rama Krishna Rao Bahadur* (*Sri Raja Rao*) v. *Court of Wards* (1899), 26 I. A. 83; 22 Mad. 383; 3 C. W. N. 415; *Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry* (1865), 10 M. I. A. 279, at pp. 310, 311; 3 W. R. (P. C.) 15, at p. 18.

[10] By will, gift, or transfer.

adopted son,[1] whether the property held by him be partible or impartible.[2] He can, in giving a power of adoption, require as a condition of the exercise of the power that the estate of his widow should not be interfered with,[3] and might apparently impose such other conditions as are not inconsistent with the provisions of the law of gifts and wills.[4]

Adoption does not revoke will.

In cases governed by the Hindu Wills Act, adoption, or the giving of a power of adoption, does not operate as a revocation of a will.[5]

There is some authority that in other cases a Hindu has no power to completely disinherit his adoptive son, and that a will making no provision for adopted sons would be invalidated by a power given subsequently,[6] but it is submitted that there is no reason why an adoption should have greater effect than the birth of a son in revoking a will. Where the will purports to deal with property, over which the adopting father ceased to have a power of disposition on the birth or adoption of a son, it would be ineffectual to deal with the property[7] except where assent to the provisions of the will was a condition of the adoption.[8]

Arrangement restraining disposition.

Effect would apparently be given to an arrangement made at the time of the adoption stipulating that the adoptive father should not exercise his powers of disposition. Such arrangement would be enforced at the instance of the adopted son.[9]

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[1] *Venkata Surya Mahipati Rama Krishna Rao Bahadoor (Sri Raja)* v. *Court of Wards* (1899), 26 I. A. 83, at p. 89; 22 Mad. 383, at p. 390; 3 C. W. N. 415, at p. 421; *Rungama* v. *Atchama* (1846), 4 M. I. A. 1, at p. 103; 7 W. R. 57, at p. 62; *Purshotam Shama Shenvi* v. *Vasudev Krishna Shenvi* (1871), 8 Bom. H. C. (O. C.) 196; *Sudanund Mohapattur* v. *Bonomallee* (1863), Marsh, 317; 2 Hay, 205.

[2] *Venkata Surya Mahipati Rama Krishna Rao Bahadoor (Sri Raja Rao)* v. *Court of Wards* (1899), 26 I. A. 83; 22 Mad. 383; 3 C. W. N. 415; *Sartaj Kuari (Rani)* v. *Deoraj Kuari (Rani)* (1888), 15 I. A. 51; 10 All. 272.

[3] See *Bepin Behari Bundopadhya* v. *Brojonath Mookhopadhya* (1882), 8 Calc. 357; *Radhamonee Debea* v. *Jadubnarain Roy*, Ben. S. D. A. of 1855, p. 139; *Prosunnomoyee (Ranee)* v. *Ramsoonder Sein*, Ben. S. D. A. of 1859, p. 162.

[4] See *Ganapati Ayyan* v. *Savithri Ammal* (1897), 21 Mad. 10; *ante*, pp. 116, 117.

[5] Act XXI. of 1870, s. 2, read with Act X. of 1865, s. 57.

[6] See *futwah* of pundits in *Nagalutchmee Ummal* v. *Gopoo Nadaraja Chetty* (1856), 6 M. I. A. 309, at p. 320, referred to by Couch, C.J., in *Vinayak Narayan Jog* v. *Govindrav Chintaman Jog* (1869), 6 Bom. H. C. A. C. 224, at p. 230.

[7] As the will must be taken to speak from the death of the testator, at which time he would have no disposing power.

[8] See *Vinayak Narayan Jog* v. *Govindrav Chintaman Jog* (1869), 6 Bom. H. C. A. C. 224.

[9] See *Surendrakeshav Roy* v. *Doorgasundari Dassee* (1892), 19 I. A. 108, at p. 132; 19 Calc. 513, at p. 536.

Coparcenary property.

In cases governed by the Mitakshara law, the adoptive father has no power to interfere with the adopted son's right of survivorship in coparcenary property.[1]

Arrangement limiting interest in ancestral property.

When, after attaining the age of majority, an adopted son ratifies an arrangement made between his natural father and the person adopting him limiting the interest in coparcenary property which he would acquire by adoption, he is bound by the arrangement.[2] It is unsettled whether, in the absence of such ratification, he can be bound by such arrangement, but it is submitted that if the arrangement be a fair one, and does not unduly interfere with the rights of the adopted son, effect will be given to it, at any rate when the arrangement is made with the adoptive father or is authorized by him.

The Madras High Court has upheld dispositions of ancestral property by the adopting father with the consent of the natural father for the purpose of providing for the maintenance of the wife of the adopting father.[3]

In another case[4] the Bombay High Court held that when the adopted son and the person who gave him in adoption were fully cognizant of the disposition of the property made by the testator, and with the knowledge of such disposition the natural father consented to the adoption taking place, and when the disposition and the adoption might, under the circumstances, be regarded as one transaction, the disposition, though contained in a will, could not be repudiated by the adopted son. "The principle underlying the decision is that the disposition was one which it was competent to the testator to make prior to the

[1] *Ganapati Aiyyan* v. *Savithri Ammal* (1897), 21 Mad. 10, at pp. 14, 15; *Rathnam* v. *Sivasubramania* (1892), 16 Mad. 353; *Vitla Butten* v. *Yamenamma* (1874), 8 Mad. H. C. 6. See Hindu Wills Act (XXI. of 1870), s. 3; Probate and Administration Act (V. of 1881), s. 4; *Lakshman Dada Naik* v. *Ramchandra Dada Naik* (1880), 7 I. A. 181; 5 Bom. 48; 7 C. L. R. 320; *Chatturbhooj Meghji* v. *Dharamsi Naranji* (1884), 9 Bom. 438; *Lakshmi Shankar* v. *Vaijnath* (1881), 6 Bom. 24; *Adjoodhia Gir* v. *Kashee Gir* (1872), 4 N. W. P. H. C. 31; *Buldeo Singh (Rajah)* v. *Koonwer Mahabeer Singh* (1866), 1 Agra, H. C. 155; *Narottam Jagjiwan* v. *Narsandas Harikisandas* (1866), 3 Bom. H. C. (A. C. J.) 6; *Gangubai* v. *Ramanna* (1866), 3 Bom. H. C. (A. C. J.) 66.

[2] See *Ramasawmi Aiyyan* v. *Vencataramaiyan* (1879), 6 I. A. 196; 2 Mad. 91.

[3] *Lakshmi* v. *Subramanya* (1889), 12 Mad. 490; *Narayanasami* v. *Ramasami* (1890), 14 Mad. 172. See *Basava* v. *Lingangauda* (1894), 19 Bom. 428.

[4] *Vinayak Narayan Jog* v. *Govindrav Chintaman Jog* (1869), 6 Bom. H. C. A. C. 224.

adoption, and that its acceptance being presumably a condition subject to which the adoption was made, it made no difference that the disposition was testamentary."[1]

The same Court upheld an arrangement between the natural father and the adopting mother, where provision was made for the enjoyment of a portion of the property by the mother in the case of her disagreement with the adopted son.[2]

In *Ramasawmi Aiyan* v. *Vencataramaiyan*,[3] the Judicial Committee said, "How far the natural father can by agreement before the adoption renounce all or part of his son's rights, is a question not altogether unattended with difficulty; although the case of *Chitko Raghunath Rajadiksh* v. *Janaki*[4] certainly decides that an agreement on the part of the father that his son's interest shall be postponed to the life interest of the widow is valid and binding." In *Bhaiya Rabidat Singh* v. *Indar Kunwar* (*Maharani*)[5] the Judicial Committee said, "It is difficult to understand how a declaration by Guman Singh (the natural father) on an agreement by him, if it was an agreement, could prejudice or affect the rights of his son, which would only arise when his parental control and authority determined."

It is submitted that the determination of this question depends upon the nature of the particular arrangement. It is scarcely necessary to speculate as to what would happen if the natural father assented to a disposition of the whole of the ancestral property away from the son, as such a case is not likely to occur. If such case did occur, the Courts would probably hold that the natural father acted in excess of his powers, and that his son was not bound by it, but in dealing with a less extreme case, effect might well be given to a fair arrangement, in which the son distinctly benefits by the adoption. Where the adoptive father is separate from his kinsmen, and has, therefore, a power of disposing by will even of ancestral property, if he has no son, it must be remembered that he is by any such arrangement only doing what it was competent for him to do in the absence of an adoption.

As to a condition contained in the permission to adopt, see *ante*, pp. 116, 117.

There is authority that where there is an express power of adoption given by the husband, the widow cannot originate conditions. If she does so, the adoption would be valid, and the conditions would be ineffectual.[6]

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[1] *Lakshmi* v. *Subramanya* (1889), 12 Mad. 490, at pp. 492, 493. See *Ganapati Ayyan* v. *Savithri Ammal* (1897), 21 Mad. 10.

[2] *Visalakshi Ammal* v. *Sivaramien* (1904), 27 Mad. 577.

[3] (1879), 6 I. A. 196, at p. 208; 2 Mad. 91, at p. 101. See *Lakshmana Rau* v. *Lakshmi Ammal* (1881), 4 Mad. 160, at p. 163.

[4] (1874), 11 Bom. H. C. 199.

[5] (1888), 16 I. A. 53, at p. 59; 16 Calc. 556, at p. 564.

[6] *Jagannadha* v. *Papamma* (1892),

Effect would be given to an arrangement which had been ratified by the boy after attaining majority.[1]

In Bombay it has been held that a widow can, at the time of the adoption, make a fair arrangement for the protection of her interest in the estate during her lifetime.[2] The cases in which this conclusion has been arrived at were not cases in which express power was given by the husband, but cases where the widow exercised the power given to her by the system of Hindu law prevalent in Western India.[3]

When a widow obtains a reservation of rights by such an arrangement, she possesses therein only the ordinary rights of a Hindu widow.[4]

A widow would apparently have no power to arrange with the natural father to obtain for herself an interest in property which had not been vested in her, as, for instance, in property which, on her husband's death, passed by survivorship to other members of the family, and which is devested by the adoption.[5]

Son born after adoption.

Where, after an adoption,[6] a son is born to the adoptive father, the adopted son loses all rights to the performance of religious ceremonies, and his rights of inheritance are reduced—

(*a*) If he be governed by the Bengal school, to one-half of the share of a natural-born son.[7]

(*b*) If he be governed by the Benares school, to one-third of the share of a natural-born son.[8]

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16 Mad. 400. In *Solukhna* (*Mussummaut*) v. *Ramdolal Pande* (1811), 1 Ben. Sel. R. 324 (new edition, 434). The pundits considered that an instrument under which the widow remained in possession was inoperative. G. C. Sircar ("Law of Adoption," p. 408) considers that the widow can made conditions.

[1] See *Kali Das* v. *Bijai Shankar* (1891), 13 All. 391.

[2] *Ravji Vinayakrav Jagannath Shankarsett* v. *Lakshmibai* (1887), 11 Bom. 381, at pp. 401, 402; *Radhabai* v. *Ganesh Tatya Gholap* (1878), 3 Bom. 7, at p. 8; *Chitko Raghunath Rajadiksh* v. *Janaki* (1874), 11 Bom. H. C. 199.

[3] *Ante*, pp. 125, 126.

[4] *Antaji* v. *Dattaji* (1893), 19 Bom. 36.

[5] *Post*, p. 202.

[6] Where the son is born before the adoption then the adoption is invalid, *ante*, p. 103.

[7] "Dayabhaga," x. 9; "Dattaka Chandrika," v. 16–17; Sir F. Macnaghten's "Considerations on Hindu Law," 137; 1 W. Macn. 70; 2 W. Macn. 184; G. C. Sircar's "Law of Adoption," p. 398. Consequently, if there be one begotten son the adopted son takes one-third of the whole, if there be two he takes one-fifth, and so on.

[8] Sir F. Macnaghten's "Considerations on Hindu Law," 137; 1 W. Macn. 70; 2 W. Macn. 184; "Mitakshara," i. 11, 24, 25; "Dattaka Mimansa," x. 1; v. 40. See, however, *Raghubanund Doss* v. *Sadhu Churn Doss* (1878), 4 Calc. 425; 3 C. L. R. 534, which was governed by the Mitakshara law and apparently by

(*c*) If he be governed by the schools prevailing in Southern India[1] and Bombay,[2] to one-fourth of the share of a natural-born son.

Sudras.

It is not settled whether this rule applies to *Sudras*, or whether in the case of Sudras natural-born and adopted sons take equally.

The Madras High Court has held[3] that among *Sudras* the adopted son is entitled to take an equal share with a legitimate son, who is born subsequently to the adoption. The "Dattaka Chandrika"[4] is to the same effect, and the same view is said to have been taken by the Calcutta High Court.[5] Baboo Shamachurn Sircar holds that this does not apply to what he calls "the good *Shudras* of this country."[6] This distinction is based upon a text of Vriddha Goutama, which says, "A given son abounding in good qualities existing, should a legitimate son be born at any time: let both be equal sharers of the father's whole estate."[7] It is submitted that where there is no special custom, the above rule applies to all classes of Sudras alike.[8]

Succession by survivorship.

In a case where A adopted B, and afterwards a son, C, was born to A, and B and C survived A, and then C died,

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the Benares school. The Court there considered that an adopted son takes half the share of a natural-born son.

[1] *Ayyavu Muppanar* v. *Niladatchi Ammal* (1862), 1 Mad. H. C. 45.

[2] *Giriapa* v. *Ningapa* (1892), 17 Bom. 100. In the earlier cases the Bombay High Court considered that the share was one-third of the share of a natural-born son. *Hanmant Ramchandra* v. *Bhimacharya* (1887), 12 Bom. 105; *Rukhab* v. *Chunilal Ambushet* (1891), 16 Bom. 347. In *Giriapa* v. *Ningapa* the Court did not refer to these earlier decisions, See "Vyavahara Mayukha," p. 60, Mandlik's edition.

[3] *Raja* v. *Subbaraya* (1883), 7 Mad. 253, at p. 254. See also W. Macnaghten's "Hindu Law," vol. i. 70, note; Strange's "Hindu Law," p. 99.

[4] S. 5, paras. 29–32.

[5] *Bramanund Mahunty* v. *Chowdhry Krishna Churn Patnaik* (1882), unreported case referred to in G. C. Sircar's "Law of Adoption," p. 403. The rule was apparently unknown to Sir F. Macnaghten, who, in dealing with a case of Sudras (*Gopee Mohun Deb* v. *Raja Rajkrishna*, "Considerations on Hindu Law," 233), expressed the opinion that the adopted son was entitled to one-third of the estate. In *Raghubanund Doss* v. *Sadhu Churn Doss* (1878), 4 Calc. 25; 3 C. L. R. 534 (*ante*, p. 189, note 8) the parties were Sudras.

[6] "Vyavastha Darpana," pp. 913–915. This is a digest of the Hindu law current in Bengal.

[7] In his "Vyavastha Chandrika" (a digest of Hindu law current in all the Provinces of India, except Bengal proper), vol. i. p. 169, Baboo Shama Churn Sircar says as to this text, "The above rule, however, is now quite inapplicable, adopted sons possessed of good qualities, such as are required by the law, being rare at the present (Kali) age."

[8] See Sircar's "Law of Adoption," pp. 402, 403.

it was held by the Madras Sudder Court that B inherited all the property of A.[1]

Competition between adopted son and relations other than son.

It is not settled whether, in sharing an inheritance with a natural relation of the same degree other than a legitimate son, an adopted son is entitled to a less share than that of a legitimate son.

It is submitted that, at any rate, on a partition of joint family property in a case governed by the Mitakshara law, there is no reason why he should receive a less share than he would have received if he had been a legitimate son.

It has been held in *Tara Mohun Bhuttacharjee* v. *Kripa Moyee Debia*,[2] by a Bench of the Bengal High Court, that "when an adopted son comes to share with heirs other than the legitimately begotten sons of his adoptive father in the property of kinsmen, he takes the same share that they would have," and in *Surjokant Nundi* v. *Mohesh Chunder Dutt*,[3] it was held by the same Court that the adopted son of one daughter shares equally with the natural son of another daughter in the inheritance left by his maternal grandfather, but it does not appear from the report whether this question was discussed in that case. In *Raghubanund Das* v. *Sadhu Churn Das*[4] it was held by the same Court in a case governed by the "Mitakshara" that in a partition between an adopted son and the natural-born sons of the brothers of his adoptive father the adopted son can only take half the share which he would have taken if he had been a legitimate son. This decision was based upon a paragraph[5] of the "Dattaka Chandrika,"[6] which has no reference

[1] Civil Petition, No. 130, of 1862 (1862), 1 Mad. H. C. 49, note. Mr. Mayne, to whom the reporter was indebted for a note of the case, says ("Hindu Law," 7th ed., p. 228) that the adopted son took by survivorship. This presumably would have been the case, as the family was probably governed by the "Mitakshara."

[2] (1868), 9 W. R. C. R. 423, at p. 425. This decision was in G. C. Sircar's opinion ("Law of Adoption," p. 400) based on an omission from, and a mistranslation of the "Dattaka Chandrika," by Mr. Sutherland.

[3] (1882), 9 Calc. 70.

[4] (1878), 4 Calc. 425; 3 C. L. R. 534.

[5] 24. "Therefore by the same relationship of brother and so forth, in virtue of which the real legitimate son would succeed to the estate of a brother or other kinsman, *the adopted son of the same description obtains his due share. And in the event of the ancestor having other sons, a grandson by adoption whose father is dead obtains the share of an adopted son.* Where such son may not exist, the adopted son takes the whole estate even." The words in italics are omitted in Mr. Sutherland's translation. See *Raghubanund Doss* v. *Sadhu Churn Doss* (1878), 4 Calc. 425, at pp. 428, 429; 3 C. L. R. 534, at p. 538.

[6] The "Dattaka Chandrika" is an

to the peculiar incidents of a Mitakshara joint family.[1] It has been doubted by the High Court of Madras.[2] Mr. Mayne[3] also gives reasons for doubting its authority. Sastri G. C. Sircar[4] says, "There cannot be any doubt that according to the 'Dattaka Chandrika,' when a relation by adoption is entitled to inherit together with a real relation of the same degree, either lineally or collaterally, the former must take half as much as is taken by the latter; as, in fact, the rule which has been laid down with respect to the distribution of the adopter's estate between an adopted and a real son, is to be applied to all cases. Accordingly it was held, upon the opinion of a Pundit in a case in which succession opened to the nephews, that a nephew by adoption was entitled to half of what was to be allotted to each of the real nephews."[5] He, however, points out the error of the Calcutta High Court in applying this rule in the case of *Raghubanund Das* v. *Sadhu Churn Das*,[6] as in that case the adopted son was entitled to the whole share which his father would have been entitled to, if a partition had been effected in his lifetime.[7]

The birth of a legitimate son would not apparently affect the incapacity of the adopted son to marry in, or adopt from, his adoptive family.

Jains.

The Jain law in this matter coincides with the ordinary Hindu law.[8]

Impartible property.

In the case of impartible property the afterborn son succeeds to the exclusion of the adopted son.[9]

Renunciation or waiver of rights.

An adopted son can renounce his interest in property which becomes vested in him by virtue of his adoption, or may waive any of his rights therein.[10]

On such renunciation the person who would take in default of adoption would succeed to the property.[11]

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authority pre-eminent in the Bengal school. See *Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (1868), 12 M. I. A. 397, at p. 437; 1 B. L. R. (P. C.) 1, at p. 13; 10 W. R. (P. C.) 17, at p. 22, and *ante*, pp. 10, 11.

[1] Sircar's "Law of Adoption," p. 402.

[2] *Raja* v. *Subbaraya* (1883), 7 Mad. 253.

[3] "Hindu Law," 7th ed., pp. 224–228.

[4] "Law of Adoption," pp. 400, 401.

[5] W. Macnaghten, "Hindu Law," vol. ii. p. 69.

[6] (1878), 4 Calc. 425; 3 C. L. R. 534.

[7] At pp. 401, 402.

[8] *Rukhab* v. *Chunilal Ambushet* (1891), 16 Bom. 347.

[9] *Ramasami Kamaya Naik* v. *Sundaralingasami Kamaya Naik* (1894), 17 Mad. 422, at p. 435.

[10] W. Macnaghten's "Hindu Law," vol. ii. pp. 183, 184. He cannot renounce his status as an adopted son, *ante*, p. 158.

[11] *Mahadu Ganu* v. *Bayaji* (1893), 19 Bom. 239; *Ruvee Bhudr* v. *Roopshunker Shunkerjee* (1829), 2 Borr. 656, at pp. 665, 671.

There is nothing to prevent an adopted son from making over his rights in the property, or in a portion thereof, to his adoptive mother or to any one else after he has attained majority.[1]

Except when he has been adopted as a *dvyamushyayana*,[2] an adopted son loses by his adoption all rights as the son of his natural father and mother.[3] Exclusion from rights in natural family.

He cannot inherit to the members of his natural family,[4] except he has such right as the son of his adoptive father, and they cannot inherit to him.[5]

It may happen that he loses the right to succeed to his natural mother and her relatives, and does not acquire a new mother, or maternal relatives for spiritual or temporal purposes, as where the adoption is by a bachelor, or a widower,[6] or by the adoptive father alone.[7]

An adopted son on adoption ceases to be liable for the debts[8] or other obligations for which he would have been liable as a member of his natural family.

In parts of the Punjab the rights of the adopted son in his natural family take effect if his natural father dies without leaving legitimate sons.[9] Punjab.

In the case of an adoption made by the Gyawals (a class of priests at Gya in Behar), the person adopted does not lose his rights in his natural family.[10] Gyawals.

Adoption does not devest any property which has vested in the adopted son by inheritance, gift, or any form of self-acquisition previous to the adoption.[11] Property vested before adoption.

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[1] *Tara Munee Dibia* (*Mussumaut*) v. *Dev Narayun Rai* (1824), 3 Ben. Sel. R. 387 (2nd ed., 516); 2 Macn., pp. 183, 184. See *Bhugobutty Dayee* (*Mussamut*) v. *Chowdhry Bholanath Thakoor* (1871), 15 W. R. C. R. 63; *Mahadu Ganu* v. *Bayaji* (1893), 19 Bom. 239.

[2] *Post*, p. 194.

[3] "Manu," chap. ix. para. 142; "Dattaka Mimansa," s. 6, paras. 6–8; "Dattaka Chandrika," s. 2, paras. 18–20; "Mitakshara," chap. i. s. 11, para. 32; "V. Mayukha," chap. iv. s. 5, para. 21.

[4] W. Macnaghten's "Hindu Law," vol. i. p. 69.

[5] *Duttnaraen Sing* v. *Ajeet Sing* (1799), 1 Ben. Sel. R. (new edition, H.L. 26); *Muthayya Rajagopala Thevar* v. *Minakshi Sundara Nachiar* (1901), 25 Mad. 394; *Srinivasa Ayyangar* v. *Kuppan Ayyangar* (1863), 1 Mad. H. C. 180; *Gunga Persad Roy* v. *Brijessuree Chowdhrain*, Ben. S. D. A. 1859, p. 1091.

[6] *Ante*, p. 106.

[7] *Ante*, p. 112.

[8] *Pranvullubh* v. *Deokristn* (1824), Bom. Sel. R. 4; *Kasheepershad* v. *Bunseedhur*, 4 N. W. P. (S. D.) 343.

[9] "Punjab Customary Law," iii. p. 83; "Punjab Cust.," 81.

[10] *Luchmun Lal Chowdhry* v. *Kanhya Lal Mowar* (1894), 22 I. A. 51; 22 Calc. 609.

[11] *Behari Lal Laha* v. *Kailas Chunder Laha* (1896), 1 C. W. N. 121. As,

He would lose such rights as he might have had in ancestral property as a member of a joint family governed by the Mitakshara school of law.[1] When the property had been partitioned and a share had vested in him by virtue of the partition, he would retain his rights in it in spite of the adoption, and where the family property had vested in him as the only surviving member of a joint family, it would not be devested by his adoption.[2]

Dvyamushyayana.

A boy can be adopted, so as to retain his relationship to his natural father, while acquiring the relationship of a son to his adoptive father. He is then said to be *Dvyamushyayana*,[3] or son of two fathers.

When so adopted he is either—

(*a*) *Nitya Dvyamushyayana* (*i.e.* perpetual or absolute son of two fathers); or

(*b*) *Anitya Dvyamushyayana* (*i.e.* temporary son of two fathers).

A boy adopted in Mithila by the *Kritima* form of adoption is also treated as the son of two fathers.[4]

Nitya dvyamushyayana.

Where there is an understanding, or a previous stipulation between the giver and the receiver in adoption, that the boy should belong to both of them, the boy is said to be *nitya dvyamushyayana*.[5]

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for instance, where he has acquired property by the will of a natural relation, or by succession to a maternal grandfather, or it may be even by inheritance from his natural father, as was the case in *Papamma* v. *V. Appa Rau* (1893), 16 Mad. 384, although the question as to whether it was divested did not arise in that case.

[1] *Ante*, p. 182.

[2] *Venkata Narasimha Appa Row* (*Sri Rajah*) v. *Rangayya Appa Row* (*Sri Rajah*) (1905), 29 Mad. 437.

[3] Literally two persons. See Sutherland's "Synopsis," head fifth. The practice of adopting a son as *dvyamushyayana* seems to have originated from the obsolete practice of *niyoga*. The *dvyamushyayana* son, treated of in the "Mitakshara," chap. i. s. 10, is the son begotten in accordance with that practice.

[4] *Ante*, p. 159–161.

[5] See *Uma Deyi* (*Srimati*) v. *Gokoolanund Das Mahapatra* (1878), 5 I. A. 40, at pp. 50, 51; 3 Calc. 587, at p. 598; 2 C. L. R. 51, at p. 58. Opinions of pundits in *Haiman Chull Sing* (*Raja*) v. *Gunsheam Sing* (*Koower*) (1834), 2 Knapp, 203, at pp. 206 – 288; *Joymoney Dossee* (*Sreemutty*) v. *Sibosoondry Dossee* (*Sreemutty*) (1837), Fulton, 75; *Shumshere Mull* (*Raja*) v. *Dilraj Konwur* (1816), 2 Ben. Sel. R. 189 (2nd ed., 216); 2 W. Macn. 192, 193; Strange's "Hindu Law," vol. i. p. 86; W. Macnaghten's "Hindu Law," vol. ii. 192; "Dattaka Mimansa," s. 6, para. 48; "Dattaka Chandrika," s. 2, para. 24.

This arrangement can be made by a widow taking in adoption.[1]

Adoption of only son.

The authorities show that where an only son has been adopted by a united brother of his father it is presumed that there was an arrangement that he was to be *dvyamushyayana*.[2] It does not seem to be very clear whether this rule applies only to the adoption of an only son of a brother, or whether it is applicable to all only sons.[3] It applies to adoption by widows of brothers.[4]

As it has now been held that an only son can be adopted in the *Dattaka* form,[5] there seems to be little advantage in adopting a boy as a *dvyamushyayana*, for a boy so adopted could not secure the salvation of the person adopting as effectually as a *Dattaka* son.[6] The adoption of a boy as *dvyamushyayana* under these circumstances seems to have arisen from a desire to reconcile the prohibition against the adoption of an only son with the recommendation to adopt the son of a brother. There is no necessity to evade a prohibition which has now been held to have no legal force.

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[1] *Krishna* v. *Paramshri* (1901), 25 Bom. 537.

[2] *Basava* v. *Lingangauda* (1894), 19 Bom. 428, at p. 454; *Uma Deyi* (*Srimati*) v. *Gokoolanund Das Mahapatra* (1878), 5 I. A. 40, at pp. 50, 51; 3 Calc. 587, at p. 598; 2 C. L. R. 51, at p. 58. See opinions of pundits in *Haimun Chull Sing* (*Raja*) v. *Gunsheam Sing* (*Koomer*) (1834), 2 Knapp, 203, at pp. 206–208; *Nilmadhub Doss* v. *Bishumber Doss* (1869), 13 M. I. A. 85, at pp. 100, 101; 3 B. L. R. P. C. 27, at p. 32; 12 W. R. P. C. 29, at p. 31.

[3] Mr. Mayne, in his "Hindu Law" (7th ed., pp. 185, 229, 230), applies this rule only to the son of a brother. See also *Gocoolanund Dass* v. *Wooma Daee* (1875), 15 B. L. R. 405, at pp. 415, 416; 23 W. R. C. R. 340, at p. 341; S. C. on appeal, *Uma Deyi* (*Srimati*) v. *Gokoolanund Das Mahapatra* (1878), 5 I. A. 40, at pp. 50, 51; 3 Calc. 587, at p. 598; 2 C. L. R. 51, at p. 58. Sastri G. C. Sircar ("Law of Adoption," p. 377), says, "It may no doubt be contended from what Nanda Pandita says in one passage that the gift of an only son is limited to the case of brothers. But in the very next passage ('Dattaka Mimansa,' ii. 39) he explains the principle of the adoption of an only son, which is applicable to all cases. And this general position is supported by what is said in the 'Mitakshara' with respect to the analogous case of a son produced by a man other than the brother on another man's wife. The 'Dattaka Chandrika,' however, does not appear to limit the *dvyamushyayana* adoption of an only son to the case of adoption by a paternal uncle only, but intimates it to be applicable to all cases" ("Dattaka Chandrika," ii. 28; iii. 17; v. 33). See also *Krishna* v. *Paramshri* (1901), 25 Bom. 537, at p. 542.

[4] See *Krishna* v. *Paramshri* (1901), 25 Bom. 537. It was not in that case necessary to raise any presumption, as the adoption was proved to have been in the *dvyamushyayana* form.

[5] *Ante*, p. 146.

[6] *Uma Deyi* (*Srimati*) v. *Gokoolanund Das Mahapatra* (1878), 5 I. A. 40, at p. 51; 3 Calc. 587, at p. 598; 2 C. L. R. 51, at p. 58; *Basava* v. *Lingangauda* (1894), 19 Bom. 428, at pp. 454, 456; *Chenava* v. *Basangavda* (1895), 21 Bom. 105 at pp. 108, 109.

In some parts of India a *nitya dvyamushyayana* seems to be quite obsolete.[1]

It is obsolete on the east coast, but is said to be the ordinary form of adoption recognized in Malabar and amongst the Nambudri Brahmins.[2] The practice has been held by the Bombay High Court to exist among Lingayets, whether the brothers are divided or joint.[3]

It is said to be not at all unusual in the southern districts of the Bombay Presidency,[4] and it has been recognized by the Judicial Committee in two cases from Bengal,[5] and by the Allahabad High Court in a case from Bareilly.[6]

Anityta dvyamushyayana.

When from a different *gotra* (family) a boy is adopted after he has been initiated into the ceremony of tonsure in the *gotra* of his natural father, and is invested with the sacred thread in the *gotra* of his adoptive father, as the rites of initiation have been performed by both fathers, he is said to be termed *anitya dvyamushyayana*.[7]

The *anitya dvyamushyayana* is said to be unknown to modern Hindu law.[8]

The forms and conditions of *dvyamushyayana* adoption are the same as in other cases, where the adoption is in the *Dattaka* form.[9]

Inheritance in case of *dvyamushyayana.*

In both kinds of *dvyamushyayana* the boy adopted inherits both in the family in which he was born and in the family of his adopter.[10]

The authorities seem to show that the issue of the *anitya dvyamushyayana* revert to their father's natural family.[11] As in the other

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[1] Strange's "Manual," 2nd ed., para. 94; V. N. Mandlik, p. 506; Mad. Dec. of 1859, p. 81; *Basava* v. *Lingangauda* (1894), 19 Bom. 428, at pp. 454, 455.

[2] *Vasudevan* v. *Secretary of State* (1887), 11 Mad. 157, at pp. 167, 179.

[3] *Chenava* v. *Basangavda* (1895), 21 Bom. 105.

[4] Steele's "Law and Custom," 45, 47, 183, 384; *Basava* v. *Lingangauda* (1894), 19 Bom. 428, at pp. 466, 467; *Krishna* v. *Paramshri* (1901), 25 Bom. 537, at p. 543.

[5] *Nilmadhub Doss* v. *Bishumber Doss* (1869), 13 M. I. A. 85, at pp. 100, 101; 12 W. R. P. C. 29, at p. 31; *Uma Deyi* (*Srimati*) v. *Gokoolanund Das Mahapatra* (1878), 5 I. A. 40, at pp. 50, 51; 3 Calc. 587, at p. 598; 2 C. L. R. 51, at p. 58.

[6] *Behari Lal* v. *Shib Lal* (1904), 26 All. 472.

[7] *I.e.* temporary son of two persons. See *Shumshere Mull* (*Raja*) v. *Dilraj Konwur* (*Ranee*) (1816), 2 Ben. Sel. R. 189; 2nd ed., 216, at p. 221.

[8] See Mayne's "Hindu Law," 7th ed., pp. 229, 230.

[9] *Krishna* v. *Paramshri* (1901), 25 Bom. 537, at p. 542. See Sircar's "Law of Adoption," p. 376.

[10] See "Vyavahara Mayukha," chap. iv. s. 5, para. 25.

[11] W. Macnaghten's "Hindu Law," vol. i. p. 71, referred to in *Uma Deyi*

case the adoption is complete, it is submitted that the issue inherit in the adoptive family, and in that family only.[1]

Failing near heirs, the natural mother[2] and other natural relations will inherit to a man adopted in this form.

If a son is born to the natural father, the *dvyamushyayana* son takes half of what the after-born son takes. If a son is born to his adoptive father, he takes half of an adopted son's share.[3] After-born son.

The "Mayukha" says,[4] "If both have legitimate sons, he offers an oblation to neither, but takes a quarter of the share allotted to a legitimate son of his adoptive father."

Adoption by a widow vests in the adopted son (as the heir of her husband) the estate vested in her as widow,[5] or as mother of a deceased son,[6] or vested in her Vesting and devesting of estate.

(*Srimati*) v. *Gokoolanund Das Mahapatra* (1878), 5 I. A. 40, at p. 51; 3 Calc. 587, at p. 598; 2 C. L. R. 51, at p. 58. See "Dattaka Mimansa," s. 6, paras. 41–44; Strange's "Hindu Law," vol. ii. pp. 122, 123.

[1] See Sutherland's "Synopsis of Law of Adoption," head v.; R. Sarvadhikari's "Law of Inheritance," p. 533. Sastri G. C. Sircar says ("Law of Adoption," p. 376) that the descendants continue to belong to both the *gotras* or families.

[2] See *Behari Lal* v. *Shib Lal* (1904), 26 All. 472.

[3] G. C. Sircar's "Law of Adoption," p. 403; "Dattaka Chandrika," s. 5, paras. 33, 34. As to what is such share, see *ante*, pp. 189, 190.

[4] IV. 5, para. 35. See Mayne's "Hindu Law," 7th ed., p. 230.

[5] See *Mondakini Dasi* v. *Adinath Dey* (1890), 18 Calc. 69; *Bamundoss Mookerjea* v. *Turinee* (*Mussamut*) (1858), 7 M. I. A. 169, at p. 185; *Lakshmana Rau* v. *Lakshmi Ammal* (1881), 4 Mad. 160, at p. 164; *Sreeramulu* v. *Kristamma* (1902), 26 Mad. 143, at p. 152; *Collector of Bareilly* v. *Nuraen Day* (*Musst.*) (1868), 3 Agra, 349. It does not affect her *Stridhan* property.

[6] *Jatindra Nath Chaudhuri* (*Rai*) v. *Amrita Lal Bagchi* (1900), 5 C. W. N. 20; *Ravji Vinayakrav Jaggannath Shankarsett* v. *Lakshmibai* (1887), 11 Bom. 381, at p. 397; *Jamnabai* v. *Raychand Nahalchand* (1883), 7 Bom. 225; *Lakhmi Chand* v. *Gatto Bai* (1886), 8 All. 319. See *Vellanki Venkata Krishna Row* (*Rajah*) v. *Venkata Rama Lakshmi Narsayya* (1876), 4 I. A. 1, at p. 9; 1 Mad. 174, at p. 186; 26 W. R. C. R. 21, at p. 23; *Ramasawmi Aiyan* v. *Vencataramaiyan* (1879), 6 I. A. 196, at p. 208; 2 Mad. 91, at p. 101; *Bykant Monee Roy* v. *Kisto Soonderee Roy* (1867), 7 W. R. C. R. 392. A contrary opinion was expressed in *Gobindo Nath Roy* v. *Ram Kanay Chowdhry* (1875), 24 W. R. C. R. 183, and *Puddo Kumaree Debee* v. *Juggut Kishore Acharjee* (1875), 5 Calc. 615, in the former of which cases the question did not directly arise, and in the latter the decision was set aside by the Judicial Committee upon another ground (*Pudma Coomari Debi* v. *Court of Wards*

co-widow,[1] as widow,[2] subject to a right of maintenance;[3] but, with these exceptions, it does not devest any estate of inheritance which has been taken by a person, as heir of a male holder other than the person to whom the adoption was made.[4]

Illustrations.

(i.) A, governed by the Bengal school of law, dies, leaving a son B, and a widow C, and having given to C a power to adopt a son in case of failure of male issue. B dies, leaving a widow D. C adopts E. E cannot oust D.[5]

(ii.) A dies, leaving a son B, and a widow C. B dies unmarried. C validly adopts D. D can oust C.[6]

(iii.) A dies, leaving a widow B, and a son C by another wife. C dies unmarried, and thereupon B adopts D. D cannot oust the heir of C who had succeeded on C's death.[7]

(iv.) A dies, leaving a widow B, and a son C by another wife, and a

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(1881), 8 I. A. 229; 8 Calc. 302). See G. C. Sircar's "Law of Adoption," p. 411.

[1] *Mondakini Dasi* v. *Adinath Dey* (1890), 18 Calc. 69; *Rakhmabai* v. *Radhabai* (1868), 5 Bom. H. C. A. C. 118, at p. 192; *Gopal Balkrishna Kenjale* v. *Vishnu Raghunath Kenjale* (1898), 23 Bom. 250; *Amava* v. *Mahadgauda*, 22 Bom. 416; *Ramji* v. *Ghamau* (1879), 6 Bom. 498.

[2] Where the estate is vested in the co-widow as heir to her son it cannot be so devested; *Faizuddin Ali Khan* v. *Tincowri Saha* (1895), 22 Calc. 565; *Anandibai* v. *Kashibai* (1904), 28 Bom. 461.

[3] *Dhurm Das Pandey* v. *Shamasoondri Dibiah* (1843), 3 M. I. A. 229, at p. 243; 6 W. R. P. C. 43, at p. 45.

[4] *Bhubaneswari Debi* v. *Nilkomul Lahiri* (1885), 12 I. A. 137; 12 Calc. 18; S. C. in Court below, *Nilcomul Lahuri* v. *Jotendro Mohun Lahari* (1881), 7 Calc. 178; 8 C. L. R. 401; *Kully Prosonno Ghose* v. *Gocool Chunder Mitter* (1877), 2 Calc. 295; *Dhurm Das Pandey* v. *Shama Soondri Dibiah* (*Mussumat*) (1843), 3 M. I. A. 229; 6 W. R. P. C. 43; *Gopal Balkrishna Kenjale* v. *Vishnu Raghunath Kenjale* (1898), 23 Bom. 250; *Vasudeo Vishnu Manohar* v. *Ramchandra Vinayak Modak* (1896), 22 Bom. 551; *Dharnidhar* (*Shri*) v. *Chinto* (1895), 20 Bom. 250; *Gavdappa* v. *Girimallappa* (1894), 19 Bom. 331; *Chandra* v. *Gojarabai* (1890), 14 Bom. 463; *Annamnah* v. *Mabbu Bali Reddy* (1875), 8 Mad. H. C. 108; *Rupchand Hindumal* v. *Rakhmabai* (1871), 8 Bom. H. C. A. C. 114; estate of grandmother, *Drobomoyee Chowdhrain* v. *Shama Churn Chowdhry* (1885), 12 Calc. 246; estate of mother, *Anandibai* v. *Kashibai* (1904), 28 Bom. 461; estate of daughter, *Lakshmibai* v. *Vishnu Vasudev Bele* (1905), 29 Bom. 410, and cases below, notes 5, 6, 7, and *post*, p. 199, notes 1–8.

[5] *Bhoobun Moyee Debia* (*Mussumat*) v. *Ram Kishore Acharj Chowdhry* (1865), 10 M. I. A. 279; 3 W. R. P. C. 15.

[6] *Vellanki Venkata Krishna Row* (*Rajah*) v. *Venkata Rama Lakshmi Narsayya* (1876), 4 I. A. 1; 1 Mad. 174.

[7] *Annammah* v. *Mabbu Bali Reddy* (1875), 8 Mad. H. C. 108.

mother D. C dies unmarried, and thereupon B adopts E. E cannot oust D who had succeeded on C's death.[1]

(v.) A dies, leaving a widow B and a son C. C dies, leaving a widow D and a son E, who subsequently dies. On E's death, B adopts F. F cannot oust D.[2]

(vi.) A and his sons B and C were members of an undivided family. B died, leaving a widow D, then A died. On his death, C succeeded to the family property. C died, leaving a widow E. After C's death, D adopted F. F cannot oust E.[3]

(vii.) A dies, leaving three widows and B the wife of a son who had predeceased him. B adopts C. C cannot oust the widows.[4]

(viii.) A and B were undivided brothers. A dies, leaving a widow C. The whole property then belonged to B. B dies, leaving a widow D. C adopts E. E cannot oust D.[5]

(ix.) A dies, leaving a widow B, and a daughter C, and a brother's son D. C dies, then D dies, having given to his widow E a power of adoption. Then B dies. Afterwards E adopts F. F has no right to the property.[6]

(x.) A dies, leaving two widows B and C, and a son D by B. He authorized C to adopt a son in the event of D dying unmarried. D died unmarried. C adopted a son E, to which adoption B was not a party. E cannot oust B who succeeded as heir to her son.[7]

(xi.) A dies, leaving a widow B and two brothers C and D. C dies, leaving a son E. D dies, leaving a widow F, and having given her a power of adoption. After B's death, F adopts G. G cannot compel E to give him half the property.[8]

In *Kalidas Das* v. *Krishan Chandra Das*,[9] Peacock, C.J., said, "There is no case in which an estate vested by

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[1] *Drobomoyee Chowdhrain* v. *Shama Churn Chowdhry* (1885), 12 Calc. 246.

[2] *Keshav Ramkrishna* v. *Govind Ganesh* (1884), 9 Bom. 94.

[3] *Chandra* v. *Gojarabai* (1890), 14 Bom. 463. If D had adopted before C's death E could have succeeded against C, *idem*, at p. 466, on the authority of *Raghunada* (*Sri*) v. *Brozo Kishoro* (*Sri*) (1876), 3 I. A. 154; 1 Mad. 69; 25 W. R. C. R. 291.

[4] *Dharnidhar* (*Shri*) v. *Chinto* (1895), 20 Bom. 250.

[5] *Rupchand Hindumal* v. *Rakhmabai* (1871), 8 Bom. H. C. A. C. 114.

[6] *Kallyprosonno Ghose* v. *Gocool Chunder Mitter* (1877), 2 Calc. 295. If the adoption had taken place during the lifetime of B, F would have succeeded, but on B's death the property must have vested in the then heir of A.

[7] *Faizuddin Ali Khan* v. *Tincowri Saha* (1895), 22 Calc. 565.

[8] If the adoption had taken place in the lifetime of C then G would have been entitled to share with E. *Bhubaneswari Debi* v. *Nilkomul Lahiri* (1885), 12 I. A. 137; 12 Calc. 18. S. C. in Court below, *Nilcomul Lahuri* v. *Jotendro Mohun Lahuri* (1881), 7 Calc. 178; 8 C. L. R. 401.

[9] (1869), 2 B. L. R. (F. B.) 103, at p. 111; 11 W. R. (A. O. J.) 11, at p. 13.

inheritance can be devested by the adoption of a son by a widow after her husband's death."

Although the judgment proceeded on the circumstance that the person in whom the estate was vested had assented to the adoption, it is said in *Babu Anaji* v. *Ratnoji Krishnarav*,[1] "For the purposes of inheritance the adoption may be considered as relating back to the death of the adoptive father devesting all estates which have during the intermediate period become vested, as it were, conditionally in another." This is, it is submitted, put too broadly. In the same case[2] the Court, in referring to *Sri Raghunada* v. *Sri Brozo Kishoro*,[3] says that "the person whose estate was there devested was a male full owner," but in the case cited the parties were members of a joint undivided family, governed by the Mitakshara law, and the person whose estate was devested had not obtained it by inheritance, but by survivorship.[4]

In *Surendra Nandan Das* v. *Sailaja Kant Das*,[5] expressions are used which would seem to apply to an estate of inheritance, but the Court was there dealing with a case where there had been a succession by survivorship in a family governed by the Mitakshara school of law.

So far as the estate of the donor of a power of adoption is concerned, the only persons whose rights of inheritance are superior to those of his widow are his son, grandson, and great-grandson, during the lifetime of any one of whom no adoption can take place, and an heir of one of such persons, in whom the estate has been vested after his death. When the estate has vested in such heir the power is at an end,[6] and no estate is devested by an attempted exercise of the power.[7]

Invalid adoption.

Where the power is at an end,[8] or from any other reason the adoption is invalid, the adoption does not even devest the interest of the woman who purports to adopt.[9]

The devesting of an estate taken as devisee under a will may perhaps stand upon a different footing.[10]

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[1] (1895), 21 Bom. 319, at p. 325.

[2] At p. 324.

[3] (1876), 3 I. A. 154; 1 Mad. 69; 25 W. R. C. R. 291.

[4] See *post*, p. 202.

[5] (1891), 18 Calc. 385, at pp. 395, 396.

[6] *Ante*, p. 130.

[7] *Bhoobun Moyee Debia* (*Mussumat*) v. *Ramkishore Acharj Chowdhry* (1865), 10 M. I. A. 279, at pp. 311, 312; 3 W. R. P. C. 15, at p. 18; *Pudma Coomari Debi* v. *Court of Wards* (1881), 8 I. A. 229; 8 Calc. 302; *Thayammal* v. *Venkatarama Aiyan* (1887), 14 I. A. 67; 10 Mad. 205; *Drobomoyee Chowdhrain* v. *Shama Churn Chowdhry* (1885), 12 Calc. 296; *Annamah* v. *Mabbu Bali Reddy* (1875), 8 Mad. H. C. 108; *Keshav Ramkrishna* v. *Govind Ganesh* (1884), 9 Bom. 94.

[8] *Ante*, p. 130.

[9] *Krishnarav Trimbak Hasabnis* v. *Shankarrav Vinayak Hasabnis* (1892), 17 Bom. 164.

[10] See *Sarat Chandra Mullick* v. *Kanai Lall Chunder* (1903), 8 C. W. N. 266, at p. 270.

Where there is a provision in a will that the estate of the devisee should be devested on an adoption, and that the adopted son should take the property, such provision might be effectual.[1]

Consent to devesting.

It is submitted that an estate cannot be devested by the mere consent of the person in whom it is vested.

This seems to be in accordance with the weight of authority.[2] It is submitted that this question depends upon the question whether consent can validate an adoption, which is otherwise invalid.[3] If it has not such effect, then the devesting of an estate would, it seems, not be effected by the act of adoption, but only in the way provided by law for the transfer of property.[4]

Even if consent can operate to devest an estate a distinction might well be made between the cases in which the person so consenting is a full owner, and those in which the estate is vested in a qualified owner; in which latter cases the rights of the reversioners could scarcely be prejudiced by the consent.[5]

Even if the then immediate reversioners should also consent, it is by no means clear that the rights of the persons who should become entitled on the succession opening out would be affected.[6]

Where the consent is necessary for the purpose of validating the adoption, as in Madras,[7] or Bombay,[8] effect would be given to it. This question stands on a different footing.

Impartible estate.

The rule prohibiting the devesting of estates applies

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[1] See Luckinarain Tagore's case; Sir F. Macnaghten's "Considerations on Hindu Law," p. 168; Sircar's "Vyavastha Darpana," 2nd ed., p. 842, referred to in *Bhoobun Moyee Debia (Mussúmat)* v. *Ramkishore Acharjee* (1865), 10 M. I. A. 279, at p. 312; 3 W. R. P. C. 15, at p. 19.

[2] The decision in *Annamah* v. *Mabbu Bali Reddy* (1875), 8 Mad. 108, at p. 112, where the estate was vested in the natural father, is express on this subject. In Bombay a different view was expressed in *Payapa Akkapa Patel* v. *Appamma*, 23 Bom. 327, at pp. 331, 332; *Gopal Balkrishna Kenjale* v. *Vishnu Raghunath Kenjale* (1898), 23 Bom. 250; *Babu Anaji* v. *Ratnoji Krishnarav* (1895), 21 Bom. 319, and *Rupchand Hindumal* v. *Rakhmabai* (1871), 8 Bom. H. C. (A. C.) 114, at p. 122; *Bhimappa* v. *Basawa* (1905), 29 Bom. 400. See *contrâ Dharnidhar (Shri)* v. *Chinto* (1895), 20 Bom. 250, at p. 258; *Vasudeo Vishnu Manohar* v. *Ramchandra Vinayak Modak* (1896), 22 Bom. 551, at p. 555.

[3] *Ante*, pp. 157, 158.

[4] See Transfer of Property Act (IV. of 1882), s. 123.

[5] This distinction was not made in the Bombay cases (above, note 2), which held that an estate could be devested by consent. Both in *Payapa Akkapa Patel* v. *Appamma* (1898), 23 Bom. 327, and in *Rupchand Hindumal* v. *Rakmabai* (1871), 8 Bom. H. C. (A. C.) 114, the estate was vested in a female having a widow's estate.

[6] See *Bahadur Singh* v. *Mohar Singh* (1901), 29 I. A. 1; 24 All. 94; 6 C. W. N. 169, at p. 174.

[7] *Ante*, p. 120.

[8] *Ante*, p. 126.

to impartible estates not governed by the Mitakshara law.

Fraud. The rule is not affected by the circumstance that the adoption has been delayed by fraud, even when the fraud has been practised by a person who has thereby procured the vesting of the estate in him.[1]

Maintenance of widow. A widow whose estate is devested is entitled to maintenance from the property.[2]

Persons taking after widow. An adoption prevents the succession of persons who would otherwise take the estate after the widow whose estate is devested.[3]

Devesting of rights acquired by survivorship. By adoption to a deceased member of a joint family governed by the Mitakshara law a person acquires such interest in the joint family property as he would have acquired if he had been natural born, and his adoption devests such interest as has passed over to other members of the family by survivorship.[4]

Adoption would not, however, devest estates which had passed by inheritance from those who had acquired rights by survivorship.[5]

Impartible estate. In the case of an impartible estate, the succession to which is in a joint family governed by Mitakshara law, the estate of a person to whom a right has accrued by survivorship may be devested by an adoption to the holder whose rights have so survived.[6]

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[1] *Bhubaneswari Debi* v. *Nilkomul Lahiri* (1885), 12 I. A. 137; 12 Calc. 18; S. C. in Court below, *Nilcomul Lahuri* v. *Jotendro Mohun Lahuri* (1881), 7 Calc. 178; 8 C. L. R. 401.

[2] *Jamnabai* v. *Raychand Nahalchand* (1883), 7 Bom. 225; *Rakhmabai* v. *Radhabai* (1868), 5 Bom. H. C. A. C. 181, at p. 193. As to the maintenance of widow, see *ante*, pp. 77, 78.

[3] As, for instance, a daughter, or daughter's son. *Ramkishen Surkeyl* v. *Srimuttee Dibia* (*Mussammaut*) (1824), 3 Ben. Sel. R. 367 (new edition, 489).

[4] See *Karunabdhi Ganesa Ratnamaiyar* v. *Gopala Ratnamaiyar* (1880), 7 I. A. 173, at p. 179; 2 Mad. 270, at p. 281; *Sreeramulu* v. *Kristamma* (1902), 26 Mad. 143, at p. 152; *Surendra Nandan Das* v. *Sailaja Kant Das Mahapatra* (1891), 18 Calc. 385; *Chandra* v. *Gojarabai* (1890), 14 Bom. 463, at p. 467; *Vithoba* v. *Bapu* (1890), 15 Bom. 110, at p. 129; *Bachoo Harkisondas* v. *Mankorebai* (1904), 29 Bom. 51; affirmed on appeal (1907), 34 I. A. 107; 31 Bom. 373; 11 C. W. N. 769.

[5] *Ante*, pp. 197, 198. See *Rupchand Hindumal* v. *Rakhmabai* (1871), 8 Bom. H. C. A. C. 114; *Chandra* v. *Gojarabai* (1890), 11 Bom. 463; *ante*, p. 199.

[6] See *Raghunada* (*Sri*) v. *Brozo Kishore* (*Sri*) (1876), 3 I. A. 154; 1 Mad. 69; 25 W. R. C. R. 291, where the estate of an undivided half-brother, who had succeeded to an impartible zemindary, was devested. This case

An adopted son is not bound by unauthorized alienations made, or acts of waste committed by, the widow adopting him, at the time when the property was vested in her, or after the adoption,[1] or by the manager of the estate. Power to dispute acts of widow.

Thus an alienation made by the widow, even before the adoption, can be set aside at the instance of the adopted son, unless it be made under such circumstances as would bind the reversioners;[2] but even in the case where the transaction be not such as would have bound the reversioners, the alienee is entitled to retain possession during the lifetime or widowhood of the widow,[3] as in the absence of an adoption she was competent to deal with her own personal interest,[4] and the rights of the adopted son do not date before the adoption.[5]

Where the alienation was made in fraud and in contemplation of the adoption, the position might be different.[6]

It has been held that if the acts of the widow have been assented to by the then immediate reversioners, they cannot be questioned by the son who has been subsequently adopted,[7] but it is submitted that this question depends upon whether a widow can with the concurrence of Assent by reversioners.

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was misunderstood by the Calcutta High Court in *Kally Prosonno Ghose* v. *Gocool Chunder Mitter* (1877), 2 Calc. 295, at p. 309. See *Surendra Nandan Das* v. *Sailaja Kant Das Mahapatra* (1891), 18 Calc. 385, at p. 395.

[1] *Antaji* v. *Dattaji* (1893), 19 Bom. 36.

[2] *Kishenmunee* (*Ranee*) v. *Oodwunt Singh* (*Rajah*) (1824), 3 Ben. Sel. R. 220 (new edition, 304); *Doorga Soonduree* v. *Goureepersaud*, Ben. S. D. A. of 1856, 170; *Sreenath Roy* v. *Ruttunmalla Chowdhrain*, Ben. S. D. A. of 1859, 421; *Manikmulla Chowdhrain* v. *Parbuttee Chowdhrain*, *ibid.* 515; *Bamundoss Mookerjea* v. *Tarinee* (*Mussamut*) (1858), 7 M. I. A. 169, at p. 180; *Madura* (*Collector of*) v. *Moottoo Ramalinga Sathupathy* (1868), 12 M. I. A. 397, at p. 443; 1 B. L. R. P. C. 1, at p. 17; 10 W. R. (P. C.) 17, at p. 24; *Lashmana Rau* v. *Lakshmi Ammal* (1881), 4 Mad. 160; *Lakshman Bhau Khopkar* v. *Radhabai* (1887), 11 Bom. 609; *Moro Narayan Joshi* v. *Balaji Raghunath* (1894), 19 Bom. 809, at p. 815; *Natraji Krishnaji* v. *Hari Jagoji* (1871), 8 Bom. H. C. A. C. 67.

[3] *Sreeramulu* v. *Kristamma* (1902), 26 Mad. 143. See G. C. Sircar's "Law of Adoption," pp. 417, 418.

[4] *Sahodra* (*Mussummat Bebea*) v. *Roy Jung Bahadoor* (1881), 8 I. A. 210; 8 Calc. 224; *Gobindmani Dasi* v. *Shamlal Bysak* (1864), B. L. R. Sup. Vol. 48; W. R. 1864, C. R. 165; *Periya Gaundan* v. *Tirumala Gaundan* (1863), 1 Mad. H. C. 206; *Bhagavatamma* v. *Pampanna Gaud* (1865), 2 Mad. H. C. 393; *Kamavadhani Venkata Subbaiya* v. *Joysa Narasingappa* (1866); 3 Mad. H. C. 116; *Ramchandra Mankeshwar* v. *Bhimrav Ravji* (1877), 1 Bom. 577; *Melgirappa* v. *Shivappa* (1869), 6 Bom. H. C. A. C. 270; *Mayaram Bhairam* v. *Motiram Govindram* (1886), 2 Bom. H. C. A. C. 313; *Prag Das* v. *Hari Kishn* (1877), 1 All. 503.

[5] *Ante*, p. 181.

[6] *Ante*, p. 189.

[7] *Rajkristo Roy* v. *Kishoree Mohun Mojoomdar* (1865), 3 W. R. C. R. 14.

the then immediate reversioners give a complete title by transfer, a question which is not yet completely settled.[1]

It is submitted that the same right to question the acts of the adoptive mother applies where she has succeeded to the estate as mother of a previously adopted son or of a natural born son. In *Gobindo Nath Roy* v. *Ram Kanay Chowdhry*,[2] it was held that the adopted son could not question an alienation made by the widow when she held the estate as mother, and that case was cited with approval in *Kally Prosonno Ghose* v. *Gocool Chunder Mitter*,[3] and in *Lakshman Bhau Khopkar* v. *Radhabai*,[4] but in neither of such two cases did this particular question arise. Mr. Mayne[5] says, as to the first-named decision, "The decision was given without any inquiry as to the propriety of the alienation, and was rested on the authority of *Chundrabullee's* case.[6] It does not seem to have occurred to the Court that a mother had no more than a limited estate, which, upon the authority of the case cited, was devested by the adoption. The son then came in for all rights which had not been lawfully disposed of, or barred, during the continuance of that estate."

It is doubtful whether a widow can, when adopting, stipulate that her management of the property shall not be inquired into. Apparently she would have no such power.[7]

The adopted son is bound by all acts of the widow within her authority.

A decree against a Hindu widow as representing her husband's estate binds her minor adopted son, and after the adoption the appeal, being for his benefit, must be considered as prosecuted on his behalf, even though he is not made a party thereto.[8]

An adopted son is not entitled to any account of the rents or profits of the estate rightfully received before his

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[1] See *Bcharilal* v. *Madholal Ahir Gyawal* (1891), 19 I. A. 30; 19 Calc. 236; *Sham Sunder Lal* v. *Achhan Kunwar* (1898), 25 I. A. 183, at p. 189; 21 All. 71, at p. 80; 2 C. W. N. 729, at p. 733; *Bahadur Singh* v. *Mohar Singh* (1901), 29 I. A. 1; 24 All. 94; 6 C. W. N. 169; *Hayes* v. *Hurendra Narain* (1904), 31 Calc. 698; *Mohima Chunder Roy Chowdhuri* v. *Gouri Nath Dey Chowdhuri* (1897), 2 C. W. N. 162; *Brajanath Baisakh* v. *Matilal Baisakh* (1869), 3 B. L. R. O. C. 92; *Vinayak Vithal Bhange* v. *Govind Venkatesh Kulkarni* (1900), 25 Bom. 129; *Nobokishore Sarma Roy* v. *Harinath Sarma Roy* (1884), 10 Calc. 1103, and cases there cited; *Sia Dasi* v. *Gur Sahai* (1880), 3 All. 362; *Varjivan Rangji* v. *Ghelji Gokaldas* (1881), 5 Bom. 563, at p. 571.

[2] (1875), 24 W. R. C. R. 183.

[3] (1877), 2 Calc. 295, at pp. 307, 308.

[4] (1887), 11 Bom. 609, at p. 615.

[5] "Hindu Law," 7th ed., pp. 260, 261.

[6] (1865), 10 M. I. A. 279; 3 W. R. P. C. 15.

[7] See *ante*, pp. 188, 189.

[8] *Hari Saran Moitra* v. *Bhubaneswari Debi* (1888), 15 I. A. 195; 16 Calc. 40.

adoption by the widow or other person whose estate is devested by his adoption.[1]

Alienation by father under Mitakshara law.

In the case of a joint family governed by the Mitakshara law, an adopted son is bound by an alienation made by his adoptive father, or by any other manager of the family, to the same extent as a natural son is bound.[2]

He cannot dispute an alienation made by the adoptive father before his adoption,[3] or any alienation of the separate property of such father.

Bengal school.

In cases governed by the Bengal school of law, an adopted son cannot dispute alienations of property, whether ancestral or self-acquired, made by his adoptive father.[4]

Alienations by male owner.

Where the adoption devests the estate of a male holder,[5] the adopted son cannot question his alienations to the extent of ousting a *bonâ fide* holder for value, nor can he require an account of rents and profits.[6]

He might, perhaps, where the proceeds of the alienation had been earmarked, or not spent, require the alienor to account for such proceeds.

Marriage and adoption in natural family.

Adoption does not sever the tie of blood which exists between the adopted son and the members of his natural family. He cannot, therefore, marry in his natural family within the prohibited degrees,[7] nor can he take in adoption therefrom a boy whom he could not have adopted if he had himself remained in that family.[8]

Effect of *Kritima* adoption.

A *Kritima* adoption does not transfer the subject of it from his natural family. It gives him, in addition to his

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[1] See *ante*, p. 181.

[2] See *Rambhat* v. *Lakshman Chintaman Mayalay* (1881), 5 Bom. 630, at p. 635. As to the right of a natural son, see *post*, p. 280, *et seq.* As to whether the father can by an arrangement made at the time of the adoption preclude the son from disputing his acts with regard to the property, see *ante*, p. 188.

[3] *Rambhat* v. *Lahskhman Chintaman Mayalay* (1881), 5 Bom. 630.

[4] *Ante*, p. 185.

[5] *Ante*, pp. 198–202.

[6] See *Raghunada* (*Sri*) v. *Broxo Kishoro* (*Sri*) (1876), 3 I. A. 154, at pp. 193, 194; 1 Mad. 69, at pp. 83, 84; 25 W. R. C. R. 291; at p. 303.

[7] See *ante*, p. 39.

[8] *E.g.* he cannot adopt his own natural brother. *Mootia Moodelly* v. *Uppen*, Mad. S. D. 1858, p. 117; Norton, L. C. i. 66, referred to in *Narasammal* v. *Balaramacharlu* (1863), 1 Mad. H. C. 420, at p. 426, note *a*.

rights in that family,[1] rights of inheritance to the person (man or woman) actually adopting him,[2] and to no one else.[3]

His sons acquire no right of inheritance to his adoptive father.[4]

If a husband and wife jointly adopt he inherits to both. If the husband adopts one son and the wife another, the sons inherit and offer oblations to each respectively.[5]

This kind of adoption is purely contractual. There is no fiction of a new birth into the adoptive family. The son adopted "does not lose his claim to his own family, nor assume the surname of his adoptive father; he merely performs obsequies and takes the inheritance."[6]

He may perform the obsequies of his natural father or mother,[7] and also those of his adopters. He would apparently be in the same position as to rights of survivorship in ancestral property in his adoptive family as a natural-born son would be.[8]

Effects of Invalid Adoption.

Effect of invalid adoption.

Where there has been an adoption in form, but such adoption is for any reason invalid, the adopted son does not acquire any rights, as such, in the family of the person purporting to adopt him, except so far as he may be entitled to maintenance.

The following are the cases of an invalid adoption:—

(i.) Where there is in existence a son begotten or adopted.[9]

[1] *Deepoo (Mussummaut)* v. *Gowreeshunker* (1824), 3 Ben. Sel. R. 307 (new edition, 410); *Srinath Serma* v. *Radhakaunt* (1796), 1 Ben. Sel. R. 15, note to p. 16 (new edition, 19, note to p. 21).

[2] *Durgopal Singh* v. *Roopun Singh* (1839), 6 Ben. Sel. R. 271 (new edition, 340); *Deepoo (Mussummaut)* v. *Gowreeshunker* (1824), 3 Ben. Sel. R. 307 (new edition, 410).

[3] *Shib Koeree (Mussamut)* v. *Joogun Singh* (1867), 8 W. R. C. R. 154; *Sreenarain Rai* v. *Bhya Jha* (1812), 2 Ben. Sel. R. 23, at p. 27 (new edition, 29, at p. 34); *Collector of Tirhoot* v. *Huropershad Mohunt* (1867), 7 W. R. C. R. 500.

[4] *Juswant Singh (Baboo)* v. *Doolee Chund* (1876), 25 W. R. C. R. 255. They would, of course, possess the ordinary rights of inheritance to property which was vested in their father.

[5] See answers of pundits in *Sreenarain Rai* v. *Bhya Jha* (1812), 2 Ben. Sel. R. 23, at p. 27 (new edition, 29, at p. 34); W. Macnaghten's "Hindu Law," vol. i. p. 101.

[6] Colebrooke's "Digest," vol. i. p. 276, n.; 1 W. Macnaghten's "Hindu Law," p. 76.

[7] See *Purmessur Dutt Jha (Chowdree)* v. *Hunooman Dutt Roy* (1837), 6 Ben. Sel. R. 192 (new edition, 235, at p. 240).

[8] See G. C. Sircar's "Law of Adoption," p. 451.

[9] *Ante*, pp. 103, 104.

(ii.) Simultaneous adoption of more than one son.[1]
(iii.) Adoption of the same boy by two persons.[2]
(iv.) Adoption by a woman without authority.[3]
(v.) Adoption of a boy of a different primary caste.[4]
(vi.) Adoption of a boy within the prohibited degrees.[5]
(vii.) Adoption of a boy where the performance of initiatory ceremonies or marriage before adoption makes the adoption invalid.[6]

It is unsettled whether, on the adoption being set aside, the boy can revert to his natural family, and whether he has any right of maintenance in his adoptive family.

Right of maintenance.

In Bengal, if not throughout India, it would seem that a member of one of the regenerate classes who had been invested with the sacred thread in his new family, or a Sudra who has undergone the ceremony of marriage in his new family, cannot revert to his natural family, but he would apparently be entitled so to revert before the happening of those events, and would acquire no rights of maintenance in the new family,[7] at any rate if there had not been a valid giving and receiving.[8] Where the above-mentioned ceremonies have been performed, or where there is a valid giving and receiving, but the adoption is invalid on account of some personal defect such as the fact that the boy belonged to a different class from that of his adoptive father, there is authority that he would acquire a right of maintenance.[9]

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[1] *Ante*, p. 149.
[2] *Ante*, p. 149.
[3] *Ante*, p. 119.
[4] *Ante*, p. 138.
[5] *Ante*, p. 139–144.
[6] *Ante*, p. 147.
[7] See *Rajcoomaree Dossee* (*Sreemutty*) v. *Nobocoomar Mullick* (1856), 1 Boulnois, 137; 2 Sevestre, 641, note, in which the Court considered that where there has been no power to take in adoption, the performance of the ceremonies will not prevent a return to the natural family. As to this case, G. C. Sircar says ("Law of Adoption," p. 424), "We have already seen that the performance of the initiatory ceremonies upon a person in the name of a *gotra* is considered to have the effect of irrevocably fixing his position in that *gotra*, hence a person upon whom these ceremonies have been performed in the name of the adoptive family cannot return to his own, notwithstanding the adoption may be invalid (*Ruvee Bhudr* v. *Roopshunker* (1823), 2 Borrodaile, 656). It is difficult to see why that rule would not govern the case of an adoption that was made by an unauthorized widow; for the ceremonies in such a case also must be performed in the name of her husband's *gotra*."
[8] See *Bawani Sankara Pandit* v. *Ambabay Ammal* (1863), 1 Mad. H. C. 363; *Lakshmappa* v. *Ramava* (1875), 12 Bom. H. C. 362, at p. 397.
[9] See *Bawani Sankara Pandit* v. *Ambabay Ammal* (1863), 1 Mad. H. C. 363, at p. 367; Strange's "Hindu Law," vol. i. pp. 82, 83. In Strange's "Manual," para. 119, a right of maintenance is asserted in every case of an invalid adoption. "Dattaka Chandrika," chap. i. ss. 14, 15; G. C. Sircar's "Law of Adoption," pp. 420–423.

It has been held in Madras that where the adoption was invalid on the ground of want of authority to take, there is no right of maintenance,[1] and that decision has been followed in Bombay.[2]

The difficulty in determining the rights of a person whose adoption is invalid arises from the absence of direct authority on the question as to when (if at all) he can revert to his natural family.

Where he can so revert, and loses nothing by the infructuous adoption, no hardship occurs. On the other hand, where he cannot so revert, as when he has been fixed by religious ceremonies in the family of the adopter,[3] or, perhaps, wherever there has been an actual giving and receiving by persons competent to give and receive,[4] it is right that he should, if possible, receive some compensation for the loss of inheritance in both families. His maintenance is the proper measure of compensation.

But where there is a gift of a boy to a person incompetent to receive, or by a person incompetent to give, the difficulty is the greater. If blame for the invalidity of the adoption can be attached to the adoptive father, as where he has omitted to satisfy himself as to the competency of the donor, or where he has given a power, which is in law invalid, it seems right that his estate should bear the burden of the maintenance. If the reversioner has delayed in challenging the adoption, it may also be equitable to require the estate to bear the burden of maintenance. Where there has been no such delay, and no blame can be attached to the adoptive father, it seems hard upon the reversioner that his interest should be affected by a charge which owes its origin to an unauthorized act. It is impossible to lay down any exact rule for adjusting these equities. The right might properly depend upon the circumstances of each case.

Descendants. A right of maintenance would apparently not extend to the descendants of the person invalidly adopted.[5] The only texts which provide for the maintenance of persons invalidly adopted, except with regard to those belonging to a class different from that of the adoptive father,[6] only contemplate the expenses of the marriage being provided.[7]

Arrangement. In some cases a boy whose adoption is invalid can take advantage of an arrangement made at the time of his adoption, or thereafter.

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[1] *Bawani Sankara Pandit* v. *Ambabay Ammal* (1863), 1 Mad. H. C. 363.

[2] *Lakshmappa* v. *Ramava* (1875), 12 Bom. H. C. 364, at p. 397.

[3] *Rajcoomaree Dossee* (*Sreemutty*) v. *Nobocoomar Mullick* (1856), 1 Boul. 137; Sevestre, 64, note.

[4] G. C. Sircar, "Law of Adoption," p. 421.

[5] In *Bawani Sankara Pandit* v. *Ambabay Ammal* (1863), 1 Mad. H. C. 363, at p. 367, the question was suggested, but not decided.

[6] "Dattaka Chandrika," s. 1, paras. 14, 15.

[7] "Dattaka Mimansa," s. 5, paras. 45, 46; "Dattaka Chandrika," s. 2, paras. 17; s. 6, 3.

In *Rungama* v. *Atchama*[1] the father had divided an ancestral property between a validly adopted son and a son whose adoption was subsequently held to be invalid at the instance of the son who had been validly adopted. The latter was required to compensate the former out of separate property belonging to the father.

In *Surendra Keshav Roy* v. *Doorgasundari Dassee*,[2] an arrangement affecting the rights of two boys who were adopted simultaneously by two widows was enforced against such widows.

As to the power to enforce a compromise of doubtful rights, see Act I. of 1877, s. 23 (*c*).

Gift to person erroneously described as adopted.

The invalidity of an adoption would not invalidate a gift by will or otherwise to a person erroneously described as an adopted son,[3] unless it appear that the validity of the adoption was a condition of,[4] or the motive for,[5] the gift.

A gift or bequest to a described person with a direction that he should be adopted as a son to the donor or testator takes effect, even in the absence of such adoption,[6] unless it appears that the adoption was a condition of the gift.[7] If it be reasonably clear that the testator would not have made the gift had it not been for the supposed existence

[1] (1846), 4 M. I. A. 1, at p. 103; 7 W. R. P. C. 57, at p. 62.

[2] (1892), 19 I. A. 108; 19 Calc. 108.

[3] *Bireswar Mookerji* v. *Ardha Chunder Roy Chowdhry* (1892), 19 I. A. 101; 19 Calc. 452; *Jivani Bhai* v. *Jivu Bhai* (1865), 2 Mad. H. C. 462; *Lali* v. *Murlidhar* (1901), 24 All. 195; S. C. on appeal (1906), 33 I. A. 97; 28 All. 488; 10 C. W. N. 130.

[4] See cases below, note 7, *Manjamma* v. *Sheshgirirao* (1902), 26 Bom. 491, at p. 496.

[5] *Fanindra Deb Raikat* v. *Rajeswar Das* (1884), 12 I. A. 72; 11 Calc. 463; *Lali* (*Mussummat*) v. *Murlidhar* (1906), 33 I. A. 97; 28 All. 488; 10 C. W. N. 130; *Vandravan Jekisan* (*Patel*) v. *Manilal Chunilal* (*Patel*) (1890), 15 Bom. 565, at p. 573; *Siddesory Dossee* v. *Doorgachurn Sett* (1865), 2 Ind. Jur. N. S. 22; Bourke (O. C.), 360.

[6] *Nidhoomoni Debya* v. *Saroda Pershad Mookerjee* (1876), 3 I. A. 253; 26 W. R. C. R. 91; *Subbarayer* v. *Subbammal* (1900), 27 I. A. 162; 24 Mad. 214; 4 C. W. N. 304. In *Monemothonanth Dey* v. *Onontnanth Dey* (1865), 2 Ind. Jur. N. S. 24, there was an actual adoption of two designated persons in accordance with an invalid power. The gift was upheld.

[7] *Karamsi Madhowji* v. *Karsandas Natha* (1896), 20 Bom. 718; S. C. on appeal (1898), 23 Bom. 271; *Abbu* v. *Kuppammal* (1892), 16 Mad. 355; *Shamavahoo* v. *Dwarkadas Vasanji* (1878), 12 Bom. 202; *Abhai Charan Ghose* v. *Dasmoni Dasi* (*S. M.*) (1871), 6 B. L. R. 623, differing on the construction of the same will from *Dossmoney Dossee* v. *Prosonomoye Dossee* (1866), 2 Ind. Jur. N. S. 18; *Manjamma* v. *Sheshgirirao* (1902), 26 Bom. 491, at p. 496; *Probodh Lal Kundu* v. *Harish Chandra Dey* (1904), 9 C. W. N. 309. See Indian Succession Act (X. of 1865), ss. 113–123, applied to certain Hindu wills by the Hindu Wills Act (XXI. of 1870).

of the character of an adopted son, the Court will construe the mention of the character as imposing a condition precedent to the gift.[1]

Where there is a bequest or gift to an unascertained person to be adopted hereafter by the widow of the testator, only a person whose adoption is valid in law can take, even if a valid adoption be inconsistent with the conditions of the gift.[2]

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[1] *Siddessory Dossee* v. *Doorgachurn Sett* (1865), 2 Ind. Jur. N. S. 22; Bourke (O. C.), 360.

[2] See *Surendra Keshav Roy* v. *Doorgasundari Dassee* (1892), 19 I. A. 108; 19 Calc. 513; S. C. in Court below (1886), 12 Calc. 686, where the bequest was to two boys to be simultaneously adopted as sons to the testator.

CHAPTER V.

PARENT AND CHILD (*continued*).

DUTIES AND RIGHTS OF FATHER.

Maintenance.

Maintenance of children.

IT is the duty of a Hindu father to maintain his minor sons[1] and unmarried daughters, provided they are not interested in property sufficient for their support, or are not otherwise capable of maintaining themselves.[2]

It is his duty to provide the marriage expenses of his daughters, and to cause his son to be educated in accordance with his station in life.

There is no obligation to maintain an adult son,[3] except, perhaps, when he is suffering from a disease which prevents him from maintaining himself.[4]

With the exception of a case in Bengal, where it was held that a suit would lie by the mother of an illegitimate child against the putative father of the maintenance of the child,[5] and of a case in Madras where

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[1] Whether natural born, or adopted.

[2] "Manu," chap. ix. para. 108; chap. xi. paras. 9, 10; Colebrooke's "Digest," vol. ii. pp. 112, 113; vol. iii. p. 5; Strange's "Hindu Law," vol. i. p. 67.

[3] *Ammakannu* v. *Appu* (1887), 11 Mad. 91; *Premchand Peparah* v. *Hulashchand Peparah* (1869), 4 B. L. R. App. 23; 12 W. R. C. R. 494; *Ramchandra Sakharam Vagh* v. *Sakharam Gopal Vagh* (1877), 2 Bom. 346, at p. 350.

[4] See *Premchand Peparah* v. *Hulashchand Peparah*, 4 B. L. R. App. 23; 12 W. R. C. R. 494.

[5] *Ghana Kanta Mohanta* v. *Gereli* (1904), 32 Calc. 479. In that decision the learned judges relied upon *Run Murdun Syn* (*Chuoturya*) v. *Sahub Purhulad Syn* (1857), 7 M. I. A. 18; 4 W. R. P. C. 132, which was a suit claiming maintenance out of the deceased father's estate. The judges go on to say, "But apart from the Hindu law, we should think that, upon general principles, the defendant, having begotten the child, is bound to provide for its maintenance, if that is necessary." It is submitted that there are no grounds for this general proposition.

a decree was given at the instance of an illegitimate son,[1] the Reports do not show any successful cases of proceedings in Civil Courts against a father for the maintenance of his child. It seems doubtful whether the duty can be enforced in a Civil Court,[2] but it is submitted that if an illegitimate son can enforce such right, legitimate sons are equally entitled.

It is clear that even if there be a right to maintenance, separate maintenance can only be awarded under very special circumstances.[3]

On the death of the father the maintenance of unmarried daughters, and the expenses of their marriage, must be provided out of his property.[4]

As to how far it amounts to a charge upon the property, see *ante*, pp. 88–92.

Married daughter.

Although on her marriage a daughter ceases to belong to her father's family,[5] and must first look to her husband[6] and his family[7] for her maintenance, there is a moral duty to maintain a married daughter who is without means, and who is unable to obtain support from her husband, or after his death from his family. This duty is not enforceable during the father's lifetime, and it has been held that it is not enforceable against his property after his death.[8]

Persons excluded from inheritance.

Where a son or other heir is excluded from inheritance on account of disability, he is entitled to maintenance for himself and his family out of the property which he would have inherited.[9]

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[1] *Kuppa* v. *Singaravelu* (1885), 8 Mad. 325.

[2] K. K. Bhattacharya ("Law of the Joint Hindu Family," pp. 282, 283) repudiates, however, any distinction between a moral and a legal obligation, except in the Bengal school.

[3] See *Shavatri* (*Ilata*) v. *Narayanan Nambudiri* (*Ilata*) (1863), 1 Mad. H. C. 372.

[4] See *Mangal* (*Bai*) v. *Rukhmini* (*Bai*) (1898), 23 Bom. 291; *Tulsha* v. *Gopal Rai* (1884), 6 All. 632; Macnaghten's "Hindu Law," vol. ii. chap. ii. case 10; "Vyavastha Darpana," 2nd ed., p. 370.

[5] *Ante*, p. 55.

[6] *Ante*, p. 75.

[7] *Ante*, p. 77.

[8] *Mangal* (*Bai*) v. *Rukhmini* (*Bai*) (1898), 23 Bom. 291. See, however, *Mokhada Dassee* v. *Nundo Lall Haldar* (1901), 28 Calc. 278, at p. 288; 5 C. W. N. 297, at p. 300. Macnaghten's "Hindu Law," vol. ii. chap. ii. case 10.

[9] "Mitakshara," chap. ii. s. 10, para. 5; "Dayabhaga," chap. v. paras. 11, 14–16; "Smriti Chandrika," chap. v. paras. 10–14, 20.

Proceedings in Criminal Court.

A father may be compelled, by proceedings under the Criminal Procedure Code,[1] to maintain his legitimate or illegitimate child, of whatever age he or she may be, who is unable to maintain himself or herself.

As to the rights of children to maintenance out of coparcenary property, see *post*, pp. 242, 272.

Illegitimate sons.

A Hindu is bound to provide for the maintenance of his minor[2] illegitimate sons[3] by Hindu mothers.[4]

After his death his illegitimate sons are entitled to maintenance out of his estate, or out of property in which he was a coparcener,[5] whether impartible or not,[6] if he was a member of one of the regenerate classes.[7] If he was a Sudra they are only so entitled in case they are not entitled to inherit,[8] or to a share on partition.

Under the Bengal school of law, this right against the father ceases on the sons attaining majority,[9] but it is submitted that after the father's death there is a right against his property, even if they are adults.[10] Under the

[1] Act V. of 1898, chap. xxxvi.

[2] *Nilmoney Singh Deo* v. *Baneshur* (1878), 4 Calc. 91.

[3] *Ghana Kanta Mohanta* v. *Gereli* (1904), 32 Calc. 479 (see *ante*, p. 211); *Kuppa* v. *Singaravelu* (1885), 8 Mad. 325.

[4] There is no text of Hindu law under which an illegitimate son of a Hindu by a woman who is not a Hindu can claim maintenance, and in none of the reported cases has maintenance ever been awarded to an illegitimate son who was not a Hindu by birth. *Lingappa Goundan* v. *Esudasan* (1903), 27 Mad. 13, at p. 15. See *Addoyto Churn Doss* v. *Woojan Beebee* (1879), 4 C. L. R. 154.

[5] *Roshan Singh* v. *Balwant Singh* (1899), 27 I. A. 51; 22 All. 191; 4 C. W. N. 353.

[6] *Run Murdun Syn* (*Chuotorya*) v. *Sahub Purhulad Syn* (1857), 7 M. I. A. 18; 4 W. R. P. C. 132; *Muttusawmy Jagavera Yettappa Naicker* v. *Venoataswara Yettaya* (1868), 12 M. I. A. 203; 2 B. L. R. P. C. 15; 11 W. R. P. C. 6; S. C. on remand, *Coomara Yettapa Naikar* v. *Venkateswara Yettia* (1870), 5 Mad. H. C. 405; *Pandaiya Telaver* v. *Puli Telaver* (1863), 1 Mad. H. C. 478, at p. 482.

[7] *Run Murdun Syn* (*Chuotorya*) v. *Sahub Purhulad Syn* (1857), 7 M. I. A. 18; 4 W. R. P. C. 132; *Parichat* (*Rajah*) v. *Zalim Singh* (1877), 4 I. A. 159; 3 Calc. 214.

[8] *Run Murdun Syn* (*Chuotorya*) v. *Sahub Purhulad Syn* (1857), 7 M. I. A. 18; 4 W. R. P. C. 132; *Inderun Valungypooly Taver* v. *Ramasawmy Pandia Talaver* (1869), 13 M. I. A. 141, at p. 159; 3 B. L. R. P. C. 1, at p. 4; 12 W. R. P. C. 41, at p. 43; *Muttusawmy Jagavera Yettappa Naicker* v. *Venoataswara Yettaya* (1868), 12 M. I. A. 203; 2 B. L. R. P. C. 15; 11 W. R P. C. 6.

[9] *Nilmoney Singh Deo* v. *Baneshur* (1878), 4 Calc. 91.

[10] See "Dayabhaga," chap. ix. para. 28.

Mitakshara school, they continue entitled to maintenance out of coparcenary property,[1] whether impartible or not; also out of self-acquired property which was owned by the father; but the right does not descend to their children.[2]

Obedience a condition.

It has been said by the Allahabad High Court in a case[3] governed by the Mitakshara school of law, "Obedience to the head of the family, not the age of the illegitimate descendant, or his capacity to earn his own livelihood, is the test by which, under Hindu law, the continuance of the right to receive maintenance must be decided. Till the illegitimate sons reach full age, this test cannot be applied, but thereafter it cannot be ignored. What constitutes docility or disobedience, in the sense of the texts, is a question the answer of which is not easy; but we think that the true answer is indicated in a *Vaivastha*, translated as No. 2, Book I. chapter vi. section 2, of Messrs. West and Bühler's collection (ed. 1878, p. 276), and we think that, on attaining full age, the respondents must, as a condition of receiving maintenance from the estate of Mauji Lal (the father), render to the head of the family such reasonable service as is ordinarily rendered by cadets of a family in that station of life to which the parties belong."

"The Court would presume the natural son qualified to receive maintenance, unless the opposite party could show what, in the contemplation of the law, is a legal disqualification."[4]

The right of maintenance is not affected by the child being the result of a casual connection,[5] or by the connection between the parents being adulterous.[6]

The maintenance of an illegitimate son may, like the maintenance of other persons entitled thereto,[7] be secured on the property out of which he is entitled to be maintained.[8]

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[1] *Hargobind Kuari* v. *Dharam Singh* (1884), 6 All. 329; *Pershad Singh* v. *Muheseee* (*Ranee*) (1821), 3 Ben. Sel. R. 132 (new edition, 176); *Rahi* v. *Govinda Valad Teja* (1876), 1 Bom. 97; "Mitakshara," chap. i. s. 12, para. 3; "Dayabhaga," ch. ix. para. 28; "Vyavahara Mayukha," chap. iv. s. 4, para. 30. These texts are founded on a passage of "Vrihaspati," which confines the right to the case where there is no other offspring.

[2] *Roshan Singh* v. *Balwant Singh* (1899), 27 I. A. 51; 22 All. 191; 4 C. W. N. 253; S. C. in Court below (1896), 18 All. 253.

[3] *Hargobind Kuari* v. *Dharam Singh* (1884), 6 All. 329, at p. 335.

[4] Strange's "Hindu Law," vol. ii. p. 71.

[5] See *Muttusamy Jagavira Yettapa Naikar* v. *Venkatasubha Yettia* (1865), 2 Mad. H. C. 293; S. C. on appeal (1868), 12 M. A. 203 (see p. 220); 2 B. L. R. P. C. 15 (see p. 20); 11 W. R. P. C. 6 (see p. 9).

[6] *Viraramuthi Udayan* v. *Singaravelu* (1877), 1 Mad. 306; *Rahi* v. *Govinda Valad Teja* (1875), 1 Bom. 97.

[7] *Ante*, p. 88.

[8] *Ananthaya* v. *Vishnu* (1893), 17 Mad. 160.

Amount of maintenance.

In a Madras case[1] it was said, "In determining the rate of maintenance, an illegitimate member of a family, who is not entitled to inherit, can be allowed only a compassionate rate of maintenance, and he cannot claim maintenance on the same principles and on the same scale as disqualified heirs and females who have become members of the family by marriage. In fixing, however, the compassionate rate of maintenance for the plaintiff, regard, no doubt, should be had to the interest of his deceased father in the joint family property and the position of his mother's family."

Illegitimate daughter.

The right of an illegitimate daughter to maintenance under the Hindu law has been denied.[2]

Maintenance of widowed daughter-in-law.

A Hindu is morally, although not legally, bound to maintain the widow of his son, even "if he has no fund with the disposal of which his son, if alive, could interfere, and if he has inherited nothing from his son, and has not had his rights in any property enlarged by his son's death."[3]

The fact that the father-in-law had sold coparcenary property to pay his debts does not render him liable for his daughter-in-law's maintenance.[4]

After his death, the persons who inherit his property, or whose interest in property is enlarged by his death, are legally bound to maintain his daughter-in-law, if chaste,[5] out of the property which they have so inherited,

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[1] *Gopalasami Chetti* v. *Arunachelam Chetti* (1903), 27 Mad. 32, at pp. 36, 37.

[2] *Parvati* v. *Ganpatrao Balal* (1893), 18 Bom. 177, at p. 183. It was not necessary to decide the point in that case.

[3] *Janki* v. *Nand Ram* (1888), 11 All. 194, at pp. 198–200; *Ammakannu* v. *Appu* (1887), 11 Mad. 91; *Kalu* v. *Kashibai* (1882), 7 Bom. 127; *Ganga Bai* v. *Sitaram* (1876), 1 All. 170; *Khetramani Dasi* v. *Kashinath Das* (1868), 2 B. L. R. A. C. 15; S. C. *Kasheenath Das* v. *Khettur Monee Dossee*, 9 W. R. C. R. 413, differing from *Koodee Monee Debea* v. *Tarrachand Chuckerbutty* (1865), 2 W. R. C. R. 134; *Khettur Monee Dossee* v. *Kasheenath Doss* (1868), 10 W. R. F. B. 89; *Rujjomoney Dossee* v. *Shibchunder Mullick* (1864), 2 Hyde, 103; *Yamunabai* v. *Manubai* (1899), 23 Bom. 608, at p. 609; *Adhibai* v. *Cursandas Nathu* (1886), 11 Bom. 199, at p. 207; *Hema Kooeree* (*Mussamut*) v. *Ajoodhya Persad* (1875), 24 W. R. C. R. 474. In *Chandrabhagabai* v. *Kashinath* (1866), 2 Bom. H. C. 323, the father-in-law was held liable for his daughter-in-law's maintenance, but that decision was differed from in *Savitribai* v. *Luximibai* (1878), 2 Bom. 573, at pp. 583, 584. See *Debur Ramnath Roy Chowdhry* v. *Arnee Kally Debia* (*Sreemutty*) W. R. 1864, C. R. 177.

[4] *Ganga Bai* v. *Sitaram* (1876), 1 All. 170, at p. 177.

[5] *Koodee Monee Dabee* v. *Tarra Chand Chuckerbutty* (1865), 2 W. R. C. R. 134.

or in which their interest has been enlarged, whether the property be coparcenary or self-acquired.[1]

This right does not interfere with the father-in-law's power to dispose of his self-acquired property by will.[2]

The daughter-in-law does not lose her right by declining to reside in her father-in-law's house.[3]

Impartible property.

Where the property of the father is impartible, and subject to the law of primogeniture, sons, even if adult, and capable of earning subsistence, are entitled to maintenance where the Mitakshara school of law applies.[4] They are also so entitled after his death, as against their brother or the person in possession,[5] whether, it is submitted, they are governed by the Bengal or the Mitakshara school. Their descendants have no such right.[6]

Grandchildren.

Grandsons[7] and granddaughters have not, as such, any right to be maintained by their grandfather.

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[1] *Siddessury Dassee* v. *Janardan Sarkar* (1902), 29 Calc. 557; 6 C. W. N. 530; *Janki* v. *Nandram* (1888), 11 All. 194; *Kamini Dassee* v. *Chandra Pole Mundle* (1889), 17 Calc. 373; *Yamunabai* v. *Manubai* (1899), 23 Bom. 608; *Koodee Monee Dabee* v. *Tarra Chand Chuckerbutty* (1865), 2 W. R. C. R. 134. See *Rangammal* v. *Echammal* (1898), 22 Mad. 305, at p. 307; *Devi Persad* v. *Gunwanti Koer* (1895), 22 Calc. 410, at p. 417; *Adhibai* v. *Cursandas Nathu* (1886), 11 Bom. 199; *Rujjomoney Dossee* v. *Shibchunder Mullick* (1864), 2 Hyde, 103, at pp. 104, 105; Jolly's "History of the Hindu Law," pp. 134, 135; West and Bühler, 3rd ed., pp. 245–252. *Contrâ Ammakannu* v. *Appu* (1887), 11 Mad. 91; *Komulmuni Dasee* v. *Bodhnarain Mujmooadar* (1823), 2 Macn. H. L. 119; "Smriti Chandrika" (Krishnasawmi Iyer's translation), chap. xi. s. 1, para. 34; Mitakshara on Subtraction of Gift, cited Strange's "Manual," para. 209.

[2] *Parvati* (*Bai*) v. *Tarwadi Dolatram* (1900), 25 Bom. 263. See, however, *Rangammal* v. *Echammal* (1898), 22 Mad. 305, at p. 307.

[3] *Siddessury Dassee* v. *Janardan Sarkar* (1902), 29 Calc. 557; 6 C. W. N. 530. See *ante*, p. 80.

[4] *Hinmatsing Becharsing* v. *Ganpatsing* (1875), 12 Bom. H. C. 94; *Ramchandra Sakharam Vagh* v. *Sakharam Gopal Vagh* (1877), 2 Bom. 346.

[5] *Mallikarjuna Prasada Nayudu* (*Raja Yarlagadda*) v. *Durga Prasada Nayudu* (*Raja Yarlagadda*) (1900), 27 I. A. 151; 24 Mad. 147; 5 C. W. N. 74. As to maintenance from *Saranjams*, see *Madhavrav Manohar* v. *Atmaram Keshav* (1890), 15 Bom. 519.

[6] See *Nilmony Sing Deo* v. *Hingoo Lall Singh Deo* (1879), 5 Calc. 256. As to a grant in lieu of maintenance see *Raja Jee Bahadur Garu* (*Raja*) v. *Parthasaradhi Appa Row* (1902), 30 I. A. 14; 26 Mad. 202; 8 C. W. N. 105.

[7] *Kalu* v. *Kashibai* (1882), 7 Bom. 127; *Manmahini Dasi* v. *Balak Chandra Pandit* (1871), 8 B. L. R. 22; 15 W. R. C. R. 498.

The marriage expenses of a granddaughter have been held to be properly payable out of deceased grandfather's estate.[1]

Maintenance of parents.

A Hindu is bound to support his father and mother if they are in want. After his death his property is liable for their maintenance.[2]

A stepson is not obliged to maintain his stepmother out of his self-acquired property,[3] but he must maintain her out of family property.

A grandmother and sister (until marriage, and after marriage if destitute[4]) are also to be maintained out of the property of a Hindu after his death.[5]

A mother does not apparently lose her right to maintenance by unchastity,[6] except in Bengal.[7]

It is also the right and duty of a son to perform the funeral ceremonies and other ceremonies in commemoration of his father and mother.[8]

Duty of heir.

An heir is legally bound to provide out of the estate which descends to him maintenance for such persons as the ancestor was legally or morally bound to support.[9]

"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." [10]

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[1] *Ramoomar Mitter* v. *Ichamoyi Dasi* (1880), 6 Calc. 36; 6 C. L. R. 429.

[2] *Subbarayana* v. *Subbakka* (1884), 8 Mad. 236; Strange's "Manual," para. 209; Macnaghten's "Hindu Law," vol. ii. pp. 113–115; Sircar's "Vyavastha Darpana," 2nd ed., p. 375; 'Manu," chap. viii. para. 389; Strange's "Hindu Law," vol. ii. pp. 83, 90.

[3] *Daya* (*Bai*) v. *Natha Govindlal* (1885), 9 Bom. 279.

[4] Strange's "Hindu Law," vol. ii. p. 83. See, however, *Mangal* (*Bai*) v. *Rukhmini* (*Bai*) (1898), 23 Bom. 291.

[5] Sircar's "Vyavastha Darpana," 2nd ed., p. 370.

[6] See *Valu* v. *Ganga* (1882), 7 Bom. 84, at p. 90.

[7] Sircar's "Vyavastha Darpana," 2nd ed., p. 371, note.

[8] *Sundarji Damji* v. *Dahibai* (1904), 29 Bom. 316; *Vrijbhukandas* v. *Parvati* (*Bai*) (1907), 32 Bom. 26.

[9] *Khetramani Dasi* v. *Kashinath Das* (1868), 2 B. L. R. A. C. 15, at p. 34; 9 W. R. C. R. 413, at p. 422. See *Mokhada Dassee* v. *Nundo Lall Haldar* (1901), 28 Calc. 278, at p. 288; 5 C. W. N. 297, at p. 300. *Janki* v. *Nand Ram* (1888), 11 All. 194, at p. 201; *Rujjomoney Dossee* v. *Shibchunder Mullick* (1864), 2 Hyde, 103. This applies to Khojas, *Rashid Karmali* v. *Sherbanoo* (1904), 29 Bom. 85.

[10] *Khetramani Dasi* v. *Kashinath Das* (1868), 2 B. L. R. A. C. 15, at p. 38; 9 W. R. C. R. 413, at p. 422. See *Tarunginee Dossee* v. *Chowdhry Dwarkanath Mussant* (1873), 20 W. R. C. R. 196.

There is a difficulty in determining whether the person claiming maintenance is one whom the late proprietor was morally bound to maintain.[1] The texts lay down generally that he who inherits a person's property is bound to maintain those whom that person was himself bound to maintain, including the persons disqualified from inheritance and those dependent on them.[2]

As to when maintenance is a complete charge upon property, see the cases relating to the maintenance of a widow, *ante*, pp. 88–92.

Guardianship.

Right of guardianship.

A Hindu father is recognized as the legal guardian of all his male, and of his female unmarried, minor legitimate children,[3] and is as such entitled to the custody of their persons and property.

The adoptive father acquires the same right, even as against the natural father.[4]

Testamentary guardian.

An adult[5] Hindu father can, by word or writing, nominate a guardian for his children, and he is unrestricted in the choice of such guardian. He may exclude even the mother from the guardianship.[6]

[1] *Kamini Dassee* v. *Chandra Pole Mundle* (1889), 17 Calc. 373, at p. 377. See Sircar's "Vyavastha Darpana," 2nd ed., p. 370; G. C. Sircar's "Hindu Law," p. 238.

[2] *Lakshman Ramchandra* v. *Saraswatibai* (1875), 12 Bom. H. C. 69, at p. 77; "Vyavahara Mayukha," chap. iv. s. 4, para. 30; s. 9, para. 22; s. 11, paras. 1, 3, 9, 12; "Mitakshara," chap. ii. s. 1, paras. 7, 12, 13, 20, 21; s. 10, paras. 5, 15. The Rishi texts on the subject are collected in R. C. Mitra's "Law of Joint Property," pp. 66–68.

[3] *Mokoond Lal Singh* v. *Nobodip Chunder Singha* (1898), 25 Calc. 881, at p. 884; 2 C. W. N. 379, at p. 381. *In the matter of Prankrishna Surma* (1882), 8 Calc. 969; S. C. *Parameshwari Surma* v. *Empress*, 11 C. L. R. 6; Macnaghten's "Hindu Law," vol. i. ed. 1829, chap. vii. p. 103. *In matter of Himnauth Bose* (1862), 1 Hyde, 111. See Act VIII. of 1890, s. 19.

[4] *Sree Narain Mitter* v. *Kishensoondery Dassee* (*Sreemutty*) (1893), I. A. Sup., vol. 149, at p. 163; 11 B. L. R. 171, at p. 191; S. C. *Nogendro Chundro Mittro* v. *Kishensoondery Dossee* (*Sreemutty*), 19 W. R. C. 133, at p. 139. *Laksmibhai* v. *Shridar Vasudev Takle* (1878), 3 Bom. 1.

[5] By not incorporating s. 47 of the Indian Succession Act (X. of 1865) in the Hindu Wills Act (XXI. of 1870), the Legislature has apparently indicated its opinion that the privilege enjoyed by adult Hindu fathers should not be extended to fathers who are themselves minors.

[6] *Pirthee Lal Jha* (*Soobah*) v. *Doorga Lal Jha* (*Soobah*) (1867), 7 W. R. C. R. 73, at p. 75. See Act VIII. of 1890, s. 6; *Budhilal Manji* v. *Murarji Premji* (1907), 31 Bom. 413.

Although the right of the father to the guardianship of his children has been recognized by the legislature, it is one which is given to him for the benefit of his children, and should he at any time show himself unfit to be guardian the Court will place the custody of his children in a more suitable person.[1]

Ample provision is made in the Guardians and Wards Act, 1890, for the purpose of protecting the persons and property of infants, and although the Court will have regard to the principle that it is generally for the benefit of infants that they should remain in the custody of their parents, and will also have regard to the personal law of the infant in question, the Courts will, in appointing a guardian, consider only the interest of the infant.[2]

Right of mother.

On the death of the father, or in his absence,[3] or in case of his having lost the right of guardianship, and in the absence of a valid appointment by him, the mother is entitled to the guardianship of her minor children.[4]

It has been held that under the Mithila law, the mother is entitled to the guardianship even during the lifetime of the father.[5]

Illegitimate children.

A mother would ordinarily be entitled to the guardianship of her illegitimate child, and the father would against the mother have no right of guardianship.[6]

Appointment of guardian by Court.

A parent is liable to be superseded by the appointment of a guardian under the provisions of the Guardians and

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[1] See Act VIII. of 1890, s. 19.

[2] See Act VIII. of 1890, s. 17; *Mokoond Lal Singh* v. *Nobodip Chunder Singha* (1898), 25 Calc. 881; 2 C. W. N. 379; *Bhikuo Koer* (*Musst.*) v. *Chamela Koer* (*Musst.*) (1897), 2 C. W. N. 191.

[3] See *Modhoosoodun Mookerjee* v. *Jadub Chunder Banerjee* (1865), 3 W. R. C. R. 194.

[4] *Pirthee Lal Jha* (*Soobah*) v. *Doorga Lal Jha* (*Soobah*) (1867), 7 W. R. C. R. 73, at p. 75; *Ram Dhun Doss* v. *Ram Ruttun Dutt* (1868), 10 W. R. C. R. 425, at p. 426; *S. Namasevayam Pillay* v. *Annamai Ummal* (1869), 4 Mad. H. C. 339, at p. 343; *Kooldeep Narain* v. *Rajbunsee Kowur* (1847), 7 Ben. Sel. R. 395 (2nd edition, p. 467); *Kaulesra* v. *Jorai Kasaundan* (1905), 28 All. 233; Macnaghten's "Hindu Law," ed. 1829, vol. i. chap. vii. p. 103; and vol. ii. chap. vii. case iv. p. 205.

[5] *Jussoda Kooer* v. *Nettya Lall* (*Lallah*) (1879), 5 Calc. 43. There does not seem to be any other authority to the same effect. In *Pirthee Lal Jha* (*Soobah*) v. *Doorga Lal Jha* (*Soobah*) (1867), 7 W. R. C. R. 74, where the parties were governed by the Mithila school, a testamentary guardian, who was appointed by the father, was preferred to the mother.

[6] *In the matter of Saithri* (1891), 16 Bom. 307, at p. 317; *Venkamma* v. *Savitramma* (1888), 12 Mad. 67, at p. 68; *King* v. *Nagapen* (1814), 2 Mad. N. C. 91.

Wards Act, 1890, but the Court cannot make such appointment when the father is alive, unless he is unfit to be guardian.[1]

Other relations.

Failing the father and mother, the Hindu law prescribed a succession to the right of guardianship. The elder brother, the elder half-brother, the paternal relations, and failing them the maternal kinsmen were preferred in order of priority;[2] but their right was not, as in the case of the father or mother, an absolute one.[3] In appointing a guardian a Court may be guided to some extent by this order of succession,[4] but it would not give the same effect to the claims of these relatives as it would to the claim of a father or mother.

As to the guardianship of a female minor after marriage, see *ante*, pp. 62, 63.

Guardianship of property.

If the minor is a member of a joint Hindu family, the *kurta* of the family would be entitled to the management of the joint property; but if the family be a divided one, the mother is, failing the father, entitled to the custody of the minor's property;[5] and even if the family were joint, she would apparently be so entitled, so far as the minor's separate property, if any, is concerned. Where the mother is manager of her minor child's property, her position necessarily requires her to seek the advice of her husband's relations,[6] and she would often strengthen her position by her so doing, but the law cannot compel her to seek, or to act under, their advice, if she wishes to take the whole responsibility upon herself.

Loss of right.

A father may lose his right to the guardianship of his children by a persistent course of ill-treatment, by conduct tending to their corruption, or by acting in a way injurious to their morals or interest.[7] He may lose the right by

[1] Act VIII. of 1890, s. 19.

[2] Macnaghten's "Hindu Law," vol. i. pp. 103, 104; Strange's "Hindu Law," vol. i. p. 71.

[3] *Kristo Kissor Neoghy* v. *Kadermoye Dossee* (1878), 2 C. L. R. 583. See *Bhikuo Koer* (*Musst.*) v. *Chamela Koer* (*Musst.*) (1897), 2 C. W. N. 191.

[4] See Strange's "Hindu Law," vol. i. p. 71; Act VIII. of 1890, s. 17.

[5] Sir E. H. East's Notes, Morley's "Digest," vol. ii. p. 50; West and Bühler, 2nd ed., p. 88. In *Motee Singh* v. *Dooluth Singh*, N.-W. P. S. D. A., 13th April, 1844, it was held that an elder brother, if not separated, could act as guardian.

[6] Macnaghten's "Hindu Law," ed. 1829, vol. i. chap. vii. p. 103; and see Sir E. H. East's Notes, Morley's "Digest," vol. ii. p. 50.

[7] See Act VIII. of 1890, s. 19 (*b*).

waiver, as where he has permitted another person to maintain and educate them, and it would be detrimental to their interests to alter the mode of their maintenance in course of their education.[1]

A mother may also for similar reasons lose her right.[2]

It is submitted that a father does not lose his right by a change of religion.[3] Change of religion.

Under the Hindu law loss of caste apparently involved a loss of the right of guardianship of the person and property of minors;[4] but since the passing of Act XXI. of 1850, such right of guardianship ceased to be affected by loss of caste.[5] Where, however, the appointment of a guardian is made by a Court, the fact that the person proposed is out of caste would be a matter for consideration.[6] Loss of caste.

Under the Hindu law a father or other guardian might lose his rights by permanently emigrating, becoming a recluse or entering a religious order.[7] Recluse.

Hindu widows do not on remarriage *ipso facto* lose their right of guardianship of their children,[8] but, if neither the widow nor any other person has been expressly constituted by the will or testamentary disposition of the Hindu widows.

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[1] *Mokoond Lal Singh* v. *Nobodip Chunder Singha* (1898), 25 Calc. 881; 2 C. W. N. 379. *In the matter of Joshi Assan* (1895), 23 Calc. 290. See *Modhoosoodun Mookerjee* v. *Jadub Chunder Banerjee* (1865), 3 W. R. C. R. 194.

[2] *Venkamma* v. *Savitramma* (1888), 12 Mad. 67. *In the matter of Saithri* (1891), 16 Bom. 307.

[3] Act XXI. of 1850; *Muchoo* v. *Arzoon Sahoo* (1866), 5 W. R. C. R. 235; *Queen* v. *Bezonji*, Perry's Oriental Cases, p. 91. It has been doubted whether Act XXI. of 1850 affects guardianship, but the Punjab Chief Court (*In the matter of Gul Mahomed*) has held that a right of guardianship is a right within the meaning of Act XXI. of 1850. See *Kanahi Ram* v. *Biddya Ram* (1878), 1 All. 549; *Kaulesra* v. *Jorai Kasaundan* (1905), 28 All. 233; *Shamsing* v. *Santabai* (1901), 25 Bom. 551, at p. 555.

[4] See Strange's "Hindu Law," vol. i. p. 160.

[5] *Muchoo* v. *Arzoon Sahoo* (1866), 5 W. R. C. R. 235, above, note 3; *Kannahi Ram* v. *Biddya Ram* (1878), 1 All. 549; *Kaulesra* v. *Jorai Kasaundhan* (1905), 28 All. 233.

[6] *Fuggoo Daye* v. *Ranah Daye* (1865), 4 W. R. M. A. 3.

[7] See *In the matter of Ishwar Chunder Surma*, Ben. S. D. A. 1850, p. 471. Strange's "Hindu Law," vol. i. p. 185; Sutherland's "Synopsis of the Law of Adoption," 2nd head.

[8] Act XV. of 1856, s. 5. This Act has been declared to be in force throughout British India, except as regards the Scheduled Districts (Act XV. of 1874, s. 3), and in the Santhal Pergunnahs (Reg. III. of 1872, s. 3, as amended by Reg. III. of 1886). As to the Scheduled Districts to which it has been applied, see General Acts, 1854–66, ed. 1887, p. 107.

husband the guardian of his children, the father, or paternal grandfather, or the mother or paternal grandmother, or any male relative, of the husband can apply to the highest Court having original jurisdiction in civil cases in the place where the husband was domiciled at the time of his death for the appointment of a guardian,[1] and the Court may, if it should think fit, appoint such guardian, who, when appointed, shall be entitled to have the care and custody of such children during their minority in the place of their mother, and in making such appointment the Court must be guided, as far as may be, by the laws and rules in force touching the guardianship of children who have neither father nor mother.[2]

When the children have not property of their own sufficient for their support and proper education whilst minors, the appointment can only be made with the consent of the mother, unless the proposed guardian gives security for the support and proper education of the children whilst minors.[3]

Remedies.

A father or other person entitled to the custody of an infant can recover such custody by suit.[4]

When the child is within the limits of the ordinary original civil jurisdiction of the High Courts of Bengal, Madras, and Bombay, he can apply for relief under sec. 491 of the Code of Criminal Procedure.[5]

Sec. 25 of the Guardians and Wards Act, 1890,[6] gives the District

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[1] Act XV. of 1856, s. 3. The application may be made under that Act, or under the Guardians and Wards Act (VIII. of 1890). In the latter case the conditions necessary for an application under Act VIII. of 1890 would apply. Act XV. of 1856 has no application to women who, by the rules of their caste, are capable of contracting a second valid marriage. In *Kishen* v. *Enayet Hossain*, S. D. A. N.-W. P., 25th June, 1861, it was held that a woman of the Aheer caste does not by remarriage forfeit her rights to act as guardian of her son by her first marriage.

[2] Act XV. of 1856, s. 3. See *Khushali* v. *Rani*, 4 All. 195.

[3] Act XV. of 1856, s. 3.

[4] *Sharifa* v. *Munekhan* (1901), 25 Bom. 574; *Balmakund* v. *Janki* (1881), 3 All. 403. The guardian would bring the suit in his own name. For recent examples of suits of this kind, see *Krishna* v. *Reade* (1885), 9 Mad. 391; S. C. *Reade* v. *Krishna* (1886), 9 Mad. 391; *Venkamma* v. *Savitramma* (1888), 12 Mad. 67; *Abasi* v. *Dunne* (1878), 1 All. 598.

[5] Act V. of 1898.

[6] Act VIII. of 1890.

Courts power to arrest a ward and deliver him into the custody of his guardian.

Where the child is confined under such circumstances that the confinement amounts to an offence, sec. 100 of the Criminal Procedure Code [1] is applicable, and sec. 552 of the same code deals with the case of a female child under fourteen years of age, who has been detained for an unlawful purpose.

[1] Act V. of 1898.

CHAPTER VI.

THE JOINT FAMILY AND ITS PROPERTY.

Of what the family consists.

AMONG Hindus a family is not ordinarily composed only of parents and their unmarried children, although that type of family is sometimes to be found. The family would generally be composed of a man, his wife, his unmarried children, his married sons and their wives and children, and, in cases where they are not maintained by their husband's family, his widowed daughters.[1]

A family of this type, although in many respects complete in itself, might be a component part of a larger family. This larger family consists of all the descendants in the male line from a common ancestor, and their wives, sons, and unmarried daughters.[2]

Whether the family be of the larger or smaller type, the members would ordinarily live together, being maintained from the common purse, and performing jointly the ceremonies required by their religion.

A family so living together is called by English lawyers a joint Hindu family, and in its ordinary condition the members of it are said to be joint in food, worship, and estate.

Rights of members.

The rights of the individual members in the property belonging to the family varies, in accordance with the school of law to which the family belongs.[3]

If the family be governed by the Bengal school of law, sons have no rights in the joint property during the

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[1] See *ante*, p. 212, and *post*, pp. 242, 272.

[2] See Intro. to "Study of Hinduism," by Guru Prosad Sen, pp. 87–90.

[3] See *ante*, pp. 15, 16.

lifetime of their father. On his death intestate they acquire rights by inheritance.

The case of a family governed by the Mitakshara school of law is different. Within certain limits sons acquire by birth rights in the property, and can assert such rights even against their own father.

Joint family according to the Mitakshara.

According to the Mitakshara school of law, "The conception of a Hindu family is a common male ancestor with his lineal descendants in the male line, and so long as that family is in its normal condition, viz. the undivided state, it forms a corporate body,"[1] or unit,[2] in the sense of having a continuous existence notwithstanding the death of individual members.[3]

"Such corporate body, with its heritage, is purely a creation of law and cannot be created by act of parties, save in so far that by adoption a stranger may be affiliated as a member of that corporate family.

"According to the above conception of a family there may, of course, be one or more families all with one common ancestor, and each of the branches of that family with a separate common ancestor."[4]

"So long as a family remains an undivided unit, two or more members thereof—whether they be members of different branches or of one and the same branch of the family—can have no legal existence as a separate independent unit; but if they comprise all the members of a branch, or of a sub-branch, they can form a distinct and separate corporate unit within the larger corporate unit and hold property as such. Such property may be the 'self-acquisition' or 'obstructed heritage'[5] of a paternal ancestor of that branch as distinguished from the other branches, which property has come to that branch and to that branch alone as 'unobstructed heritage,' or it may be the self-acquisition of one or more individual members of that branch, which by act of parties has been impressed with the character of joint property,[6] owned by that branch and that branch alone, to the exclusion of the other branches."[7]

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[1] *Sudarsanam Maistri* v. *Narasimhulu Maistri* (1901), 25 Mad. 149, at p. 154; *Gan Savant Bal Savant* v. *Narayan Dhond Savant* (1883), 7 Bom. 467, at p. 471.

[2] *Ram Narain Singh* (*Rajah*) v. *Pertum Singh* (1873), 11 B. L. R. 397, at p. 404; 20 W. R. C. R. 189, at p. 191.

[3] It is not a corporation in the sense of being a legal person. *Sokkanadha Vannimundar* v. *Sokkanadha Vannimundar* (1904), 28 Mad. 344, at p. 345.

[4] *Sudarsanam Maistri* v. *Narasimhulu Maistri* (1901), 25 Mad. 149, at p. 154.

[5] *Post*, p. 261.

[6] *Post*, p. 251.

[7] *Sudarsanam Maistri* v. *Narasimhulu Maistri* (1901), 25 Mad. 149, at p. 155.

Disintegration of family.

The joint family may be broken up by the separation of individual members from the corporate body, or by the partition of the rights of all the members. On such separation or partition, the separating or dividing members form new families, to which the joint family system applies.[1]

The joint family may also come to an end by the death of the last surviving coparcener, in which case, in default of his disposing of the property, his heir takes by inheritance.

"By the nature of the case the joint family must commence, and also must end, when it does end, in an individual who holds the property in a separate condition. If this individual dies without becoming the root of a joint family, the Mitakshara law gives an *interim* enjoyment of the property to his female representatives, when there are any, and then transfers it to a collateral heir as the origin of a new joint family."[2]

As to the origin of the joint family system, and as to the similarities between it, and other ancient systems of law, see Sir Henry Maine's "Ancient Law," pp. 123–161; Mayne's "Hindu Law," 7th ed., chap. vii.; Krishna Kamal Bhattacharya's "Law Relating to the Joint Hindu Family," Lectures I. and II.; Jogendranath Bhattacharya's "Commentaries on the Hindu Law," 2nd ed., pp. 216–218.

Burden of proof as to family or property being joint.

In a suit which involves a question as to whether a family was joint or separate, or whether a particular property belonged to a joint family, or was the separate acquisition of an individual member of the family, the burden of proof would depend upon the allegations in the pleadings or at the hearing,[3] and would, as in other cases, lie on the person who would fail if no evidence at all were given on either side.

This burden of proof would be shifted by the following presumptions:—

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[1] *Bata Krishna Naik* v. *Chintamani Naik* (1885), 12 Calc. 262.

[2] *Ram Narain Singh* (*Rajah*) v. *Pertum Singh* (1873), 11 B. L. R. 397; at p. 404; 20 W. R. C. R. 189, at p. 192. See *Saminadha Pillai* v. *Thangathanni* (1895), 19 Mad. 70; *Jasoda Koer* v. *Sheo Pershad Singh* (1889), 17 Calc. 33, at p. 36. See *post*, p. 248.

[3] Indian Evidence Act (I. of 1872), s. 102. See *Bholanath Mahta* v. *Ajoodhia Persad Sookul* (1873), 12 B. L. R. 336; 20 W. R. C. R. 65.

Presumption of union.

Every Hindu family is presumed to be joint in food, worship, and estate. The property belonging to that family is presumed to be joint and undivided, the burden of proving a separation being upon the person alleging it.[1]

As to the presumption with regard to property in the name of a coparcener, see *post*, pp. 264, 265.

This presumption is merely as to the continuance of a juridical relationship.[2] It takes the place of evidence, and may be displaced by evidence of a state of things inconsistent with such presumption.[3]

Separation in dwelling and food.

It is not necessary, for the preservation of the joint nature of family property, that the members of the family should live in commensality; they may dwell and mess apart, and yet remain joint in property.[4]

Separate dealings.

The presumption that the family is joint would be

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[1] *Rewun Persad* v. *Radha Beeby* (*Mussumat*) (1846), 4 M. I. A. 137, at p. 168; *Naragunty Lutchmeedavamah* v. *Vengama Naidoo* (1861), 9 M. I. A. 66, at p. 92; 1 W. R. P. C. 30, at p. 32; *Neelkisto Deb Burmono* v. *Beerchunder Thakoor* (1869), 12 M. I. A. 523, at p. 540; 3 B. L. R. P. C. 13, at p. 17; 12 W. R. P. C. 21, at p. 23; *Cheetha* (*Mussamut*) v. *Miheen Lall* (*Baboo*) (1867), 11 M. I. A. 369; *Prit Koer* v. *Mahadeo Pershad Singh* (1894), 21 I. A. 134, at p. 135; 22 Calc. 85, at p. 89; *Bhugobutty Misrain* v. *Domun Misser* (1875), 24 W. R. C. R. 365; *Taruck Chunder Poddar* v. *Jodeshur Chunder Koondoo* (1873), 11 B. L. R. 193; 19 W. R. C. R. 178; *Shib Pershad Chuckerbutty* v. *Gunga Monee Debee* (1871), 16 W. R. C. R. 291; *Cassumbhoy Ahmedbhoy* v. *Ahmedbhoy Hubibhoy* (1887), 12 Bom. 280, at p. 309; *Bilash Koonwar* (*Mussamut*) v. *Bhawanee Buksh Narain* (*Baboo*), W. R. 1864, C. R. 1; *Bissumbhur Sircar* v. *Soorodhuny Dossee* (1865), 3 W. R. C. R. 21; *Treelochun Roy* v. *Rajkishen Roy* (1866), 5 W. R. C. R. 214; *Beer Narain Sircar* v. *Teen Cowree Nundee* (1864), 1 W. R. C. R. 316.

[2] Cf. Indian Evidence Act (I. of 1872), ss. 109, 114, illustration (*d*).

[3] See *Bholanath Mahta* v. *Ajoodhia Persad Sookul* (1873), 12 B. L. R. 336; 20 W. R. C. R. 65.

[4] *Ganesh Dutt Thakoor* (*Chowdhry*) v. *Jewach Thakoorain* (*Mussummat*) (1903), 31 I. A. 10; 31 Calc. 262; 8 C. W. N. 146; *Rewun Persad* v. *Radha Beeby* (*Mussumat*) (1846) 4 M. I. A. 137, at p. 168; 7 W. R. P. C. 35, at p. 37; *Nursingh Das* (*Rai*) v. *Narain Das* (*Rai*) (1871), 3 N. W. P. 217, at p. 235; *Banee Madhub Mookerjee* v. *Bhuggobutty Churn Banerjee* (1867), 8 W. R. C. R. 270; *Hurish Chunder Mookerjee* v. *Mokhoda Debia* (1872), 17 W. R. C. R. 564; *Sherajooddeen Ahmed* (*Shaikh*) v. *Horel Singh* (1876), 25 W. R. C. R. 116; *Parbutty Coomar* v. *Sudabut Persad*, 2 Hay, 315; *Gour Lall Singh* v. *Mohesh Narain Ghose* (1870), 14 W. R. C. R. 484; *Pearee Monee Bibee* v. *Madhub Singh* (1871), 15 W. R. C. R. 93; *Belas Koer* (*Mussamut*) v. *Bhowanee Buksh* (*Baboo*) (1863), Marsh, 641; *Vurdyengar* v. *Alagasingyengar* (1807). Strange's "Hindu Law," vol. ii. p. 371.

weakened, if not rebutted, by evidence of separate trading, funds, and property, and independent dealing with such property,[1] although the family may have been joint in food.[2]

Some holdings in severalty.

The circumstance that certain parcels are held in severalty does not rebut the presumption as regards the rest of the joint estate.[3]

Disruption of unity.

Where it is admitted or proved that a disruption of the unity of the joint family has taken place, this presumption has no application.[4]

When one coparcener separates from the others there is no presumption that the remaining members continue united. In that case an agreement to remain united or to reunite must be proved like any other fact;[5] but where a share is allotted to more than one person the presumption will be that such persons remain joint.[6]

No presumption as to time of separation.

When it is admitted or proved that the members of the family were not in a complete state of union at the time of the institution of the suit, there is no presumption as to the family being joint at a particular time,[7] or as to when the separation took place, but it lies upon the plaintiff to prove such a case as would entitle him to the relief which he seeks.[8]

There is authority under the Bengal school of law that when one coparcener separates from the others who remain joint, such others are to be treated as reunited,[9] but it is submitted that such separation in

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[1] *Bodh Sing Doodhooria* v. *Gunesh Chunder Sen* (1873), 12 B. L. R. 317; 19 W. R. C. R. 356. See *Murari Vithoji* v. *Mukund Shivaji Naik Golatkar* (1890), 15 Bom. 201; *Makhun Lall Dutt* v. *Ram Lall Shaw* (1898), 3 C. W. N. 134; *Peary Lall* v. *Bhawoot Koer* (1862), W. R. Sp. No. 18; *Udoy Chand Biswas* v. *Panchoo Ram Biswas* (1882), 11 C. L. R. 514.

[2] See *Bodh Sing Doodhooria* v. *Gunesh Chunder Sen* (1878), 12 B. L. R. 317, at p. 326; 19 W. R. C. R. 356, at p. 357.

[3] *Sreeram Ghose* v. *Sreenath Dutt Chowdhry* (1867), 7 W. R. C. R. 451.

[4] *Radha Churn Dass* v. *Kripa Sindhu Dass* (1879), 5 Calc. 474; 4 C. L. R. 428; *Bannu* v. *Kashee Ram* (1877), 3 Calc. 315; *Badul Singh* v. *Chutterdharee Singh* (1868), 9 W. R. C. R. 558; *Somungowda* v. *Bhurmungowda* (1863), 1 Bom. H. C. 43.

[5] *Balabux Ladhuram* v. *Rukhmabai* (1903), 30 I. A. 130; 30 Calc. 725; 7 C. W. N. 642; *Radha Churn Dass* v. *Kripa Sindhu Dass* (1879), 5 Calc. 474; 4 C. L. R 428. See, however, *Upendranarain Myti* v. *Gopeenath Bera* (1883), 9 Calc. 817; 12 C. L. R. 356.

[6] See *Durga Dei* v. *Balmakund* (1906), 29 All. 93.

[7] *Obhoy Churn Ghose* v. *Gobind Chunder Dey* (1882), 9 Calc. 237, at p. 243.

[8] *Ram Ghulam Singh* v. *Ram Behari Singh* (1895), 18 All. 90.

[9] *Jaudub Chunder Ghose* v. *Benodbeharry Ghose* (1862), 1 Hyde, 214; *Petambur Dutt* v. *Hurish Chunder Dutt* (1871), 15 W. R. C. R. 200.

no way affects the status *inter se* of the coparceners who remain joint.[1]

New families.

The presumption as to union applies to new families formed from the separation of members of an old family.[2]

Strength of presumption.

"The strength of the presumption necessarily varies in every case. The presumption of union is stronger in the case of brothers than in the case of cousins, and the farther you go from the founder of the family, the presumption becomes weaker and weaker."[3]

In practice a family does not continue joint for many generations. It has been said[4] that "in no case . . . will it be found that the diluted degree of blood relationship amongst the members of the complex family group extends beyond the fourth degree." Another writer says, "I doubt whether at this day there is a single undivided Hindu family throughout India, in which persons related to one another by a common ancestor beyond the seventh degree are to be found living together, or holding property in common."[5] The seventh degree seems always to have been the limit.[6]

Coparcenary property.

The property belonging to a joint family is called the coparcenary property.

The expression used in the Mitakshara is translated as "ancestral property,"[7] *i.e.* property transmitted in the direct male line from a common ancestor; but having regard to the fact that under the decisions[8] all property held by the members of a Mitakshara family, as such, is ordinarily coparcenary property, and that in every case it cannot properly be described as "ancestral," it is more convenient to use the term "coparcenary."

See *Kesabram Mahapattar* v. *Nandkishor Mahapattar* (1869), 3 B. L. R. A. C. 7. As to reunion, see *post*, pp. 358, 359.

[1] See *Upendranarain Myti* v. *Gopeenath Bera* (1883), 9 Calc. 817; 12 C. L. R. 356; *Sudarsanam Maistri* v. *Narasimhulu Maistri* (1901), 25 Mad. 149, at pp. 156, 157. *Post*, p. 344.

[2] *Bata Krishna Naik* v. *Chintamani Naik* (1885), 12 Calc. 262.

[3] *Moro Vishvanath* v. *Ganesh Vithal* (1873), 10 Bom. H. C. 444, at p. 468. Mr. Ellis' remarks, Strange's "Hindu Law," ii. 347.

[4] Introduction to "Study of Hinduism," by G. P. Sen, p. 89.

[5] K. K. Bhattacharya's "Law Relating to the Joint Hindu Family," p. 137.

[6] *Ibid.*, pp. 136–138.

[7] *Pitrarjit*, as distinguished from *Swarjit*, self-acquired.

[8] *Post*, p. 245.

WHO ARE COPARCENERS.

Coparceners according to the Bengal school.

Under the Bengal school the coparceners consist of the persons, whether male or female, entitled to shares by inheritance, transfer, or a will. These shares are defined.[1]

There is no right of survivorship. On the death of a coparcener his share passes by inheritance or by will. A son, therefore, cannot as such,[2] as under the Mitakshara law, be a coparcener with his father.

There is thus unity of possession, but not as in the case of the Mitakshara law unity of ownership.

Power of disposition.

Under the Bengal school of law a Hindu may, without any restriction, dispose of his property,[3] whether ancestral or self-acquired, by sale, mortgage, gift, or will, whether in favour of strangers or in favour of some of his own issue or relations, to the exclusion of others.[4]

This applies also to property,[5] the succession to which is governed by the law of primogeniture.

The sons do not acquire any right in their father's property except under his will or as his heirs.[6]

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[1] *Soorjeemoney Dossee* (*Sreemutty*) v. *Denobundoo Mullick* (1857), 6 M. I. A. 526, at p. 553; 4 W. R. P. C. 114, at p. 115; *Rajkishore Lahoory* v. *Gobind Chunder Lahoory* (1875), 1 Calc. 27; 4 I. A. 153. See *Sheo Soondary* v. *Pirthee Singh* (1877), 4 I. A. 147.

[2] There might be a case of a son taking by a transfer or a will a share in property in which his father is also a sharer.

[3] The property is not coparcenary property, but is on the same footing as self-acquired property.

[4] *Ramkishore Acharj Chowdree* v. *Bhoobunmoyee Debea Chowdrain*, Ben. S. D. A. 1859, p. 229, at pp. 250, 251; *Bhoobunmoyee Debea Chowdhrain* v. *Ramkishore Acharj Chowdree*, Ben. S. D. A. 1860, p. 485, at p. 489; *Kumla Kaunt Chukerbutty* v. *Gooroo Govind Chowdree* (1829), 4 Ben. Sel. R. 322 (2nd ed. 410). Certificate of judges of Bengal Sudder Dewanny Adawlut, set out in 6 Ben. Sel. R. at p. 73 (2nd ed., p. 85). *Tarnee Churn* v. *Dasee Daseea* (*Mussummaut*) (1824), 3 Ben. Sel. R. 397 (2nd ed., p. 530); *Debendra Coomar Roy Chowdhry* v. *Brojendra Coomar Roy Chowdhry* (1890), 17 Calc. 886; Shamachurn Sircar's "Vyavastha Darpana," 2nd ed., 552 *et seq.*

[5] *Uddoy Addítya Deb* v. *Jadublal Adittya Deb* (1879), 5 Calc. 113; 4 C. L. R. 181; *Narain Khootia* v. *Lokenath Khootia* (1881), 7 Calc. 461; 9 C. L. R. 243.

[6] See *Dharmadas Kundu* v. *Amulya Dhan Kundu* (1906), 10 C. W. N. 765.

In *Soorjeemoney Dossee (Sreemutty)* v. *Denobundhoo Mullick* (1857),[1] the Supreme Court of Bengal laid down the following propositions with regard to joint property governed by the Bengal school of law :—

1. "Each of the co-sharers has a right to call for a partition,[2] but until such partition takes place . . . the whole remains common stock; the co-sharers being equally interested in every part of it.

2. On the death of an original co-sharer his heirs stand in his place and succeed to his rights as they stood at his death; his rights may also, in his lifetime, pass to strangers, either by alienation, or, as in the case of creditors, by operation of law;[3] . . . but in all cases those who come 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, the right to call for a partition.

3. Whatever increment is made to the common stock, whilst the estate continues joint, falls into and becomes part of that stock."

Illegitimate son.

According to the decisions of the High Court of Bengal, an illegitimate son of a Sudra cannot inherit according to the Bengal school. This view has been arrived at by limiting the expression "*dasiputra*" in the "Dayabhaga"[4] to the son of a female slave.[5] His father can give him a share of the property.[6]

Coparceners according to the Mitakshara.

Under the Mitakshara law, those persons who by birth acquire a vested interest[7] in the coparcenary property are coparceners. By that law a Hindu acquires by birth a vested interest in all coparcenary property[8] held by his father, or grandfather, or great-grandfather, as members of a joint family, even during their lifetime.[9]

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[1] 6 M. I. A. 526, at p. 539.

[2] "Dayabhaga," chap. iii. s. 1, para. 16.

[3] *Post*, p. 298.

[4] Chap. ix. paras. 29, 30.

[5] *Ram Saran Garain* v. *Tekchand Garain* (1900), 28 Calc. 194; *Kirpal Narain Tewari* v. *Sukurmoni* (1891), 19 Calc. 91; *Narain Dhara* v. *Rakhal Gain* (1875), 1 Calc. 1; 23 W. R. C R. 334.

[6] "Dayabhaga," chap. ix. para. 29.

[7] They have, individually, no proprietary right until partition, which is treated by the Mitakshara as one of the sources of such right. See *Chuckun Lall Singh* v. *Poran Chunder Singh* (1868), 9 W. R. C. R. 483.

[8] He does not by birth acquire an interest in a mere right of suit, or in an equitable right to procure an alteration in a grant. *Ujagur Singh (Chaudhri)* v. *Pitam Singh (Chaudhri)* (1881), 8 I. A. 190; 4 All. 120. He acquires an interest in debutter property. *Ram Chandra Panda* v. *Ram Krishna Mahapatra* (1906), 33 Calc. 507.

[9] *Suraj Bunsi Koer* v. *Sheo Proshad Singh* (1879), 6 I. A. 88, at pp. 99, 100; 5 Calc. 148, at p. 164; 4 C. L. R. 226, at p. 232; *Raja Ram Tewary* v. *Luchmun Persad* (1867), B. L. R. Sup. Vol. 731; 8 W. R. C. R. 15; 2 Ind. Jur. N. S. 216; *Sudarsanam Maistri* v. *Narasimhulu Maistri*

All the coparceners are male descendants in the male line of the acquirer of the property.[1]

The interest that a son acquires is equal to that of his father. He does not acquire his title through his father, but separately and independently of his father,[2] and he has no independent dominion over the property.[3]

The distance in degree from the founder of the family does not affect the right of coparcenership,[4] but the coparceners are limited to the head of each stock, and his sons, grandsons, and great-grandsons.[5]

Thus the body of coparceners cannot include any individual together with a male descendant of his other than his son, grandson, or great grandson, or, in other words, no man can be a coparcener if his great-great-grandfather is also a coparcener.

If either his father, grandfather, or great-grandfather survive his great-great-grandfather, then he steps into the coparcenary on the death of the great-great-grandfather. If they all predecease his great-great-grandfather he does not take, but the interest survives to the collaterals, if any. If there is no coparcener, then the heir of the great-great-grandfather takes by inheritance.

In *Moro Vishvanath* v. *Ganesh Vithal*[6] (1873), Nanabhai Haridas, J., said, "The rule which I deduce from the authorities on the subject is, not that a partition cannot be demanded by one more than four

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(1901), 25 Mad. 149, at p. 155; *Karuppai Nachiar* v. *Sankaranaryana Chetty* (1903), 27 Mad. 300, at p. 313; *Subbayya* v. *Surayya* (1887), 10 Mad. 251, at p. 254; *Sartaj Kuari* (*Rani*) v. *Deoraj Kuari* (*Rani*) (1888), 15 I. A. 51, at p. 61; 10 All. 272, at pp. 284, 285; *Ram Narain Singh* (*Rajah*) v. *Pertum Singh* (1873), 11 B. L. R. 397, at pp. 401, 402; 20 W. R. 189, at p. 190; *Goor Surun Doss* v. *Ram Surun Bhukut* (1866), 5 W. R. C. R. 54; *Sudanund Mohapattur* v. *Soorjo Monee Dayee* (1869), 11 W. R. C. R. 436.

[1] Bhattacharya's "Hindu Law," 2nd ed., p. 323.

[2] *Sundar Lal* v. *Chhitar Mal* (1906), 29 All. 1.

[3] *Baldeo Das* v. *Sham Lal* (1875), 1 All. 77; *Beer Kishore Suhye Singh* (*Baboo*) v. *Hur Bullub Narain Singh* (*Baboo*) (1867), 7 W. R. C. R. 502.

[4] *Moro Vishvanath* v. *Ganesh Vithal* (1873), 10 Bom. H. C. 444; *Yenumala Gavuridevamma Garu* (*Sri Rajah*) v. *Yenumala Ramandora Garu* (*Sri Rajah*) (1870), 6 Mad. H. C. 93; *Girwurdharee Sing* (*Baboo*) v. *Kulahul Sing* (1825), 4 Ben. Sel. R. 9 (new edition, 12).

[5] See *Moro Vishvanath* v. *Ganesh Vithal* (1873), 10 Bom. H. C. 444, at p. 449; Bhattacharya's "Hindu Law," 2nd ed., p. 323.

[6] 10 Bom. H. C. Rep. 444, at p. 465. As to the application of this principle to an impartible estate, see *Yenumala Gavuridevamma Garu* (*Sri Rajah*) v. *Yenumala Ramandora Garu* (*Sri Rajah*) (1870), 6 Mad. H. C. 93.

degrees removed from the acquirer or original owner of the property sought to be divided, but that it cannot be demanded by one more than four degrees removed from the last owner, however remote he may be from the original owner thereof."

This is the only case in which a male member of a Mitakshara family, who is free from defects which operate as grounds for exclusion from partition,[1] is not a coparcener. As he is not a *sapinda* of his great-great-grandfather, he does not on his death, in that case, become a coparcener.

"According to the Mitakshara law, all the male descendants of the common ancestor have an interest in the property, and any of them may demand partition,[2] unless excluded by some disability.[3] The descendants of the common ancestor may live together for generations; and when partition is to take place, all that is necessary is to ascertain their mutual relationship. To effect a partition in a case governed by the Dayabhaga it is necessary to know the dates of birth and death of predeceased members. But in a Mitakshara family the surviving members remain in possession of the whole property, as if the predeceased members never existed."[4]

Illegitimate son.

An illegitimate son of a member of one of the three regenerate classes acquires no rights as coparcener in coparcenary property.[5]

According to the Mitakshara school, an illegitimate son by a Sudra can inherit[6] and be a coparcener, if he be not the result of adulterous[7] or incestuous intercourse.[8]

An illegitimate son does not acquire an interest by

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[1] *Post*, p. 235.

[2] See *post*, pp. 322–329.

[3] See *post*, p. 235.

[4] Bhattacharya's "Hindu Law," 2nd ed., p. 322.

[5] *Roshan Singh* v. *Balwant Singh* (1899), 27 I. A. 51, at p. 56; 22 All. 191, at p. 197; *Run Murdun Syn (Chuoturya)* v. *Sahub Purhulad Syn* (1857), 7 M. I. A. 18; 4 W. R. P. C. 132. As to his right of maintenance, see *ante*, p. 213.

[6] *Rahi* v. *Govinda Valad Teja* (1875), 1 Bom. 97; *Sadu* v. *Baiza* (1878), 4 Bom. 37; *Sarasuti* v. *Mannu* (1879), 2 All. 134; *Hargobind Kuari* v. *Dharam Singh* (1884), 6 All. 329; *Krishnayyan* v. *Muttusami* (1883), 7 Mad. 407; *N. Krishnamma* v. *N. Papa* (1869), 4 Mad. H. C. 234; *Brindavana* v. *Radhamani* (1888), 12 Mad. 72, at p. 86. See *Inderun Valungypooly Taver* v. *Ramasawmy Pandia Talaver* (1869), 13 M. I. A. 141, at p. 159; 3 B. L. R. P. C. 1, at p. 4; 12 W. R. P. C. 41, at p. 43; "Manu," chap. ix. para. 179; "Yajnavalkya," chap. ii. para. 135.

[7] *Rahi* v. *Govinda Valad Teja* (1875), 1 Bom. 97; *Venoatachella Chetty* v. *Parvatham* (1875), 8 Mad. H. C. 134.

[8] *Datti Parisi Nayudu* v. *Datti Bangaru Nayudu* (1869), 4 Mad. H. C. 204.

birth, and therefore cannot claim partition against his father, or dispute his father's dealings with the coparcenary property,[1] but his father can permit him to have a share of the coparcenary property.[2]

On the death of his father he becomes a coparcener with the legitimate sons, and on their deaths takes by survivorship.[3]

He can bring a suit against them for partition,[4] and his sons are entitled to share with the sons of legitimate sons.[5]

In case of a partition between the illegitimate sons and legitimate sons, the former is entitled only to half a share of one of the latter.[6]

As he does not represent his father he has no right as against the undivided brothers of his father or against the sons of such brother.[7]

He is thus only by right a coparcener when there are legitimate sons, and the father has died separated from his brothers.[8]

An illegitimate son who cannot inherit, or be a coparcener, is entitled to maintenance out of the property in which his father was a coparcener.[9] This right can be enforced against impartible property.[10]

Woman.

Under the Mitakshara law, a woman cannot become a coparcener[11] with male coparceners.[12]

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[1] *Ram Saran Garain* v. *Tekchand Garain* (1900), 28 Calc. 194.

[2] *Ram Saran Garain* v. *Tekchand Garain* (1900), 28 Calc. 194, at p. 203; *Karuppannan Chetti* v. *Bulokam Chetti* (1899), 23 Mad. 16; "Mitakshara," chap. i. s. 12; "Vyavahara Mayukha," chap. iv. s. 4, para. 32; Colebrooke's "Digest," vol. iii. p. 143.

[3] *Jogendra Bhupati Hurri Chundun Mahapatra (Raja)* v. *Nityanund Mansingh* (1890), 17 I. A. 128; 18 Calc. 151. S. C. in Court below (1885), 11 Calc. 702; *Sadu* v. *Baiza* (1878), 4 Bom. 37, at pp. 44, 45.

[4] *Thangam Pillai* v. *Suppa Pillai* (1888), 12 Mad. 401.

[5] *Fakirappa* v. *Fakirappa*, 4 Bom. L. R. 809.

[6] *Parvathi* v. *Thirumalai* (1887), 10 Mad. 334, at p. 344; "Dayabhaga," chap. ix. para. 30; "Daya-Krama-Sangraha," chap. vi. para. 3; "Mayukha," chap. iv. s. 4, para. 32; Colebrooke's "Digest," vol. iii. p. 143.

[7] *Krishnayyan* v. *Muttusami* (1883), 7 Mad. 407; *Ranoji* v. *Kandoji* (1885), 8 Mad. 557; *Parvathi* v. *Thirumalai* (1887), 10 Mad. 334, at p. 346; *Gopalasami Chetti* v. *Arunachelam Chetti* (1903), 27 Mad. 32.

[8] See *Ramalinga Muppan* v. *Pavadai Goundan* (1901), 25 Mad. 519, at pp. 521, 522.

[9] "Dayabhaga," chap. ix. para. 28; "Mitakshara," chap. i. s. 12, para. 3. See *ante*, p. 213.

[10] *Run Murdun Syn* (*Chuoturya*) v. *Sahub Purhulad Syn* (1857), 7 M. I. A. 18; 4 W. R. P. C. 132; *Muttusawmy Jagavera Yettappa Naicker* v. *Vencataswara Yettaya* (1868), 12 M. I. A. 203; 2 B. L. R. (P. C.) 15; 11 W. R. P. C. 6, *ante*, p. 213.

[11] *Punna Bibee* v. *Radhakissen Das* (1903), 31 Calc. 476.

[12] See *post*, p. 324.

Exclusion from coparcenership.

Under all the schools of law, those who by Hindu law are incapacitated by physical infirmity from inheriting, are also incapacitated from taking as coparceners, or from taking a share on a partition, but if they would otherwise be coparceners they are entitled to maintenance [1] for themselves and for the persons whom they are legally or morally bound to support,[2] and on a partition of the coparcenary property provision should be made for such maintenance.

The following are the grounds of exclusion: impotence,[3] idiocy,[4] congenital blindness,[5] deafness or dumbness,[6] absence of a limb or sense,[7] lameness, *i.e.* complete

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[1] *Ram Sahye Bhukkut* v. *Laljee Sahye* (*Lalla*) (1881), 8 Calc. 149; 9 C. L. R. 457; *Ram Soonder Roy* v. *Ram Sahye Bhugut* (1882), 8 Calc. 919; "Mitakshara," chap. ii. s. 10; "Vyavahara Mayukha," chap. iv. s. 11; "Dayabhaga," chap. v.; "Daya-Krama-Sangraha," chap. iii.; *post*, p. 272.

[2] *Ante*, pp. 211–216.

[3] "Dayabhaga," chap. v. paras. 7, 8; "Viramitrodaya," chap. viii. The "Mitakshara" (chap. ii. s. 10, para. 2) describes an impotent person as one of the third sex, but "Balabhatta" (a commentary on the "Mitakshara" by Lakshmi Devi) includes a male eunuch, so, according to her, impotence need not be congenital. The "Viramitrodaya" takes a different view, but the "Mitakshara" (chap. ii. s. 10, para. 3) includes persons who have become impotent. "Manu," chap. ix. para. 201, excludes eunuchs, so apparently non-congenital impotence will be a ground of exclusion. Impotence, except in the cases of hermaphrodites and eunuchs, would be difficult, if not impossible, to prove, see Bhattacharya's "Law of Joint Family," pp. 405, 406.

[4] *I.e.* of unsound and imbecile mind. See *Tirumamagal Ammal* v. *Ramasvami Ayyangar* (1863), 1 Mad. H. C. 214. The "Mitakshara" (chap. ii. s. 10, para. 2) defines an idiot as "a person deprived of the internal faculty; meaning one incapable of discriminating right from wrong."

[5] *Murarji Gokuldas* v. *Parvatibai* (1876), 1 Bom. 177. Blindness, even if incurable, is not, if it is not congenital, a ground of exclusion. *Umabai* v. *Bhavu Padmanji* (1877), 1 Bom. 557; *Mohesh Chunder Roy* v. *Chunder Mohun Roy* (1874), 14 B. L. R. 273; 23 W. R. C. R. 78; *Kalidas Das* v. *Krishan Chandra Das* (1869), 2 B. L. R. F. B. 103; 11 W. R. O. C 11. See Bhattacharya's "Law of the Joint Family," p. 419.

[6] *Muddun Gopal Lal* (*Lala*) v. *Khikhinda Koer* (*Mussumat*) (1890), 18 I. A. 9; 18 Calc. 341; *Vallabhram Shivnarayan* v. *Hariganga* (*Bai*) (1867), 4 Bom. H. C. A. C. 135.

[7] "Mitakshara," chap. ii. s. 10; "Dayabhaga," chap. v. s. 7. "Literally, an organ; explained by some a sense, as that of smelling, or of sight, etc., but by others a limb, as the hand, foot, and so forth," Colebrooke's annotation to "Dayabhaga," chap. v. s. 7.

incapacity to walk,[1] lunacy, although not congenital[2] or incurable.[3]

If the interest be vested by birth, it cannot be devested by subsequent lunacy.[4]

The rule of Hindu law which disqualifies "idiots" and "madmen" from inheritance, should be enforced only upon the most clear and satisfactory proof that its requirements are satisfied. The rule does not contemplate the disqualification of persons who are merely of weak intellect in the sense that they are not up to the average standard of human intelligence, or endowed with the business capacity to manage their affairs properly.[5]

The ancient text-books also exclude persons suffering from an incurable disease.[6] Under modern authorities, persons suffering from an aggravated and incurable form of leprosy are excluded.[7]

Although there are no cases on the subject, there seems no reason why the text of the law should not be followed, and why, if it be clearly proved that a person is suffering from a serious and incurable

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[1] "Dayabhaga," chap. v. para. 10; Colebrooke's "Digest," vol. iii. p. 421. "There is no text which declares that lameness should be congenital," Bhattacharya's "Hindu Law," 2nd ed., p. 350, but in *Venkata Subba Rao* v. *Puroshottam* (1902), 26 Mad. 133, it was held that lameness which was not congenital did not exclude. See *Futtick Chunder Chatterjee* v. *Juggut Mohinee Dabee* (1874), 22 W. R. C. R. 348; Sircar's "Vyavastha Darpana," 2nd ed., p. 1005.

[2] *Ram Sahye Bhukkut* v. *Laljee Sahye* (*Lalla*) (1881), 8 Calc. 149; 9 C. L. R. 452; *Dwarkanath Bysak* v. *Mahendranath Bysak* (1872), 9 B. L. R. 198; 18 W. R. C. R. 305; *Wooma Pershad Roy* v. *Grish Chunder Prochundo* (1884), 10 Calc. 639; *Deo Kishen* v. *Budh Prakash* (1883), 5 All. 509. See *Bodhnarain Singh* (*Baboo*) v. *Omrao Singh* (*Baboo*) (1870), 13 M. I. A. 519; 6 B. L. R. 509; 15 W. R. P. C. 1; *Goureenath* v. *Collector of Monghyr* (1867), 7 W. R. C. R. 5.

[3] *Dwarkanath Bysak* v. *Mahendranath Bysak* (1872), 9 B. L. R. 198; 18 W. R. C. R. 305; *Deo Kishen* v. *Budh Prakash* (1883), 5 All. 509.

[4] *Tirbeni Sahai* v. *Muhammad Umar* (1905), 28 All. 247.

[5] *Surti* v. *Narain Das* (1890), 12 All. 530.

[6] "Mitakshara," chap. ii. s. 10, in para. 2, "marasmus" (atrophy) is given as an example; Colebrooke's "Digest," vol. iii. p. 321.

[7] *Ananta* v. *Ramabai* (1877), 1 Bom. 554; *Jawardhan Pandurang* v. *Gopal* (1868), 5 Bom. H. C. A. C. J. 145; *Muttuvilaya* v. *Parasakti*, 1 Mad. S. D. A. 239; *Bhoobuneswree Debia* v. *Gouree Doss Turkopunchum* (1869), 11 W. R. C. R. 535. See *Bhagaban Ramanuj Das* (*Mohunt*) v. *Roghunundun Ramanuj Das* (*Mohunt*) (1895), 22 I. A. 94; 22 Calc. 843; K. K. Bhattacharya's "Law of Joint Family," pp. 408, 409.

disease such as cancer or phthisis he should not be excluded. In the case of the latter disease, as modern research has produced cures in cases which before were treated as incurable, it would be difficult to prove a case of exclusion. As to the former disease much might depend on the situation and stage of the disease.[1]

In ancient times there were many other grounds for exclusion from inheritance and partition, but as they were removable by expiation, it is said that the Courts would not apparently now give effect to them.[2] There is, however, authority that expiation is necessary.[3] For instance, "an enemy to his father" was excluded,[4] but this portion of the law is now obsolete.[5]

Change of religion and loss of caste do not exclude from inheritance.[6]

Although "Manu"[7] treats fraud by one of the coparceners as operating as a forfeiture of his share, it seems clear that it has no such effect, but that the defrauding coparcener is merely compelled to bring into partition the property of which he sought to defraud his coparceners.[8]

An excluded person who is cured of his malady after partition is apparently entitled to a share.[9]

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[1] K. K. Bhattacharya ("Law of Joint Family," pp. 407, 408) points out the difficulty in holding that a disease is incurable. See *Issur Chunder Sein* v. *Ranee Dossee* (1865), 2 W. R. C. R. 125.

[2] See Mayne's "Hindu Law," 7th ed., p. 803.

[3] Sircar's "Vyavastha Darpana," 2nd ed., pp. 1007, 1008. See, however, *Bhoobunessuree Debia* v. *Gouree Doss Turkopunchanun* (1869), 11 W. R. C. R. 535; *Bholanath Raee* v. *Sabitra* (*Mussummaut*) (1836), 6 Ben. Sel. R. 62 (new edition, 71); *Sheonauth Rai* v. *Dayamyee Chowdrain* (1814), 2 Ben. Sel. R. 108 (new edition, 137).

[4] "Mitakshara," chap. ii. s. 10, para. 3. See *Jye Koonwur* (*Musst.*) v. *Bhikaree Singh*, Ben. S. D. A. 1848, p. 320; *Bholanath Raee* v. *Sabitra* (*Mussummaut*) (1836), 6 Ben. Sel. R. 62 (new edition, 71).

[5] *Kalka Pershad* v. *Budree Sah* (1871), 3 N. W. P. H. C. 267.

[6] Act XXI. of 1850. For a case as to the law before the passing of that Act, see *Gobind Krishna Narain* v. *Abdul Qayyum* (1903), 25 All. 546; *Gobind Krishna Narain* v. *Khunni Lal* (1907), 29 All. 487.

[7] Chap. ix. para. 213.

[8] *Kalka Pershad* v. *Budree Sah* (1871), 3 N. W. P. H. C. 267. See Colebrooke's "Digest," vol. ii. p. 564, vol. iii. p. 398; "Yajnavalkya," ii. para. 126; "Mitakshara," chap. i. s. 9; "Smriti Chandrika," chap. xiv. paras. 4–6; "Vyavahara Mayukha," chap. iv. s. 6, para. 3; Strange's "Hindu Law," vol. i. p. 232; Strange's "Manual," s. 273; West and Bühler's "Hindu Law," 2nd ed., pp. 307, 308; "Viramitrodaya" (Sircar's translation), p. 245; "Dayabhaga," chap. xiii. para. 2; Daya-Krama-Sangraha," chap. viii.

[9] "Mitakshara," chap. ii. s. 10, para. 7; "Mayukha," chap. iv. s. 11, para. 2; "Viramitrodaya," chap. viii. ver. 4; Bhattacharya's "Law of the Joint Family," pp. 396, 397, 411–414. See, however, Mayne's "Hindu Law," 7th ed., p. 655; and *Deo Kishen* v. *Budh Prakash* (1883), 5 All. 509.

This is an exception to the ordinary rule of Hindu law that an estate once vested cannot be devested.

A disqualification arising subsequent to separation does not exclude.[1]

It is apparently competent to the other coparceners to waive the objection of disqualification.[2]

There is nothing to prevent a disqualified person from acquiring property by gift,[3] or otherwise than by inheritance or partition.[4]

The burden of proof is upon the person seeking to prove the disability.[5]

The effect of exclusion from participation in the rights of the other members of the family is the same as if the person excluded were dead.[6]

Renunciation of interest.

In Madras and Bombay a coparcener may renounce his interest in the coparcenary property either in favour of the body of coparceners, or in favour of one or more individual coparcener,[7] but in Bengal and the United Provinces he cannot renounce such interest except in favour of the whole body of coparceners.[8] He can only renounce such interest with the acquiescence of the other members on his being given some trifle out of the family property.[9]

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[1] "Mitakshara," chap. ii. s. 10, para. 6. See *Shamachurn Audhicoaree Byragee* v. *Roop Doss Byragee* (1866), 6 W. R. C. R. 68.

[2] See *Muddun Gopal Lal* (*Lala*) v. *Khikhinda Koer* (*Mussumat*) (1890), 18 I. A. 9; 18 Calc. 341.

[3] See *Ganga Sahai* v. *Hira Singh* (1880), 2 All. 809.

[4] *Court of Wards* v. *Kupulmun Sing* (1873), 10 B. L. R. 364; 19 W. R. C. R. 164.

[5] *Helan Dasi* v. *Durga Das*, 1 C. L. J. 323; *Futtick Chunder Chatterjee* v. *Juggut Mohinee Debee* (1874), 22 W. R. C. R. 348; *Chunder Monee Debia* v. *Kristo Chunder Mojoomdar* (1872), 18 W. R. C. R. 375; *Issur Chunder Sein* v. *Ranee Dossee* (1865), 2 W. R. C. R. 125. Cf. *Bhagaban Ramanuj Das* (*Mohunt*) v. *Roghunundun Ramanuj Das* (*Mohunt*) (1895), 22 I. A. 94; 22 Calc. 843.

[6] See Bhattacharya's "Law of the Joint Family," pp. 420–423; *Bapuji Lakshman* v. *Pandurang* (1882), 6 Bom. 616; "Mitakshara," chap. ii. s. 10, para. 9; "Viramitrodaya," chap. viii. s. 6; "Vivada Chintamani" (Tagore's translation), p. 244; "Dayabhaga," chap. v. para. 19; "Smriti Chandrika," chap. v. para. 32; "Vyavahara Mayukha," chap. iv. s. 11, para. 11.

[7] *Peddaya* v. *Ramalingam* (1888), 11 Mad. 406.

[8] See *Chandar Kishore* v. *Dampat Kishore* (1894), 16 All. 369. See *post*, p. 300.

[9] *Sudarsanam Maistri* v. *Narasimhulu Maistri* (1901), 25 Mad. 149, at p. 156; "Mitakshara," chap. i. s. 2, paras. 11, 12; "Manu," chap. ix. para. 207.

RIGHTS OF COPARCENERS.

Rights of coparceners.

I. Subject to any power the manager may have to make arrangements for the enjoyment of the property,[1] each coparcener is entitled to joint possession of the coparcenary property with the other coparceners, and to the full enjoyment thereof.

Although he cannot sue for a share, he is entitled[2] to enforce his right to joint possession by a suit.[3]

He can bring a suit within twelve years from the time when his exclusion from the joint family property becomes known to him.[4]

In a case governed by the Bengal school of law, the Judicial Committee said,[5] "If there be two or more tenants in common, and one (A) be in actual occupation of part of the estate, and is engaged in cultivating that part in a proper course of cultivation as if it were his separate property, and another tenant in common (B) attempts to come upon the said part for the purpose of carrying on operations there inconsistent with the course of cultivation in which A is engaged, and the profitable use by him of the said part, and A resists and prevents such entry, not in denial of B's title, but simply with the object of protecting himself in the profitable enjoyment of the land, such conduct on the part of A would not entitle B to a decree for joint possession. . . . In India a large proportion of the land, including many very large estates, is held in undivided shares, and if one shareholder can restrain another from cultivating a portion of the estate in a proper and husbandlike manner, the whole estate may, by means of cross injunctions, have to remain altogether without cultivation until all the shareholders can agree upon a mode of cultivation to be adopted, or until a partition by metes and bounds can be effected—a work which in ordinary course, in large estates would probably occupy a period including many seasons. In such a case, in a climate like that of India, land which has been brought into cultivation would probably become waste or jungle, and greatly deteriorated in value. In Bengal the courts of justice, in cases where no specific rule exists,[6] are to act

[1] *Post*, p. 278.

[2] See *Hulodhur Sein* v. *Gooroodoss Roy* (1873), 20 W. R. C. R. 126, and cases, *post*, p. 268, note 4; *Surendra Narain Sinha* v. *Hari Mohan Misser* (1906), 33 Calc. 1201; *Stalkartt* v. *Gopal Panday* (1873), 12 B. L. R. 197; 20 W. R. C. R. 58; *Nundun Lall* v. *Lloyd* (1874), 22 W. R. C. R. 74.

[3] *Laluchand* v. *Girjappa* (1895), 20 Bom. 469.

[4] Act XV. of 1877, Sched. II., art. 127. See *Sellam* v. *Chinnammal* (1901), 24 Mad. 441, and cases cited in U. N. Mitra's "Law of Limitation," in the notes to the above article.

[5] *Watson and Company* v. *Ram Chand Dutt* (1890), 17 I. A. 110, at pp. 120, 121; 18 Calc. 10, at p. 21, 22.

[6] See *ante*, p. 3.

according to justice, equity, and good conscience, and if in a case of shareholders holding lands in common, it should be found that one shareholder is in the act of cultivating a portion of the lands which is not being actually used by another, it would scarcely be consistent with the rule above indicated to restrain him from proceeding with his work, or to allow any other shareholder to appropriate to himself the fruits of the other's labour or capital."

Building, etc., without consent.

The Court can prevent a coparcener from altering the nature of the property without the consent of his coparceners, as by building on it, or otherwise interfering with the joint enjoyment.[1] Whether it will do so depends upon the nature of the case. It will not do so in the absence of a real injury.[2]

By arrangement between the parties, or at the discretion of the manager,[3] portions may be occupied as a matter of convenience by individual coparceners. Where the coparceners permit one of their number to occupy a particular portion of the property and to improve it, they cannot oust him.[4]

In the absence of an express agreement no claim for rent can be made against a coparcener occupying coparcenary property.[5]

A coparcener cannot, without the consent of the other coparceners, appropriate a share of the proceeds of family property for the purpose of an investment for himself.[6]

An individual member of a Mitakshara family cannot

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[1] *Soshi Bhusan Ghose* v. *Gonesh Chunder Ghose* (1902), 29 Calc. 500; *Jankee Singh* v. *Bukhooree Singh*, Ben. S. D. A. 1856, p. 761; *Indurdeonarain Singh* (*Baboo*) v. *Toolseenarain Singh*, Ben. S. D. A. 1857, p. 765; *Guru Das Dhar* v. *Bijaya Gobinda Baral* (1868), 1 B. L. R. A. C. 108; 10 W. R. C. R. 171; *Sheopersad Singh* v. *Leela Singh* (1873), 12 B. L. R. 188; 20 W. R. C. R. 160; *Najju Khan* v. *Imtiaz-ud-din* (1895), 18 All. 115; *Rajendro Lall Gossami* v. *Shama Churn Lahori* (1879), 5 Calc. 188; 4 C. L. R. 417; *Shadi* v. *Anup Singh* (1889), 12 All. 436. *Contrâ Dwarkanath Bhooyea* v. *Goopeenath Bhooyea* (1871), 12 B. L. R. 189, note; 16 W. R. C. R. 10; *Crowdee* v. *Bhekdhari Sing* (1871), 8 B. L. R. App. 45; 16 W. R. C. R. 41; *Chunder Kant Chowdhry* v. *Nund Lall Chowdhry* (1871), 16 W. R. C. R. 277. See *Paras Ram* v. *Sherjit* (1887), 9 All. 661.

[2] *Biswambhar Lal* (*Lala*) v. *Rajaram* (1869), 3 B. L. R. App. 67; 16 W. R. C. R. 140, note.

[3] *Post*, p. 278.

[4] See *Collector of 24 Pergunnahs* v. *Debnath Roy Chowdhry* (1874), 21 W. R. C. R. 222; *Jotee Roy* v. *Bheechuck Meah* (1873), 20 W. R. C. R. 288.

[5] *Gobind Chunder Ghose* v. *Ram Coomar Dey* (1875), 24 W. R. C. R. 393. See *Alladinee Dossee* (*Sreemutty*) v. *Sreenath Chunder Bose* (1873), 20 W. R. C. R. 258.

[6] See *Bona Kooree* (*Mussamut*) v. *Boolee Singh* (*Baboo*) (1867), 8 W. R. C. R. 182.

sue for a share of the coparcenary property,[1] but he can sue for possession jointly with his coparceners.[2]

There is also authority that he may sue a trespasser alone.[3] At any rate, he may do so if he joins his coparceners as parties.

According to all the schools a coparcener is not entitled to sue for a declaration as to the amount of his share,[4] or to sue his coparceners for a portion of the property held by them.[5] His remedy is by partition.[6]

Limitation.

A suit by a person excluded from joint family property to enforce a right to share therein must be brought within twelve years from the time when the exclusion becomes known to the plaintiff.[7]

Where it is admitted or proved that the plaintiff was a member of a joint family, the burden of proving his exclusion, and his knowledge of such exclusion, for the period which would bar his right, lies upon the person asserting such exclusion.[8]

Adverse possession.

It is competent to a person resisting a claim to property, which is alleged to be joint, to prove that he has acquired a right by adverse possession for twelve years.[9] But as the possession of one member of a joint family is the possession of all,[10] he cannot so acquire such rights unless he proves that the right has been claimed or asserted by other members of the family, and denied by him at least twelve years before suit.[11]

Similarly, a person entitled to property as his separate acquisition may lose his right in consequence of the family having held possession adverse to his exclusive right for a period of twelve years.[12]

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[1] *Rajaram Tewari* v. *Lachman Prasad* (1869), 4 B. L. R. A. C. 118; 12 W. R. C. R. 478; *Phoolbas Kooer* v. *Juggessur Sahoy* (*Lalla*) (1872), 18 W. R. C. R. 48; *Chyet Narain Singh* v. *Buswaree Singh* (1875), 23 W. R. C. R. 395; *Jugoo Lall Oopadhya* v. *Manoohur Lall Oopadhya* (1872), 19 W. R. C. R. 43.

[2] *Naranbhai Vaghjibai* v. *Ranchod Premchand* (1901), 26 Bom. 141; *Ramchandra Kashipathar* v. *Damodar Trimbak Patkar* (1895), 20 Bom. 467. As to parties to suits, see *post*, p. 268.

[3] See *Radha Proshad Wasti* v. *Esuf* (1881), 7 Calc. 414; 9 C. L. R. 76.

[4] *Raol Gorain* v. *Teza Gorain* (1870), 4 B. L. R. App. 90.

[5] *Trimbak Dixit* v. *Narayan Dixit* (1874), 11 Bom. H. C. 69; *Rutton Monee Dutt* v. *Brojomohun Dutt* (1874), 22 W. R. C. R. 333; *Gobind Chunder Ghose* v. *Ramcoomar Dey* (1875), 24 W. R. C. R. 393.

[6] See *post*, Chap. IX.

[7] Act XV. of 1877, Sched. II., art. 127.

[8] *Jivanbhat* v. *Anibhat* (1896), 22 Bom. 259; *Krishnabai* v. *Khangowda* (1893), 18 Bom. 197, at p. 202; *Dinkar Sadashiv* v. *Bhikaji Sadashiv* (1887), 11 Bom. 365. *Hari* v. *Maruti* (1882), 6 Bom. 741.

[9] *Bainee Singh* v. *Bhurth Singh* (1866), 1 Agra, 162; *Runjeet Singh* v. *Madud Ali* (1868), 3 Agra, 222. See *Bhana Govind Guravi* v. *Vithoji Ladoji Guravi* (1866), 3 Bom. H. C. A. C. 170.

[10] *Asud Ali Khan* (*Sheikh*) v. *Akbar Ali Khan* (1877), 1 C. L. R. 364; *Yusaf Ali Khan* v. *Chubbee Singh* (1873), 5 N. W. P. 122.

[11] *Shurfunnissa Bibee Chowdhrain* v. *Kylash Chunder Gungopadhya* (1875), 25 W. R. C. R. 53; *Rakhaldas Bundopadhya* v. *Indru Monee Debi* (1877), 1 C. L. R. 155.

[12] *Post*, p. 251.

II. A coparcener is entitled to receive from the coparcenary property maintenance for himself, his wife, and his children,[1] and for such persons as he is legally or morally bound to support,[2] and provision for all usual and proper religious observances which should be performed by himself and such persons,[3] also provision for the education of his sons, and for the marriage expenses of his daughters,[4] or of other female dependents of his family.

As to the maintenance of such persons after the death of the coparcener, see *post*, p. 272.

All ancestral property is, while it remains undisposed of and unpartitioned, charged with the maintenance of all persons who are entitled to maintenance therefrom[5] in the same sense that the maintenance of a widow is charged upon the estate of her husband.[6]

III. A coparcener is entitled to receive such information as he may require as to the management of the property,[7] and to be consulted in matters of great importance thereto, such as the sale or mortgage of the property, or of any portion thereof.

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[1] *Ayyavu Muppanar* v. *Niladatchi Ammal* (1862), 1 Mad. H. C. 45; "Manu," chap. ix. para. 108; "Narada Smriti," chap. ix. paras. 26–28; Bhattacharya's "Law of the Joint Family," pp. 280, 281. It has been held (12 Bom. H. C. 96, note) that a coparcener who can sue for partition cannot sue for maintenance, but it is submitted that there is no reason why he should be forced to such a proceeding. As to daughters, see *Mankoonwur* v. *Bhugoo* (1822), 2 Borr. 139, at p. 144; *ante*, p. 212. As to sisters, see "Yajnavalkya," bk. ii. chap. v. para. 124A.

[2] *Ante*, pp. 211–217. "Narada Smriti," chap. xiii. paras. 26–28, 33; K. K. Bhattacharya's "Law of the Joint Family," p. 293; R. L. Mitra's "Law of Joint Property," p. 69.

[3] "The indispensable duties alluded to in the 'Mitakshara' are undoubtedly the annual sradhs, the ceremony of investiture with sacred thread among the three superior castes, the marriage of the minor girls of the family, where such marriage must be celebrated before the girls arrive at the age of puberty (see *ante*, pp. 27, 28), and other religious ceremonies enjoined by the sacred writings, necessary to be performed at stated times and the non-performance of which would be a cause of sin, or forfeiture of caste, or would lower the position of the family," K. K. Bhattacharya's "Law of the Joint Family," p. 277.

[4] *Ante*, p. 48. See *Vaikuntam Ammangar* v. *Kallapiran Ayyangar* (1900), 23 Mad. 512.

[5] *Shib Dayee* v. *Doorga Pershad* (1872), 4 N. W. P. H. C. 63. As to impartible property, see *Mallikarjuna Prasada Nayudu* (*Raja Yarlagadda*) v. *Durga Prosada Nayudu* (*Raja Yarlagadda*) (1900), 27 I. A. 151; 24 Mad. 147; 5 C. W. N. 74.

[6] *Ante*, pp. 88–92.

[7] See *post*, p. 274.

IV. A coparcener is entitled to sue to impeach and to restrain the acts of the manager or of other coparceners which are in excess of their powers.[1]

V. A coparcener is entitled to obtain a partition of the property when he desires to be separated from the coparcenary.[2]

This right exists as long as there is a joint tenancy.[3]

Where father is manager.

"The rights of the coparceners in . . . an undivided Hindu family governed by the law of the Mitakshara, which consists of a father and his sons, do not differ from those of the coparceners in a like family, which consists of undivided brethren, except so far as they are affected by the peculiar obligation of paying their father's debts, which the Hindu law imposes upon sons,[4] and the fact that the father is in all cases naturally, and, in the case of infant sons, necessarily, the manager of the joint family estate."[5]

Effect of death of coparcener.

On the death of a coparcener, his interest in the coparcenary property does not pass by inheritance. It lapses, or, as it is generally put, his rights pass by survivorship to the other coparceners,[6] subject to the rule that where

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[1] *Post*, p. 302. See *Suraj Bunsi Koer* v. *Sheo Proshad Singh* (1879), 6 I. A. 88, at p. 101; 5 Calc. 148, at p. 165; 4 C. L. R. 226, at p. 233; *Anant Ramrav* v. *Gopal Balvant* (1894), 19 Bom. 269; *Ganpat* v. *Annaji* (1898), 23 Bom. 144; *Ramchandra Kashi Patkar* v. *Damodhar Trimbak Patkar* (1895), 20 Bom. 467; *Gopee Kishen Gossain* v. *Hem Chunder Gossain* (1870), 13 W. R. C. R. 322, at p. 323.

[2] He is not entitled to sue only for a declaration of his right to a share, or to claim otherwise than in a partition suit property held by the family as joint, *ante*, p. 241.

[3] *Bisheshar Das* v. *Ram Prasad* (1906), 28 All. 627.

[4] *Post*, p. 305.

[5] *Suraj Bunsi Koer* v. *Sheo Proshad Singh* (1879), 6 I. A. 88, at pp. 100, 101; 5 Calc. 148, at p. 165; 4 C. L. R. 226, at p. 233. See *Subbayya* v. *Surayya* (1887), 10 Mad. 251, at p. 254. *Post*, p. 270.

[6] *Rajnarain Singh* v. *Heeralal* (1878), 5 Calc. 142. *Bhimul Doss* v. *Choonee Lall* (1877), 2 Calc. 379; *Debi Parshad* v. *Thakur Dial* (1875), 1 All. 105. To the exclusion of the widow, *Parbati Kumari Debi* (*Srimati Rani*) v. *Jagadis Chunder Dhabal* (1902), 29 I. A. 82, at p. 96; 29 Calc. 433, at p. 452; 6 C. W. N. 490, at p. 494; or other heir, see *Bhimul Doss* v. *Choonee Lall* (1877), 2 Calc. 377; *Debi Parshad* v. *Thakur Dial* (1875), 1 All. 105; *Sadabart Prasad Sahu* v. *Foolbash Koer* (1869), 3 B. L. R. F. B. 31; 12 W. R. F. B. I. S. C. *Sudabart Pershad Sahoo* v. *Lotf Ali Khan* (1870), 14 W. R. C. R. 339;

he leaves male issue they represent his rights to a partition.[1] His death has also the effect of introducing into the coparcenary one who is excluded by the rule which limits the coparcenary to four generations.[2]

This process continues until partition.[3]

The right to partition determines the right to take by survivorship.[4]

Where there is no coparcener, property, which would otherwise be coparcenary, would pass by inheritance to the heirs of the deceased.[5] There is no succession while the joint family remains.[6]

Where there is a joint family business the death of a member of the family does not *per se* dissolve the business.[7]

Under Mitakshara shares not defined.

Under the Mitakshara school, the shares of coparceners are not defined until there be partition, or the members of the family agree among themselves with regard to particular property that it shall henceforth be the subject of ownership in defined shares.[8]

The removal of coparceners by death, and the accession of new coparceners by birth, is continually affecting the interest of the coparceners to the extent that it increases or diminishes the share, which, if there were a partition,

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Benee Pershad v. *Mohaboodhy* (*Mussamut*) (1867), 7 W. R. C. R. 292; *Mooniah* (*Mussamut*) v. *Teeknoo* (*Mussamut*) (1867), 7 W. R. C. R. 440; *Ratan Dabee* v. *Modhoosoodun Mohapator* (1878), 2 C. L. R. 328. The widow may acquire a right to the property by adverse possession, see *Sham Koer* v. *Dah Koer* (1902), 29 I. A. 132; 29 Calc. 664; 6 C. W. N. 657. The enlarged share is subject to the same incidents as the original share. *Gungoomull* v. *Bunseedhur* (1869), 1 N. W. P. H. C. 170. The Curators Act (XIX. of 1841) has no application: *Sato Koer* v. *Gopal Sahu* (1907), 34 Calc. 929; 12 C. W. N. 65.

[1] *Post*, p. 336. See *Manjanatha* v. *Narayana* (1882), 5 Mad. 362.

[2] *Ante*, p. 232.

[3] *Rajnarain Singh* v. *Heeralall* (1878), 5 Calc. 142.

[4] *Venkayamma Garu* (*Raja Chelikani*) v. *Venkataramanayyamma* (*Raja Chelikani*) (1902), 29 I. A. 156, at p. 165; 25 Mad. 678, at p. 687; 7 C. W. N. 1, at p. 8. See *Jogeswar Narain Deo* v. *Ramchund Dutt* (1896), 23 I. A. 37, at p. 44; 23 Calc. 670, at p. 679.

[5] *Post*, p. 296.

[6] *Ram Narain Singh* (*Rajah*) v. *Pertum Singh* (1875), 11 B. L. R. 397, at p. 404; 20 W. R. C. R. 189, at p. 191.

[7] *Samalbhai Nathubhai* v. *Someshvar* (1880), 5 Bom. 38, at p. 40. *In the matter of Haroon Mahomed* (1890), 14 Bom. 189, at p. 194. As to the death of the manager, see *post*, p. 276.

[8] *Post*, chap. ix.

would be allotted to them respectively, but until partition no coparcener has a greater interest in the coparcenary property than any one of the other coparceners.

In the well-known case of *Appovier* v. *Rama Subba Aiyan* (1866),[1] Lord Westbury said, "According to the true notion of an undivided family in Hindu law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property, that he, that particular member, has a certain definite share. No individual member of an undivided family could go to the place of the receipt of rent and claim to take from the collector or receiver of the rents a certain definite share. The proceeds of undivided property must be brought, according to the theory of an undivided family, to the common chest or purse, and then dealt with according to the modes of enjoyment by the members of an undivided family."[2]

COPARCENARY PROPERTY.

Coparcenary property consists of—

(*a*) All property in which the members of a joint family have a common interest and a common possession, and therefore a right to partition.[3] Nature of coparcenary property.

"The principle of joint tenancy appears to be unknown to Hindu law, except in the case of coparcenary between the members of an undivided family."[4] Property held jointly.

Thus property acquired by a transfer to members of the family jointly belongs to the coparcenary.[5] Joint transfer.

The 45th section of the Transfer of Property Act[6] is as follows:—"Where immovable property is transferred for consideration to two or more persons, and such consideration is paid out of a fund belonging to them in common, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property identical, as nearly as may be, with the interests to which they were respectively entitled in the fund; and where such consideration is paid out of separate funds belonging to them respectively, they are, in the absence of a contract

[1] 11 M. I. A. 75, at pp. 89-90; 8 W. R. P. C. 1.

[2] As to the right to joint possession, see *ante*, p. 239.

[3] *Katama Natchiar* v. *Shivagunga (Rajah of)* (1863), 9 M. I. A. 543, at p. 615; 2 W. R. P. C. 1, at pp. 39, 40; *Venkayamma Garu (Raja Chelikani)* v. *Venkataramanayamma (Raja Chelikani)* (1902), 29 I. A. 156, at p. 164; 25 Mad. 678, at p. 687; 7 C. W. N. 1, at p. 8. See *Shamnarain* v. *Court of Wards* (1873), 20 W. R. C. R. 197.

[4] *Jogeswar Narain Deo* v. *Ram Chund Dutt* (1896), 23 I. A. 37, at p. 44; 23 Calc. 670, at p. 679.

[5] *Radhabai* v. *Nanarav* (1879), 3 Bom. 151.

[6] IV. of 1882.

to the contrary, respectively entitled to interests in such property in proportion to the shares of the consideration which they respectively advanced.

In the absence of evidence as to the interests in the fund to which they were respectively entitled, or as to the shares which they respectively advanced, such persons shall be presumed to be equally interested in the property."

Acquisitions by family.

Where property has been acquired jointly in business or otherwise by their joint labour by the members of a joint family, even without resort to the family funds,[1] it is to be presumed to be the property of the family as such,[2] but this presumption may be rebutted by proof that there was only an ordinary partnership, that is to say, a partnership which was the creature of contract, and not of birth and relationship, in which case the members would be entitled to share in accordance with their shares in the partnership, and there would be no rights of survivorship, or other incidents of coparcenary property.[3]

The presumption does not apply when the business is carried on by some only of the members of the family without any aid from the family funds.[4]

Mr. Mayne contends that in the case of property acquired by the joint exertions of the members of the family, but without any aid from the family funds, the sons would acquire no interest by birth.[5]

"If the joint acquirers intended to hold the property so acquired as

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[1] See *Rampershad Tewarry* v. *Sheochurn Doss* (1866), 10 M. I. A. 490, at p. 506; *Shamnarain* v. *Court of Wards* (1873), 20 W. R. C. R. 197, and cases note 3 below. See Colebrooke's "Digest," vol. iii. p. 386; "Mitakshara," chap. i. s. 4, para. 15; "Manu," chap. ix. para. 215. See, however, *Chatturbhooj Meghji* v. *Dharamsi Naranji* (1884), 9 Bom. 438, at pp. 445, 446. As to property acquired with the aid of family funds, see *post*, p. 252.

[2] *Gopalasami Chetti* v. *Arunachelam Chetti* (1903), 27 Mad. 32, and cases *post*, note 3.

[3] See *Rampershad Tewarry* v. *Sheochurn Doss* (1866), 10 M. I. A. 490, at p. 506; *Chatturbhooj Meghji* v. *Dharamsi Naranji* (1884), 9 Bom. 438, at p. 445; *Sudarsanam Maistri* v. *Narasimhulu Maistri* (1901), 25 Mad. 149, at p. 156; *Ram Narain Nursing Doss* v. *Ram Chunder Junkee Loll* (1890), 18 Calc. 86. For an instance of a partnership between members of a joint family and a stranger, see *Anant Ram* v. *Channu Lal* (1903), 25 All. 378.

[4] *Sudarsanam Maistri* v. *Narasimhulu Maistri* (1901), 25 Mad. 149.

[5] "Hindu Law," 7th ed., pp. 348, 349. See also *Chatturbhooj Meghji* v. *Dharamsi Naranji* (1884), 9 Bom. 438, at pp. 445, 446.

co-owners, and not as joint family property in the Mitakshara sense of that expression, this view would be perfectly sound. But if, as supposed, the property was acquired by all the members of the undivided family, by their joint labour, it would, in the absence of any indication of intention to the contrary, be owned by them as joint family property, and in that case their male issue, who, by their birth, become members of such undivided family, necessarily acquire a right by birth in such property."[1]

Gift or devise to joint family.

In the case of a gift or a devise to the members of a joint family, the property would, in the absence of any term in the gift or devise which would show a different intention, be held as coparcenary property.[2]

It has been suggested[3] that this view might be inconsistent with the Tagore case,[4] inasmuch as unborn persons might on birth obtain rights in the coparcenary. It is submitted that recent decisions as to a gift to a class[5] negative this suggestion.

As to a *babuana* grant for the benefit of a junior member of the family and his direct male line, see *Ramchunder Marwari* v. *Mudeshwar Singh* (1906), 33 Calc. 1158; 10 C. W. N. 979.

Acquired by compromise.

Whether property, which may have been ancestral, but has been acquired by virtue of a compromise or arrangement, belongs to the coparcenary depends upon the nature of the arrangement.[6]

Maternal grandfather's property.

Property inherited from the maternal grandfather by two persons living as members of a joint family[7] is, in a case governed by the Mitakshara law, on a similar footing.

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[1] *Sudarsanam Maistri* v. *Narasimhulu Maistri* (1901), 25 Mad. 149, at pp. 155, 156.

[2] Cases *ante*, p. 245, note 3; *Radhabai* v. *Nanarav* (1879), 3 Bom. 151; *Yethirajulu Naidu* v. *Mukunthu Naidu* (1905), 28 Mad. 363, at p. 369. A different view was entertained in *Diwali* (*Bai*) v. *Bechardas* (*Patel*) (1902), 26 Bom. 445. See *Kunhacha Umma* v. *Kutti Mammi Hajee* (1892), 16 Mad. 201.

[3] *Diwali* (*Bai*) v. *Bechardas* (*Patel*) (1902), 26 Bom. 445, at p. 448.

[4] *Juttendromohun Tagore* v. *Ganendromohun Tagore* (1872), I. A. Sup. Vol. 47; 9 B. L. R. 377; 18 W. R. C. R. 359.

[5] *Bishen Chand* (*Rai*) v. *Asmaida Koer* (1883), 11 I. A. 164; 6 All. 560; *Bhagabati Barmanya* v. *Kali Charan Singh* (1905), 32 Calc. 992; 9 C. W. N. 749; *Ram Lall Sett* v. *Kanailall Sett* (1886), 12 Calc. 663; *Advocate-General* v. *Karmali Rahimbai* (1903), 29 Bom. 133. See Phillips and Trevelyan's "Law of Hindu Wills," pp. 196, 300, 301.

[6] *Mahabir Koer* v. *Jubha Sing* (1871), 8 B. L. R. 38; 16 W. R. C. R. 221.

[7] *Venkayyamma Garu* (*Raja Chelikani*) v. *Venkataramanayyamma* (*Raja Chelikani*) (1902), 29 I. A. 156, at pp. 164, 165; 25 Mad. 678, at p. 687; 7 C. W. N. 1, at p. 8; overruling *Jasoda Koer* v. *Sheo Pershad Singh* (1889), 17 Calc. 33, and *Saminadha Pillai* v. *Thangathanni* (1895), 19 Mad. 70. As to the case where a single son inherits through his mother, see *post*, p. 249.

A full bench of the Madras High Court has declined to extend this principle to sister's sons, and expressed their inability to apply it "to cases other than those in which the inheritance devolves from a paternal or maternal male ancestor on his lineal descendants whether as 'unobstructed,' or as 'obstructed heritage.'" They point out that the distinction between the two cases is that whereas the class of daughters is incapable of being added to after the vesting, the class of sister's sons would be added to after the vesting by the birth of others.[1]

"Unobstructed" succession.

(*b*) In cases governed by the Mitakshara school of law, all property, whether movable or immovable,[2] and however originally acquired,[3] which is inherited by what is called "unobstructed heritage,"[4] *i.e.* which is inherited from a natural or adopted[5] father, is coparcenary property[6] as regards the issue of the person so inheriting it.[7]

"In the 'Mitakshara,' chap. i. s. 1, v. 3, heritage is said to be 'of two sorts, unobstructed, or liable to obstruction. The wealth of the father or paternal grandfather becomes the property of his sons or of his grandsons in right of their being his sons or grandsons, and that is an inheritance not liable to obstruction. But property devolves on parents

[1] *Karuppai Naohiar* v. *Sankaranarayanan Chetty* (1903), 27 Mad. 300, at p. 314.

[2] *Jugmohandas Mangaldas* v. *Sir Mangaldas Nathubhoy* (1886), 10 Bom. 528, at pp. 570–574. This includes a right of occupancy, *Mahabir Prasad* v. *Basdeo Singh* (1884), 6 All. 234.

[3] *Chatturbhooj Meghji* v. *Dharamsi Naranji* (1884), 9 Bom. 438, at p. 450; *Hardai Narain* v. *Haruck Dhari Singh* (1882), 12 C. L. R. 104.

[4] *Apratibandha Daya* (inheritance not liable to be obstructed) as distinguished from *Sapratibandha Daya* (inheritance liable to be obstructed, *post*, p. 261). The distinction between the two forms of heritage is the same as the distinction between inheritance by an heir at law, and inheritance by an heir presumptive. In the latter case there is a possibility of a nearer heir being born. In the former case there is no such possibility.

[5] This has no application to property inherited by a person adopted according to the *illatom* system (*ante*, p. 162); *Challa Papi Reddi* v. *Challa Koti Reddi* (1872), 7 Mad. H. C. 25. See *Ramakristna* v. *Subbabka* (1889), 12 Mad. 442.

[6] *Nund Coomar Lall* (*Baboo*) v. *Razeeoddeen Hossein* (1872), 10 B. L. R. 183; 18 W. R. C. R. 477; *Nallatambi Chetti* (*Rayadur*) v. *Mukunda Chetti* (*Rayadur*) (1868), 3 Mad. H. C. 455; *Jawahir Singh* v. *Guyan Singh* (1868), 3 Agra, H. C. 78; *Jugmohandas Mangaldas* v. *Sir Mangaldas Nathubhoy* (1886), 10 Bom. 528. See also *Jasoda Koer* v. *Sheo Pershad Singh* (1889), 17 Calc. 33 (overruled by the Judicial Committee on another point, *ante*, p. 247); *Ramnarain Singh* (*Rajah*) v. *Pertum Singh* (1873), 11 B. L. R. 397, at p. 401; 20 W. R. C. R. 189, at p. 190; *Janki* v. *Nandram* (1888), 11 All. 194. See J. C. Ghose's "Hindu Law," 2nd ed., pp. 375, 376; "Viramitrodaya," G. C. Sircar's translation, p. 72.

[7] It is otherwise as regards other persons, see *Janki* v. *Nandram* (1888), 11 All. 194, at p. 198.

(or uncles), brothers, and the rest upon the demise of the owner, if there be no male issue; and thus the actual existence of a son and the survival of the owner are impediments to the succession; and, on their ceasing, the property devolves on the successor in right of his being uncle or brother. This is an inheritance subject to obstruction.'"[1]

Allotted to widow for maintenance.

Property inherited after the death of a widow to whom it was assigned in lieu of maintenance is on the same footing.[2]

Collateral relations.

It is only the descendants of the person so inheriting, who acquire an interest in the property. Collateral relations who happen to be joint with such person acquire no such interest.[3]

Inheritance from mother and maternal grandfather.

(*c*) In cases governed by the Mitakshara school of law, property inherited from a mother[4] is coparcenary, but it is unsettled whether property inherited from the maternal grandfather is also coparcenary property.

The Madras decisions hold that property inherited by a daughter's son is coparcenary.[5] The Bengal and Allahabad High Courts have entertained a different view,[6] and there is no reported decision in Bombay on the subject.[7]

The Judicial Committee has held that such property is not "self-acquired,"[8] and therefore it follows, it is submitted, that it is coparcenary, with all the incidents of coparcenary property.[9]

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[1] *Nund Coomar Lall* (*Baboo*) v. *Razeeooddeen Hossein* (1872), 10 B. L. R. 183, at p. 191; 18 W. R. C. R. 477, at p. 479; *Debi Parshad* v. *Thakur Dial* (1875), 1 All. 105, at p. 112.

[2] *Beni Parshad* v. *Puran Chand* (1895), 23 Calc. 262, at p. 273.

[3] See *Gopal Dutt Pandey* v. *Gopallal Misser*, Ben. S. D. A., 1859, p. 1314; *Janki* v. *Nandram* (1888), 11 All. 194, at p. 198.

[4] "Mitakshara," chap. i. s. 4, para. 2.

[5] *Vythinatha Ayyar* v. *Yeggia Narayana Ayyar* (1903), 27 Mad. 382; *Muttayan Chetti* v. *Sangili Vira Pandia Chinna Tambiar* (1879), 3 Mad. 370. This question did not arise on appeal in this case (1882), 9 I. A. 128; 6 Mad. 1; 12 C. L. R. 169; *Sivaganga Zemindar* v. *Lakshmana* (1885), 9 Mad. 188, at p. 190. These last two cases were doubted in *Venkataramanayamma Garu* (*Sri Raja Chelikani*) v. *Appa Rau Bahadur Garu* (1897), 20 Mad. 207, at p. 219, which was reversed on a different point by the Judicial Committee; *Venkayyamma Garu* (*Raja Chelikani*) v. *Venkataramanayamma* (*Raja Chelikani*) (1902), 29 I. A. 156; 25 Mad. 678; 7 C. W. N. 1.

[6] *Gunga Prosad* v. *Ajudhia Pershad Singh* (1881), 8 Calc. 131, at p. 134; 9 C. L. R. 417, at pp. 421, 422; *Jasoda Koer* v. *Sheopershad Singh* (1889), 17 Calc. 33, at p. 38; *Jamna Prasad* v. *Ram Partap* (1907), 29 All. 667.

[7] See *Nanabhai Ganpatrav Dhairyavan* v. *Achratbai* (1886), 12 Bom. 122, at p. 134.

[8] *Muttayan Chettiar* v. *Sangili Vira Pandia Chinnatambiar* (1882), 9 I. A. 128, at p. 143; 6 Mad. 1, at p. 16; 12 C. L. R. 169, at p. 182. In the Court below, the High Court held (*Muttayan Chetti* v. *Sangili Vira Pandia Chinna Tambiar*, 3 Mad. 370, at p. 375) that the sons could not interfere with their father's action with regard to it, but there is, it is submitted, no reason for this distinction.

[9] *Ante*, p. 245.

Mr. Mayne[1] says, "When the case arises again it will be material to remember that property only becomes joint property by reason of being ancestral property where the ancestor from whom it was derived was a paternal ancestor. See 'Mitakshara,' chap. i. s. 1, paras. 3, 5, 21, 24, 27, 33; s. 5, paras. 2, 3, 5, 9–11."

Share allotted on partition.

(*d*) In cases governed by the Mitakshara school of law, the share of coparcenary property allotted to any member on partition becomes coparcenary property as regards his issue,[2] whether such issue were or were not born at the time of partition.[3]

The circumstance that the person to whom the property is allotted discharges it from encumbrances does not alter its nature.[4] If the person to whom the property has been allotted has no issue, it passes to his heir.[5]

Gift or devise by father.

(*e*) Self-acquired property, given or devised by a Hindu governed by the Mitakshara school of law to a son is, according to the High Courts of Bengal and Madras, in the absence of any contrary intention appearing from the gift or will,[6] to be taken to be coparcenary property, so far as the issue of that son are concerned.[7] The Bombay and Allahabad High Courts repudiate such presumption.[8]

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[1] "Hindu Law," 7th ed., p. 344 note (*x*). See also West and Bühler (3rd ed.), pp. 714, 715.

[2] *Lal Bahadur* v. *Kanhaia Lal* (1907), 34 I. A. 65; 29 All. 244; 11 C. W. N. 417; *Chatturbhooj Meghji* v. *Dharamsi Narainji* (1884), 9 Bom. 438; *Adurmoni Deyi* v. *Chowdhry Sib Narain Kur* (1877), 3 Calc. 1; *Muddun Gopal Thakoor* v. *Ram Buksh Pandey* (1863), 6 W. R. C. R. 71; *Lakshmibai* v. *Ganpat Moroba* (1868), 5 Bom. H. C. O. C. J. 129; *Mewa Koonwer* (*Ranee*) v. *Oudh Behares Lall* (*Lalla*) (1867), 2 Agra, 311.

[3] In *Adurmoni Deyi* v. *Chowdhry Sib Narain Kur* (1877), 3 Calc. 1, the son was not born at the time of the partition.

[4] *Visalatchi Ammal* v. *Annasamy Sastry* (1870), 5 Mad. H. C. 150.

[5] See *Bejai Bahadur Singh* v. *Bhupindar Bahadur Singh* (1895), 22 I. A. 139; 17 All. 456.

[6] In *Laksmibai* v. *Ganpat Moroba* (1868), 5 Bom. H. C. O. C. 128, the property was given to the grandsons in severalty.

[7] *Nagalingam Pillai* v. *Ramachandra Tevar* (1901), 24 Mad. 429; *Muddun Gopal Thakoor* v. *Ram Buksh Pandey* (1863), 6 W. R. C. R. 71. See *Tara Chand* v. *Reeb Ram* (1866), 3 Mad. H. C. 50.

[8] See *Nanabhai Ganpatrao Dhairayavan* v. *Achratbai* (1886), 12 Bom. 122, at pp. 131, 131. (As in this case the devise was to the sons jointly, the property was coparcenary, *ante*, p. 245.) *Jugmohandas Mangaldas* v. *Sir Mangaldas Nathubhoy* (1886), 10 Bom. 528; *Parsotam Rao Tantia* v. *Janki Bai* (1907), 29 All. 354.

Where coparcenary property purports to be given or devised to a son or other coparcener its character would obviously be unchanged,[1] even where such gift or devise is permissible.[2]

(*f*) The joint property of reunited coparceners.[3] Reunion.

(*g*) Property which was originally the separate[4] property of an individual member of a joint family, but has been treated by him as coparcenary property, belongs to the coparcenary.[5] Property treated as coparcenary.

Where the members of a family having coparcenary property put their separate earnings into the joint stock, the proceeds of such earnings are to be presumed to be joint.[6] The treatment must be such as to show unmistakably an intention to throw the property into the common stock. Where it is plain that no gift can have been intended, none can be inferred.[7]

The right to claim property as separate may be barred by the operation of the law of Limitation.[8] Right by prescription.

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[1] See *Tara Chand* v. *Reeb Ram* (1866), 3 Mad. H. C. 50, at p. 55; *Hardai Narain* v. *Haruck Dhari Singh* (1882), 12 C. L. R. 104; *Nanomi Babuasin* (*Mussamut*) v. *Modun Mohun* (judgment of High Court, 1882), 13 I. A. 1, at pp. 5, 6; 13 Calc. 21.

[2] See *Lakshman Dada Naik* v. *Ramchandra Dada Naik* (1876), 1 Bom. 561, at p. 563. Affirmed on appeal (1880), 7 I. A. 181; 5 Bom. 48; 7 C. L. R. 320.

[3] *Jasoda Koer* v. *Sheo Pershad Singh* (1889), 17 Calc. 33, at p. 38. As to reunion, see *post*, pp. 358, 359.

[4] *Post*, pp. 255 *et seq.*

[5] *Gopalasami* v. *Chinnasami* (1884), 7 Mad. 458; *Krishnaji Mahadev Mahajan* v. *Moro Mahadev Mahajan* (1890), 15 Bom. 32, at p. 39; *Sudarsanam Maistri* v. *Narasimhulu Maistri* (1901), 25 Mad. 149, at p. 154; *Tottempudi Venkataratnam* v. *Tottempudi Seshamma* (1903), 27 Mad. 228. See *Venkayyamma Garu* (*Raja Chelikani*) v. *Venkataramanayyamma* (*Raja Chelikani*) (1902), 29 I. A. 156, at p. 166; 25 Mad. 678, at p. 688; 7 C. W. N. 1, at pp. 9, 10; *Shankar Baksh* v. *Hardeo Baksh* (1888), 16 I. A. 71; 16 Calc. 397; *Hurpurshad* v. *Sheo Dyal* (1876), 3 I. A. 259; 26 W. R. C. R. 55; *Hardeo Bux* (*Thakoor*) v. *Jawahir Singh* (1877), 4 I. A. 178; 3 Calc. 522; S. C. (1879), 6 I. A. 161; *Rampershad Tewarry* v. *Sheo Churn Doss* (1866), 10 M. I. A. 490, at pp. 505, 506; *Birajun Koer* v. *Luchmi Narain Mahata* (1884), 10 Calc. 392, at p. 398; *Tribhovandas* v. *Smith* (1896), 21 Bom. 349; S. C. in Court below (1895), 20 Bom. 316; *Nagalingam Pillai* v. *Ramachandra Tevar* (1901), 24 Mad. 429. As to Government grants, see *post*, p. 259.

[6] *Lal Bahadur* v. *Kanhaia Lal* (1907), 34 I. A. 65; 29 All. 244; 11 C. W. N. 417.

[7] See *Muddun Gopal Lal* (*Lala*) v. *Khikhinda Koer* (*Mussumat*) (1890), 18 I. A. 9, at p. 21; 18 Calc. 341, at p. 348.

[8] See *Vasudeva Padhi Khadanga Garu* v. *Maguni Devan Bakshi Mahapatrula Garu* (1901), 28 I. A. 81; 24 Mad. 387; 5 C. W. N. 545.

Accretions and acquisitions.

(*h*) Accretions to coparcenary property. Property acquired out of the income or with the aid[1] or on the credit of coparcenary property, whether movable or immovable,[2] the income of such property,[4] the proceeds of sale of such property, and property purchased out of such proceeds,[5] or from movable property belonging to the family,[6] are coparcenary property.

In a case governed by the Mitakshara law, a son acquires an interest in such property, whether he was or was not born[7] or adopted[8] before the date of the acquisition.

Slight or indirect aid.

Even where the acquirer has received some aid from the family property he is entitled to treat the acquisition as separate, if the family property has not contributed in a material degree to the acquisition,[9] and was not directly instrumental in bringing it about.[10] See *post*, pp. 256, 257.

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[1] *Lal Bahadur* v. *Kanhaia Lal* (1907), 34 I. A. 65; 29 All. 244; 11 C. W. N. 417; *Umrithnath Chowdhry* v. *Goureenath Chowdhry* (1870), 13 M. I. A. 542; 15 W. R. P. C. 10; *Isree Pershad Singh* v. *Nasib Kooer* (1884), 10 Calc. 1017; *Subbayya* v. *Surayya* (1887), 10 Mad. 251 (a case of waste land brought under cultivation); *Ramasheshaiya Panday* v. *Bhagavat Panday* (1868), 4 Mad. H. C. 5; *Booniadi Lall* (*Bukshee*) v. *Dewkee Nundun Lall* (*Bukshee*)(1873), 19 W. R. C. R. 223; *Kalee Sunkur Bhadooree* v. *Eshan Chunder Bhadooree* (1872), 17 W. R. C. R. 528; *Bona Kooree* (*Mussamut*) v. *Boolee Singh* (*Baboo*) (1867), 8 W. R. C. R. 182; *Shudanund Mohapattur* v. *Bonomalee Doss Mohapattur* (1866), 6 W. R. C. R. 256; *Purtab Bahadur Sing* v. *Tilukdharee Sing* (1807), 1 Ben. Sel. R. 179 (new edition, 236).

[2] *Sheopersad Sing* v. *Kullunder Sing* (1803), 1 Ben. Sel. R. 76 (2nd ed. 101).

[3] *Shib Dayee* v. *Doorga Pershad* (1872), 4 N. W. P. 63, at p. 71.

[4] *Ramanna* v. *Venkata* (1888), 11 Mad. 246.

[5] *Krishnasami Ayyangar* v. *Rajagopola Ayyangar* (1894), 18 Mad. 73, at p. 83. See *Shamnarain Singh* v. *Rughooburdyal* (1877), 3 Calc. 508; 1 C. L. R. 343.

[6] See *Shamnarain Singh* v. *Rughooburdyal* (1877), 3 Calc. 508, at p. 510; 1 C. L. R. 343, at p. 345.

[7] *Ramanna* v. *Venkata* (1888), 11 Mad. 246; *Jugmohandas Mangaldas* v. *Sir Mangaldas Nathubhoy* (1886), 10 Bom. 528, at p. 581; *Isree Pershad Singh* v. *Nasib Kooer* (1884), 10 Calc. 1017, at p. 1021; *contrâ* per Mitter, J., *Gunga Prosad* v. *Ajudhia Pershad* (1881), 8 Calc. 131, at p. 134; S. C. *Gunga Pershad* v. *Sheodyal Singh*, 9 C. L. R. 417, at p. 420.

[8] *Sudanund Mohapattur* v. *Soorjo Monee Dayee* (1869), 11 W. R. C. R. 436.

[9] See *Rampershad Tewarry* v. *Sheo Churn Doss* (1866), 10 M. I. A. 490, at p. 505; *Ahmedbhoy Hubibbhoy* v. *Cassumbhoy Ahmedbhoy* (1889), 13 Bom. 534, at p. 545; Strange's "Hindu Law," i. 214.

[10] *Jugmohandas Mangaldas* v. *Sir Mangaldas Nathubhoy* (1886), 10 Bom. 528, at pp. 558, 559; *Jadumani Dasi* (*Srimati*) v. *Gangadhar Seal*,

"It seems agreed that maintenance in the family, during the period of separate acquisition, though it contribute to the end, is not alone sufficient to affect it with a joint character, the expenditure for the purpose being incidental."[1]

It has been held that property acquired by a coparcener while drawing an income from coparcenary property is joint.[2]

As to property acquired by the exercise of a profession, see *post*, pp. 257, 258.

Form of transfer.

The form of the transfer[3] or the fact that the property was purchased or settled in the name of a particular member of the family[4] is immaterial.[5]

Savings from impartible estates.

Property purchased from the income of an impartible estate governed by the Mitakshara school of law, and the savings from the income of such estate not appropriated by the owner, or disposed of by his will, will form part of the estate.[6]

The estate itself cannot be regarded as coparcenary property, inasmuch as by the custom of the family, it is held by a single individual.[7]

Impartible property.

It was formerly considered that coparcenary property would include property which by custom is held and enjoyed by a single member of the family, but in which there was a right of survivorship.[8]

In a recent case in Bombay,[9] Jenkins, C.J., said this: "No doubt

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Boul. 600; "Vyavastha Darpana," 2nd ed., p. 525; *Gooroo Churn* v. *Goluckmoney*, Fulton, 165, at p. 181; *Meenatchee* v. *Chedumbra*, Mad. Dec. of 1853, p. 61.

[1] Strange's "Hindu Law," i. 214.

[2] *Rameshaiya Panday* v. *Bhagavat Panday* (1868), 4 Mad. H. C. 5. See *post*, p. 256.

[3] See *In the goods of Pokurmull Augurwallah* (1896), 23 Calc. 980; 1 C. W. N. 31.

[4] *Unrithnath Chowdhry* v. *Gouresnath Chowdhry* (1870), 13 M. I. A. 542, at p. 547; 6 B. L. R. 232, at p. 241; 15 W. R. P. C. 10, at p. 11; *Bodh Sing Doodhooria* v. *Gunesh Chunder Sen* (1873), 12 B. L. R. 317; 19 W. R. C. R. 356.

[5] See *post*, pp. 264, 265.

[6] *Sarabjit Partap Bahadur Sahi* v. *Indarjit Partap Bahadur Sahi* (1904), 27 All. 203, at p. 252; *Rajeswara Gajapaty Naraina Deo Maharajulungaru* (*Sri Sri Sri Rajah*) v. *Viraprataph Rudra Gajapaty Naraina Deo Maharajulungaru* (*Sri Sri Sri*) (1869), 5 Mad. H. C. 31, at p. 41; *Kotta Ramasmi Chetti* v. *Bangari Seshama Nayanivaru* (1881), 3 Mad. 145, at p. 150; *Parbati Kumari Debi* (*Srimati Rani*) v. *Jagadis Chunder Dhabal* (1902), 29 I. A. 82, at p. 98; 29 Calc. 433, at p. 453; 6 C. W. N. 490, at p. 495. As to the private property of a Sovereign Prince, see *Secretary of State* v. *Kamachee Boye Sahaba* (1859), 7 M. I. A. 476, at p. 537; 4 W. R. P. C. 42, at p. 45; Strange's "Hindu Law," vol. ii. pp. 329, 330.

[7] It was held otherwise in *Bawani Ghulam* v. *Deo Raj Kuari* (1883), 5 All. 542; but see *post*, p. 254.

[8] See *post*, pp. 337–339.

[9] *Bachoo* v. *Mankorebai* (1904), 29 Bom. 51, at p. 57; S. C. on appeal,

the property claimed in *Raghunadha's* case[1] was impartible, but at one time it was the common notion that even in impartible property all the male members of a joint family were coparceners subject to the qualification that the enjoyment was by one member of the family alone, and it was considered, rightly or wrongly, that there was warrant for this view in a number of decisions of the Privy Council, and notably *Naragunty* v. *Vengama*,[2] *Shivagunga* case,[3] the *Tipperah* case,[4] *Stree Rajah Yamanula Venkayamah* v. *Stree Rajah Yamanula Boochia Venkondara*,[5] *Chowdhry Chintamun Singh* v. *Mussamut Nowlucko Konwari*.[6] I mention these cases as to all of them Sir James Colville, who delivered the judgment in *Raghunadha's* case, was a party; and if it was his view that the impartible zemindari belonged to the whole family, then the decision in *Raghunadha's* case would seem to have proceeded on circumstances very closely resembling those with which we are now dealing. But whatever may have been the opinion that prevailed at that time, it has now been definitely decided by the Privy Council in *Rani Surtaj Kuari* v. *Rani Devraj Kuari*,[7] and in *Sri Raja Rao Venkata Surya* v. *Court of Wards*,[8] that in impartible properties there is no coparcenary, so that in the light of these latter decisions it cannot be said that the conditions in *Raghunadha's* case were in all respects identical with those now under consideration."

Presumption.

If the owner of an estate, the devolution of which is governed by family custom, acquires separate property, but does not in his lifetime alienate the property so acquired, or dispose of it by his will, or leave behind him some indication of a contrary intention, the reasonable presumption is that he intended to incorporate it with the family estate.[9]

Coparcenary as regards some coparceners only.

Property may be coparcenary as regards some members of a joint family, while other members of the family, although coparceners in the family property, have no share therein.[10] Thus, if a coparcener dies leaving self-acquired

Bachoo Harkisondas v. *Mankorebai* (1907), 34 I. A. 107; 31 Bom. 373; 11 C. W. N. 769.

[1] *Raghunada (Sri)* v. *Brozo Kishoro (Sri)* (1876), 3 I. A. 154; 1 Mad. 69.

[2] (1861), 9 M. I. A. 66, at p. 86; 1 W. R. P. C. 30.

[3] (1863), 9 M. I. A. 543, at p. 589; 2 W. R. P. C. 31.

[4] (1869), 12 M. I. A. 523, at p. 540; 3 B. L. R. P. C. 13.

[5] (1870), 13 M. I. A. 333, at p. 339; 13 W. R. P. C. 21.

[6] (1875), 2 I. A. 263, at pp. 269, 270; 1 Calc. 153.

[7] (1888), 15 I. A. 51; 10 All. 272.

[8] (1899), 26 I. A. 83; 22 Mad. 383; 3 C. W. N. 415.

[9] *Sarabjit Partap Bahadur Sahi* v. *Indarjit Partap Bahadur Sahi* (1904), 27 All. 203, at p. 252. See observations of the Judicial Committee in *Parbati Kumari Debi (Srimati Rani)* v. *Jagadis Chunder Dhabal* (1902), 29 I. A. 82, at p. 98; 29 Calc. 433, at p. 453; 6 C. W. N. 490, at p. 495.

[10] See *Shamnarain* v. *Court of Wards* (1873), 20 W. R. C. R. 197.

property,[1] such property becomes the coparcenary property of his descendants, but his collateral coparceners have no interest therein.[2]

The coparcenary may also be trustees of property devoted to religious or pious uses.[3] This class of property is incapable of partition.[4] Endowed property.

SEPARATE PROPERTY.

It is competent to a member of a joint family to acquire property for himself independently of his coparceners. Such separate acquisitions can be dealt with at the pleasure of the acquirer.[5] In default of a will they pass to the heirs of the acquirer,[6] who will, in cases under the Mitakshara law, if he be a son, take them as coparcenary property.[7] Separate property.

As to the power of a father to divide his self-acquired property unequally amongst his sons, see *post*, p. 335.

Property acquired in the following ways are the absolute property of the acquirer. Other members of the family have no interest therein.[8]

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[1] *Post*, pp. 256–261.

[2] See *ante*, p. 248.

[3] See *Ramchandra Panda* v. *Ram Krishna Mahapatra* (1906), 33 Calc. 507.

[4] See *post*, pp. 341, 342.

[5] *Jugmohandas Mangaldas* v. *Sir Mangaldas Nathubhoy* (1886), 10 Bom. 528, at pp. 578, 580; *Muddun Gopal Thakoor* v. *Ram Buksh Pandey* (1863), 6 W. R. C. R. 71; *Sital* v. *Madho* (1877), 1 All. 394; *Narottam Jagjivan* v. *Narsandas Harikisandas* (1866), 3 Bom. H. C. A. C. J. 6; *Purshotam Shama Shenvi* v. *Vasudev Krishna Shenvi* (1871), 8 Bom. H. C. O. C. 196; *Bishen Perkash Narain Singh (Raja)* v. *Bawa Misser* (1873), 12 B. L. R. 430; 20 W. R. C. R. 137; S. C. in Court below, 10 W. R. C. R. 287; *Nana Narain Rao* v. *Huree Punth Bhao* (1862), 9 M. I. A. 96; Marsh. 436; *Nagalingam Pillai* v. *Ramachandra Tevar* (1901), 24 Mad. 429; *Rameshwar Prosad* v. *Lachmi Prosad Singh* (1903), 7 C. W. N. 688; *Gunnaiyan* v. *Kamakchi Ayyar* (1902), 26 Mad. 339, at p. 353; *Subbayya* v. *Surayya* (1887), 10 Mad. 251; *Gangabai* v. *Vamanaji* (1864), 2 Bom. H. C. (2nd ed.) 301. See *Hanmantapa* v. *Jivubai* (1900), 24 Bom. 547.

[6] *Katama Natchier* v. *The Rajah of Shivagunga* (1863), 9 M. I. A. 543, at p. 613; 9 W. R. P. C. 31, at p. 39; *Balwant Singh (Rao)* v. *Kishori (Rani)* (1898), 25 I. A. 54; 20 All. 267; 2 C. W. N. 273.

[7] *Chatturbhooj Meghji* v. *Dharamsi Naranji* (1884), 9 Bom. 438, at p. 450; *Ram Narain Singh (Rajah)* v. *Pertum Singh* (1873), 11 B. L. R. 397, at p. 404; 20 W. R. C. R. 189, at p. 191. *Ante*, p. 248.

[8] See *Yamunabai* v. *Manubai* (1899), 23 Bom. 608, at pp. 611. As to the Bengal school, see *ante*, p. 230.

Such property is not liable to partition because it has been acquired without detriment to the estate of the father or mother.[1]

Separate acquisitions.

(*a*) Property acquired by an individual member of the joint family by his own exertions,[2] or from his separate capital, or on his own credit,[3] without any help from, or detriment to, the coparcenary property.[4]

Increased share.

Where with comparatively small aid from the coparcenary property the separate acquisition of a distinct property is made by an individual member by his own labour or capital, the acquirer, according to the Bengal authorities, is entitled to a double share on partition,[5] no such share being given in case of the common stock being only improved or augmented.[6]

It has been suggested[7] that the extra share allotted to the acquirer may be treated by him as self-acquired.

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[1] "Mitakshara," chap. i. s. 4, para. 2.

[2] *Tottempudi Venkataratnam* v. *Tottempudi Seshamma* (1903), 27 Mad. 228; *Somasundara Mudaliar* v. *Ganga Bissen Soni* (1904), 28 Mad. 386 (income derived from Government service). This would not include exertions as manager, *Sheo Dyal Tewaree* v. *Judoonath Tewaree* (1868), 9 W. R. C. R. 61, at p. 64. As to earnings by a prostitute, see *Chandravcka* v. *Secretary of State* (1890), 14 Mad. 163; *Boologam* v. *Swornam* (1881), 4 Mad. 330.

[3] *Nursingh Dass* (*Rai*) v. *Narain Dass* (*Rai*) (1871), 3 N. W. P. H. C. 217, at p. 235. As to a policy of insurance, see *Rajamma* v. *Ramakrishnayya* (1905), 29 Mad. 121.

[4] *Tottempudi Venkataratnam* v. *Tottempudi Seshamma* (1903), 27 Mad. 228; *Soobuns Lal* v. *Hurbuns Lal* (1805), 1 Ben. Sel. R. 91 (new ed. 121); *Purtab Bahaudur Sing* v. *Tilukdharee Sing* (1807), 1 Ben. Sel. R. 179 (new ed. 236); *Koul Nath Singh* v. *Jagrup Singh* (1830), 5 Ben. Sel. R. 12 (new ed. 14).

[5] *Sheo Dyal Tewaree* v. *Judoonath Tewaree* (1868), 9 W. R. C. R. 61, at p. 64; *Sree Narain Berah* v. *Gooro Pershad Berah* (1866), 6 W. R. C. R. 219; *Soorjeemoney Dossee* (*Sreemutty*) v. *Denobundoo Mullick* (judgment of Supreme Court, 1855), 6 M. I. A. 526, at p. 539; *Golab Chand* v. *Goluk Monee Dossee* (1843), Fulton, 165; *Jadumani* v. *Gangadhar Seal*, Boul. 600; "Vyavastha Darpana" (2nd ed.), 521; *Gudadhur Serma* v. *AjodheeramChowdry* (1794), 1 Ben. Sel. R. 8 (new ed. 7); *Koshul Chukurwutty* v. *Radhanath Chukurwutty* (1811), 1 Ben. Sel. R. 336 (new ed. 448); *Purtab Bahaudur Sing* v. *Tilukdharee Sing* (1807), 1 Ben. Sel. R. 179 (new ed. 236); *Kripa Sindhu Patjoshi* v. *Kanhaya Acharya* (1833), 5 Ben. Sel. R. 335 (new ed. 393); "Mitakshara," chap. i. s. 4, para. 29; "Dayabhaga," chap. ii. para. 41; chap. vi. s. 1, paras. 14, 28. See *ante*, p. 252.

[6] "Mitakshara," chap. i. s. 4, paras. 30, 31.

[7] Bhattacharya's "Hindu Law," 2nd ed., p. 228. It cannot be said to have been acquired without detriment to the paternal estate: above, note 1.

Whether this limitation will be accepted by the Judicial Committee or will be adopted in the other Provinces may be open to question.

Mr. Mayne[1] says that the text of Vasishta,[2] on which it is founded, "probably applied originally to self-acquisition properly so called, and that it cut down the rights of a self-acquirer, instead of enlarging the rights of one who has made use of common property. The Smriti Chandrika and Madhaviya both restrict the text to the gains of learning, when considered to be partible in consequence of the education from which they sprung having been imparted at the expense of the family.[3] The general principles laid down by Vijnanesvara seem to exclude the idea that any special and exclusive benefit can be obtained to any co-heir by a use of the family property.[4] Mr. W. Macnaghten states that under Benares law no such benefit can be obtained, whatever may have been the personal exertions of any individuals, but that the rule does not exist in Bengal." [5]

Under the Bengal school of law the father takes a double share in acquisitions made by a son; if they have been made by the use of joint funds the father and the acquirer take two shares each, and the rest of the brothers one share each; but if made without the use of joint funds the acquisitions are divided half and half between the father and the son. A father claiming a share of property acquired by his son is not bound to allow the son any share of the ancestral property in his hands.[6]

This rule has no application when the son has separated from his father.[7]

(*b*) Property acquired as "gains of science," [8] *i.e.* by the

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[1] "Hindu Law," 7th ed., p. 361.

[2] "And if one of the brothers has gained something by his own effort, he shall receive a double share," "Vasishta," xvii. 51; "Mitakshara," chap. i. s. 4, para. 29; "Dayabhaga," chap. vi. s. 1, paras. 27–29.

[3] "Smriti Chandrika," chap. vii. para. 9, and see futwah in 2 William Macnaghten, 167.

[4] "Mitakshara," chap. i. s. 4, paras. 1–6.

[5] 1 Wm. Macnaghten, 52; 2 Wm. Macn. 7 n., 158, 160 n., 162 n.

[6] *Wooma Soondaree Dossee* v. *Dwarka Nath Roy* (1868), 11 W. R. C. R. 72; *Dharma Das Kundu* v. *Amulyadhan Kundu* (1906), 33 Calc. 1119, at p. 1126; 10 C. W. N. 765. In the latter case reliance was placed on the case of *Sreenarain Berah* v. *Gooro Pershad Berah* (1866), 6 W. R. C. R. 219, but the question of the father's right did not arise in that case. Macnaghten's "Hindu Law," vol. ii. pp. 163, 164; Sircar's "Vyavastha Darpana," 2nd ed., pp. 447–456; "Dayabhaga," chap. ii. para. 71.

[7] See *Anund Mohun Paul Chowdhry* v. *Shamasoondery* (*Sreemutty*), W. R., 1864, C. R. 352.

[8] "Manu," chap. ix. para. 206; "Narada Smriti," chap. ix. para. 6. The word which was translated by Colebrooke as "gains of science" is said to be literally "learning money," and to have meant money acquired by the teaching of the Vedas, K. K. Bhattacharya's "Joint Hindu Family," pp. 661–667.

practice of a (learned) profession or occupation, where the property of the family has not been used for acquiring such property, or in the special education, which was necessary for the purpose of practising such profession.[1]

A mere general education or maintenance, even during the time of the acquisition,[2] at the expense of the family, would not, apparently, make the profits of the profession coparcenary property,[3] but a special education for the particular profession would stand upon a different footing.

Gifts and bequests.

(*c*) Gifts on marriage[4] or on other occasions,[5] and bequests.

The payment of the marriage expenses out of coparcenary property does not render the marriage gifts joint property.[6]

A *babuana* grant of ancestral property by the owner of an impartible estate, to enure for the benefit not only of a junior member of the family, but of his direct male line, does not lose its ancestral character by the grant.[7]

As to gifts and bequests to a son in cases governed by the Mitakshara school of law, see *ante*, p. 250.

As to gifts and bequests to the joint family, see *ante*, p. 247.

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[1] See cases in note 2, *post*.

[2] Strange's "Hindu Law," i. 214, 215; "Dayabhaga," chap. vi. s. 1, paras. 44–50. See *Durvasula Gangadharudu* v. *Durvasula Narasammah* (1872), 7 Mad. H. C. 47, at p. 49; *Chalakonda Alasani* v. *Chalakonda Ratnachalam* (1864), 2 Mad. H. C. 56, at p. 76; *Chellaperoomall* v. *Verraperoomall*, 4 Mad. Jur. 54, 240, referred to in Mayne's "Hindu Law," 7th ed., p. 355.

[3] *Laksman Mayaram* v. *Jamnabai* (1882), 6 Bom. 225 (earnings in government employment); *Krishnaji Mahadev Mahajan* v. *Moro Mahadev Mahajan* (1890), 15 Bom. 32 (earning as *Karkun* [agent in financial or revenue collections]); *Dhunookdharee Lall* v. *Gunput Lall* (1868), 11 B. L. R. 201 note; 10 W. R. C. R. 122; *Valloo Chetty* (*Pauliem*) v. *Sooryah Chetty* (*Pauliem*) (1877), 4 I. A. 109, at pp. 117, 118; 1 Mad. 252, at pp. 261, 262; *Lachmin Kuar* v. *Debi Prasad* (1897), 20 All. 435 (a case of money earned as a commissariat officer); *Boologam* v. *Swornam* (1881), 4 Mad. 330 (where it was attempted to treat the earnings of a dancing-girl as joint property); *Manchha* (*Bai*) v. *Narotam Das* (1868), 6 Bom. H. C. A. C. 1.

[4] *Adhar Chandra Chatterjee* v. *Nobin Chandra Chatterjee* (1907), 12 C. W. N. 103; *Beharee Lall Roy* v. *Lall Chunder Roy* (1876), 25 W. R. C. R. 307.

[5] See "Mitakshara," chap. i. s. 4, para. 2. "Manu" (chap. ix. para. 206) includes gifts presented as a mark of respect to a guest; "Narada" (chap. xiii. paras. 6, 7) includes gifts by father and mother.

[6] *Sheo Gobind* v. *Sham Narain Singh* (1875), 7 N. W. P. 75.

[7] *Ram Chandra Marwari* v. *Mudeshwar Singh* (1906), 33 Calc. 1158.

(*d*) Grants of property made by Government,[1] whether to a stranger or to a kinsman of a former owner of the land, unless it appears from the grant that it was to enure for the benefit of the family,[2] or where the grantee has constituted himself a trustee for the family,[3] or apparently where a family custom has treated them as joint.[4] Grants by Government.

The quality of the estate in regard to its descendibility would not, *primâ facie*, be altered by the regrant.[5]

(*e*) Coparcenary property which had been lost to the family,[6] but recovered by an individual member without Recovery of lost property.

[1] *Katama Natchiar* v. *Rajah of Shivagunga* (1863), 9 M. I. A. 543, at p. 610; 2 W. R. P. C. 31, at p. 38; *Beer Pertab Sahee* (*Baboo*) v. *Rajender Pertab Sahee* (*Maharajah*) (1867), 12 M. I. A. 1, at p. 34; 9 W. R. P. C. 15, at p. 21. See *Raja Jee Bahadur Garu* (*Raja*) v. *Parthasaradhi Appa Row* (1902), 30 I. A. 14; 26 Mad. 202; 8 C. W. N. 105. See *Sookraj Koowar* (*Mussumat Thukrain*) v. *Government* (1871), 14 M. I. A. 112; *Hurpurshad* v. *Sheo Dyal* (1876), 3 I. A. 259; 26 W. R. C. R. 55; *Brij Indar Bahadur Singh* v. *Janki Koer* (*Ranee*) (1877), 5 I. A. 1; *Shere Bahadur Singh* (*Thakur*) v. *Dariao Kuar* (*Thakurain*) (1877), 3 Calc. 645. See *Jaganatha* v. *Ramabhadra* (1888), 11 Mad. 380; *Ram Nundun Singh* v. *Janki Koer* (*Maharani*) (1902), 29 I. A. 178, at p. 193; 29 Calc. 828, at p. 851; 7 C. W. N. 57, at p. 72. As to a sale by Government of property which had been claimed as an escheat, see *Mallan* v. *Purushothama* (1889), 12 Mad. 287. As to the enfranchisement of an inam, see *Gunnaiyan* v. *Kamakchi Ayyar* (1902), 26 Mad. 339, and cases there cited; *Subbarayâ Mudali* v. *Kamu Chetti* (1899), 23 Mad. 47.

[2] *Hurpurshad* v. *Sheo Dyal* (1876), 3 I. A. 259; 26 W. R. C. R. 55; *Govind Rao* (*Sri Mahant*) v. *Sita Ram Kesho* (1898), 25 I. A. 195; 21 All. 53; 2 C. W. N. 681. As where the grant merely operated as an ascertainment of the claim for revenue, and a release of the reversionary right of the Crown, *Narayana* v. *Chengalamma* (1886), 10 Mad. 1. See *Radhabai* v. *Nanarav* (1879), 3 Bom. 151.

[3] See *Hardeo Bux* (*Thakoor*) v. *Jawahir Singh* (*Thakoor*) (1877), 4 I. A. 178; 3 Calc. 522; 6 I. A. 161; *Sookraj Koowar* (*Mussumat Thukrain*) v. *Government* (1871), 14 M. I. A. 112; *Shere Bahadur Singh* (*Thakur*) v. *Dariao Kuar* (*Thakurain*) (1877), 3 Calc. 645; *Ramanund Koer* (*Thakurain*) v. *Raghunath Koer* (*Thakurain*) (1881), 9 I. A. 41; 8 Calc. 769.

[4] See *Madharav Manohar* v. *Atmaram Keshav* (1890), 15 Bom. 519.

[5] See *Venkata Narasimha Appa Row* (*Sri Rajah*) v. *Rangayya Appa Row* (*Sri Rajah*) (1905), 29 Mad. 437.

[6] This does not apply to a case where the property was held by a person claiming to be a member of the family, *Bissessur Chuckerbutty* v. *Seetul Chunder Chuckerbutty* (1868), 9 W. R. C. R. 69; S. C. 8 W. R. C. R. 13.

the aid of the family property[1] from a stranger holding adversely to the family.[2]

There must have been an express or implied abandonment of their rights by the coparceners, and the coparceners must have been in a position to sue.[3]

Where the property recovered under these conditions consists of land,[4] the recoverer, except perhaps he be the father, is not entitled to the property absolutely, but he is entitled on partition to take one-fourth share as a reward for the recovery, and he has to share the remainder with his brethren.[5]

Where the recoverer is the father, the Mitakshara would apparently give him the whole of the property,[6] but the Bengal authorities are said to make no distinction between a recovery by the father or one by another coparcener.[7]

The redemption of property is not a recovery within the meaning of this rule.[8]

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[1] "Yajnavalkya," Bk. ii. v. 119; "Mitakshara," chap. i. s. 5, para. 11; "Manu," chap. ix. para. 209; *Bolakee Sahoo* v. *Court of Wards* (1870), 14 W. R. C. R. 34; *Naraganti Achammagaru* v. *Venkatachalapati Nayanivaru* (1881), 4 Mad. 250, at p. 259.

[2] *Naraganti Achammagaru* v. *Venkatachalapati Nayanivaru* (1881), 4 Mad. 250, at p. 259.

[3] *Ibid.*, *Visalatchi Ammal* v. *Annasamy Sastry* (1870), 5 Mad. H. C. 150; *Jugmohandas Mangaldas* v. *Sir Mangaldas Nathubhoy* (1886), 10 Bom. 528, at p. 551; *Shamnarain Singh* v. *Rughooburdyal* (1877), 3 Calc. 508, at p. 511; 1 C. L. R. 343, at pp. 345, 346. See also *Bissessur Chuckerbutty* v. *Seetul Chunder Chuckerbutty* (1868), 9 W. R. C. R. 69; S. C. (1867), 8 W. R. C. R. 13.

[4] K. K. Bhattacharya ("Law Relating to the Joint Hindu Family," p. 661) considers that this distinction only applies to arable land.

[5] "Mitakshara," chap. i. s. 4, para. 3; Colebrooke's "Digest," vol. iii. p. 365; "Daya-Krama Sangraha," chap. iv. s. 2, para. 9. See *Naraganti Achammagaru* v. *Venkatachalapati Nayanivaru* (1881), 4 Mad. 250, at p. 259. Where the property is impartible, the recoverer would apparently be entitled to a reward. *Ibid.*, pp. 259, 260.

[6] Chap. i. s. 5, para. 11.

[7] Mayne's "Hindu Law" (7th ed.), pp. 360, 361, citing "Dayabhaga," chap. vi. s. 2, paras. 36–39; "Daya-Krama Sangraha," chap. iv. s. 2, paras. 7, 8; William Macnaghten, vol. i. 52; William Macnaghten, vol. ii. 157. With the exception perhaps of the statement in 1 William Macnaghten, these are authorities of the Bengal school, in which the distinction could not be made. In *Bolakee Sahoo* v. *Court of Wards* (1870), 14 W. R. C. R. 34, the right of the father to the whole was maintained, but the question as to his being entitled only to an extra share does not seem to have been raised.

[8] *Visalatchi Ammal* v. *Annasamy Sastry* (1870), 5 Mad. H. C. 150.

The use of family money for the purpose of recovering such property does not necessarily make it joint.[1]

Obstructed heritage.

(*f*) In a case governed by the Mitakshara school of law, property inherited by obstructed inheritance (*Sapratibandha*),[2] *i.e.* from some person other than a natural or adopted father.[3]

As to property inherited from a maternal grandfather, see *ante*, p. 249.

Under the Bengal school, inherited property, from whomsoever it be inherited, is the absolute property of a male heir.

Accretions and proceeds.

(*g*) Accretions to separate property of any kind and savings therefrom, and property purchased with the income thereof, or from the proceeds thereof.[4]

Burden of proof that property separate.

A member of a joint family claiming property as separate must show of what the separate property consists,[5] and that it was his separate acquisition.

As to the presumption with regard to the family being joint, see *ante*, pp. 226–229.

Property in name of coparcener.

Property[6] purchased, or held, by or in the name of, or settled with[7] a coparcener in a family which is joint in estate,[8] is, if held in a manner not inconsistent with the property being joint, presumed, apart from special circumstances, to have belonged to the coparcenary at the time of its acquisition.[9]

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[1] *Bachcho Kuwar* v. *Dharam Das* (1906), 28 All. 347.

[2] *Ante*, p. 248, note 4.

[3] *Nund Coomar Lall* (*Baboo*) v. *Razeeoddeen Hossein* (1872), 10 B. L. R. 183; 18 W. R. C. R. 477; *Nallatambi Chetti* (*Rayadur*) v. *Mukunda Chetti* (*Rayadur*) (1868), 3 Mad. H. C. 455; *Saminadha Pillai* v. *Thangathanni* (1895), 19 Mad. 70; *Lochun Singh* v. *Nemdharee Singh* (1873), 20 W. R. C. R. 170; *Pitam Singh* v. *Ujagar Singh* (1878), 1 All. 651; *Jawahir Singh* v. *Guyan Singh* (1868), 3 Agra H. C. 78. See Ghose's "Hindu Law," 2nd ed., pp. 375, 376.

[4] See *Booniadi Lall* (*Bukshee*) v. *Dewkee Nundun Lall* (*Bukshee*) (1873), 19 W. R. C. R. 223.

[5] *Gane Bhive Parab* v. *Kane Bhive* (1867), 4 Bom. H. C. A. C. J. 169.

[6] This includes money due on a bond, *Kalee Sunkur Bhadooree* v. *Eshan Chunder Bhadooree* (1872), 17 W. R. C. R. 528.

[7] *Huro Soondaree Debia* v. *Doorga Doss Bhuttacharjee* (1871), 16 W. R. C. R. 265.

[8] They may have separated in food or worship, *ante*, p. 227.

[9] *Dhurm Das Pandey* v. *Shamasoondri Dibiah* (1843), 3 M. I. A. 229, at p. 240; 6 W. R. P. C. 43, at p. 44; *Prankishen Paul Chowdhry* v. *Mothooramohun Paul Chowdhry* (1865), 10 M. I. A. 403; 5 W. R. P. C. 11; *Bissessur Lall Sahoo* v. *Luchmessur Singh* (*Maharajah*) (1879), 6 I. A.

Dependent members.

There is no similar presumption in the case of property purchased by or in the name of dependent members of the family, who have no vested interest in the joint family, as, for instance, a son-in-law living in the house,[1] a wife,[2] under the Bengal school of law a son when the father is alive,[3] or a female member of the family;[4] but where the property had been purchased by the managing members in such name the presumption might arise.[5]

"In the case of an ordinary Hindu family who are living together, or have their entire property in common, the presumption is that all that any one member of the family is found in possession of belongs to the common stock. That is the ordinary presumption, and the onus of

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233, at p. 236; 5 C. L. R. 477, at p. 479; *Cheetha (Mussumat)* v. *Miheen Lal (Baboo)* (1867), 11 M. I. A. 369; *Luximan Row Sadasow* v. *Mullar Row Bajee* (1831), 2 Knapp, 60; 5 W. R. P. C. 67; *Kanhia Lal* v. *Debi Das* (1899), 22 All. 141; *Yanumula Venkayama (Stree Rajah)* v. *Yanumula Boochia Vankondora (Stree Rajah)* (1870), 13 M. I. A. 333; 13 W. R. P. C. 4; *Bodh Sing Doodhooria* v. *Gunesh Chunder Sen* (1873), 12 B. L. R. 317, at p. 327; 19 W. R. C. R. 356, at p. 357; *Prannath Chowdhry* v. *Kashinath Roy Chowdhry*, W. R. 1864, C. R. 169; *Ramphul Singh* v. *Degnarain Singh* (1881), 8 Calc. 517; 10 C. L. R. 489; *Jugodumba Debia* v. *Rohinee Debia* (1875), 23 W. R. C. R. 422; *Heera Lall Roy* v. *Bidyadhur Roy* (1874), 21 W. R. C. R. 343; *Cassumbhoy Ahmedbhoy* v. *Ahmedbhoy Hubibhoy* (1887), 12 Bom. 280, at p. 309; *Annundo Mohun Roy* v. *Lamb* (1862), Marsh, 169; 1 Hay, 374; *Hait Singh* v. *Dabee Singh* (1870), 2 N. W. P. 308; *Nursingh Dass (Rai)* v. *Narain Dass (Rai)* (1871), 3 N. W. P. 217; S. C. on appeal (1876), 26 W. R. C. R. 17; *Gopeekrist Gosain* v. *Gungapersaud Gosain* (1854), 6 M. I. A. 53; *Subbayya* v. *Surayya* (1887), 10 Mad. 251; *Subbayya* v. *Chellamma* (1886), 9 Mad. 477 (where waste lands were brought under cultivation); *Gopee Lall* v. *Bhugwan Doss (Mohunt)* (1869), 12 W. R. C. R. 7; *Narayan Deshpande* v. *Anaji Deshpande* (1880), 5 Bom. 130; *Nilmoney Bhooya* v. *Gunga Narain Shahur Roy* (1864), 1 W. R. C. R. 334. See *Balaram Bhaskarji* v. *Ramchandra Bhaskarji* (1898), 22 Bom. 922; *Shib Pershad Chuckerbutty* v. *Gunga Monee Debee* (1871), 16 W. R. C. R. 291; *Deela Singh* v. *Toofanee Singh* (1864), 1 W. R. C. R. 306; *Beharee Lal (Lalla)* v. *Modho Pershad (Lalla)* (1866), 6 W. R. C. R. 69.

[1] *Dossee Monee Dossee* v. *Ram Chand Mohur* (1867), 7 W. R. C. R. 249.

[2] *Chowdrani* v. *Tariny Kanth Lahiri Chowdry* (1882), 8 Calc. 545. This decision was reversed on the facts, *Dharani Kant Lahiri* v. *Kristokumari Chowdhrani* (1886), 13 I. A. 70; 13 Calc. 181. See *Bindoo Bashinee Debee* v. *Pearee Mohun Bose* (1866), 6 W. R. C. R. 312.

[3] *Sarada Prosad Ray* v. *Mahananda Ray* (1904), 31 Calc. 448.

[4] *Narayana* v. *Krishna* (1884), 8 Mad. 214.

[5] See *Chand Hurree Maitee* v. *Norendro Narain Roy (Rajah)* (1873), 19 W. R. C. R. 231. The purchase was made by the managing member in the name of the family priest.

establishing the contrary is thrown on the member of the family who disputes it."[1]

"The fact of the Hindu family is enough to put the purchaser upon inquiry, and if he deals with a single member without obtaining proof that the property is separate property he does so at his own risk."[2]

Proof of nucleus.

There has been some conflict as to whether it is necessary for the person claiming the property as joint to prove that there was a nucleus of family property from which the property in question might have been acquired, or whether mere proof that the acquirer was at the time of the acquisition a member of a Hindu family is not sufficient.[3] Mr. Mayne[4] seeks to reconcile these decisions by pointing out how the burden of proof varies in accordance with the nature of the claim to separate property.

It is difficult, if not impossible, to lay down a rule which will suit the circumstances of each case, but every weight must be given to the practice of sharing property in common as members of a joint family which prevails among Hindus. It rarely happens that a case depends upon the mere necessity to prove the existence of a nucleus of family property.

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[1] *Bannoo* v. *Kashee Ram* (1877), 3 Calc. 315, at p. 317; *Sudanund Mohapattur* v. *Soorjo Monee Dayee* (1869), 11 W. R. C. R. 436. This presumption applies also to the case where the property has passed by sale into the hands of third parties and has been redeemed by private purchase by a coparcener; *Gooroo Pershad Roy* v. *Debee Pershad Tewaree* (1866), 6 W. R. C. R. 58.

[2] *Shibosoondery Dossee* v. *Rakhall Doss Sirkar* (1864), 1 W. R. C. R. 38.

[3] The following cases assert that it is unnecessary to prove a nucleus: *Taruck Chunder Poddar* v. *Jodeshur Chunder Koondoo* (1873), 11 B. L. R. 193; 19 W. R. C. R. 178; *Gobind Chunder Mookerjee* v. *Doorgapersad Baboo* (1874), 14 B. L. R. 337; 22 W. R. C. R. 248; *Shushee Mohun Pal Chowdhry* v. *Aukhil Chunder Banerjee* (1876), 25 W. R. C. R. 232; *Vedavalli* v. *Narayana* (1877), 2 Mad. 19; *Tara Churn Mookerjee* v. *Joynarain Mookerjee* (1867), 8 W. R. C. R. 226. In the following cases a different view was entertained: *Bholanath Mahta* v. *Ajoodhia Persad Sookul* (1873), 12 B. L. R. 336; 20 W. R. C. R. 65; *Denonath Shaw* v. *Hurrynarain Shaw* (1873), 12 B. L. R. 349; *Kristo Chunder Kurmokar* v. *Rughoonath Kurmokar* (1873), 12 B. L. R. 352, note; *Hurish Chunder Doss* v. *Gouree Pershad Chatterjee* (1871), 16 W. R. C. R. 162; *Khilut Chunder Ghose* v. *Koonj Lall Dhur* (1868), 11 B. L. R. 194, note; 10 W. R. C. R. 333; *Radhika Prasad Dey* v. *Dharma Dasi Debi* (*Mussumat*) (1869), 3 B. L. R. A. C. 124; 11 W. R. C. R. 499. See *Pran Kristo Mojoomdar* v. *Bhageerutee Gooptia* (*Sreemutty*) (1873), 20 W. R. C. R. 158; *Chundro Tara Deba* v. *Buksh Ali* (1869), 11 W. R. C. R. 305; *Hurish Chunder Mookerjee* v. *Mokhoda Debia* (1872), 17 W. R. C. R. 564; *Sudanund Mohapattur* v. *Soorjo Monee Dayee* (1869), 11 W. R. C. R. 436, at p. 438.

[4] "Hindu Law," 7th ed., pp. 367, 368.

Where there is such a nucleus it is clear that the burden is upon the person who alleges that the property was a separate acquisition.[1]

When it is proved that there was family property, the fruits of which were capable of providing for the acquisition of the property in question, then the person claiming the property as a separate acquisition must prove that the family property was not used for the acquisition.[2]

The fact that the property had increased during a long period to a considerable value from a small nucleus of family property is not sufficient to repeat the presumption that it was all family property.[3]

Use of name of individual member.

The purchase of property in the name of one member of the family, or the use of his name in documents relating to the property,[4] or in the carrying on of law suits by him alone,[5] or an entry of his name in revenue records,[6] does not by itself show that the acquisition was separate, or that there had been a separation, particularly where that member is the managing member of the family;[7] but where a purchaser from such member has been misled, the family may, in some cases, be estopped from claiming the property as joint,[8] and in conjunction with other evidence of separation, or of separate acquisition, such evidence may be of importance.[9]

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[1] *Lal Bahadur* v. *Kanhaia Lal* (1907), 34 I. A. 65; 29 All. 244; 11 C. W. N. 417; *Anandrao Gunputrao* v. *Vasantrao Madhavrao* (1907), 11 C. W. N. 478.

[2] See *Tara Churn Mookerjee* v. *Joynarain Mookerjee* (1867), 8 W. R. C. R. 226.

[3] *Tottempudi Venkataratnam* v. *Tottempudi Seshamma* (1903), 27 Mad. 228.

[4] *Ante*, p. 261. *Dhurm Das Pandey* v. *Shama Soondri Dibiah* (1843), 3 M. I. A. 229, at p. 240; 6 W. R. P. C. 43, at p. 44; *Janokee Dassee* v. *Kisto Komul Singh* (1862), Marsh. 1; *Deela Singh* v. *Toofanee Singh* (1864), 1 W. R. C. R. 306; *Beharee Lal* (*Lalla*) v. *Modho Pershad* (*Lalla*) (1866), 6 W. R. C. R. 69; *Runjeet Singh* v. *Madud Ali* (1868), 3 Agra, 222; *Shibosoondery Dossee* v. *Rakhall Doss Sirkar* (1864), 1 W. R. C. R. 38: *Mun Mohinee Dubee* v. *Soodamonee Dabee* (1865), 3 W. R. C. R. 31. See *Umrithnath Chowdhry* v. *Gouresnath Chowdhry* (1870), 13 M. I. A. 542; 6 B. L. R. 232; 15 W. R. P. C. 10; *Vedavalli* v. *Narayana* (1877), 2 Mad. 19.

[5] *Deela Singh* v. *Toofanee Singh* (1865), 1 W. R. C. R. 306.

[6] *Jussoondah* v. *Ajodhia Pershad* (1867), 2 Ind. Jur. N. S. 261. See *Rewa Prasad Sukal* v. *Deo Dutt Ram Sukal* (1899), 27 I. A. 39; 2 Calc. 515; 4 C. W. N. 582.

[7] *Kishen Komul Singh* v. *Janokee Dossee* (1862), W. R. Sp. No. 3; 1 Ind. Jur. O. S. 23.

[8] See *Gour Chunder Biswas* v. *Greesh Chunder Biswas* (1867), 7 W. R. C. R. 120, at p. 122.

[9] See *Bholanath Mahta* v. *Ajoodhia Persad Sookul* (1873), 12 B. L. R. 336; 20 W. R. C. R. 65; *Peary Lall* v. *Bhawoot Koer* (1862), W. R. Sp. No. 18.

Rebuttal of presumption.

The presumption may be rebutted by showing that the property has been self-acquired from separate funds, without the aid of the coparcenary property, and that the property is held separately,[1] or by proof of separation before the acquisition, or by proof that at the time of acquisition there was no family property out of which it could have been acquired,[2] or by proof of separation after the purchase, and exclusive possession of the property thereafter.[3]

Evidence as to the source of the purchase-money is generally the most satisfactory mode of proof, but it is not indispensable.[4]

Where it is admitted or proved that property in dispute was not acquired by use of coparcenary funds,[5] or that a partition has already taken place,[6] the burden lies upon the person alleging the property to be joint.

Originally a separate acquisition.

Where property was in its origin a separate acquisition of an individual member of the family, the burden of proving that it has become joint property, *i.e.* that its character has been changed by treatment,[7] is on the person making the assertion.[8]

Possession of property.

There is no presumption that a family possesses any

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[1] *Lokenath Surma* v. *Ooma Moyee Dabee* (1864), 1 W. R. C. R. 107.

[2] See *Gunga Dhur Chatterjee* v. *Soorjo Nath Chatterjee* (1871), 15 W. R. C. R. 446.

[3] *Bholanath Mahta* v. *Ajoodhia Persad Sookul* (1873), 12 B. L. R. 336; 20 W. R. C. R. 65.

[4] See *Dhurm Das Pandey* v. *Shama Soondri Dibiah* (*Mussumat*) (1843), 3 M. I. A. 229; 6 W. R. P. C. 43; *Dhunookdharee Lall* v. *Gunput Lall* (1868), 11 B. L. R. 201, note; 10 W. R. C. R. 122; *Bholanath Mahta* v. *Ajoodhia Persad Sookul* (1873), 12 B. L. R. 336; 20 W. R. C. R. 85.

[5] *Narayan Babaji* v. *Nana Manohar* (1870), 7 Bom. H. C. A. C. J. 153, at pp. 176, 177.

[6] *Ram Ghulam Singh* v. *Ram Behari Singh* (1895), 18 All. 90; *Narayan Babaji* v. *Nana Manohar* (1870), 7 Bom. H. C. A. C. J. 153, at pp. 176, 177; *Ram Gobind Koond* v. *Hossein Ali* (*Moulvie Syud*) (1867), 7 W. R. C. R. 90; *Vinayak Narsinvh* v. *Datto Govind* (1900), 25 Bom. 367; *Prem Chund Dan* v. *Darimba Debia* (1871), 15 W. R. C. R. 238.

[7] *Ante*, p. 251.

[8] See *Venkataramanayamma Garu* (*Sri Raja Chelikani*) v. *Appa Rau Bahadur Garu* (1897), 20 Mad. 207, at p. 220. This decision was set aside on appeal (1902), 29 I. A. 156; 25 Mad. 678; 7 C. W. N. 1, but this dictum as to the burden of proof was untouched by the decision of the Judicial Committee.

particular property,[1] or any property at all.[2] A person who claims a share in property as belonging to a joint family, of which he is admitted or has been proved to be a member, must prove either that the property was held or acquired by the members of the family as such,[3] or that the person in whose possession it is is a member of the family.[4]

He may, of course, rebut evidence of self-acquisition by evidence as to the source of the acquisition, or by other evidence tending to show that the property was joint.

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[1] See *Obhoy Churn Ghose* v. *Gobind Chunder Dey* (1882), 9 Calc. 237.

[2] *Toolseydas Ludha* v. *Premji Tricumdas* (1888), 13 Bom. 61, at p. 66. See *Nanabhai Ganpatrav Dhairyavan* v. *Achratbai* (1886), 12 Bom. 122, at p. 131.

[3] See *Balaram Bhaskarji* v. *Ramchandra Bhaskarji* (1898), 22 Bom. 922, at p. 931; *Obhoy Churn Ghose* v. *Gobind Chunder Dey* (1882), 9 Calc. 237.

[4] Cases, *ante*, p. 263, note 1, and p. 264, note 4. A different view was entertained in *Shiu Golam Sing* v. *Baran Sing* (1868), 1 B. L. R. A. C. 164, at p. 167, where it was said, "He must, at least, show that the defendants whom he sues constitute a joint family, and that the property in question became joint property when acquired, or that at some period since its acquisition, it has been enjoyed jointly by that family."

CHAPTER VII.

MANAGEMENT AND DISPOSAL OF PROPERTY OF JOINT FAMILY.

Application of proceeds of coparcenary property.

"THE proceeds of undivided property must be brought, according to the theory of an undivided family, to the common chest or purse, and there dealt with according to the mode of enjoyment by the members of an undivided family."[1]

This principle was laid down in a case governed by the Mitakshara school of law, but it would apply also to a joint family governed by the Bengal school of law, it being remembered that in the latter case sons have not during their father's lifetime any interest in the family chest or purse.

Payments on behalf of family.

Although a coparcener is not entitled ordinarily to credit for moneys paid by him out of his own funds for the benefit of the family on the improvement of the estate,[2] he is entitled to such credit where it is clear that he reserved his right to such credit, as where he paid the money to save the coparcenary estate from sale for arrears of Government revenue.[3]

All coparceners to be parties to transactions.

Except where in a coparcenary governed by the Mitakshara the father has power to act independently of his sons,[4] each coparcener must either himself, or by a manager having power in that behalf, be a party to every transaction relating to the coparcenary property.[5]

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[1] *Appovier* v. *Rama Subba Ayyan* (1866), 11 M. I. A. 75, at p. 90; 8 W. R. P. C. 1.

[2] *Muttusvami Gaundan* v. *Subbiramanya Gaundan* (1863), 1 Mad. H. C. 309.

[3] *Vizianagram* (*Rajah of*) v. *Setrucherla Somasekharadas* (*Rajah*) (1903), 26 Mad. 686.

[4] Viz. in contracting debts, *post*, chap. viii.

[5] See *Sangappa* v. *Sahebanna* (1870), 7 Bom. H. C. A. C. 141; *Ghunshyam Singh* v. *Runjeet Singh* (1865), 4 W. R., Act X. R. 39.

No coparcener, unless he be the manager, has power to enhance rent or eject tenants at his pleasure.[1]

It has been held[2] that payment to one of several joint proprietors is a payment to all. This would, it is submitted, depend upon the circumstances. Where there is a manager a tenant would rarely be entitled to pay to any other coparcener. Under some circumstances a debtor might get a discharge by payment to one coparcener,[3] but it would ordinarily be safer for him to require a receipt from the manager or from the whole body of coparceners.

Parties to suits.

All the coparceners must be parties to a suit or execution proceedings relating to the coparcenary property,[4] or to a trade or business belonging to the family,[5] even if it be founded on a transaction which was validly entered into by the manager,[6] but a decree made against the father[7] or other manager, as representing the family, without any objection being made as to want of parties, may bind the other coparceners.[8]

Thus one coparcener cannot sue alone to eject a tenant,[9] and cannot

[1] *Balaji Baikaji Pinge* v. *Gopal* (1878), 3 Bom. 23. See cases below, note 9, and *post*, p. 269, note 1.

[2] *Oodit Narain Singh* v. *Hudson* (1865), 2 W. R., Act X. R. 15.

[3] See *Gurushantappa* v. *Channallappa* (1899), 24 Bom. 123.

[4] See Civil Procedure Code, 1908, order i. rules 1, 3, 4; Act XIV. of 1882, ss. 26, 28. *Guruvayya Gouda* v. *Dattatraya Anant* (1903), 28 Bom. 11; *Vadilal Lallubhai* v. *Shah Khushal Dalpatram* (1902), 27 Bom. 157; *Muhammad Askari* v. *Radhe Ram Singh* (1900), 22 All. 307; *Balkrishna Sakharam* v. *Moro Krishna Dabholkar* (1896), 21 Bom. 154; *Banarsi Das* v. *Maharani Kuar* (1882), 5 All. 27; *Phoolbas Koonwur* (*Mussumat*) v. *Juggeshur Sahoy* (1876), 3 I. A. 7, at p. 26; 1 Calc. 226, at pp. 243, 244; 25 W. R. C. R. 285, at p. 289; *Rajaram Tewari* v. *Lachman Prasad* (1869), 4 B. L. R. A. C. 118; 12 W. R. C. R. 478; *Gopal* v. *Macnaghten* (1881), 7 Calc. 751; *Unnoda Persad Roy* v. *Erskine* (1873), 12 B. L. R. 370; 21 W. R. C. R. 68; *Nathuni Mahton* v. *Manraj Mahton* (1876), 2 Calc. 149; *Sheo Churn Narain Singh* v. *Chukrawee Pershad Narain Singh* (1871), 15 W. R. C. R. 436; *Nundun Lall* v. *Lloyd* (1874), 22 W. R. C. R. 74; *Arunachala Pillai* v. *Vythialinga Mudaliyar* (1882), 6 Mad. 27; *Hari Gopal* v. *Gokaldas Kushabashet* (1887), 12 Bom. 158.

[5] *Jugal Kishore* v. *Hulasi Ram* (1886), 8 All. 264; *Ramsebuk* v. *Ramlall Koondoo* (1881), 6 Calc. 815; 8 C. L. R. 457. See *Vadilal Lallubhai* v. *Shah Khushal Dalpatram* (1902), 27 Bom. 157; *Anant Ram* v. *Channu Lal* (1903), 25 All. 378. Where there is a contract by or in the name of the manager, he alone need be a party. *Gopal Das* v. *Badri Nath* (1904), 27 All. 361.

[6] *Jas Ram* v. *Sher Singh* (1902), 25 All. 162; *Alagappa Chetti* v. *Vellian Chetti* (1894), 18 Mad. 33. As to mortgages by the father, see *post*, pp. 283–285.

[7] See Act XIV. of 1882, s. 34, Civil Procedure Code, 1908, order i. r. 13.

[8] *Post*, p. 278.

[9] *Reasut Hossein* v. *Chowar Singh*

sue for enhancement of rent,[1] or for his share of the rent,[2] unless by an express or implied arrangement between the coparceners and the tenant he collects his share separately.[3]

In *Ramayya* v. *Venkataratnam*,[4] where a suit was brought by a manager as representative of the family, the Court considered that the omission to make the coparcener a party was a mere formal error.

When a coparcener declines to be a plaintiff,[5] or where he is acting in collusion with the tenant[6] or other person sued, he may be joined as a defendant.

If the suit be barred against some of them, the whole suit fails.[7]

It has been held that where one of the family has

(1881), 7 Calc. 470; 9 C. L. R. 260; *Sri Chand* v. *Nimchand Sahu* (1870), 5 B. L. R. App. 25; 13 W. R. C. R. 337; *Krishnarav Jahagirdar* v. *Govind Trimbak* (1875), 12 Bom. H. C. 85.

[1] *Jogendro Chunder Ghose* v. *Nobin Chunder Chottopadhya* (1882), 8 Calc. 353; *Balkrishna Sakharam* v. *Moro Krishna Dabholkar* (1896), 21 Bom. 154. As to a suit by a registered zemindar under Act VIII. (M. C.) of 1865, see *Ayyappa* v. *Venkata Krishnamarazu* (1892), 15 Mad. 484.

[2] *Bhyrub Mundul* v. *Gungaram Bonnerjee* (1872), 12 B. L. R. 290, note; 17 W. R. C. R. 408; *Hurkishor Das Bhooya* v. *Joogul Kishor Saha Roy* (1871), 12 B. L. R. 293, note; 16 W. R. C. R. 281; *Annoda Churn Roy* v. *Kally Coomar Roy* (1878), 4 Calc. 89; 2 C. L. R. 464.

[3] *Guni Mahomed* v. *Doorga Proshad Mytse* (1878), 4 Calc. 96, 2 C. L. R. 370; *Ganga Narayan Das* v. *Saroda Mohan Roy* (1869), 3 B. L. R. A. C. 230; 12 W. R. C. R. 30; *Lootfulhuck* v. *Gopee Churn Mojoomdar* (1880), 5 Calc. 941; 6 C. L. R. 402; *Doorga Churn Surma* v. *Jampa Dossee* (1873), 12 B. L. R. 289; 21 W. R. C. R. 46; *Rakhal Chunder Roy Chowdhry* v. *Mahtab Khan* (1876), 25 W. R. C. R. 221; *Dinobundhoo Chowdhry* v. *Dinonath Mookerjee* (1873), 19 W. R. C. R. 168; *Shamrathi Singh* v. *Kishan Prasad* (1907), 29 All. 311; *Kashinath Chimnaji* v. *Chimnaji Sadashiv* (1906), 30 Bom. 477; *Haradhun Gossamee* v. *Ram Newaz Missry* (1872), 17 W. R. C. R. 414; *Salehoonissa Khatoon* v. *Mohesh Chunder Roy* (1872), 17 W. R. C. R. 452; *Sree Misser* v. *Crowdy* (1871), 15 W. R. C. R. 243.

[4] (1893), 17 Mad. 122, at pp. 126, 127.

[5] *Rajaram Tewari* v. *Lachman Prasad* (1869), 4 B. L. R. A. C. 118; 12 W. R. C. R. 478; *Dwarkanath Mitter* v. *Tara Prosunna Roy* (1889), 17 Calc. 160; *Kali Chandra Singh* v. *Rajkishore Bhuddro* (1885), 11 Calc. 615; *Kattusheri Pisharath Kanna Pisharody* v. *Vallotil Manakel Narayanan Somayajipad* (1881), 3 Mad. 234; *Parameswaran* v. *Shangaran* (1891), 14 Mad. 489; *Juggodumba Dossee* v. *Haran Chunder Dutt* (1868), 10 W. R. C. R. 108; *Gokool Pershad* v. *Etwaree Mahto* (1873), 20 W. R. C. R. 138.

[6] *Jadu Dass* v. *Sutherland* (1878), 4 Calc. 556; 3 C. L. R. 223; *Doorga Churn Surma* v. *Jampa Dassee* (1873), 12 B. L. R. 289; 21 W. R. C. R. 46. See, however, *Jadoo Shat* v. *Kadumbinee Dassee* (1881), 7 Calc. 150.

[7] *Kalidas Kevaldas* v. *Nathu Bhagvan* (1883), 7 Bom. 217; *Shamrathi Singh* v. *Kishan Prasad* (1907), 29 All. 311; *Ramsebuk* v. *Ramlall Koondoo* (1881), 6 Calc. 815; 8 C. L. R. 457; *contrâ Labhu Ram* v. *Kanshi Ram* (1905), 76 P. L. R. Cf. *Ramdoyal* v. *Junmenjoy Coondoo* (1887), 14 Calc. 791.

entered into a contract in his own name he can enforce it alone.[1]

Where he has been put in possession of a portion of the property by the others, he may be able to sue alone in respect of it.[2]

A coparcener can sue for damages for an act by which he is individually damnified.[3]

MANAGER.

Manager.

The property of a joint family is ordinarily managed by one of the coparceners who represents the family to the outside world. The father, if living, of a family governed by the Mitakshara school of law would be the manager.[4] In other cases, the eldest male member of the family would ordinarily, but not necessarily, be selected.[5]

When the coparceners cannot agree as to the selection of a manager, a partition seems to be the only practical remedy.

In Bengal the manager is called the "*Karta*."

The manager is not an ordinary agent of the family.[6] He is thus described by Mr. Cowell[7]: "When, therefore, we come to define the relation of each member, especially of the managing member, to the joint family and the joint estate, we are brought into contact with a relationship which has no counterpart in English law. Neither the term 'partner,' nor 'principal,' nor 'agent,' nor even 'coparcener,' will strictly apply. He is, in fact, a sort of representative owner, his independent rights being limited

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[1] *Bungsee Singh* v. *Soodisht Lall* (1881), 7 Calc. 739; 10 C. L. R. 263.

[2] *Amir Singh* v. *Moazzum Ali Khan* (1875), 7 N. W. P. 58.

[3] *Gopee Kishen Gossain* v. *Ryland* (1868), 9 W. R. C. R. 279. As, for instance, a claim for mesne profits, *Chundee Chowdhry* v. *Macnaghten* (1875), 23 W. R. C. R. 386.

[4] See *Surja Prosad* (*Lala*) v. *Golab Chand* (1900), 27 Calc. 724, at p. 743; 4 C. W. N. 701, at p. 711.

[5] See K. K. Bhattacharya's "Joint Hindu Family," pp. 209, 223. As to the disqualification of a father, or other manager, see *ibid.*, pp. 220, 221.

[6] *Muhammad Askari* v. *Radhe Ram Singh* (1900), 22 All. 307, at pp. 317, 320.

[7] "Tagore Law Lectures," 1870, p. 108.

on all sides by the correlative rights of others, and burdened with a liability, coextensive with his ownership, to provide for the maintenance of the family."

In dealing with the same question, the Judicial Committee said,[1] "The relation of such persons is not that of principal, or agent, or of partners; it is much more like that of trustee and cestui que trust."

Guardianship of share in joint family property.

The manager is the *de facto* guardian of the interests of minor coparceners in the coparcenary property.[2]

"A guardian of the property of an infant cannot properly be appointed in respect of the infant's interest in the property of an undivided Mitakshara family . . . on the plain ground that the interest of a member of such a family is not individual property at all, and that therefore a guardian, if appointed, would have nothing to do with the family property."[3] These observations of the Judicial Committee would apparently apply also to the appointment of a guardian by a High Court.[4] This principle does not apply when all the coparceners are minors and a guardian of the property is appointed of the whole number, but the order should reserve liberty to any minor

[1] *Annamalai Chetty* v. *Murugasa Chetty* (1903), 30 I. A. 220, at p. 228; 26 Mad. 544, at p. 553; 7 C. W. N. 754, at p. 765. See *Chuckun Lall Singh* v. *Poran Chunder Singh* (1868), 9 W. R. C. R. 483.

[2] As to his powers of sale, see *post*, pp. 280 *et seq.*

[3] *Gharib-ul-lah* v. *Khalak Singh* (1903), 30 I. A. 165, at p. 170; 25 All. 407, at p. 416; 7 C. W. N. 681, at p. 687; *Bindaji Laxuman Triputikar* v. *Mathurabai* (1905), 30 Bom. 152. See *Bandhu Prasad* v. *Dhiraji Kuar* (1898), 20 All. 400. *Virupakshappa* v. *Nilgangava* (1894), 19 Bom. 309; *Sham Kuar* v. *Mohanunda Sahoy* (1891), 19 Calc. 301; *Jhabbu Singh* v. *Ganga Bishan* (1895), 17 All. 529. In *Doorga Persad* v. *Kesho Persad Singh* (1882), 9 I. A. 27; 8 Calc. 656, it was taken for granted that a certificate under Act XL. of 1858 could be given to a co-sharer. Cf. Act IV. of 1892, s. 2, Act I. (M. C.) of 1902, s. 17.

[4] In *In re Manilal Hurgovan* (1900), 25 Bom. 353, the High Court of Bombay, under its general jurisdiction, and apart from the Guardians and Wards Act, appointed a guardian of the interest of a minor in property held by a family governed by the Mitakshara school of Hindu law. In doing so the Court said (at p. 357), "But in coming to this conclusion we desire to add that it is a power to be exercised with the greatest caution. We make the appointment in this case because the person applying to be appointed the guardian is also the manager of the family to which the minor belongs, and thus we do not introduce into the family any element of possible disturbance. I can hardly imagine a case in which it would be right to grant such an appointment unless the applicant were the manager, and it is expressly upon this ground that we make the appointment in this case." See also *Jairam Luxmon* (1892), 16 Bom. 634; *Jagannath Ramji* (1893), 19 Bom. 96.

on attaining majority to apply for removal of the guardian or restriction of his power.[1]

Where the minor has separate property there would be no objection to the appointment of a guardian,[2] and in any case a guardian of his person can be appointed.[3]

Representation of authority. When the members of the family have represented that a member other than the manager is entitled to act as such, they are bound by his acts in the same as if he had been *de jure* manager.[4]

Duty of manager. The duty of the father or other manager is to manage the property of the joint family for the benefit of such family as a whole; to realize the income of the family property, pay the debts[5] and other outgoings connected with the management, and expend the residue for the benefit of the family and its members. He must provide for the maintenance, education, marriages, shrads, and other usual religious expenses of the coparceners,[6] and of such members of their family as they are, or were when alive, legally or morally bound to maintain,[7] including their illegitimate sons when not coparceners,[8] and also of persons disqualified from inheritance and their families.[9] In expending money for the benefit of an individual member or his family, he need not take into account the share which such member would be entitled to on a partition.[10]

Widows and daughters entitled to maintenance out of coparcenary property would lose the right under the same

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[1] *Bindaji Laxuman Triputikar* v. *Mathurabai* (1905), 30 Bom. 152.

[2] See *Bandhu Prasad* v. *Dhiraji Kuar* (1898), 20 All. 400.

[3] *Virupakshappa* v. *Nilgangava* (1894), 19 Bom. 309.

[4] See *Mudit Narayan Singh* v. *Ranglal Singh* (1902), 29 Calc. 797; *Krishna Ayyar* v. *Krishnasami Ayyar* (1900), 23 Mad. 597. Act I. of 1872, s. 115.

[5] Where he cannot pay the debts out of income, he may have to alienate the property, see *post*, pp. 280 *et seq.*

[6] *Ante*, p. 242.

[7] As to widows, see *ante*, p. 85. As to the marriage of daughters, see *Vaikuntam Ammangar* v. *Kallapiran Ayyangar* (1900), 23 Mad. 512.

[8] *Ante*, p. 233.

[9] *Ante*, p. 235. "Mitakshara," chap. ii. s. 10, paras. 12–14; "Dayabhaga," chap. v. paras. 10, 11; "Vyavahara Mayukha," chap. iv. s. 11, para. 10; "Dattaka Chandrika," s. 6, para. 2; K. K. Bhattacharya's "Law of the Joint Family," p. 295. A list of the persons entitled under the Rishi texts to maintenance, is to be found in R. C. Mitra's "Law of Joint Property," pp. 66–68.

[10] See K. K. Bhattacharya, "Law of the Joint Hindu Family," p. 193.

circumstances as those which would deprive them of maintenance from the separate estate of their deceased husband or father.[1]

"Of course no member of a joint Hindu family is liable to his coparceners for anything which might have been actually consumed by him in consequence of his having a larger family to support, or of his being subject to greater expenses than the others; but this is simply because all such expenses are justly considered to be the legitimate expenses of the whole family. Thus, for instance, one member of a joint Hindu family may have a larger number of daughters to marry than the others. The marriage of each of those daughters to a suitable bridegroom is an obligation incumbent upon the whole family so long as it continues to be joint, and the expenses incurred on account of such marriage must be necessarily borne by all the members without any reference whatever to respective interests in the family estate." [2]

Arrangement as to management.

It is competent to the members of the family to make a special arrangement as to the accountability of the manager,[3] or as to the way in which the family is to be managed.

Separate account of expenditure.

By arrangement a manager may keep a separate account of expenditure on behalf of a particular member of the family, and on a partition such member may become liable for the amount appearing due on such account.[4]

Account by manager.

In a suit for partition a coparcener can require the manager to furnish an account of his dealings with the coparcenary property for the purpose of ascertaining the amount of the property to be partitioned.[5]

In the case of a partition between members who have been in possession of different portions there may be no such right to an account.[6]

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[1] *Ante*, pp. 81, 112.

[2] *Abhaychandra Roy Chowdhry* v. *Pyari Mohan Guho* (1870), 5 B. L. R. 347, at p. 349; 13 W. R. F. B. R. 75. See *Soorjeemoney Dossee* (*Sreemutty*) v. *Denobundoo Mullick* (1857), 6 M. I. A. 526, at p. 540. See *Ranganmani Dasi* (*S. M.*) v. *Kasinath Dutt* (1868), 3 B. L. R. O. C. 1, at p. 4, differed from on another point in *Abhaychandra Roy Chowdhry* v. *Pyarimohan Guho* (1870), 5 B. L. R. 347; 13 W. R. F. B. R. 75.

[3] See *Ramabhadra* (*Rajah Setrucherla*) v. *Virabhadra Suryanarayana* (*Rajah Setrucherla*) (1899), 26 I. A. 167; 22 Mad. 470; 3 C. W. N. 533.

[4] *Soorjeemoney Dossee* (*Sreemutty*) v. *Denobundoo Mullick* (1857), 6 M. I. A. 526, at. p 540.

[5] *Damodardas Maneklal* v. *Uttamram Maneklal* (1892), 17 Bom. 271. See *Venkata Narasimha Naidu* (*Raja Bommadevara*) v. *Bhashyakarlu Naidu* (*Raja Bommadevara*) (1902), 29 I. A. 76, at p. 81; 25 Mad. 367, at p. 379; 6 C. W. N. 641, at p. 647; *Soorjeemoney Dossee* (*Srcemutty*) v. *Denobundhoo Mullick* (1857), 6 M. I. A. 526, at p. 540.

[6] *Konerrav* v. *Gurrav* (1881), 5 Bom. 589, as explained in *Damodardas Maneklal* v. *Uttamram Maneklal* (1892), 17 Bom. 271, at pp. 278, 279.

Although he does not seek for partition, a coparcener, who does not himself take part in the management of the property, may at any time by suit require the manager to account for his dealings with the family property,[1] but he is not entitled, while he remains undivided, to require any particular share of the profits to be made over to him.[2]

The cost of taking such account would probably not be on the same footing as the costs of an account, which is ancillary to partition. The Court would probably, unless default appeared in the manager's accounts, or unless the manager had declined to render any information to his coparceners, or where the person seeking the account was in possession of complete information as to the accounts, require the coparcener asking for an account to pay the costs. Where the account is ancillary to the partition, the costs would ordinarily be borne in proportion to the shares.

In furnishing such account, the managing member of a joint family is entitled to credit for all sums of money *bonâ fide* spent by him for the benefit of the joint family. He must be debited with all sums which he has actually misappropriated, or which he has spent for purposes other than those in which the joint family was interested.[3]

"What that account should be, so as to discharge him from his liability to account as manager, and what objections the other members can take to it, must . . . depend on the conduct of the manager and the other members, the nature of the property, and the circumstances of the family, and cannot be satisfactorily stated in definite terms."[4]

An arrangement between the coparceners as to the management of the property may be such as to render the manager liable to an account on the footing of an ordinary agency.[5]

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[1] *Abhaychandra Roy Chowdhry* v. *Pyari Mohan Guho* (1870), 5 B. L. R. 347; 13 W. R. F. B. R. 75; *Nowlaso Kooeree* (*Mussamut*) v. *Lalljee Modi* (1874), 22 W. R. C. R. 202.

[2] See *Shudanund Mohapattur* v. *Bonomalee Doss Mohapattur* (1866), 6 W. R. C. R. 256, at p. 259; *Ganpat* v. *Annaji* (1898), 23 Bom. 144; *Chuckun Lall Singh* v. *Poran Chunder Singh* (1868), 9 W. R. C. R. 483, as explained in *Abhaychandra Roy Chowdhry* v. *Pyari Mohan Guho* (1870), 5 B. L. R. 347, at pp. 354–356; 13 W. R. F. B. R. 75, at p. 79; *Nowlaso Kooeree* (*Mussamut*) v. *Lalljee Modi* (1874), 22 W. R. C. R. 202.

[3] *Abhaychandra Roy Chowdhry* v. *Pyari Mohan Guho* (1870), 5 B. L. R. 347, at p. 349; 13 W. R. F. B. R. 75.

[4] *Damodardas Maneklal* v. *Uttamram Maneklal* (1892), 17 Bom. 271, at p. 279.

[5] *Ramabhadra* (*Rajah Setrucherla*) v. *Virabhadra Suryanarayana* (*Rajah Setrucherla*) (1899), 26 I. A. 167; 22 Mad. 470; 3 C. W. N. 533. See *Shankar Baksh* v. *Hardeo Baksh* (1888), 16 I. A. 71; 16 Calc. 397.

A coparcener is not, except under special circumstances, entitled to ask for an account of a portion of the property only. Where a trading business forms a part of the assets of the joint family, one member cannot sue for an account of past profits and losses, apart from the accounts of the joint family.[1]

Powers of manager.

The manager represents the family in transactions with outsiders. He has the ordinary powers incident to the due management of the property;[2] but he can act only with the assent, express or implied, of the body of coparceners.[3]

Family business.

Where a portion of the family assets consists of a trade or other business, the manager, or other member of the family in charge of the business, has all the powers which are usually exercised by a person carrying on such business, and can bind the members of the family by debts properly incurred for the purposes of the business,[4] but minor members are only liable to the extent of the assets of the business, *i.e.* the joint family property.[5]

"A trade like other personal property is descendible amongst Hindus, but it does not follow that a Hindu infant, who by birth or inheritance becomes entitled to an interest in a joint family business, becomes at the same time a member of the trading partnership which carries on

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[1] See *Samalbhai Nathubhai* v. *Someshvar* (1880), 5 Bom. 38, at p. 40.

[2] See *Kotta Ramasami Chetti* v. *Bangari Seshama Nayanivaru* (1881), 3 Mad. 145, at p. 150.

[3] *Chimnaji Govind Godbole* v. *Dinkar Dhondev Godbole* (1886), 11 Bom. 320, at p. 324.

[4] *Ramlal Thakursidas* v. *Lakhmichand Muniram* (1861), 1 Bom. H. C. App. li.; *Samalbhai Nathubhai* v. *Someshvar* (1880), 5 Bom. 38; *Sakrabhai Nathubhai* v. *Maganlal Mulchand* (1901), 26 Bom. 206; *Bemola Dossee* v. *Mohun Dossee* (1880), 5 Calc. 792; 6 C. L. R. 34; *Johurra Bibee* v. *Sree Gopal Misser* (1876), 1 Calc. 470; *Prem Chand Bauthra* v. *Radhica Lall Roy* (1877), 1 Shome, 1; *Joykisto Cowar* v. *Nittyanund Nundy* (1878), 3 Calc. 738; 2 C. L. R. 440; *Baldeo Sonar* v. *Mobarak Ali* (1902), 29 Calc. 583; 6 C. W. N. 370; *Sheo Pershad Singh* v. *Raj Kumar Lal* (1892), 20 Calc. 453; *Morrison* v. *Verschoyle* (1901), 6 C. W. N. 429, at p. 458; *Nagendra Chandra Dey* v. *Amar Chandra Kundu* (1903), 7 C. W. N. 725. *In the matter of Haroon Mahomed* (1890), 14 Bom. 189; *Nunna Brahmayya Setti* v. *Chedaraboyina Venkitaswamy* (1902), 26 Mad. 214.

[5] *Johurra Bibee* v. *Sree Gopal Misser* (1876), 1 Calc. 470; *Bishambhar Nath* v. *Sheo Narain* (1906), 29 All. 166; *Bishambhar Nath* v. *Fateh Lal* (1906), 29 All. 176; *Joykisto Cowar* v. *Nittyanund Nundy* (1878), 3 Calc. 738; 2 C. L. R. 440.

the business. He can only become a member of the partnership by a consentient act on the part of himself and the partners."[1]

The manager cannot start a new business so as to bind minor coparceners,[2] or adult coparceners who do not consent.

The fact that all the coparceners are partners in the business must, if disputed, be proved.[3]

Where the business is carried on by the manager on behalf of the family in partnership with a stranger, the death of the manager dissolves the partnership.[4]

Debts.

Where the manager has contracted debts for a proper joint family purpose, the coparcenary property is liable.[5] The members of the family are liable to the extent of family property which has come to their hands, and if the manager or any other member of the party pays more than his share he can require the others to contribute.[6]

There is no presumption that the action of a manager in contracting debts, etc., is on behalf of the joint family,[7] or that it is within his authority.[8]

Promissory notes.

It has been held that where the manager borrows money on promissory notes for the purpose of a joint family business, or to meet a joint family necessity, the creditor can recover the money from all the members of the family, although they were not all parties to the notes.[9] It is submitted that no one but a party to a promissory note can be held liable thereunder,[10] although the family may be liable for the debt.

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[1] *Lutchmanen Chetty* v. *Siva Prokasa Modeliar* (1899), 26 Calc. 349, at p. 354; 3 C. W. N. 190, at pp. 192, 193; *Anant Ram* v. *Channu Lal* (1903), 25 All. 378.

[2] See *Makhun Lall Dutt* v. *Ramlall Shaw* (1898), 3 C. W. N. 134; *Morrison* v. *Verschoyle* (1901), 6 C. W. N. 429, at p. 458.

[3] *Vadilal Lallubhai* v. *Shah Khushal Dalpatram* (1902), 27 Bom. 157.

[4] *Sokkanadha Vannimundar* v. *Sokkanadha Vannimundar* (1904), 28 Mad. 344.

[5] *Dwarka Nath Chowdhury* v. *Bungshi Chandra Saha* (1905), 9 C. W. N. 879.

[6] See *Bimala Debi* (*Srimati*) v. *Tarasundari Debi* (*Srimati*) (1870), 6 B. L. R. App. 101; 14 W. R. C. R. 480: *Aghore Nath Mukhopadhya* v. *Grish Chunder Mukhopadhya* (1892), 20 Calc. 18; *Baldeo Sonar* v. *Moburak Ali* (1902), 29 Calc. 583; 6 C. W. N. 370.

[7] *Soiru Padmanabh Rangappa* v. *Narayanrao* (1893), 18 Bom. 520; *Krishna Ramaya Naik* v. *Vasudev Venkatesh Pai* (1896), 21 Bom. 808, at p. 815; *Sunkur Pershad* v. *Goury Pershad* (1879), 5 Calc. 321.

[8] See *Nagendra Chandra Dey* v. *Amar Chandra Kundu* (1903), 7 C. W. N. 725.

[9] *Baisnab Chandra De* v. *Ramdhon Dhor* (1903), 11 C. W. N. 139. See also *Nagendra Chandra Dey* v. *Amar Chandra Kundu* (1903), 7 C. W. N. 725; *Krishna Ayyar* v. *Krishnasami Ayyar* (1900), 23 Mad. 597.

[10] See per Davies, J., in *Krishna Ayyar* v. *Krishnasami Ayyar* (1900), 23 Mad. 597, at p. 601.

Election by creditor.

Where the manager contracts a debt which is binding not only on the persons executing the contract but on the other members of the joint family to which he belongs, the creditor may elect to treat the debt as a personal debt, and sue the manager personally, or he may sue him as representative of the family,[1] or the whole family.

In the former case he can only realize his debt from the share of the manager;[2] in the latter case he can recover it from the family property.[3]

Although a manager may have power to deal with the property,[4] he has no power to bind the other members of the family personally.[5]

Compromise.

In the absence of fraud or collusion, the manager can bind the estate by a compromise,[6] or by a reference to arbitration.[7]

He can pay interest on a debt, or can acknowledge one, so as to extend the period of limitation,[8] but he has no power to pay or receive a debt which is barred by limitation, except as against himself.[9]

Fraud.

A coparcener is entitled to have a contract made by the manager without authority or in fraud of the family rescinded.[10]

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[1] *Jumoona Persad Singh* v. *Dignarain Singh* (1883), 10 Calc. 1; 13 C. L. R. 74.

[2] See *post*, p. 280.

[3] See *post*, p. 278.

[4] *Post*, pp. 280 *et seq.*

[5] *Chalamayya* v. *Varadayya* (1898), 22 Mad. 166; *Ranjit Sing* v. *Amulya Prosad Ghose* (1905), 9 C. W. N. 923; cf. *Wagchela Rajsanji* v. *Maludin* (*Shekh*) (1887), 14 I. A. 89; 11 Bom. 551; *Indur Chunder Singh* v. *Radhakishore Ghose* (1892), 19 I. A. 90; 19 Calc. 507; *Ranmal Singji* (*Maharana Shri*) v. *Vadilal Vakhatchand* (1894), 20 Bom. 61; *Surendra Nath Sarkar* v. *Atul Chandra Roy* (1907), 34 Calc. 892; *Bhaoul Sahu* v. *Baij Nath Pertab Narain Singh* (1907), 12 C. W. N. 256,

[6] *Pitam Singh* v. *Ujagar Singh* (1878), 1 All. 651.

[7] *Jagan Nath* v. *Manun Lal* (1894), 16 All. 231.

[8] *Bhasker Tatya Shet* v. *Vijalal Nathu* (1892), 17 Bom. 512; *Chinnaya Nayudu* v. *Gurunatham Chetti* (1881), 5 Mad. 169; *Kumarasami Nadan* v. *Pala Nagappa Chetti* (1878), 1 Mad. 385. As to the power of a father to bind his son, see *Narayanasami Chetti* v. *Samidas Mudali* (1883), 6 Mad. 293.

[9] *Chinnaya Nayudu* v. *Gurunatham Chetti* (1881), 5 Mad. 169; *Dinkar* v. *Appaji* (1894), 20 Bom. 155; *Sobhanadri Appa Rau* v. *Sriramulu* (1893), 17 Mad. 221; *Gopalnarain Mozoomdar* v. *Muddomutty Guptee* (1874), 14 B. L. R. 21.

[10] *Ravji Janardan Sarangpani* v. *Gangadharbhat* (1879), 4 Bom. 29.

Arrangements.

A manager has power to make all necessary arrangements as to the mode of enjoyment of the joint property by the coparceners, as to their commensality, and as to their religious duties and observances.[1]

Where a son had taken possession of a portion of the coparcenary property against the will of his father, who was the manager, he was ejected.[2]

Discretion of manager.

Where the discretion of the managing member is exercised *bonâ fide* and for the benefit of the estate, and the family have the benefit, such discretion should not be narrowly scrutinized.[3]

Decree against manager.

The members of a family are all bound by a decree obtained *bonâ fide* against the manager, as such, for a debt duly incurred in the management of the property, whether it were or were not charged upon the family property, and by a sale of the family property in pursuance of such decree, or in any suit brought in respect of the family property,[4] although they were not parties to the suit.[5] When they are of age and acquiesce in the conduct of the suit by their father, or other manager, the coparceners would the more clearly be bound by the decree.[6]

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[1] *Raghunadha (Sri)* v. *Brozokishoro (Sri)* (1876), 3 I. A. 154, at p. 191; 1 Mad. 69, at p. 81; 25 W. R. C. R. 291, at p. 302. See *Romesh Chunder Bhuttacharjee* v. *Soorjo Coomar Bhuttacharjee* (1866), 5 W. R. C. R. 90.

[2] *Baldeo Das* v. *Sham Lal* (1875), 1 All. 77. This was put upon the ground that the son had no independent dominion.

[3] *Ratnam* v. *Govindarajulu* (1877), 2 Mad. 339, at p. 341.

[4] As, for instance, a decree charging the family property with maintenance, *Minakshi* v. *Chinnappa Udayan* (1901), 24 Mad. 689.

[5] *Kunjan Chetti* v. *Sidda Pillai* (1898), 22 Mad. 461; *Jogendro Deb Roy Kut* v. *Funindro Deb Roy Kut* (1871), 14 M. I. A. 367, at p. 376; 11 B. L. R. 244, at p. 249; 17 W. R. C. R. 104, at p. 106; *Hari Vithal* v. *Jairam Vithal* (1890), 14 Bom. 597; *Doulut Ram* v. *Mehr Chand* (1887), 14 I. A. 187; 15 Calc. 70; *Bissessur Lall Sahoo* v. *Luchmessur Singh (Maharajah)* (1879), 6 I. A. 233; 5 C. L. R. 477; *Baldeo Sonar* v. *Mobarak Ali* (1902), 29 Calc. 583; 6 C. W. N. 370; *Ram Sevak Das* v. *Raghubar Rai* (1880), 3 All. 72; *Jeo Lal Singh* v. *Gunga Pershad* (1884), 10 Calc. 996; *Sakharam* v. *Devji* (1898), 23 Bom. 372; *Bhana* v. *Chindhu* (1896), 21 Bom. 616; *Krishnama* v. *Perumal* (1885), 8 Mad. 388; *Gan Savant Bal Savant* v. *Narayan Dhond Savant* (1883), 7 Bom. 467. See *Subramaniyayyan* v. *Subramaniyayyan* (1882), 5 Mad. 125. As to suits brought against a father governed by the Mitakshara law, see *post*, p. 315.

[6] See *Kunjan Chetti* v. *Sidda Pillai* (1899), 22 Mad. 461.

If a manager (with the acquiescence, express or implied, of the adult members of the family) bring a suit on behalf of the family, and no objection be made by the defendant, a decree can be made; but a defendant may protect himself by insisting that the other members of the family be brought on the record.[1] There is a conflict of decisions as to whether, in a suit on a mortgage instituted since the Transfer of Property Act[2] came into force, any but the actual parties are bound.[3]

In *Kashinath Chimnaji* v. *Chimnaji Sadashiv*,[4] Scott, J., sitting on the Original side of the Bombay High Court, said, "As a matter of practice suits are not filed in this Court[5] by managers representing their infant coparceners; the practice is to join all parties interested, but it would seem that even if in the face of the plaint there was an allegation of a sole plaintiff that he sued as manager on behalf of a coparcenary, the minor coparcener would not be bound by proceedings, unless by judicial sale under the decree, rights had been created in third parties, and no prejudice were shown to the absent minors."

As to parties to suits, see *ante*, p. 268.

All members of a family are bound by decrees in suits brought by or against the manager of a joint family business as such, even though they are not parties to the suit;[6] but in a suit brought by such manager the defendant may insist upon all the members of the family who are members of the partnership being brought upon the record.[7]

Minor members of the family who have not by a consentient act become members of the partnership are not necessary parties to the suit.[8]

The decree on a mortgage is equally binding when the manager

[1] See *Guruvayya Gouda* v. *Dattatraya Anant*, 28 Bom. 11; *Thakurmani Singh* v. *Dai Rani Koeri* (1906), 33 Calc. 1079; *Angamuthu Pillai* v. *Kolandavelu Pillai* (1899), 23 Mad. 190; *Gan Savant Bal Savant* v. *Narayan Dhond Savant* (1883), 7 Bom. 467; *ante*, p. 268.

[2] Act IV. of 1882.

[3] See *post*, pp. 311–313.

[4] (1906), 30 Bom. 477, at p. 486. See, however, *Bissessur Lall Sahoo* v. *Luchmessur Singh (Maharajah)* (1879), 6 I. A. 233, at p. 237; 5 C. L. R. 477, at p. 480, and cases *ante*, p. 278, note 5.

[5] The practice is the same on the Original side of the Bengal High Court.

[6] *Baldeo Sonar* v. *Mobarak Ali Khan* (1902), 29 Calc. 583; 6 C. W. N. 370; *Sheo Pershad Singh* v. *Rajkumar Lal* (1892), 20 Calc. 453; *Phul Chand* v. *Lachmi Chand* (1882), 4 All. 486. See *Sundar Lal* v. *Chhitar Mal* (1906), 29 All. 1.

[7] *Shamrathi Singh* v. *Kishan Prasad* (1907), 29 All. 311. See *Alagappa Chetti* v. *Vellian Chetti* (1894), 18 Mad. 33; *Lutchmanen Chetty* v. *Sivaprokasa Modeliar* (1899), 26 Calc. 349; 3 C. W. N. 190; *ante*, p. 268.

[8] *Lutchmanen Chetty* v. *Sivaprokasa Modeliar* (1899), 26 Calc. 349; 3 C. W. N. 190.

happens to have been appointed as guardian by the Court, but has obtained no sanction from the Court.[1]

An appeal by the manager as representative of the family is on the same footing as a suit brought by him.[2]

When a suit on a mortgage or other contract has been brought against the manager, it has been held that there is nothing to prevent another suit against the other members of the family on the same cause of action.[3]

A decree, even for a joint family debt, in a suit by or against the manager alone, and not as representing the family, does not bind his coparceners,[4] and cannot be executed against the coparcenary property.[5] If a sale takes place in execution of such decree the interest of the defendant alone passes thereby.[6]

ALIENATION AND CHARGE.

Alienation by coparcenary.

Where all the coparceners are adults they can together effect a valid sale or charge of the coparcenary property.[7] A sale or charge can also be made by the adult coparceners, and the manager acting on behalf of the minor coparceners in case of necessity.[8]

Alienation by manager.

A manager can alienate or charge the family property with the express or implied consent of all the then existing adult coparceners, so as to bind them.[9]

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[1] *Ram Avtar Singh* v. *Nursing Narain Singh*, 3 C. L. J. 12. See *Gharib-ul-lah* v. *Khalak Singh* (1903), 30 I. A. 165; 25 All. 407; 7 C. W. N. 681.

[2] See *Jutadhari Lal* v. *Rughoobeer Persad* (1883), 9 Calc. 508; 12 C. L. R. 255.

[3] *Muhammad Askari* v. *Radhe Ram Singh* (1900), 22 All. 307.

[4] See *Sundar Lal* v. *Chhitar Mal* (1906), 29 All. 1; S. C. *ibid.*, p. 215.

[5] *Dwarka Nath Chowdhury* v. *Bungshi Chandra Saha* (1905), 9 C. W. N. 879.

[6] *Armugam Pillai* v. *Sabapathi Padiachi* (1882), 5 Mad. 12; *Subramaniyayyan* v. *Subramaniyayyan* (1882), 5 Mad. 125; *Viraraghavamma* v. *Sanundrala* (1885), 8 Mad. 208; followed in *Abilak Roy* v. *Rubbi Roy* (1885), 11 Calc. 293; *Guruvappa* v. *Thimma* (1887), 10 Mad. 316; *Maruti Narayan* v. *Lilachand* (1882), 6 Bom. 564; *Kisansing Jivansing Pardesi* v. *Moreshwar Vishnu Joshi* (1882), 7 Bom. 91; *Dasaradhi Ravulo* v. *Joddumoni Ravulo* (1882), 5 Mad. 193; *Babaji* v. *Dhuri* (1884), 9 Bom. 305. See *post*, pp. 311, 312.

[7] *Mahabeer Persad* v. *Ramyad Singh* (1873), 12 B. L. R. 90, at p. 94; 20 W. R. C. R. 192, at p. 194.

[8] *Post*, pp. 283 *et seq.*

[9] *Gharibullah* v. *Khalak Singh* (1903), 30 I. A. 165, at p. 169; 25 All. 407, at p. 415; 7 C. W. N. 681, at p. 687; *Miller* v. *Runga Nath*

Ratification is equivalent to consent.[1]

It is unsettled whether a manager can, even in the case of necessity,[2] alienate the family estate, so far as adult coparceners are concerned, without their assent, either express or implied.

The decisions are in conflict.[3] The texts of the Mitakshara[4] upon which the law on the subject is based do not extend to such a case.

It is submitted that in case of necessity[5] the consent may be presumed,[6] but that where there is an express dissent, of which the purchaser had notice, or which he had means of knowing, there could be no valid sale or charge.

As to the powers of a father in a family governed by the Mitakshara law, to sell or charge the property to pay his debts, see *post*, pp. 306–310.

Where the parties intend that all the coparceners should execute the transfer, the document does not take effect by reason only that the managing member has signed it, and that there is a recital of necessity.[7]

Where there is neither consent nor necessity, a manager,

Moulick (1885), 12 Calc. 389; *Buraik Chuttur Singh* v. *Greedharee Singh* (1868), 9 W. R. C. R. 337; *Chhotiram* v. *Narayandas* (1887), 11 Bom. 605.

[1] *Gangabai* v. *Vamanaji A. Datar* (1864), 2 Bom. H. C. 301. Acquiescence shown by receiving the benefit of the purchase-money, with knowledge of the facts, amounts to a ratification, *Modhoo Dyal Singh* v. *Kolbur Singh* (1868), B. L. R. F. B. R. 1018, at p. 1020; 9 W. R. C. R. 511; *White* v. *Bishto Chunder Bose*, 2 Hay, 567.

[2] As to what amounts to necessity, see *post*, pp. 285–287.

[3] In *Phul Chand* v. *Man Singh* (1882), 4 All. 309; *Bishambhur Naik* v. *Sudasheeb Mohapatter* (1864), 1 W. R. C. R. 96, and *Juggurnath Khootia* v. *Doobo Misser* (1870), 14 W. R. C. R. 80, the power was affirmed. See also *Ponnappa Pillai* v. *Pappuvayyangar* (1881), 4 Mad. 1, at p. 18; *Sadabart Prasad Sahu* v. *Foolbash Koer* (1869), 3 B. L. R. F. B. R. 31, at p. 45; 12 W. R. F. B. R. 1, at p. 8; *Bunsee Lall* v. *Aoladh Ahsan* (*Shaikh*) (1874), 22 W. R. C. R., 552. See "Dayabhaga," chap. ii. para. 26; Strange's "Hindu Law," vol. ii. p. 348. It was held in *Deotaree Mahapattur* v. *Damoodhur Mahapattur*, Ben. S. D. A. 1859, p. 1643, that the principles of *Hunooman Persaud Panday's* case (*post*, p. 283) govern all cases of alienation by persons holding limited estates. *Contrâ Muthoora Koonwaree* v. *Bootun Singh* (1870), 13 W. R. C. R. 30; *Miller* v. *Runga Nath Moulick* (1885), 12 Calc. 389, at p. 399. See *Upooroop Tewary* v. *Bandhjee Suhoy* (1881), 6 Calc. 749, at p. 753; 6 C. L. R. 192, at p. 196; Strange's "Hindu Law," vol. i. p. 20.

[4] Chap. i. s. 1, paras. 28, 29.

[5] *Post*, pp. 285–287.

[6] See *Miller* v. *Runga Nath Moulick* (1885), 12 Calc. 389, at p. 399; *Chhotiram* v. *Narayandas* (1887), 11 Bom. 605; K. K. Bhattacharya's "Joint Hindu Family," pp. 487, 488.

[7] *Sivasami Chetti* v. *Sevugan Chetti* (1901), 25 Mad. 389.

other than the father,[1] cannot alienate the family property by sale, mortgage, gift, permanent lease,[2] or otherwise.

Gift by father

Under the Mitakshara law, a father can make a gift of a small portion of the movable coparcenary property for pious purposes, or as a gift of affection, *i.e.* to a child or other near relative.[3] He can also devote a small portion of the immovable property to pious purposes,[4] but not for any other purpose.[5] He cannot do so by will.[6]

Movables.

There is some authority that, even under the Mitakshara law, a father has complete power of disposition over ancestral movables,[7] but it is submitted that he has no greater power over movables than he has over immovable property.[8]

Powers of father.

With these exceptions, and except so far as he has power to alienate the property for payment of his debts,[9] the powers of the father over coparcenary property are not in law greater than those of any other manager.[10]

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[1] As to the powers of a father to alienate for payment of debts, see *post*, pp. 306–310.

[2] *Brojomohun Ghose* v. *Luchmun Singh Thakoor*, W. R. 1864, C. R. 83; *Oahud Buksh* (*Cazee*) v. *Bindoo Bashinee Dossee* (1867), 7 W. R. C. R. 298.

[3] *Bachoo Harkisondas* v. *Mankorebai* (1904), 29 Bom. 51, affirmed on appeal (1907) 34 I. A. 107; 31 Bom. 373; 11 C. W. N. 769: *Kamakshi Ammal* v. *Chakrapany Chettiar* (1907), 30 Mad. 452. See *Hanmantapa* v. *Jivubai* (1900), 24 Bom. 547.

[4] See *Raghunath Prasad* v. *Gobind Prasad* (1885), 8 All. 76; *Gopal Chand Pande* v. *Kunwar Singh* (*Babu*) (1830), 5 Ben. Sel. R. 24 (new edition, 29). "Mitakshara," chap. i. s. 1, para. 28.

[5] *Rayakkal* v. *Subbanna* (1892), 16 Mad. 84; *Baba* v. *Timma* (1883), 7 Mad. 357; *Ganga Bisheshar* v. *Pirthi Pal* (1880), 2 All. 635; *Rottala Runganatham Chetty* v. *Pulicat Ramasami Chetti* (1903), 27 Mad. 162; *Bala* v. *Balaji* (1897), 22 Bom. 825; *Pratabnarayan Das* v. *Court of Wards* (1869), 3 B. L. R. (A. J.) 21; 11 W. R. C. R. 343.

[6] *Rathnam* v. *Sivasubramania* (1892), 16 Mad. 353, *post*, p. 301.

[7] See *Ponnappa Pillai* v. *Pappuvayyangar* (1881), 4 Mad. 1, at p. 47; *Nallatambi Chetti* (*Rayadur*) v. *Mukunda Chetti* (*Rayadur*) (1868), 3 Mad. H. C. 455, at p. 456; *Shib Dayee* v. *Doorga Pershad* (1872), 4 N. W. P. 63, at p. 70. "Mitakshara," chap. i. s. 1, paras. 21, 24.

[8] See *Lakshman Dada Naik* v. *Ramchandra Dada Naik* (1880), 7 I. A. 181; 5 Bom. 48; 7 C. L. R. 320; S. C. in Court below (1876), 1 Bom. 561.

[9] *Post*, pp. 306–310.

[10] *Suraj Bunsi Koer* v. *Sheo Proshad Singh* (1879), 6 I. A. 88, at pp. 100, 101; 5 Calc. 148, at p. 165; 4 C. L. R. 226, at p. 233; *Chinnaya* v. *Perumal* (1889), 13 Mad. 51; *Palanivelappa Kaundan* v. *Mannaru Naikan* (1865), 2 Mad. H. C. 416; *Shudanund Mohapattur* v. *Bonomalee Doss Mohapattur* (1866), 6 W. R. C. R.

Having regard to his position, greater deference will necessarily be paid to his wishes than in the case of any other manager.[1]

In case of necessity,[2] the father or other manager[3] can bind the interest of a minor coparcener by a sale or charge.[4]

This principle was laid down in the leading case of *Hunooman Persaud Panday* v. *Munraj Koonweree* (*Mussamut Babooee*)[5] with regard to the manager for an infant heir, but it has been applied to the managers of joint families acting on behalf of infant coparceners,[6] to widows and daughters inheriting property from their husbands and fathers,[7] to the managers of religious endowments,[8] to managers on behalf of lunatics,[9] and to the holders of impartible estates, which are inalienable by custom.[10]

256, at p. 261; *Ningareddi* v. *Lakshmava* (1901), 26 Bom. 163, at p. 166. An agreement amounting *pro tanto* to an alienation without consideration was set aside in *Bala* v. *Balaji* (1897), 22 Bom. 825.

[1] See R. C. Mitra's "Law of Joint Property," pp. 81, 82.

[2] *Post*, pp. 285–287.

[3] The fact of his acting as manager is sufficient, although he may not be strictly entitled so to act. *Hunooman Persaud Panday* v. *Munraj Koonweree* (*Mussamut Babooee*) (1856), 6 M. I. A. 393, at p. 413; 18 W. R. C. R. note to p. 81. See also *Gunga Pershad* v. *Phool Singh* (1868), 10 W. R. C. R. 106; 10 B. L. R., note to p. 368; *Sheo Shankar Gir* v. *Ram Shewak Chowdhri* (1896), 24 Calc. 77.

[4] No distinction can be drawn between the power to charge and the power to sell. The need which would justify the exercise of the one power would justify the exercise of the other. *Mohanund Mondul* v. *Nafur Mondul* (1899), 26 Calc. 820; 3 C. W. N. 770.

[5] (1856), 6 M. I. A. 393; 18 W. R. C. R. note to p. 81.

[6] *Soorendro Pershad Dobey* v. *Nundun Misser* (1874), 21 W. R. C. R. 196; *Tandavaraya Muduli* v. *Valli Ammal* (1863), 1 Mad. H. C. 398; *Deotaree Mahapattur* v. *Damoodhur Mahapattur*, Ben. S. D. A. 1859, p. 1643.

[7] *Kameswar Pershad* (*Baboo*) v. *Run Bahadoor Singh* (1880), 8 I. A 8; 6 Calc. 843; 8 C. L. R. 361; *Amarnath Sah* (*Lala*) v. *Achan Kuar* (*Rani*) (1892), 19 I. A. 196; 14 All. 420; *Maheshar Baksh Singh* v. *Ratan Singh* (1896), 23 I. A. 57; 23 Calc. 766.

[8] *Sheo Shankar Gir* v. *Ram Shewak Chowdhri* (1896), 24 Calc. 77; *Doorganath Roy* (*Koonwur*) v. *Ram Chunder Sen* (1876), 4 I. A. 52, at p. 63; 2 Calc. 341, at p. 351.

[9] *Goureenath* v. *Collector of Monghyr* (1867), 7 W. R. C. R. 5.

[10] *Gopal Prosad Bhakat* v. *Raghunath Deb* (1904), 32 Calc. 158; 9 C. W. N. 330. As to polygars, see *Kotta Ramasami Chetti* v. *Bangari Seshama Nayanivaru* (1881), 3 Mad. 145. As to the powers of the karnavan of a tarwad, see *Kalliyani* v. *Narayana* (1885), 9 Mad. 266; *Kanna Pisharodi* v. *Kombi Achen* (1885), 8 Mad. 381; *Elayachandidathil Kombi Achen* v. *Kenatumkora Lakshmi Amma* (1882), 5 Mad. 201. As to the alienation of impartible estates which are not inalienable by custom, see *post*, p. 296.

Benefit apart from necessity.

In that case it was said that the power "can only be exercised rightly in a case of need or for the benefit of the estate." Of the large number of cases in which the principles contained in *Hunooman Persaud Panday's*[1] case have been applied, there is not, so far as the writer is aware, any one in which a sale or charge has been justified by benefit apart from necessity, except the case of *Ratnam* v. *Govindarajulu*,[2] where the money was originally raised for, amongst other purposes, enlarging the family dwelling-house, but in that case, as the debt in question was raised for the purpose of paying an antecedent debt, the question as to the original loan did not really arise (see *post*, p. 285). Apart from necessity, it is not easy to say what is for the benefit of the estate. It is clearly not intended that this power should authorize a sale or charge for the purpose only of increasing the immediate income of the estate.[3]

Manager having powers given by Court.

When the manager of a joint family is acting under the authority of Court, as when he has been appointed a guardian under Act VIII. of 1890,[4] or is acting as administrator under the Probate and Administration Act,[5] his powers are limited by the provisions of the Acts under the authority of which he has received an appointment; but as in the case of a family governed by the Mitakshara school of law a guardian cannot be appointed of the interest of a minor in coparcenary property,[6] where such appointment has been made it will not interfere with his powers as manager under Hindu law.[7]

Matters to be regarded.

"Where, in the particular instance, the charge is one that a prudent owner would make in order to benefit the estate, the *bonâ fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on

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[1] 6 M. I. A., at p. 423; 18 W. R. note to p. 81.

[2] (1877), 2 Mad. 339.

[3] See *Radha Pershad Singh* v. *Talook Raj Kooer* (*Mussamut*) (1873), 20 W. R. C. R. 38; *Kaihur Singh* v. *Roop Singh* (1871), 3 N. W. P. H. C. 4.

[4] See *Shurrut Chunder* v. *Rajkissen Mookerjee* (1875), 15 B. L. R. 350; 24 W. R. C. R. 46. In *Tejpal* v. *Ganga* (1902), 25 All. 59, following *Girraj Bakhsh* v. *Hamid Ali* (*Kazi*) (1886), 9 All. 340 (a case under Act XL. of 1858), it was held that there being no sanction, the guardian was relegated to the powers he would have had, if he had not been appointed by the Court. The High Court of Bengal has taken a different view in *Bhupendro Narayan Dutt* v. *Nemye Chand Mondul* (1888), 15 Calc. 627, at p. 636, and *Shurrut Chunder* v. *Rajkissen Mookerjee* (1875), 15 B. L. R. 350; 24 W. R. C. R. 46; and it is submitted that the express terms of Act VIII. of 1890, s. 29, make this question clear. See *Sinaya Pillai* v. *Munisami* (1899), 22 Mad. 289; *Anpurnabai* v. *Durgapa Mahalapa Naik* (1894), 20 Bom. 150.

[5] See *Ranjit Sing* v. *Amullya Prosad Ghose* (1905), 9 C. W. N. 923.

[6] *Ante*, p. 271.

[7] *Gharibullah* v. *Khalak Singh* (1903), 30 I. A. 165; 25 All. 407; 7 C. W. N. 681; *Ram Autar Singh* v. *Nursing Narain Singh*, 3 C. L. J. 12.

the estate, the danger to be averted, or the benefit to be conferred upon it in the particular instance, is the thing to be regarded. But, of course, if that danger arises, or has arisen, from any misconduct to which the lender is or has been a party, he cannot take advantage of his own wrong to support a charge in his own favour against the heir, grounded on a necessity which his wrong has helped to cause. Therefore, the lender . . . unless he is shown to have acted *malâ fide*, will not be affected, though it be shown that with better management the estate might have been kept free from debt."[1]

What amounts to necessity.

All circumstances of pressure which render the raising of money necessary for the protection or preservation of the estate, or for the personal well-being of the coparceners, would support a sale or charge.

Baboo K. K. Bhattacharya, in his "Law of the Joint Hindu Family,"[2] says, "Legal necessity is of various forms. All the indispensable religious ceremonies, the sacraments, such as marriage and the investiture with the sacred thread, the obsequies, the cremation, the periodical oblations to the manes, the ceremonies customary in the family, the subsistence of the family, the education of the younger members, the payment of the ancestral debts, the giving of presents at particular seasons and on special occasions to the relatives, these and a thousand other causes of expenditure are constantly cropping up in a fairly prosperous Hindu joint family. All these are, in the strict sense of the word, lawful necessities."

The following are proper objects for the raising of money:—

(*a*) The payment of Government revenue or of other debts which are payable out of the estate.[3]

The debts of the father or other person through whom the property has been acquired by inheritance, will, or gift, must be paid, provided

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[1] *Hunooman Persaud Panday* v. *Munraj Koonweree* (*Mussamut Babooee*) (1856), 6 M. I. A. 393, at p. 423; 18 W. R. C. R., note to p. 81.

[2] Page 488.

[3] Macnaghten's "Hindu Law," vol. ii. chap. xi. case 2, p. 293. *Goorooprsaud Jena* v. *Muddunmohun Soor*, Ben. S. D. A. Rep., 1856, p. 980; *Bishambur Naik* v. *Sudasheeb Mohapatter* (1864), 1 W. R. C. R. 96. As to the debts of an ancestral business, see *Sakrabai Nathubai* v. *Maganlal Mulchand* (1901), 26 Bom. 206.

they are such as to bind the estate,[1] and therefore the payment of them constitutes a sufficient necessity for sale or mortgage,[2] although no suit may have been instituted for the purpose of recovering them.[3] Where there is a decree the necessity is the more pressing.[4]

According to Hindu law, the payment of a father's debt, even in his lifetime, is a pious duty on the part of a son.[5] In the case of a family governed by the Mitakshara school of Hindu law, the discharge of such debt is therefore such a necessary purpose as to give validity to a sale or mortgage of ancestral property by the father,[6] or after his death,[7] by the manager, whether the sons be minors or adults, provided that the debt has not been incurred for illegal or immoral purposes.

(*b*) The maintenance of the coparceners and of the persons whom they are legally or morally bound to maintain.[8]

(*c*) The reasonable marriage expenses of the female members of his family.[9]

The marriage of male members of the family does not in Mitakshara cases appear to justify a sale or charge,[10] but in a case governed by

[1] Debts barred by limitation do not justify an alienation by the manager, *Melgirappa* v. *Shivappa* (1869), 6 Bom. H. C. 270; *Dinkar* v. *Appaji* (1894), 20 Bom. 155. See *Chinnaya Naidu* v. *Gurunatham Chetti* (1882), 5 Mad. 169. A widow having the pious duty of paying her husband's debts can alienate for the purpose of paying them, although they be barred by limitation. *Udai Chunder Chuckerbutty* v. *Ashutosh Das Mozumdar* (1893), 21 Calc. 190; *Kondappa* v. *Subba* (1889), 13 Mad. 189; *Chimnaji Govind Godbole* v. *Dinkar Dhondev Godbole* (1886), 11 Bom. 320. This same rule applies to the debts of a father-in-law. *Babaji* (*Bhaee*) v. *Gopala Mahipati* (1886), 11 Bom. 325.

[2] See Macnaghten's "Hindu Law," vol. ii. chap. xi. case 6. Act VII. (Bo. C.) of 1866, s. 5. *Gunput Lall* (*Lalla*) v. *Toorun Koonwar* (*Mussamut*) (1871), 16 W. R. C. R. 52; *Soorjoo Pershad* v. *Krishan Pertab* (*Rajah*) (1869), 1 N. W. P. H. C. Rep. 46.

[3] *Kaihur Singh* v. *Roop Singh* (1871), 3 N. W. P. 5.

[4] See *Purmessur Ojha* v. *Goolbee* (*Mussamut*) (1869), 11 W. R. C. R. 446; *Sheoraj Kooer* v. *Nuckchedee Lall* (1870), 14 W. R. C. R. 72.

[5] See *post*, p. 305.

[6] See *post*, pp. 305–309.

[7] *Luchmun Dass* v. *Giridhur Chowdhry* (1880), 5 Calc. 855; 6 C. L. R. 473; *Gunga Prosad* v. *Ajudhia Pershad* (1881), 8 Calc. 131; S. C. *Gunga Pershad* v. *Sheodyal Singh*, 9 C. L. R. 417.

[8] *Makundi* v. *Sarabsukh* (1884), 6 All. 417, at p. 421; *Bishambur Naik* v. *Sudasheeb Mohapatter* (1864), 1 W. R. C. R. 96. As to the right to maintenance, see *ante*, pp. 242, 272.

[9] *Preaj Nurain* v. *Ajodhyapurshad* (1848), 7 Ben. Sel. Rep. 513, 2nd ed., 602; *Gunput Lall* (*Lalla*) v. *Toorun Koonwar* (*Mussamut*) (1871), 16 W. R. C. R. 52.

[10] *Govindarazulu Narasimham* v. *Devarabhotla Venkatanarasayya* (1903), 27 Mad. 206, dissented from in *Sundrabai* v. *Shivnarayana* (1907), 32 Bom. 81.

Bengal law the sale of a share would, it is submitted, be justified. It is submitted that under both schools the sale of separate property would be justified.[1]

(*d*) The performance of an indispensable religious duty,[2] such as the initiatory ceremony of a member of the family,[3] the funeral ceremonies[4] or *sradh* of a member of the family, or of the widow of a member,[5] or a debt incurred on account of such expenditure.[6]

(*e*) Necessary legal expenses.[7]

Recital of necessity.

The instrument effecting a sale or creating a charge need not contain any recital of necessity,[8] but it is always better to insert such recital therein.

Discretion of manager.

In determining whether a sale or mortgage for a family necessity is justifiable, a reasonable latitude must be allowed for the exercise of the manager's judgment, especially in the case of a father or of a manager of a trading family, though this must not be extended so far as to free the persons dealing with him from the need of all precautions where a minor has an interest in the property.[9]

Manager may sell to repay money borrowed on personal credit.

The circumstance that to meet the necessities of his ward the manager has pledged his personal credit, does not disentitle him to charge or sell the property,[10] but he

[1] *Juggessur Sircar* v. *Nilambur Biswas* (1865), 3 W. R. C. R. 217. See *Makundi* v. *Sarabsukh* (1884), 6 All. 417, at p. 420; *Bhoorun Koer* (*Mussamut*) v. *Sahebzadee* (1866), 6 W. R. C. R. 149.

[2] As to pilgrimages, see *Mutteeram Kowar* v. *Gopaul Sahoo* (1873), 11 B. L. R. 416.

[3] Macnaghten's "Hindu Law," vol. ii. chap. xi. case 6, p. 296.

[4] *Gunput Lall* (*Lalla*) v. *Toorun Koonwar* (*Mussamut*) (1871), 16 W. R. C. R. 52; *Nathuram* v. *Shoma Chhagan* (1890), 14 Bom. 562.

[5] *Sukeenath Banoo* v. *Huro Churn Buruj* (1886), 6 W. R. C. R. 34; *Gunput Lall* (*Lalla*) v. *Toorun Koonwar* (*Mussamut*) (1871), 16 W. R. C. R. 52. See Macnaghten's "Hindu Law," vol. ii. chap. xi. case 6, p. 296 (1818); *Sadashiv Bhaskar Joshi* v. *Dhakubai* (1880), 5 Bom. 450.

[6] *Gunput Lall* (*Lalla*) v. *Toorun Koonwar* (*Mussamut*) (1871), 16 W. R. C. R. 52.

[7] *Gunga Pershad* v. *Phool Singh* (1868), 10 W. R. C. R. 106; 10 B. L. R., note to p. 368.

[8] *Woomesh Chunder Sircar* v. *Digumburee Dossee* (1865), 3 W. R. C. R. 154.

[9] *Babaji Mahadaji* v. *Krishnaji Devji* (1878), 2 Bom. 666; *Ratnam* v. *Govindarajulu* (1877), 2 Mad. 339, at p. 341.

[10] *Succaram Morarji* v. *Kalidas Kallianji* (1894), 18 Bom. 631, at p. 635.

can only charge or sell it for the purpose of paying money which the minor was under an obligation to pay.[1]

Purchaser or mortgagee bound to inquire as to necessity.

A person lending money on the security of coparcenary property, or of the property of a minor, or buying that property, is bound to exercise due care and attention in seeing that there was a legal necessity for the loan,[2] and must satisfy himself as well as he can,[3] and as an honest man,[4] with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate,[5] and that circumstances of necessity had occurred which, under the Hindu law, would justify the sale of the property,[6] or a charge upon it at the rate of interest arranged for in the particular instance.[7]

Current account.

In the case of a long series of borrowings it is not always possible to prove exactly the purpose for which any particular item was borrowed. "It will . . . be sufficient for the creditor to show that the family was in chronic need of money for the current outgoings of the family life or its trade necessities, and that the moneys were advanced on the representation of the manager that they were needed for such objects."[8]

Judgment debt.

Where the necessity arises from the pressure of a judgment debt, the person dealing with the manager is entitled to treat the judgment as *primâ facie* proof of necessity.[9]

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[1] *Ranmalsingji* (*Maharana Shri*) v. *Vadilal Vakhatchand* (1894), 20 Bom. 61.

[2] *Gour Pershad Narain* v. *Sheo Pershad Ram* (1866), 5 W. R. C. R. 103; *Lootf Hossein* (*Syud*) v. *Dursun Lall Sahoo* (1875), 23 W. R. C. R. 424; *Gane Bhive Parab* v. *Kane Bhive* (1867), 4 Bom. H. C. A. C. 169.

[3] *Muthoora Doss* v. *Kanoo Beharee Singh* (1874), 21 W. R. C. R. 287; *Dalibai* v. *Gopibai* (1902), 26 Bom. 433.

[4] *Looloo Singh* v. *Rajendur Laha* (1867), 8 W. R. C. R. 364; *Runnoo Pandey* v. *Buksh Ali* (1871), 3 N. W. P. 2. See Act IV. of 1882, s. 38; *Jamsetji N. Tata* v. *Kashinath Jivan Manglia* (1901), 26 Bom. 326.

[5] *Hunooman Persaud Panday* v. *Munraj Koonweree* (*Mussamut Babooee*) (1856), 6 M. I. A. 393; 18 W. R. C. R., note to p. 81; *Bunseedhur* (*Lalla*) v. *Bindeseree Dutt Singh* (*Koonwur*) (1866), 10 M. I. A. 454, at p. 471; 1 Ind. Jur. N. S. 165; *Trimbuck Anunt* v. *Gopallshet* (1863), 1 Bom. H. C. (2nd ed.) 27.

[6] *Kasheenath Bose* v. *Chunder Mohun Nundee*, Ben. S. D. A. 1858, p. 1791; *Nowruttun Kooer* (*Mussamut*) v. *Gouree Dutt Singh* (*Baboo*) (1866), 6 W. R. C. R. 193.

[7] See *Hurronath Roy Bahadoor* (*Rajah*) v. *Rundhir Singh* (1890), 18 I. A. 1; 18 Calc. 311.

[8] *Krishna Ramaya Naik* v. *Vasudev Venkatesh Pai* (1896), 21 Bom. 808, at p. 815.

[9] See *Muddun Thakoor* v. *Kantoo Lall* (1874), 1 I. A. 321, at p. 334; 14 B. L. R. 187, at p. 199; 22 W. R.

Alienation authorized by Court.

Where the manager is authorized by the Court to sell or pledge under secs. 28 or 29 of the Guardians and Wards Act,[1] or sec. 90 of the Probate and Administration Act,[2] or under the powers possessed by the High Courts, a *bonâ fide* purchaser or mortgagee need not investigate behind the order of authority.[3]

Effect of inquiry.

If the person dealing with the manager does make the above inquiries and acts honestly, the real existence of an alleged sufficient, and reasonably credited, necessity is not a condition precedent to the validity of his charge;[4] and, under such circumstances, he is not bound to see to the application of the purchase-money.[5]

"It is obvious that money to be secured on any estate is likely to be obtained on easier terms than a loan which rests on mere personal security; and that, therefore, the mere creation of a charge securing a proper debt cannot be viewed as improvident management. The purposes for which a loan is wanted are often future as regards the actual application, and a lender can rarely have, unless he enters on the management, the means of controlling and rightly directing the actual application."[6]

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[1] VIII. of 1890.

[2] V. of 1881.

[3] *Gungapershad Sahu* v. *Maharani Bibi* (1884), 12 I. A. 47, at p. 50; 11 Calc. 379, at pp. 383, 384. *Sikher Chund* v. *Dulputty Singh* (1879), 5 Calc. 363, at p. 381; S. C. *sub nomine Rajah Lall* v. *Delputty Singh*, 5 C. L. R. 374, at p. 401.

[4] *Hunooman Persaud Panday* v. *Munraj Koonweree* (*Mussamut Babooee*) (1856), 6 M. I. A. 293, at p. 424; 18 W. R. C. R., note to p. 81. See also *Tajoodeen Hossein* (*Sheikh*) v. *Bhugwanlol Sahoo*, Ben. S. D. A. 1860, p. 33; *Mahabeer Pershad Singh* v. *Dumreram Opadhya*, W. R. 1864, C. R. 166; *Trimbuck Anunt* v. *Gopallshet* (1863), 1 Bom. H. C. A. C. (2nd ed.) 27.

[5] *Radha Kishore Mookerjee* v. *Mirtoonjoy Gow* (1867), 7 W. R. C. R. 23; *Sukeenath Banoo* v. *Huro Churn Buruj* (1866), 6 W. R. C. R. 34; *Mahabeer Pershad Sing* v. *Dumreram Opadhya*, W. R. 1864, C. R. 166; *Gomain Sircar* v. *Prannath Goopto* (1864), 1 W. R. C. R. 14; *Kandhia Lal* v. *Muna Bibi* (1897), 20 All. 135; *Gane Bhive Parab* v. *Kane Bhive* (1867), 4 Bom. H. C. A. C. 169; *Ghansham Singh* v. *Badiya Lal* (1902), 24 All. 547.

[6] *Hunooman Persaud Panday* v. *Munraj Koonweree* (*Mussamut Babooee*) (1856), 6 M. I. A. 393, at p. 424; 18 W. R. C. R., note to p. 81.

This principle is to be found in sec. 38 of the Transfer of Property Act,[1] which is as follows:—

"Where any person, authorized only under circumstances in their nature variable to dispose of immovable property, transfers such property for consideration, alleging the existence of such circumstances, they shall, as between the transferee on the one part and the transferor and other persons (if any) affected by the transfer on the other part, be deemed to have existed, if the transferee, after using reasonable care to ascertain the existence of such circumstances, has acted in good faith."

Illustration.

A, a Hindu widow, whose husband has left collateral heirs, alleging that the property held by her as such is insufficient for her maintenance, agrees, for purposes neither religious nor charitable, to sell a field, part of such property, to B. B satisfies himself by reasonable inquiry that the income of the property is insufficient for A's maintenance, and that the sale of the field is necessary, and, acting in good faith, buys the field from A. As between B on the one part and A and the collateral heirs on the other part, a necessity for the sale shall be deemed to have existed.

Nature of inquiry.

The existence of a necessity and of sufficient pressure on the estate is all that the lender need inquire about.[2] He need not inquire into its causes,[3] or what is the exact amount required to be borrowed.[4] Where the lender knows, or by ordinary diligence might have known, that there are funds available and sufficient for paying off the

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[1] Act IV. of 1882. See *Jamsetji N. Tata* v. *Kashinath Jivan Manglia* (1901), 26 Bom. 326, at p. 336.

[2] *Sheoraj Kooer* v. *Nuckchedee Lall* (1870), 14 W. R. C. R. 72.

[3] *Mahabir Kooer* v. *Jubha Singh* (1871), 8 B. L. R. 38; 16 W. R. C. R. 221; *Luchmeedhur Singh (Baboo)* v. *Ekbal Ali* (1867), 8 W. R. C. R. 75.

[4] *Nuffer Chunder Banerjee* v. *Guddadhur Mundle* (1865), 3 W. R. C. R. 122; *Ghansham Singh* v. *Badiya Lal* (1902), 24 All. 547. "If a larger portion than is required is sold, it must be shown by the purchaser that the money required to pay off the claim could not be raised otherwise than by the course adopted." *Luchmeedhur Singh (Baboo)* v. *Ekbal Ali* (1867), 8 W. R. C. R. 75, at pp. 77, 78.

debt, the sale would be invalid.[1] He must be entirely on his guard. He must see whether the family with which he is dealing be divided or undivided; and if the latter, at his peril he must see that the transaction be one by which the coparceners will be concluded.[2]

Consent of adult coparceners.

The fact that the adult members support the manager in the transaction may justify the person advancing the money in giving additional credit to the representatives of the manager.[3]

Subsequent purchaser.

Where the transaction has been unimpeached for some years, a purchaser from the original vendee would not be expected to make minute inquiries.[4]

Burden of proof.

Where it is sought to enforce or support a sale or mortgage by a manager, the purchaser or mortgagee must prove that the transaction was entered into in good faith;[5] that he advanced in consideration of the sale or mortgage a sum of money which was reasonable with reference to the value of the property;[6] that the money was raised or applied[7] for the relief of a recognized necessity,[8] or that proper inquiries were made by him with respect to the existence of a necessity justifying the sale, and that the

[1] *Kaleenarain Roy Chowdhry* v. *Ram Coomar Chand*, W. R. 1864, C. R. 99. See *Gomain Sircar* v. *Prannath Goopto* (1864), 1 W. R. C. R. 14. He need not inquire whether the debt could have been met from other sources. *Ajey Ram* v. *Girdharee* (1872), 4 N. W. P. 110. See *Damoodur Mohapattur* v. *Birjo Mohapattur*, Ben. S. D. A. 1858, p. 802.

[2] Strange's "Hindu Law," vol. i. p. 200; *Dalpatsing* v. *Nanabhai* (1864), 2 Bom. H. C. (2nd ed.) 306.

[3] *Balvant Santaram* v. *Babaji* (1884), 8 Bom. 602, at p. 609.

[4] *Surub Narain Chowdhry* v. *Shew Gobind Pandey* (1873), 11 B. L. R. App. 29.

[5] *Roopnarain Sing* v. *Gugadhur Pershad Narain* (1868), 9 W. R. C. R. 297; *Tandavaraya Mudali* v. *Valli Ammal* (1863), 1 Mad. H. C. 398.

[6] See *Saravana Tevan* v. *Muttayi Ammal* (1871), 6 Mad. H. C. Rep. 371.

[7] *Muthoora Doss* v. *Kanoo Beharee Singh* (1874), 21 W. R. C. R. 287, and cases *ante*, p. 288, and *post*, p. 292.

[8] *Debi Dayal Sahoo* v. *Bhan Pertap Singh* (1903), 31 Calc. 433, at p. 455; 8 C. W. N. 408, at p. 419; *Jamna* v. *Nain Sukh* (1887), 9 All. 493; *Vadali Rama Kristnama* v. *Manda Appaiya* (1865), 2 Mad. H. C. 407; *Amarnath Sah* (*Lala*) v. *Achan Kuar* (*Rani*) (1892), 19 I. A. 196; 14 All. 420; *Bunseedhur* (*Lalla*) v. *Bindeseree Dutt Singh* (1866), 10 M. I. A. 454; 1 Ind. Jur. N. S. 165. The necessity cannot be inferred from the habits and general character of the vendor. *Mittrajit Sing* v. *Raghubansi Sing* (1871), 8 B. L. R. App. 5.

result of such inquiries was such as to satisfy him as an honest man of the existence of such necessity.[1]

In *Hunooman Persaud Panday's case*[2] their Lordships of the Privy Council said, "Next as to the consideration for the bond. The argument for the appellant in the reply, if correct, would indeed reduce the matter for consideration to a very short point; for, according to that argument, if the *factum* of a deed of charge by a manager for an infant be established, and the fact of the advance be proved, the presumption of law is *primâ facie*, to support the charge and the onus of disproving it rests on the heir. For this position a decision, or rather a *dictum* of the Sudder Dewany Adawlut at Agra in the case of *Omed Rai* v. *Heeralall*,[3] was quoted and relied upon. But the *dictum* there, though general, must be read in connection with the facts of that case. It might be a correct course to adopt with reference to suits of that particular character, which was one where the sons of a living father were, with his suspected collusion, attempting, in a suit against a creditor, to get rid of the charge on an ancestral estate created by the father, on the ground of the alleged misconduct of the father in extravagant waste of the estate. Now, it is to be observed that a lender of money may reasonably be expected to prove the circumstances connected with his own particular loan, but cannot reasonably be expected to know, or to come prepared with proof, of the antecedent economy and good conduct of the owner of an ancestral estate; whilst the antecedents of their father's career would be more likely to be in the knowledge of the sons, members of the same family, than of a stranger; consequently, this *dictum* may perhaps be supported on the general principle that the allegation, and proof of facts, presumably in his better knowledge, is to be looked for from the party who possesses that better knowledge,[4] as well as on the obvious ground in

[1] *Amarnath Sah* (*Lala*) v. *Achan Kuar* (*Rani*) (1892), 19 I. A. 196; 14 All. 420; *Kameswar Pershad* (*Baboo*) v. *Run Bahadoor Singh* (1880), 8 I. A. 8; 6 Calc. 843; 8 C. L. R. 361; *Poolunder Singh* v. *Ram Pershad* (1867), 2 Agra H. C. Reps. 147; *Kasheenath Bose* v. *Chunder Mohun Nundee*, Ben. S. D. A. 1858, p. 1791; *Bheknarain Singh* v. *Januk Singh* (1877), 2 Calc. 438; *Jamna* v. *Nain Sukh* (1887), 9 All. 493; *Kumola Pershad Narain Singh* v. *Nokh Lall Sahoo* (1866), 6 W. R. C. R. 30; *Sheo Pershad Ram* v. *Thakoor Pershad* (1866), 5 W. R. C. R. 103; *Trimbuck Anunt* v. *Gopalshet* (1863), 1 Bom. H. C., 2nd ed., 27; *Bhoorun Koer* (*Mussamut*) v. *Sahebzades* (1866), 6 W. R. C. R. 149; *Soorendro Pershad Dobey* v. *Nundun Misser* (1874), 21 W. R. C. R. 196; *Lal Singh* v. *Deo Narain Singh* (1886), 8 All. 279.

[2] *Hunooman Persaud Panday* v. *Munraj Koonweree* (*Mussamut*) *Babooee* (1856), 6 M. I. A. 393, at pp. 418, 419; 18 W. R. C. R. note to p. 81.

[3] 6 S. D. A. N. W. P. 618.

[4] See also the Indian Evidence Act I. of 1872, s. 106, which provides that "when any fact is specially within the knowledge of any person, the burden of proving that fact is upon him."

such suits of the danger of collusion between father and sons in fraud of the creditor of the former. But this case is of a description wholly different, and the *dictum* does not profess to be a general one, nor is it so to be regarded. Their Lordships think that the question on whom does the *onus* of proof lie in such suits as the present is one not capable of a general and inflexible answer. The presumption proper to be made will vary with circumstances, and must be regulated by, and dependent on, them.[1] Thus, where the mortgagee himself, with whom the transaction took place, is setting up a charge in his favour made by one, whose title to alienate he necessarily knew to be limited and qualified, he may be reasonably expected to allege and prove facts presumably better known to him than to the infant heir, namely, those facts which embody the representations made to him of the alleged needs of the estate, and the motives influencing his immediate loan."

Representations by manager.

The representations made by the manager at the time of the loan or alienation are evidence in favour of the person making the advance.

In *Hunooman Persaud Panday's case*[2] the following will be found: "It is to be observed that the representations by the manager accompanying the loan as part of the *res gestæ* and as the contemporaneous declarations of an agent, though not actually selected by the principal, have been held to be evidence against the heir; and as their Lordships are informed that such *primâ facie* proof has been generally required in the Supreme Court of Calcutta between the lender and the heir; where the lender is enforcing his security against the heir, they think it reasonable and right that it should be required. A case in the time of Sir Edward Hyde East, reported in his decisions in the 2nd volume of Morley's "Digest," seems to be the foundation of this practice (see also the case of *Brown* v. *Ram Kunaee Dutt*).[3] It is obvious, however, that it might be unreasonable to require such proof from one not an original party after a lapse of time and enjoyment, and apparent acquiescence; consequently, if, as is the case here as to part of the charge, it be created by substitution of a new security for an older one, when the consideration for the older one was an old precedent debt of an ancestor not previously questioned, a presumption of the kind contended for by the appellant would be reasonable."[4]

Recital of necessity.

A recital of the necessity is by itself not sufficient

[1] See *Kaihur Singh* v. *Roop Singh* (1871), 3 N. W. P. H. C. 4.

[2] *Hunooman Persaud Panday* v. *Munraj Koonweree* (*Mussamut*) *Babooee* (1856), 6 M. I. A. 393, at pp. 419, 420; 18 W. R. C. R. note to p. 81.

[3] Ben. S. D. A. 1853, p. 883.

[4] See *Tasouwar Ali* (*Syud*) v. *Koonj Beharee Lal* (1869), 3 N. W. P. H. C. 8.

evidence of necessity;[1] but it may be some evidence of the representations made at the time.[2]

Adequacy of price.

In determining the question of the validity of a sale, adequacy of price is often an important point to be considered,[3] though inadequacy of price is not necessarily conclusive proof of *malâ fides*.[4] The mere fact that the manager or guardian might at the time of the sale have been able to make some more advantageous arrangement for the estate would not nullify a sale to a *bonâ fide* purchaser for value.[5]

Fraud.

Evidence of the *bonâ fides* of the transaction would of course be subject to be rebutted by evidence that the purchaser had acted *malâ fide*, or in collusion with the manager to the injury of the family.[6] If there be any fraud in proceedings to enforce a charge, which was free from fraud, such proceedings may be set aside.[7]

Charge for a portion of advance.

When the purchaser or lender is unable to prove necessity for the raising of the whole of the money, or he is unable to prove that he was satisfied as to the necessity for the raising of the whole sum, he is entitled to a charge on the property for the amount which it was necessary to raise, or which after reasonable inquiries was shown to him to be necessary to raise.[8] In any case he would be

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[1] See *Raj Lukhee Dabea* v. *Gokool Chunder Chowdry* (1869), 13 M. I. A. 209; 3 B. L. R. P. C. 57; 12 W. R. P. C. 47; *Makundi* v. *Sarabsukh* (1884), 6 All. 417.

[2] See *Sikher Chund* v. *Dulputty Singh* (1879), 5 Calc. 363, at p. 375; 5 C. L. R. 374, at p. 387.

[3] *Daydu* v. *Kamble* (1864), 2 Bom. H. C. 343, at pp. 360, 361; *Khetermonce Dassee* v. *Kishenmohun Mitter* (1863), Marsh. 313; 2 Hay, 196; *Kumola Pershad Narain Singh* (*Baboo*) v. *Nokh Lall Sahoo* (1866), 6 W. R. C. R. 30.

[4] *Kumola Pershad Narain Singh* (*Baboo*) v. *Nokh Lall Sahoo* (1866), 6 W. R. C. R. 30, at p. 33.

[5] *Kool Chunder Surmah* v. *Ramjoy Surmona* (1868), 10 W. R. C. R. 8.

[6] *Bunseedhur* (*Lalla*) v. *Bindeseree Dutt Singh* (1866), 10 M. I. A. 454, at pp. 471, 472; 1 Ind. Jur. N. S. 165.

[7] As to the rights of a purchaser at an execution-sale without notice of the fraud, see *Khetermonee Dossee* v. *Kishenmohun Mitter* (1863), Marsh. 313; 2 Hay, 196. The question whether the sale should be set aside must be determined by the Court in accordance with the principles of justice, equity, and good conscience: *Abdul Haye* v. *Nawab Raj* (1868), B. L. R., F. B. R. 911; 9 W. R. C. R. 196.

[8] *Doorganath Roy* (*Konwur*) v.

entitled to a charge for what is actually applied for the benefit of the family.[1]

Interest.

In the case of his obtaining such charge, a creditor, who has acted fairly, would ordinarily be entitled to interest at the contract rate.[2]

Where the interest is at a rate exceeding the rate at which the manager would have been able to borrow under the circumstances, the Court will reduce the interest to such lower rate, as the rate of interest is a question to which the lender ought to have applied his mind when inquiring as to the necessity.[3]

Burden of proof not altered by foreclosure proceedings or decree.

Foreclosure proceedings, or a purchase at a sale held under a decree in a suit on the mortgage, would not relieve a mortgagee from the burden of proving the *bonâ fides* of the transaction, or place him in any better position with regard to the family,[4] although a *bonâ fide* purchaser without notice at a sale held in execution of a decree in a suit which was properly constituted might not be bound to inquire into the propriety of the loan which formed the basis of the decree.[5]

Acts of co-parcener not manager.

Except where, under the Mitakshara law, the father can alienate or charge the coparcenary property,[6] no individual coparcener, other than the manager, is entitled, without the consent of all the members, to deal with the joint family property.[7]

There may be circumstances where the acts of a member of the family, who is not the manager, can be treated as binding the family,

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Ramchunder Sen (1875), 4 I. A. 52; 2 Calc. 311; *Deputy-Commissioner of Kheri* v. *Khanjan Singh* (1907), 34 I. A. 72; 29 All. 331; 11 C. W. N. 474.

[1] *Muthoora Doss* v. *Kanoo Beharee Singh* (1876), 21 W. R. C. R. 287. See *Hasmat Rai* (*Koer*) v. *Sunder Das* (1885), 11 Calc. 396; *Bunseedhur* (*Lalla*) v. *Bindeseree Dutt Singh* (1866), 10 M. I. A. 454; 1 Ind. Jur. N. S. 165; *Paran Chandra Pal* v. *Karunamayi Dasi* (1871), 7 B. L. R. 90; 15 W. R. C. R. 268.

[2] See *Bunseedhur* (*Lalla*) v. *Bindeseree Dutt Singh* (1866), 10 M. I. A. 454; 1 Ind. Jur. N. S. 165.

[3] See *Hurronath Roy Bahadoor* (*Rajah*) v. *Rundhir Singh* (1890), 18 I. A. 1; 18 Calc. 311.

[4] *Purmanund* v. *Orumbah Koer* (*Musst.*), W. R. 1864, C. R. 143; *Busrung Sahoy Singh* v. *Mautora Chowdhrain* (*Mussamut*) (1874), 22 W. R. C. R. 119.

[5] See *ante*, p. 288.

[6] *Post*, pp. 305–309.

[7] *Guruvappa* v. *Thimma* (1887), 10 Mad. 316; *Rajbulubh Bhooyar* v. *Buneta De* (*Mussummaut*) (1801), 1 Ben. Sel. R. 44 (2nd ed. 59); *Prannath Das* v. *Calishunkar Ghosal* (1801), 1 Ben. Sel. R. 45 (2nd ed. 60). As to the duty of the purchaser, see *Shibosoondery Dossee* v. *Rakhall Doss Sirkar* (1864), 1 W. R. C. R. 38.

on the ground that there was an express or implied agency,[1] as where money is borrowed for family purposes.[2]

As to who may contest an alienation, see *ante*, p. 243, and *post*, pp. 301, 302.

Power of surviving coparcener.

When there are no existing coparceners, the surviving coparcener is, under the Mitakshara law, entitled to dispose of ancestral property as if it were his separate acquisition;[3] but a gift by will will take no effect against a son who was in his mother's womb at the time of the death of his father.[4]

Impartible estate.

The holder of an impartible estate can, in the absence of a custom rendering it inalienable,[5] dispose thereof by will or transfer *inter vivos*, whether he be governed by the Mitakshara[6] or by the Bengal[7] school of law.

A sale which took place at a time when the accepted interpretation of the law was that an impartible estate was inalienable was construed with reference to the law as it then stood.[8]

When the estate is inalienable, the holder can sell or charge it,[9]

[1] See *Krishna Ayyar* v. *Krishnasami Ayyar* (1900), 23 Mad. 597.

[2] *Buldeo Ram Tewaree* v. *Somessur Panray* (1867), 7 W. R. C. R. 490.

[3] *Nagalutchmee Ummal* v. *Gopoo Nadaraja Chetty* (1856), 6 M. I. A. 309; *Vallinayagam Pillai* v. *Pachche* (1863), 1 Mad. H. C. 326; *Narottam Jagjivan* v. *Narsandas Harikisandas* (1866), 3 Bom. H. C. A. C. 6; *Adjoodhia Gir* v. *Kashee Gir* (1872), 4 N. W. P. 31. See *ante*, p. 226. As to the power to deal with separate acquisitions, see *ante*, p. 255. The last surviving member of a Madras *tarwad* can dispose of the *tarwad* property by will, *Alami* v. *Komu* (1888), 12 Mad. 126.

[4] *Minakshi* v. *Virappa* (1884), 8 Mad. 89; *Hanmant Ramchandra* v. *Bhimacharya* (1887), 12 Bom. 105; *Vrandavandas Ramdas* v. *Yamunabhai* (1875), 12 Bom. H. C. A. C. 229.

[5] *Sivasubramania Naicker* v. *Krishnammal* (1894), 18 Mad. 287.

[6] *Venkata Surya Mahipati Rama Krishna Rao Bahadur* (*Sri Raja Rao*) v. *Court of Wards* (1899), 26 I. A. 83; 22 Mad. 383; 3 C. W. N. 415; *Sartaj Kuari* (*Rani*) v. *Deoraj Kuari* (*Rani*) (1888), 15 I. A. 51; 10 All. 272; *Venkata Narasimha Naidu* v. *Bhashyakarlu Naidu* (1899), 22 Mad. 538; *Ram Das Marwari* v. *Braja Behari Singh* (*Tekait*) (1902), 6 C. W. N. 879; *Beresford* v. *Ramasubba* (1889), 13 Mad. 197; *Rup Singh* v. *Pirbhu Narain Singh* (1898), 20 All. 537; *Kapilnauth Sahai Deo* (*Thakoor*) v. *The Government* (1874), 13 B. L. R. 445, at pp. 458–460; 22 W. R. C. R. 17, at pp. 20, 21.

[7] *Udaya Aditya Deb* (*Rajah*) v. *Jadub Lal Aditya Deb* (1881), 8 I. A. 248; 8 Calc. 199. S. C. in Court below, 5 Calc. 113; 4 C. L. R. 181; *Narain Khootia* v. *Lokenath Khootia* (1881), 7 Calc. 461; 9 C. L. R. 243.

[8] *Abdul Aziz Khan Sahib* v. *Appayasami Naicker* (1903), 31 I. A. 1; 27 Mad. 131; 8 C. W. N. 186.

[9] *Gopal Prosad Bhakat* v. *Raghunath Deb* (1904), 32 Calc. 158; 9 C. W. N. 330.

in case of such a necessity as would justify the manager of an infant heir in a sale or charge.[1]

Madras Acts II. of 1902, II. of 1903, and II. of 1904[2] have rendered the holders of a large number of impartible estates in the Madras Presidency incapable of alienating or binding by their debts the estate except under circumstances which would entitle the managing member of a joint Hindu family, not being the father or grandfather of the other coparceners, to make an alienation of the joint property, or incur a debt, binding on the shares of the other coparceners independently of their consent.

ALIENATION OF UNDIVIDED SHARE.

Alienation of undivided share. Bengal school.

A Hindu governed by the Bengal school of Hindu law can deal with his undivided share of joint family property either by act *inter vivos* or by will, in the same way as he can deal with his separate property.[3] On his death intestate his undivided share passes to his heir.

His share may be sold in execution of a decree.

The purchaser has been held entitled to be put into possession of the share bought by him,[4] but not in such a way as to interfere with the family.

In one case[5] when he applied for possession, a share was allotted to him in severalty. This had the same effect as if he had brought a partition suit.

According to the Mitakshara law, except where the debtor is the father, or paternal grandfather, of a coparcener, whose rights are enlarged by his death, a creditor of a coparcener, who has not obtained a judgment and has not attached the debtor's interest[6] before the death of

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[1] *Ante*, pp. 285–287.

[2] S. 4.

[3] *Ram Debul Lall* v. *Mitterjeet Singh* (1872), 17 W. R. C. R. 420; *Anund Chund Rai* v. *Kishen Mohun Bunoja* (1805), 1 Ben. Sel. R. 115 (new edition, 152); *Ramkunhaee Rai* v. *Bung Chund Bunhoojea* (1820), 3 Ben. Sel. R. 17 (new edition, 22); *Kounla Kant Ghosal* v. *Ram Huree Nund Gramee* (1827), 4 Ben. Sel. R. 196 (new edition, 247).

[4] *Rajanikanth Biswas* v. *Ram Nath Neogy* (1883), 10 Calc. 244.

[5] *Bijoy Keshub Roy Bahadoor* (*Koonwar*) v. *Shama Soondaree Dossee* (1865), 2 W. R. M. A. 30. See *Kesubnath Ghose* v. *Hurgovind Bose*, Ben. S. D. A., 1853, p. 768; *Ramtonoo Chatterjee* v. *Ishurchunder Neogee*, Ben. S. D. A., 1857, p. 1585.

[6] This does not include an attachment before judgment: *Ramanayya* v. *Rangappayya* (1893), 17 Mad. 144.

his debtor,[1] has no right to recover his debt from the coparcenary property.[2]

If it were otherwise the right of survivorship[3] would be ineffectual.

Sale in execution.

He can obtain a sale of the undivided interest of his debtor in the property of the coparcenary in execution of a decree,[4] if during the lifetime of the debtor there has been an attachment and order for sale.[5]

A provisional release from attachment does not affect his right.[6]

The purchaser at such sale is not entitled to sue for possession,[7] but is entitled to ascertain his share by such partition as the judgment debtor might have compelled before the alienation of his share took place.[8]

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[1] *Bithal Das* v. *Nand Kishore* (1900), 23 All. 106; *Suraj Bunsi Koer* v. *Sheo Proshad Singh* (1879), 6 I. A. 88, at pp. 108, 109; 5 Calc. 148, at pp. 173, 174; 4 C. L. R. 226, at p. 241; *Bailur Krishna Rau* v. *Lakshmana Shanbhogue* (1881), 4 Mad. 302; *Balkishen* (*Rai*) v. *Sitaram* (*Rai*) (1885), 7 All. 731.

[2] *Bithal Das* v. *Nand Kishore* (1900), 23 All. 106; *Udaram Sitaram* v. *Ranu Panduji* (1875), 11 Bom. H. C. 76; *Narsinbhat* v. *Chenapa* (1877), 2 Bom. 479; *Balbhadhar* v. *Bisheshar* (1886), 8 All. 495; *Jagannath Prasad* v. *Sitaram* (1888), 11 All. 302; *Sadabart Prasad Sahu* v. *Foolbash Koer* (1869), 3 B. L. R. F. B. 31, at p. 35; 12 W. R. F. B. 1, at p. 3.

[3] *Ante*, p. 243.

[4] *Deendyal Lal* v. *Jugdeep Narain Singh* (1877), 4 I. A. 247; 3 Calc. 198; *Suraj Bunsi Koer* v. *Sheo Proshad Singh* (1879), 6 I. A. 88; 5 Calc. 148; 4 C. L. R. 226; *Hurdey Narain Sahu* (*Baboo*) v. *Rooder Perkash Misser* (*Pundit Baboo*) (1883), 11 I. A. 26; 10 Calc. 626; *Tuffuzzool Hossein Khan* (*Syud*) v. *Rughoonath Pershad* (1871), 14 M. I. A. 40, at p. 50; *Jumoona Persad Singh* v. *Dignarain Singh* (1883), 10 Calc. 1; 13 C. L. R. 74; *Jallidar Singh* v. *Ram Lal* (1878), 4 Calc. 723: *Narain Dass* (*Rai*) v. *Nownit Lal* (1879), 4 Calc. 809; 4 C. L. R. 67; *Collector of Monghyr* v. *Hurdai Narain Shahai* (1879), 5 Calc. 425; 5 C. L. R. 112; *Vasudev Bhat* v. *Venkatesh Sambhav* (1873), 10 Bom. H. C. 139; *Udaram Sitaram* v. *Ranu Panduji* (1875), 11 Bom. H. C. 76; *Virasvami Gramini* v. *Ayyasami Gramini* (1863), 1 Mad. H. C. 471; *Goor Surun Dass* v. *Ram Surun Bhukut* (1866), 5 W. R. C. R. 54.

[5] *Suraj Bunsi Koer* v. *Sheo Proshad Singh* (1879), 6 I. A. 88, at p. 109; 5 Calc. 148, at p. 174; 4 C. L. R. 226, at p. 241; *Balkishen* (*Rai*) v. *Sita Ram* (*Rai*) (1885), 7 All. 731. In *Bithal Das* v. *Nand Kishore* (1900), 23 All. 106, the mere attachment seems to have been held sufficient to create a charge, but it is doubtful whether it has such effect, see *Soobhul Chunder Paul* v. *Nitye Churn Bysack* (1880), 6 Cal. 663.

[6] *Ram Chandra Marwari* v. *Mudeshwar Singh* (1906), 33 Calc. 1158; 10 C. W. N. 979.

[7] *Kallapa* v. *Venkatesh Vinayak* (1878), 2 Bom. 676; *Palani Konan* v. *Musa Konan* (1896), 20 Mad. 243.

[8] *Deendyal Lal* v. *Jugdeep Narain Singh* (1877), 4 I. A. 247; 3 Calc. 198; *Hurdey Narain Sahu* (*Baboo*) v. *Rooder Perkash Misser* (1883), 11 I. A. 26; 10 Calc. 626; *Jallidar Singh* v. *Ram Lall* (1878), 4 Calc. 723;

If he has obtained possession he is not liable to be turned out, but the coparceners are entitled to joint possession with him.[1]

Alienation.

The question whether a member of a joint family governed by the Mitakshara school of law can alienate or charge his interest in the coparcenary property, must be determined according to the Province in which the case arises.

It is settled law in Madras[2] and Bombay[3] that a purchaser for value[4] acquires the interest of his vendor, that is a right to partition, and a right on partition to the share to which his vendor would have been entitled,[5] but without partition he cannot acquire a right to any specific property[6] or to a specific share. He is not entitled to possession,[7] his right in that respect being the same as the right of a purchaser at a sale in execution of a decree.[8]

The Judicial Committee has recognized this to be the law applicable in Madras and Bombay.[9]

Sumrun Thakur v. *Chundermun Misser* (1879), 5 C. L. R. 26; 3 C. L. R. 282; *Pandurang Anandrav* v. *Bhaskar Shadashiv* (1874), 11 Bom. H. C. 72; *Lall Jha* (*Baboo*) v. *Juma Buksh* (*Sheikh*) (1874), 22 W. R. C. R. 116; *Maruti Narayan* v. *Lila Chand* (1882), 6 Bom. 564; *post*, pp. 328, 329.

[1] *Mahabalaya* v. *Timaya* (1875), 12 Bom. H. C. 138; *Babaji Lakshman* v. *Vasudev Vinayak* (1876), 1 Bom. 95; *Kallapa* v. *Venkatesh Vinayak* (1878), 2 Bom. 676; *Hari Premji* (*Patil*) v. *Hakamchand* (1884), 10 Bom. 363.

[2] *Virasvami Gramini* v. *Ayyasvami Gramini* (1863), 1 Mad. H. C. 471; *Peddamuthulaty* v. *N. Timma Reddy* (1864), 2 Mad. H. C. 270; *Palanivelappa Kaundan* v. *Mannaru Naikan* (1865), 2 Mad. H. C. 416; *Kotta Ramasami Chetti* v. *Bangari Seshama Nayanivaru* (1881), 3 Mad. 145, at p. 167; *Aiyyagari Venkataramayya* v. *Aiyyagari Ramayya* (1902), 25 Mad. 690.

[3] *Tukaram Ambaidas* v. *Ramchandra* (1869), 6 Bom. H. C. A. C. J. 247; *Vasudev Bhat* v. *Venkatesh Sanbhav* (1873), 10 Bom. H. C. 139; *Fakirapa* v. *Chanapa* (1873), 10 Bom. H. C. 162.

[4] In the case of a sale for inadequate consideration, the purchaser is entitled to a charge for the amount paid. *Rottala Runganathan Chetty* v. *Pulicat Ramasami Chetti* (1903), 27 Mad. 162.

[5] *Ante*, p. 298. He cannot alienate a share in impartible property. See *Byari* v. *Puttanna* (1890), 14 Mad. 38. As to a right of worship, see *Rajessur Mullik* v. *Gopessur Mullik* (1907), 11 C. W. N. 782.

[6] *Venkatachella Pillay* v. *Chinnaiya Mudaliar* (1870), 5 Mad. H. C. 166; *Vitla Butten* v. *Yamenamma* (1874), 8 Mad. H. C. 6.

[7] Act IV. of 1882, s. 44.

[8] *Ante*, p. 298.

[9] *Lakshman Dada Naik* v. *Ranchandra Dada Naik* (1880), 7 I. A. 181, at p. 195; 5 Bom. 48, at p. 62; *Balgobind Das* v. *Narain Lal* (1893), 20 I. A. 116, at p. 125; 15 All. 339, at p. 351; *Suraj Bunsi Koer* v. *Sheo Proshad Singh* (1879), 6 I. A. 88, at pp. 101, 102; 5 Calc. 148, at p. 166; 4 C. L. R. 226, at p. 234.

Position of purchaser.

The purchaser becomes "a sort of tenant in common with the coparceners, admissible as such to his distributive share upon a partition taking place."[1]

As the purchaser does not by the death of his vendor lose his right to a partition, so his position is not improved by the death of other coparceners before partition. He stands in no better position than his alienor, and, consequently, like the latter, is liable to have his share diminished before partition by the birth of other coparceners if he stands by and does not insist upon an immediate partition.[2]

As to the effect of a partition upon the rights of a purchaser or mortgagee of an undivided share, see *post*, p. 357.

Agreement not to sell.

An agreement in restraint of the alienation of an undivided share is valid,[3] but it will not, it is submitted, bind a purchaser, at any rate where he has received no notice of the agreement.[4] It does not affect a purchaser at a sale in execution of a decree.[5]

In Bengal[6] and in the United Provinces[7] a coparcener has no power to alienate by sale or mortgage his undivided share[8] to a stranger or to a coparcener for his own benefit[9] without the consent of his coparceners. This view has been accepted by the Judicial Committee.[10]

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[1] *Vasudev Bhat* v. *Venkatesh* (1873), 10 Bom. H. C. 139, at p. 147. As to a partition at the instance of the purchaser, see *post*, p. 328.

[2] *Gurlingapa* v. *Nandapa* (1896), 21 Bom. 797.

[3] *Lachmi Chand* v. *Tori Lal* (1878), 1 All. 618.

[4] Cf. *Kanna Pisharodi* v. *Kombi Achen* (1885), 8 Mad. 381.

[5] Cf. *Golak Nath Roy Chowdhry* v. *Mathura Nath Roy Chowdhry* (1891), 20 Calc. 273.

[6] *Madho Parshad* v. *Mehrban Singh* (1890), 17 I. A. 194; 18 Calc. 157; *Sadabart Prasad Sahu* v. *Foolbash Koer* (1869), 3 B. L. R. F. B. R. 31; 12 W. R. F. B. 1; and cases there cited: *Nathu Lal Chowdhry* v. *Chadi Sahi* (1869), 4 B. L. R. A. C. 15; 12 W. R. C. R. 447; *Mahabeer Persad* v. *Ramyad Sing* (1873), 12 B. L. R. 90; 20 W. R. C. R. 192; *Bunsee Lall* v. *Aoladh Ahsan* (*Shaikh*) (1874), 22 W. R. C. R. 552; *Chunder Coomar* v. *Hurbuns Sahai* (1888), 16 Calc. 137. As to a lease, see *Ram Debul Lall* v. *Mitterjeet Singh* (1872), 17 W. R. C. R. 420.

[7] *Joynarain Sing* v. *Roshun Sing* 2 S. D. A. N. W. P. (1860), 162; *Goor Pershad* v. *Sheodeen* (1872), 4 N. W. P. 137; *Chamaili Kuar* v. *Ram Prasad* (1879), 2 All. 267; *Rama Nand Singh* v. *Gobind Singh* (1883), 5 All. 384; *Chandar Kishore* v. *Dampat Kishore* (1894), 16 All. 369; *Bhagirathi Misr* v. *Sheobhik* (1898), 20 All. 325. See *Amolak Ram* v. *Chandan Singh* (1902), 24 All. 483.

[8] He can do so when they are so far separate, that each collects his quota of rent separately, *Kalika Sahoy* v. *Gouree Sunkur* (1869), 12 W. R. C. R. 287.

[9] It has been held that he can alienate it for the benefit of the family, *Juggurnath Khootia* v. *Doobo Misser* (1870), 14 W. R. C. R. 80.

[10] *Balgobind Das* v. *Narain Lal* (1893), 20 I. A. 116, at p. 125; 15 All. 339, at p. 351.

The alienation of his share by one member, would imply his consent to the alienation of their shares by the other members.[1]

The alienation will not be set aside at the instance of the alienor or persons claiming through him except upon the terms of refunding the amount paid with interest.[2] Equity on setting aside alienation.

The power to dispose by gift or devise of his interest in coparcenary property in a case subject to the Mitakshara law is disallowed by all the High Courts.[3] Gift or devise.

As a right of survivorship accrues to the other coparceners on the death of coparcener,[4] it follows that there can be no right to dispose of any interest in the coparcenary property by will.[5]

As to the power of the last surviving coparcener, see *ante*, p. 296.

SETTING ASIDE ALIENATION.

An alienation of coparcenary property, or of any interest thereon, by a father or other manager, or by a coparcener or stranger, may be contested by the son or any coparcener Who may contest alienation.

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[1] *Ganraj Dubey* v. *Sheozore Singh* (1880), 2 All. 898.

[2] *Jamuna Parshad* v. *Ganga Pershad Singh* (1892), 19 Calc. 401.

[3] *Baba* v. *Timma* (1883), 7 Mad. 357; *Ponnusami* v. *Thatha* (1886), 9 Mad. 273; *Ramanna* v. *Venkata* (1888), 11 Mad. 246; *Rottala Runganatham Chetty* v. *Pulicat Ramasami Chetti* (1903), 27 Mad. 162; *Gopal Lal* v. *Mahadeo Prasad* (1901), 6 C. W. N. 651; *Gangubai* v. *Ramanna* (1866), 3 Bom. H. C. (A. C. J.) 66; *Udaram Sitaram* v. *Ranu Panduji* (1875), 11 Bom. H. C. 76; *Vrandavandas Ramdas* v. *Yamunabai* (1875), 12 Bom. H. C. 229; *Kalu* v. *Earsu* (1894), 19 Bom. 803. See *Lakshman Dada Naik* v. *Ramchandra Dada Naik* (1880), 7 I. A. 181, at p. 195; 5 Bom. 48, at p. 62; 7 C. L. R. 320, at p. 329. As to the power of a father to make a gift of coparcenary property, see *ante*, p. 282.

[4] *Ante*, p. 243.

[5] *Tottempudi Venkataratnam* v. *Tottempudi Seshamma* (1903), 27 Mad. 228; *Rathnam* v. *Sivasubramania* (1892), 16 Mad. 353; *Vitla Butten* v. *Yamenamma* (1874), 8 Mad. H. C. 6; *Lakshman Dada Naik* v. *Ramchandra Dada Naik* (1880), 7 I. A. 181; 5 Bom. 48; 7 C. L. R. 320; *Harilal Bapuji* v. *Mani* (*Bai*) (1905), 29 Bom. 351; *Chatturbhooj Meghji* v. *Dharamsi Naranji* (1884), 9 Bom. 438; *Lakshmi Shankar* v. *Vaijnath* (1881), 6 Bom. 24; *Adjoodhia Gir* v. *Kashee Gir* (1872), 4 N. W. P. 31; *Buldeo Singh* (*Rajah*) v. *Mahabeer Singh* (1866), 1 Agra H. C. 155; *Minakshi* v. *Virappa* (1884), 8 Mad. 89; Hindu Wills Act (XXI. of 1870), s. 3.

who was born,[1] conceived,[2] or adopted[3] at the time of the completion of the alienation,[4] and is entitled to a share on partition.

A person disqualified from inheritance could not sue, although he might have a right of maintenance.[5]

It has been held that an invalid alienation made without the consent of existing sons can be set aside at the instance of a son who was not born at the time of the alienation,[6] but it is clear that an alienation which by consent or otherwise is binding upon all the coparceners in existence at the time cannot be contested by a person who is born subsequently.[7]

Death of person entitled to contest alienation.

In a family governed by the Mitakshara law a suit to set aside an alienation cannot on the death of the plaintiff be continued by his heir, as his right lapses.[8] Under the Bengal school the right would pass to the heir.

The person entitled to contest an alienation may sue to set aside the alienation, or if it has not taken place may sue for an injunction.[9] Where he cannot obtain substantive relief he can sue for a declaratory decree.[10]

How alienation is to be set aside.

In a case governed by the Bengal school of law a coparcener can sue to set aside an alienation, so far only as it affects his share of the coparcenary property.

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[1] *Girdharee Lall* v. *Kantoo Lall* (1874), 1 I. A. 321; 14 B. L. R. 187; 22 W. R. C. R. 56; *Bholanath Khettry* v. *Kartick Kissen Das Khettry* (1907), 34 Calc. 372; 11 C. W. N. 462; *Raja Ram Tewary* v. *Luchmun Persad* (1867), B. L. R. Sup. Vol. 731, at p. 741; 8 W. R. C. R. 15, at p. 21; *Aghori Ramasarg Sing* v. *Cochrane* (1870), 5 B. L. R. App. 14.

[2] *Madho Singh* v. *Hurmut Ally* (1868), 3 Agra, 432; *Jado Singh* v. *Rance* (*Mussumat*) (1873), 5 N. W. P. 113. See, however, *Goura Chowdhrain* (*Mussamut*) v. *Chummun Chowdhry*, W. R. (1864), C. R. 340. Cf. *Yekeyamian* v. *Agniswarian* (1869), 4 Mad. H. C. 307.

[3] See *Sudanund Mohapattur* v. *Soorjo Monee Dayee* (1869), 11 W. R. C. R. 436; *Rambhat* v. *Lakshman Chintaman Mayalay* (1881), 5 Bom. 630, *ante*, p. 203.

[4] See *Ponnambula Pillai* v. *Sundarapayyar* (1897), 20 Mad. 354.

[5] *Ram Soonder Roy* v. *Ram Sahye Bhugut* (1882), 8 Calc. 919; *Ram Sahye Bhukkut* v. *Laljee Sahye* (*Lalla*), 8 Calc. 149; 9 C. L. R. 487.

[6] *Hurodoot Narain Singh* v. *Beer Narain Singh* (1869), 11 W. R. C. R. 480.

[7] See *Bholanath Khettry* v. *Kartick Kissen Das Khettry* (1907), 34 Calc. 372; 11 C. W. N. 462; *Muthuraman Chetti* v. *Ettapasami* (1899), 22 Mad. 372, at p. 375; *Ramasamayyan* v. *Virasami Ayyan* (1898), 21 Mad. 222.

[8] *Padarath Singh* v. *Raja Ram* (1882), 4 All. 235.

[9] *Knath Narain Singh* v. *Prem Lal Paurey* (1865), 3 W. R. C. R. 102; *Raja Ram Tewary* v. *Luchmun Persad* (1867), B. L. R. Sup. Vol. 731; 8 W. R. C. R. 15; *Retoo Raj Pandey* v. *Lalljee Pandey* (1875), 24 W. R. C. R. 399.

[10] As to declaratory decrees, see Act I. of 1877, s. 42; *Kathama Natchiar* v. *Dorasinga Tever* (1875), 2 I. A. 169; 15 B. L. R. 83; 23 W. R. C. R. 314.

Under the Mitakshara school, in the case of an invalid alienation in the Bombay or Madras Presidencies by a coparcener, the coparcener aggrieved may be entitled to have it set aside except so far as the share of the alienor is concerned,[1] whereas in Bengal or the United Provinces he is entitled to have the whole alienation set aside, subject to such equities as may be applicable.[2]

This distinction arises because a sale of an undivided interest is permissible in the two former Presidencies.[3]

A son is not entitled, during the father's lifetime, to eject the purchaser because the father sells without authority.[4] He may bring a suit for partition, or may possibly, if he sues on behalf of the family, be entitled to a decree for possession[5] on such terms as may be equitable, as, for instance, that the purchaser be entitled to a charge for the money paid by him,[6] or be entitled to sue for partition.[7]

As to the right of the purchaser to compensation when he is ejected after the death of the father, see *post*, p. 304.

Consent of coparcener.

The consent of an adult coparcener or his acquiescence, at any rate where it amounts to an estoppel, prevents him from disputing an alienation made by a father or other manager.[8] The ratification of the alienation by him will also have the same effect.[9]

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[1] See *Marappa Gaundan* v. *Rangasami Gaundan* (1899), 23 Mad. 89.

[2] *Hanuman Dutt Roy* v. *Kishen Kishor Narayan Sing* (*Baboo*), 8 B. L. R. 358; 15 W. R. F. B. 6.

[3] *Ante*, p. 299.

[4] *Baboo Ram* v. *Gajadhur Singh* (1867), Agra H. C. F. B. R. 86; *Pursun Sahoo* v. *Ramdeen Lall*, S. D. A. R. N. W. P., 1852, p. 365; *Chutter Dharee Lal* v. *Bikaoo Lal*, Ben. S. D. A., 1850, p. 282.

[5] *Hanuman Dutt Roy* v. *Kishen Kishor Narayan Sing* (*Baboo*) (1879), 8 B. L. R. 358; 15 W. R. F. B. 6.

[6] *Post*, p. 311.

[7] *Deendyal Lal* v. *Jugdeep Narain Singh* (1877), 4 I. A. 247; 3 Calc. 198; 1 C. L. R. 49; *Hurdey Narain Sahu* (*Baboo*) v. *Rooder Perkash Misser* (*Pundit Baboo*) (1883), 11 I. A. 26; 10 Calc. 626.

[8] See *Miller* v. *Runga Nath Moulick* (1885), 12 Calc. 389; Act I. of 1872, s. 115. The mere absence of objection does not amount to acquiescence, see *Kamakshi Ammal* v. *Chakrapany Chettiar* (1907), 30 Mad. 452.

[9] See *Modhoo Dyal Singh* v. *Kolbur Singh* (1868), B. L. R. F. B. R. 1018, at p. 1020; 9. W. R. C. R. 511, at p. 512; *Gangabai* v. *Vamanaji A. Datar* (1864), 2 Bom. H. C. (2nd ed.) 301. As to ratification of the manager or guardian's acts after the ward has attained majority, see *Chetty Colum Comara Vencatachella Reddyer* v. *Rungasawmy Streemunth Jyengar*

Limitation of suit.

A suit brought by a Hindu governed by the law of the Mitakshara to set aside his father's alienation[1] of ancestral property must be brought within twelve years from the time when the alienee takes possession of the property.[2]

Compensation.

When the coparcener seeking to set aside the alienation, or the family has benefitted by the alienation, it may be equitable to compensate the purchaser or mortgagee.[3]

As to a sale or mortgage by the father, see *post*, p. 311.

The equity to pay compensation only arises when the sale or charge affects the interests of members of the family other than the alienor.[4]

Improvements.

Where the purchaser has, to the knowledge of those interested in setting aside the sale, and without their protest, laid out sums for the improvement or benefit of the property, they may be required to compensate him.[5]

The burden is upon the alienee to show that the money has been applied to family purposes; or that the person seeking to set aside the alienation has benefitted thereby.[6]

Bahadoor (*Rajah*) (1861), 8 M. I. A. 319; *Prosonno Koomar Bural* v. *Sajudoor Ruhman* (*Chowdree*), Ben. S. D. A., 1853, p. 525; *Ramasawmi Aiyan* v. *Venkataramaiyan* (1879), 6 I. A. 196; 2 Mad. 91.

[1] This does not include a sale in execution of a decree: *Issuri Dutt Singh* v. *Ibrahim* (1881), 8 Calc. 653.

[2] Act XV. of 1877, Sched. II. art. 126. See *Raja Ram Tewary* v. *Luchmun Persad* (1867), B. L. R. F. B. R. 731; 8 W. R. C. R. 15; *Munbasi Koer* v. *Nowrutton Koer* (1881), 8 C. L. R. 428; *Beer Pershad* v. *Doorga Pershad*, W. R. 1864, p. 215; *Seetul Pershad Singh* (*Baboo*) v. *Gour Dyal Singh* (*Baboo*) (1864), 1 W. R. C. R. 283 (an alienation by a grandfather); *Beer Kishore Suhye Singh* (*Baboo*) v. *Hur Bullub Narain Singh* (*Baboo*) (1867), 7 W. R. C. R. 502; *Aghori Ramasarg Sing* v. *Cochrane* (1870), 5 B. L. R. App. 14.

[3] See *Madho Parshad* v. *Mehrban Singh* (1890), 17 I. A. 194, at pp. 198, 199; 18 Calc. 157, at pp. 163, 164; *Haunman Dutt Roy* v. *Kishen Kishor Narayan Sing* (*Baboo*) (1870), 8 B. L. R. 358; 15 W. R. F. B. 6; *Surub Narain Chowdhry* v. *Shew Gobind Pandey* (1873), 11 B. L. R. App. 29; *Mahabeer Persad* v. *Ramyad Singh* (1873), 12 B. L. R. 90; 20 W. R. C. R. 192. See, however, *Marappa Gaundan* v. *Rangasami Gaundan* (1899), 23 Mad. 89.

[4] *Virabhadra Gowdu* v. *Guruvenkata Charlu* (1898), 22 Mad. 312. See *Sivaganga Zamindar* v. *Lakshmana* (1885), 9 Mad. 188, at pp. 200, 201.

[5] See Act IV. of 1882, s. 51. *Dattaji Sukharam Rajadhiksh* v. *Kalba Yese Parabhu* (1896), 21 Bom. 749.

[6] *Modhoo Dyal Singh* v. *Kolbur Singh* (1868), B. L. R. F. B. R. 1018; 9 W. R. C. R. 511, differing from *Muddun Gopal Thakoor* v. *Ram Buksh Pandey* (1863), 6 W. R. C. R. 71; *Haunman Dutt Roy* v. *Kishen Kishor Narayan Sing* (*Baboo*) (1870), 8 B. L. R. 358; 15 W. R. F. B. R. 6.

CHAPTER VIII.

THE DEBTS OF A FATHER UNDER THE MITAKSHARA LAW.

Duty of son to pay debts of father.

THE Hindu law imposes upon a son, and grandson, the duty of paying the debts of his father, and paternal grandfather,[1] provided that they have not been incurred for immoral or illegal purposes.[2]

Although, under the Mitakshara system of law, the father takes no greater interest than his son, grandson, or great-grandson when the family is undivided, the father can pay such debts out of the income of the family property,[3] and can charge or sell the family property for that purpose.[4] After his death his sons must pay his debts out of the coparcenary property. Moreover, a creditor can enforce the debt against the family property either during the lifetime of the debtor, or after his death.[5]

"By the Hindu law, 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."[6]

Right of father to alienate for payment of debts.

In a joint family governed by the Mitakshara school of law, a father can bind his sons, grandsons, and great-grandsons by a charge or alienation of the coparcenary estate, or of any portion thereof, for the purpose of paying

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[1] Colebrooke's "Digest," vol. i. pp. 267, 334; "Narada Smriti," chap. iii. paras. 4, 6. See *post*, p. 420.

[2] Colebrooke's "Digest," vol. i. pp. 300, 305, 309, 311.

[3] This follows from his power to charge and sell.

[4] Below and *post*, p. 306.

[5] *Post*, p. 319.

[6] *Hunooman Persaud Panday* v *Munraj Koonweree* (*Mussumat Babooee* (1856), 6 M. I. A. 393, at p. 421; 10 W. R. C. R., note to p. 81; *Girdharee Lall* v. *Kantoo Lal* (1874), 1 I. A. 321, at p. 331; 14 B. L. R. 187, at p. 197; 22 W. R. C. R. 56, at p. 58.

his personal debts,[1] which he has incurred before the date of such charge or alienation,[2] provided that such debts have not been incurred for an illegal or immoral purpose or consideration.[3]

Burden of proof.

A creditor or alienee, claiming under such charge or alienation, would have to prove that the debt existed, or that after due inquiries he, in good faith, believed that it existed.[4] The purchaser in execution of a decree need not prove any inquiry.[5]

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[1] This does not apparently include a claim to damages, see *Pareman Das* v. *Bhattu Mahton* (1897), 24 Calc. 672.

[2] *Khalilul Rahman* v. *Gobind Pershad* (1892), 20 Calc. 328; *Kishun Pershad Chowdhry* v. *Tipan Pershad Singh* (1907), 34 Calc. 735; 11 C. W. N. 613. This will include a prior debt due by the father to the person to whom he mortgaged or conveyed family property, *Badri Prasad* v. *Madan Lal* (1893), 15 All. 75, at p. 80.

[3] *Hunoóman Persaud Panday* v. *Munraj Koonweree* (*Mussamut Babooee*) (1856), 6 M. I. A. 393, at p. 421; 18 W. R. C. R. 81, note; *Surja Prasad* v. *Golab Chand* (1900), 27 Calc. 762; *Laljee Sahoy* v. *Fakeer Chand* (1880), 6 Calc. 135; 7 C. L. R. 97; *Ramphul Singh* v. *Degnarain Singh* (1881), 8 Calc. 517; 10 C. L. R. 489; *Trimbak Balkrishna* v. *Narayan Damodar Dabholkar* (1884), 8 Bom. 481; *Muddun Gopal Lall* v. *Gowrunbutty* (*Mussamut*) (1875), 15 B. L. R. 264; 23 W. R. C. R. 365; *Adurmoni Deyi* v. *Sib Narain Kur* (*Chowdhry*) (1877), 3 Calc. 1; *Venkataramanaya Pantulu* v. *Venkataramana Doss Pantulu* (1905), 29 Mad. 200; *Ponnappa Pillai* v. *Pappuvayyangar* (1881), 4 Mad. 1; *Gangulu* v. *Ancha Bapulu* (1881), 4 Mad. 73; *Ponnappa Pillai* v. *Pappuvayyangar* (1885), 9 Mad. 343; *Lakshman Ram Chandra Joshi* v. *Satyabhamabai* (1877), 2 Bom. 494, at p. 498; *Kastur Bhavani* v. *Appa* (1876), 5 Bom. 621; *Sadashiv Dinkar Joshi* v. *Dinkar Narayan Joshi* (1882), 6 Bom. 520; *Darsu Pandey* v. *Bikarmajit Lal* (1880), 3 All. 125; *Hasmat Rai* (*Koer*) v. *Sunder Das* (1885), 11 Calc. 396; *Gunga Pershad* v. *Sheodyal Singh* (1879), 5 C. L. R. 224, differing from *Bheknarain Singh* v. *Januk Singh* (1877), 2 Calc. 438; *Yenamandra Sitaramasami* v. *Midatana Sanyasi* (1883), 6 Mad. 400; *Pran Krishna Tewary* v. *Jadu Nath Trivedy* (1898), 2 C. W. N. 603; *Hardai Narain* v. *Haruck Dhari Singh* (1882), 12 C. L. R. 104; *Narayana Charya* v. *Narso Krishna* (1876), 1 Bom. 262; *Luchmun Dass* v. *Giridhur Chowdhry* (1880), 5 Calc. 855; 6 C. L. R. 470; *Wajed Hossein* (*Shah*) v. *Nanku Singh* (*Baboo*), 25 W. R. C. R. 311. This rule applies also to an impartible estate, *Veera Soorappa Nayani* v. *Errappa Naidu* (1906), 29 Mad. 481, at any rate, where it is not inalienable, see *ante*, p. 296.

[4] *Subramanya* v. *Sadasiva* (1884), 8 Mad. 75. See *Gurusami Sastrial* v. *Ganapathia Pillai* (1882), 5 Mad. 337; *Yenamandra Sitaramasami* v. *Midatana Sanyasi* (1883), 6 Mad. 400; *Chinnaya* v. *Perumal* (1889), 13 Mad. 51; *Jamsetji N. Tata* v. *Kashinath* (1901), 26 Bom. 326, at p. 336; *Bhowna* (*Mussumat*) v. *Roop Kishore* (1873), 5 N. W. P. H. C. 89; *Maharaj Singh* v. *Balwant Singh* (1906), 28 All. 508, at p. 541. Act IV. of 1882, s. 38, *ante*, p. 290.

[5] *Bhagbut Pershad* v. *Girja Koer* (*Mussumat*) (1888), 15 I. A. 99; 15 Calc. 717.

The burden is then shifted upon the son to prove that the particular debt was contracted for an illegal or immoral purpose, and that the purchaser had notice, or upon reasonable inquiry might have discovered, that they were so contracted.[1]

It is not sufficient for him to show that the father was of licentious or extravagant habits.[2]

"When ancestral property has passed out of the family either under a conveyance executed by the 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 latter's debt, his sons by reason of their duty to pay their father's debts cannot recover that property, unless they show that the debts were of a kind for which they would not have been liable, and that the purchasers had notice that they were so contracted . . . the purchasers at an execution sale, being strangers to the suit, if they have not notice that the debts were so contracted, are not bound to make inquiry beyond what appears on the surface of the proceedings."[3]

A son who was not born at the time that the debt was originally incurred[4] cannot dispute a mortgage made to pay off the debt.[5]

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[1] *Girdharee Lall* v. *Kantoo Lall* (1874), 1 I. A. 321; 14 B. L. R. 187; 22 W. R. C. R. 56; *Suraj Bunsi Koer* v. *Sheo Proshad Singh* (1879), 6 I. A. 88, at p. 106; 5 Calc. 148, at p. 171; 4 C. L. R. 226, at p. 238; *Natasayyan* v. *Ponnusami* (1892), 16 Mad. 99; *Bhowna* (*Mussumat*) v. *Roop Kishore* (1873), 5 N. W. P. 89; *Joharmal* v. *Eknath* (1899), 24 Bom. 343; *Venamandra Sitaramasami* v. *Midatana Sanyasi* (1883), 6 Mad. 400. See *Bhagbut Pershad* v. *Girja Koer* (*Mussumat*) (1888), 15 I. A. 99; 15 Calc. 717; *Kooldeep Kooer* (*Mussamut*) v. *Runjeet Singh* (1875), 24 W. R. C. R. 231; *Ram Sahoy Singh* v. *Mohabeer Pershad* (1876), 25 W. R. C. R. 185.

[2] See *Sita Ram* v. *Zalim Singh* (1886), 8 All. 231; *Hanuman Singh* v. *Nanak Chand* (1884), 6 All. 193; *Budree Lall* v. *Kantee Lall* (1875), 23 W. R. C. R. 260; *Bhagbut Pershad* v. *Girja Koer* (*Mussumat*) (1888), 15 I. A. 99; 15 Calc. 717; *Vasudev Morbhat Kale* v. *Krishnaji Ballal Gokhale* (1895), 20 Bom. 534; *Chintamanrav Mehendale* v. *Kashinath* (1889), 14 Bom. 320; *Subramanya* v. *Sadasiva* (1884), 8 Mad. 75; *Kishan Lal* v. *Garuruddhwaja Prasad Singh* (1899), 21 All. 238; *Sadashiv Dinkar Joshi* v. *Dinkar Narayan Joshi* (1882), 6 Bom. 520.

[3] *Suraj Bunsi Koer* v. *Sheo Proshad Singh* (1879), 6 I, A. 88, at p. 106; 5 Calc. 148, at p. 171; 4 C. L. R. 226, at p. 238; *Bhagbut Pershad* v. *Girja Koer* (*Mussumat*) (1888), 15 I. A. 99; 15 Calc. 717; *Meenakshi Naidu* v. *Immudi Kanaka Ramaya Koonden* (1888), 16 I. A. 1; 12 Mad. 142.

[4] See *ante*, pp. 301, 302.

[5] See *Bholanath Khettry* v. *Kartick Kissen Das Khettry* (1907), 34 Calc. 372; 11 C. W. N. 462.

Where the son is only able to prove that a portion of the debt was incurred for illegal or immoral purposes, the land would apparently stand charged for the remainder of the money.[1]

What is an illegal or immoral purpose or consideration.

The exception is based upon certain texts which are to be found in Colebrooke's "Digest." Vrihaspati says,[2] "The sons are not compellable to pay sums due by their father for spirituous liquors, for losses at play, for promises made without any consideration, or under the influence of lust[3] or of wrath; or sums for which he is a surety (except in the cases before mentioned[4]), or a fine, or a toll,[5] or the balance of either." There are other similar texts.[6]

The exception as to sums for which the father is liable as surety applies apparently to cases of security for appearance, for keeping the peace, or for good behaviour.[7] Where the father was surety for a debt, the liability of his son has been declared in several cases,[8] but the liability of a grandson has been denied.[9]

Crime or fraud.

If a criminal offence or fraud was the origin of the debt, the sons would not be obliged to recognize it; for instance, a decree for the value of property obtained by theft,[10] a decree for money, or for the value of property misappropriated.[11] This would not apply to a case of money being merely wrongfully retained,[12] or to a decree for mesne profits obtained against the father by a person whom the latter wrongfully kept out of possession of immovable property.[13]

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[1] Cf. *ante*, pp. 294, 295, 304.

[2] Colebrooke, "Digest," i. p. 305.

[3] For an illustration of cases of these kinds, see *Maharaj Singh* v. *Balwant Singh* (1906), 28 All. 508.

[4] What these words within brackets mean is not very clear.

[5] This expression includes money paid for a bride, see *Keshow Rao Diwakur* v. *Naro Junardhun Patunkur* (1822), 2 Borr. 194, at pp. 200, 201. Strange says (vol. i. p. 167), "that the reason why tolls and fines are excepted may be, that they are to be regarded as ready money payments, for which credit will have been given, at the risk of him by whom they ought to have been received."

[6] Colebrooke, "Digest," vol. i. pp. 247, 300, 305, 307, 311; "Narada Smriti," chap. iii. para. 11.

[7] Colebrooke, "Digest," vol. i. pp. 246, 247.

[8] *Chettikulam Venkitachala Reddiar* v. *Chettikulam Kumara Venkitachala Reddiar* (1905), 28 Mad. 377; *Benares (Maharajah of)* v. *Ramkumar Misir* (1904), 26 All. 611; *Tukarambhat* v. *Gangaram Mulchand Gujar* (1898), 23 Bom. 454; *Sitaramayya* v. *Venkatramanna* (1888), 11 Mad. 373.

[9] *Narayan* v. *Venkatacharya Balkrishnacharya* (1904), 28 Bom. 408. It is submitted that in this matter there is no difference between the case of a son and that of a grandson.

[10] *Pareman Das* v. *Bhattu Mahton* (1897), 24 Calc. 672.

[11] *Mahabir Prasad* v. *Basdeo Singh* (1884), 6 All. 234. See *Chandra Sen* v. *Ganga Ram* (1880), 2 All. 899; *McDowell and Co.* v. *Ragava Chetty* (1903), 27 Mad. 71; *Jaikumar* v. *Gauri Nath* (1906), 28 All. 718, at p. 720, where it was held that a promissory note given to satisfy a claim for money misappropriated did not create an illegal or immoral debt.

[12] *Narasayyan* v. *Ponnusami* (1892), 16 Mad. 99.

[13] *Peary Lal Sinha* v. *Chandicharan Sinha* (1906), 11 C. W. N. 163.

Similarly, fines need not be paid out of the family property. "Neither sins nor the expiation of them are hereditary."[1]

The son's liability extends also to the payment of interest,[2] the amount of interest being determinable by the law of the place. Where the rule of *damdupat*[3] is not in force, that rule cannot be put in force.[4] Interest.

Such charge or alienation binds his sons[5] and grandsons, whether they be minors or adults.

There is some authority that adult sons, who do not consent, would not be bound,[6] but there is express authority to the contrary,[7] and the many other decisions on the subject do not make this distinction. As the antecedent debt clearly binds the sons, the question whether they are bound by the mortgage or sale is not of great importance.[8]

This power which is given to the father cannot be exercised by any other member of the family even in the father's absence.[9] Power limited to father.

It has been held that when the father is insolvent, the official assignee has the same power as the father.[10]

[1] A Bengal case referred to in *Nhanee* v. *Hureeram Dhoolubh* (1814), 1 Borr. 84, at p. 90.

[2] See *post*, p. 319.

[3] The rule of Hindu law forbidding the recovering of interest at any one time in excess of the amount of principal. It has been held that that rule applies in the Bombay Presidency. See *Nusserwanjee* v. *Laxman* (1906), 30 Bom. 452; *Sukalal* v. *Bapu Sakharam* (1899), 24 Bom. 305; *Sundrabai* v. *Jayavant Bhikaji Nadgowda* (1899), 24 Bom. 114; *Dagdusa Shevakdas* v. *Ramchandra* (1895), 20 Bom. 611; *Ganesh Dharnidhar Maharajdev (Shri)* v. *Keshavrav Govind Kulgavkar* (1890), 15 Bom. 625; *Balkrishna Babaji* v. *Hari Govind* (1890), 15 Bom. 84; *Ganpat Pandurang* v. *Adarji Dadabhai* (1877), 3 Bom. 312; *Hari Mahadaji Savarkar* v. *Balambhat Raghunath Khare* (1884), 9 Bom. 233; *Narayan* v. *Satvaji* (1872), 9 Bom. H. C. 83. It applies in the town of Calcutta, *Nobin Chunder Bannerjee* v. *Romesh Chunder Ghose* (1887), 14 Calc. 781; *Ramconnoy Audicarry* v. *Johur Lall Dutt* (1880), 5 Calc. 867; 7 C. L. R. 204; but not in the mofossil of Bengal; *Hetnarain Singh* v. *Ram Dein Singh* (1883), 9 Calc. 871; 12 C. L. R. 590; *Surjya Narain Singh* v. *Sirdhary Lall* (1883), 9 Calc. 825; 12 C. L. R. 400. This rule is not in force in Madras, *V. Annaji Rau* v. *Ragubai* (1871), 6 Mad. H. C. 400.

[4] *Pran Krishna Tewary* v. *Jadu Nath Trivedy* (1898), 2 C. W. N. 603.

[5] It does not bind any one else as, for instance, a nephew. *Gangulu* v. *Ancha Bapulu* (1881), 4 Mad. 73.

[6] *Upooroop Tewary* v. *Bandhjee Suhay (Lalla)*, 6 Calc. 749, at p. 753; 8 C. L. R. 192, at p. 196; *Muthoora Koonwaree* v. *Bootun Singh* (1870), 13 W. R. C. R. 30.

[7] *Phul Chand* v. *Man Singh* (1882), 4 All. 309.

[8] See *Laljee Sahoy* v. *Fakeer Chand* (1880), 6 Calc. 135; 7 C. L. R. 97; *Baso Kooer* v. *Hurry Dass* (1882), 9 Calc. 495, at p. 501; 12 C. L. R. 292, at p. 297.

[9] *Hari Premji (Patel)* v. *Hakamchand* (1884), 10 Bom. 363.

[10] *Fakirchand Motichand* v. *Motichand Hurruckchand* (1883), 7 Bom.

Except for the purpose of discharging such antecedent debt, or in case of a valid necessity,[1] a father has no power to alienate or charge the coparcenary property,[2] and the sale can be set aside.[3]

Mortgage for other debt.

Where a mortgage is given in respect of a debt not antecedent to the transaction,[4] it can be treated as a secured debt against the father's interest,[5] and, so far as the sons are concerned, it will be treated as an unsecured debt, and can be enforced against the sons by a suit, the decree in which can be executed against the coparcenary property (including the mortgaged property), but in that case it has been held that the limitation applicable to an unsecured debt would apply.[6]

So (except, perhaps, so far as questions of limitation are concerned, and except, perhaps, in cases where the property had been dealt with by the sons before suit) there is no difference between the remedy on

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438; *Rangayya Chetti* v. *Thanikachalla Mudali* (1895), 19 Mad. 74. In the former case it was further held that the official assignee can deal with the estate after the death of the father. It is submitted that this is not good law.

[1] *Ante*, p. 283.

[2] *Chinnaya* v. *Perumal* (1889), 13 Mad. 51.

[3] See *Ram Dayal* v. *Ajudhia Prasad* (1906), 28 All. 328; *Beer Kishore Suhye Singh* (*Baboo*) v. *Hur Bullub Narain Singh* (*Baboo*) (1867), 7 W. R. C. R. 502.

[4] See *Luchmun Dass* v. *Giridhur Chowdhry* (1880), 5 Calc. 855; 6 C. L. R. 473; *Laljee Sahoy* v. *Fakeer Chand* (1880), 6 Calc. 135, at p. 138; 7 C. L. R. 97, at p. 100; *Gunga Prosad* v. *Ajudhia Pershad* (1881), 8 Calc. 131; 9 C. L. R. 417; *Khalilul Rahman* v. *Gobind Pershad* (1892), 20 Calc. 328; *Debi Dat* v. *Jadu Rai* (1902), 24 All. 459, differing from *Jamna* v. *Nain Sukh* (1887), 9 All. 493; *Sami Ayyangar* v. *Ponnammal* (1897), 21 Mad. 28; *Hanuman Kamat* v. *Dowlut Mundar* (1884), 10 Calc. 528; *Kishun Pershad Chowdhry* v. *Tipan Pershad Singh* (1907), 34 Calc. 735; 11 C. W. N. 613, dissenting from *Maheswar Dutt Tewari* v. *Kishun Singh* (1907), 34 Calc. 184; 11 C. W. N. 294, in which latter case it was held, it is submitted erroneously, that the sons were bound by a mortgage not in respect of a debt, which was antecedent to the transaction. The decisions relied upon in the latter case were in cases relating to sales in execution of decrees, and therefore stand upon a different footing. As to impartible estates, see *Veera Soorappa Nayani* v. *Errappa Naidu* (1906), 29 Mad. 484.

[5] *Kishun Pershad Chowdhry* v. *Tipan Pershad Singh* (1907), 34 Calc. 735; 11 C. W. N. 613; *Khalilul Rahman* v. *Gobind Pershad* (1892), 20 Calc. 328, at p. 327.

[6] *Surja Prasad* v. *Golab Chand* (1900), 27 Calc. 762, differed from in *Maheshwar Dutt Tewari* v. *Kishun Singh* (1907), 34 Calc. 184; 11 C. W. N. 294, see above, note 4. See *Ran Singh* v. *Sobha Ram* (1907), 29 All. 544. See note 1, *post*, p. 311.

a mortgage which is based on an antecedent debt and a mortgage given in consideration of a payment at the time.[1]

In some of the older cases it was held that where the debt was not antecedent to the mortgage, the creditor had no rights against the coparcenary property except in case of necessity.[2]

Where there is a sale by the father, not on account of an antecedent debt, the sons cannot, unless the money was obtained for illegal or immoral purposes, set it aside without refunding the amount of the purchase-money, as the purchase-money would be a debt which they would be liable to pay.[3]

Question whether alienation passed property.

The question as to whether the mortgage or transfer passed the whole property, or only the father's interest therein, depends upon what the parties contracted about.[4] This may be determined not only by the terms of the document, but also by the surrounding circumstances. The burden is upon the person claiming under the mortgage or sale.[5]

Whether sons bound if not parties to suit.

It is unsettled whether sons can be bound by a decree enforcing a mortgage on coparcenary property made by their father, and passed in a suit to which they are not parties.

The decisions in many suits instituted before the passing of the Transfer of Property Act,[6] determined that sons who were joint with their father[7] were so liable if the suit were brought against the father as representing himself and his sons.[8]

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[1] See *Chidambara Mudaliar* v. *Koothaperumal* (1903), 27 Mad. 326, at p. 328. In this case it was said, "on principle it is difficult to make any distinction between a mortgage given for an antecedent debt and a mortgage given for a debt then incurred, for in either case the debt is binding upon the son and the enforcement of the security exonerates the son from the burden of the father's debt." See *Gunga Pershad* v. *Sheodyal Singh* (1881), 9 C. L. R. 417.

[2] *Hanuman Kamat* v. *Dowlut Mundar* (1884), 10 Calc. 528; *Lal Singh* v. *Deonarain Singh* (1886), 8 All. 279; *Arunachala Chetti* v. *Munisami Mudali* (1883), 7 Mad. 39.

[3] *Hasmat Rai* (*Koer*) v. *Sunder Das* (1885), 11 Calc. 396. See *post*, pp. 319, 320, and *Nathu Lal Chowdhry* v. *Chadi Sahi* (1869), 4 B. L. R. A. C. 15; 12 W. R. C. R. 447.

[4] See *Simbhunath Panday* v. *Golab Singh* (1887), 14 I. A. 77, at p. 83; 14 Calc. 572, at p. 579.

[5] *Narayanrav Damodar* v. *Balkrishna Mahadeo*, Bom. P. J., 1881, p. 293.

[6] IV. of 1882.

[7] See *Trimbak Balkrishna* v. *Narayan Damodhar Dabholkar* (1884), 8 Bom. 481.

[8] *Ponnappa Pillai* v. *Pappuvayangar* (1881), 4 Mad. 1; S. C. (1885), 9 Mad. 343; *Srinivasa*

In each case it was a question whether the decree was intended to bind the family, and whether in execution their interests passed by the sale.[1] It did not follow from the mere fact that the interest purporting to be sold was the right title and interest of the father that the entire interest which he had authority to deal with did not pass.[2]

If, however, the decree from the form of the suit, the character of the debt recovered by it and its terms was to be interpreted as a decree against the father alone and personal to himself, and all that was put up and sold thereunder in execution was his right and interest in the joint ancestral estate, then the auction purchaser acquired no more than that right and interest, *i.e.* the right to demand partition.[3]

Where the mortgage charged the whole interests, the form of mortgage decree now adopted by the Indian Courts would be sufficient to cause a sale of all of such interest.[4]

There is a difference of opinion as to whether the law as to who is bound by the decree has been altered by sec. 85 of the Transfer of Property Act.[5] That section is as follows :—

Suits for Foreclosure, Sale, or Redemption.

Parties to suits for foreclosure, sale, and redemption.

"Subject to the provisions of the Code of Civil Procedure,[6] sec. 437, all persons having an interest in the property comprised in a mortgage

Nayudu v. *Yelaya Nayudu* (1882), 5 Mad. 251; *Sadashiv Dinkar Joshi* v. *Dinkar Narayan Joshi* (1882), 6 Bom. 520; *Studd* v. *Brij Nundun Pershad Singh* (1881), 9 C. L. R. 350; *Sundararaja Ayyangar* v. *Jagannada Pillai* (1881), 4 Mad. 111; *Doulut Ram* v. *Mehr Chand* (1887), 14 I. A. 187; 15 Calc. 70; *Deva Singh* v. *Rai Manohar* (1880), 2 All. 746; *Ram Sevak Das* v. *Raghubar Rai* (1880), 3 All. 72; *Gayadin* v. *Raj Bansi Kuar* (1880), 3 All. 191; *Ram Narain Lal* v. *Bhawani Prasad* (1881), 3 All. 443; *Parsidh Narain Singh* v. *Hunoman Sahai* (1881), 11 C. L. R. 263.

[1] See *Pemraj Chandra Bhau* v. *Savalya Gajaba* (1890), 15 Bom. 293; *Doulut Ram* v. *Mehr Chand* (1887), 14 I. A. 187; 15 Calc. 70; *Ram Narain Lal* v. *Bhawani Prasad* (1881), 3 All. 443.

[2] See *post*, pp. 316, 317. *Mahabir Pershad* (*Rai Babu*) v. *Markunda Nath Sahai* (*Rai*) (1889), 17 I. A. 11, at p. 16; S. C. *nomine Mahibir Pershad* v. *Moheswar Nath Sahai* 17 Calc. 584, at p. 589; *Bhagbut Pershad* v. *Girja Koer* (*Mussumat*) (1888), 15 I. A. 99; 15 Calc. 717; *Trimbak Balkrisna* v. *Narayan Damodar Dabholkar* (1884), 8 Bom. 481, at p. 486; *Ponnappa Pillai* v. *Pappuvayyangar* (1881), 4 Mad. 1, at p. 15; *Hardai Narain* v. *Haruck Dhari Singh* (1882), 12 C. L. R. 104; *Sadashiv Dinkar Joshi* v. *Dinkar Narayan Joshi* (1882), 6 Bom. 520; *Gnanammal* v. *Muthusami* (1889), 13 Mad. 47. In *Nanhak Joti* v. *Jaimangal Chaubey* (1880), 3 All. 294, the sale was expressly limited to the father's interest. See cases, *post*, p. 317.

[3] *Basa Mal* v. *Maharaj Singh* (1886), 8 All. 205; *Simbhunath Panday* v. *Golab Singh* (1887), 14 I. A. 77; 14 Calc. 572.

[4] See Act XIV. of 1882, Sched. IV., No. 128.

[5] Act IV. of 1882.

[6] That section deals with suits concerning property vested in a trustee, executor, or administrator, and has therefore no application to the present question.

must be joined as parties to any suit under this chapter relating to such mortgage: Provided that the plaintiff has notice of such interest."

The Bengal[1] and Allahabad High Courts[2] have held that where the plaintiff had notice of their existence,[3] the sons can sue to set aside a decree to which they are not parties, but the latter Court has declined to extend this principle to a case where the property had been sold to a purchaser other than the decree holder.[4] The result of this view of the section is that a new suit against the sons is necessary, and in such new suit the debt can be recovered by sale of the ancestral property.[5] The Madras High Court considers that the law in this respect was not altered by the Transfer of Property Act.[6] See Civil Procedure Code, 1908, Sched. I., Order XXXIV. r. 1.

"Independently of the statute, the position of a purchaser, who in a sale in execution of a decree against the father bought the entirety of the estate, is the same as regards the son, whether the decree was a mortgage decree or a decree for money. In either case, all that the son can claim is that not having been a party to the sale or the proceedings which led up to it, he should have an opportunity of showing that there was in reality no such debt as to justify the sale."[7]

Rights of sons when not parties.

Where the sons are not parties to the suit, whether sec. 85 of the Transfer of Property Act applies or not, they are entitled to have an opportunity, either in a fresh suit or in proceedings for execution of the decree,[8] of raising

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[1] *Suraj Prosad* (*Lala*) v. *Golab Chand* (1901), 28 Calc. 517; 5 C. W. N. 640, reversing decision of Ghose, J. (1900), 27 Calc. 724; 4 C. W. N. 701.

[2] *Bhawani Prasad* v. *Kallu* (1895), 17 All. 537; *Kanhaia Lal* v. *Raj Bahadur* (1902), 24 All. 211. See *Hira Lal Sahu* v. *Parmeshar Rai* (1899), 21 All. 356.

[3] The burden of proving this is upon the sons: *Ram Nath Rai* v. *Lachman Rai* (1899), 21 All. 193.

[4] *Debi Singh* v. *Jia Ram* (1902), 25 All. 214; *Lal Singh* v. *Pulandar Singh* (1905), 28 All. 182.

[5] *Dharam Singh* v. *Angal Lal* (1899), 21 All. 301; *Lachhman Das* v. *Dallu* (1900), 22 All. 394. See *Ram Singh* v. *Sobhà Ram* (1907), 29 All. 544. In *Suraj Prosad* (*Lala*) v. *Golab Chand* (1901), 28 Calc. 517; 5 C. W. N. 640; and *Kanhaia Lal* v. *Raj Bahadur* (1902), 24 All. 211, the son in the suit brought by him had an opportunity of contesting the mortgage, so the Court declined to give him any remedy, except a right to redeem.

[6] *Ramasamayyan* v. *Virasami Ayyar* (1898), 21 Mad. 222; *Palani Goundan* v. *Rangayya Goundan* (1898), 22 Mad. 207.

[7] *Ramasammayyan* v. *Virasami Ayyar* (1898), 21 Mad. 222, at p. 224; *Kunhali Beari* v. *Keshava Shanbaga* (1887), 11 Mad. 64, at p. 76. *Karan Singh* v. *Bhup Singh* (1904), 27 All. 16. See *post*, p. 315.

[8] See *Umaheswara* v. *Singaperumal* (1885), 8 Mad. 376; *Chander Pershad* v. *Sham Koer* (1905), 33 Calc. 676. It has been held that the son cannot raise the question in the same suit where he has been made a party to the suit as representing his father: *Hira Lal Sahu* v. *Parmeshar Rai* (1899), 21 All. 356.

such questions and of asserting such rights as they could have raised and asserted if they had been made parties.

They can thus get a right to redeem,[1] but if the property has been sold to a third person, the Allahabad High Court has held that a suit for redemption does not lie simply on the ground they have not been made parties.[2] A son born after a decree for sale would have no right of redemption.[3]

A son who was not joint with the father at the time of the suit would be entitled to redeem.[4]

Where the son has been a party to the suit he could not, of course, raise in another suit any question as to the validity of the mortgage or sale.

When the sons are not parties to the suit against their father, the creditor may institute another suit against them.[5]

When interests of sons pass by sale in execution.

The interests of the sons pass in a sale of coparcenary property in execution of a decree against their father,[6] except—

1. When their interests are not sold.[7]

2. When the sons prove that the debt was contracted for an illegal or immoral purpose,[8] and the execution

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[1] See *Ramphul Singh* v. *Degnarain Singh* (1881), 8 Calc. 517; 10 C. L. R. 489; *Ponnappa Pillai* v. *Pappuvayyangar* (1881), 4 Mad. 1, at p. 69; *Trimbak Balkrishna* v. *Narayan Damodar Dabholkar* (1884), 8 Bom. 481, at p. 488; *Ramasamayyan* v. *Virasami Ayyar* (1898), 21 Mad. 222.

[2] *Lal Singh* v. *Pulandar Singh* (1905), 28 All. 182; *Debi Singh* v. *Jia Ram* (1902), 25 All. 214.

[3] *Muthuraman Chetti* v. *Ettapasami* (1899), 22 Mad. 372; *ante*, pp. 302, 307.

[4] See *Trimbak Balkrishna* v. *Narayan Damodhar Dabholkar* (1884), 8 Bom. 481.

[5] See *Run Singh* v. *Sobha Ram* (1907), 29 All. 544; *Dharam Singh* v. *Angan Lal* (1899), 21 All. 301; *Ariabudra* v. *Dorasami* (1888), 11 Mad. 413.

[6] *Muddun Thakoor* v. *Kantoo Lall* (1874), 1 I. A. 321; 14 B. L. R. 187; 22 W. R. C. R. 56; *Nanomi Babuasin* (*Mussamut*) v. *Modun Mohun* (1885), 13 I. A. 1; 13 Calc. 21; *Bhagbut Pershad* v. *Girja Koer* (*Mussumat*) (1888), 15 I. A. 99; 15 Calc. 717; *Meenakshi Naidu* v. *Immudi Kanaka Ramaya Kounden* (1888), 16 I. A. 1; 12 Mad. 142; *Sheo Pershad Singh* v. *Soorjbunsee Kooer* (*Mussamut*) (1875), 24 W. R. C. R. 281; *Cooverji Hirji* v. *Dewsey Bhoja* (1893), 17 Bom. 718; *Ramphul Singh* v. *Degnarain Singh* 8 Cal. 517; 10 C. L. R. 489; *Beni Parshad* v. *Puran Chand* (1895), 23 Calc. 262, at p. 274; *Mahabir Prasad* v. *Basdeo Singh* (1884), 6 All. 234; *Gonesh Pandey* v. *Dabee Doyal Singh* (1879), 5 C. L. R. 36.

[7] See *post*, p. 317.

[8] See *ante*, pp. 307, 308.

creditor purchases, or, if a stranger purchases, and has notice of, or upon inquiry could have ascertained, the illegal or immoral character of the debt upon which the decree was based.[1]

Decree for money.

A decree for a mere money debt of the father,[2] not illegal or immoral, and whether incurred for family purposes or not, may be enforced in his lifetime by an execution sale of the entire coparcenary estate,[3] and is binding on the sons, whether they were or were not parties to the suit.[4] They are, however, entitled in case they were not parties to contest the binding nature of the debt in another suit,[5] or by a claim under the Civil Procedure Code, 1908, Sched. I., Order XXI. r. 57.[6]

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[1] See *Joharmal* v. *Eknath* (1899), 24 Bom. 343; *Natasayyan* v. *Ponnusami* (1892), 16 Mad. 99; *ante*, pp. 306, 307.

[2] This includes a decree for the unsatisfied balance of a mortgage debt, *Hari Ram* v. *Bishnath Singh* (1900), 22 All. 408.

[3] *Meenakshi Naidu* v. *Immudi Kanaka Ramaya Kounden* (1888), 16 I. A. 1; 12 Mad. 142; *Khalilul Rahman* v. *Gobind Pershad* (1892), 20 Calc. 328; *Sheo Proshad* v. *Jung Bahadoor* (1882), 9 Calc. 389; 12 C. L. R. 494; *Narayana Charya* v. *Narso Krishna* (1876), 1 Bom. 262; *Luchmun Dass* v. *Giridhur Chowdhry* (1880), 5 Calc. 855; 6 C. L. R. 473; *Bhowna* (*Mussumat*) v. *Roop Kishore* (1873), 5 N. W. P. 89.

[4] *Muddun Thakoor* v. *Kantoo Lall* (1874), 1 I. A. 321, at p. 338; 14 B. L. R. 187, at p. 199; 22 W. R. C. R. 56, at p. 59. The facts of this case are to be found in *Ponnappa Pillai* v. *Pappuvayyangar* (1885), 9 Mad. 343, at pp. 345–349; *Nanomi Babusin* v. *Modun Mohun* (1885), 13 I. A. 1; 13 Calc. 21; *Suraj Bunsi Koer* v. *Sheo Proshad Singh* (1879), 6 I. A. 88, at p. 106; 5 Calc. 148, at p. 171; 5 C. L. R. 226, at p. 238; *Bhagbut Pershad* v. *Girja Koer* (*Mussumat*) (1888), 15 I. A. 99; 15 Calc. 717; *Meenakshi Naidu* v. *Immudi Kanaka Ramaya Kounden* (1888), 16 I. A. 1; 12 Mad. 142; *Karan Singh* v. *Bhup Singh* (1904), 27 All. 16; *Mathura Prasad* v. *Ramchandra Rao* (1902), 25 All. 57; *Mallesam Naidu* v. *Jugala Panda* (1899), 23 Mad. 292; *Natasayyan* v. *Ponnusami* (1892), 16 Mad. 99; *Kunhali Beari* v. *Keshav Shanbaga* (1887), 11 Mad. 64; *Ramanadan* v. *Rajagopola* (1889), 12 Mad. 309; *Ramdut Sing* v. *Mahender Prasad* (1882), 9 Calc. 452; 12 C. L. R. 47. See *Shiam Lal* v. *Ganeshi Lal* (1905), 28 All. 288, where the suit had been dismissed as against the son.

[5] See *Ramasami Nadan* v. *Ulaganatha Goundan* (1898), 22 Mad. 49; *Gopalasami Pillai* v. *Chokalingam Pillai* (1881), 4 Mad. 320; *Devji* v. *Sambhu* (1899), 24 Bom. 135; *Jagabhai Lalubhai* v. *Vijbhukandas Jagjivandas* (1886), 11 Bom. 37; *Karan Singh* v. *Bhup Singh* (1904), 27 All. 16.

[6] Act XIV. of 1882, s. 278. *Umed Hathising* v. *Goman Bhaiji* (1895), 20 Bom. 385, at p. 389; *Ram Dayal* v. *Durga Singh* (1890), 12 All. 209.

In two cases the Allahabad High Court[1] considered that where no sale had taken place, the sons could contest the decree on the sole ground that they were not parties to it, but in a latter case the same Court held that there is no ground for such distinction.[2]

Irregularity in sale.

The son's rights do not pass when in contravention of sec. 99 of the Transfer of Property Act[3] the mortgagee has attached the property in execution of a money decree,[4] or the sale is otherwise irregular.

Execution decree after death of father.

Under the Civil Procedure Code of 1908 (s. 53) a creditor can, after the death of the father, execute the decree against coparcenary property in the hands of the sons. Where the property was attached in the father's lifetime he could proceed[5]; but where there was no such attachment, a new suit was necessary according to the High Courts of Madras and Allahabad, and according to some of the Bengal decisions.[6] It was held in Bombay,[7] and by the majority of a Full Bench in Bengal,[8] that the decree could be executed against the sons.

The carrying out of a mortgage decree stands upon the same footing.[9]

If the coparcenary property has been charged by the decree, proceedings in execution can be taken against the sons after the death of the father.[10]

When son's interests pass by sale.

The question whether the sale in execution of a decree against the father passed the whole interest of the family,

[1] *Ram Dayal* v. *Durga Singh* (1890), 12 All. 209; *Jagraj Singa* v. *Ajudhia Prasad* (1886), 9 All. 142.

[2] *Karan Singh* v. *Bhup Singh* (1904), 27 All. 16.

[3] Act IV. of 1882.

[4] *Muthuraman Chetti* v. *Ettapasami* (1899), 22 Mad. 372.

[5] *Peary Lal Sinha* v. *Chandi Charan Sinha* (1906), 11 C. W. N. 163; *Beni Pershad* v. *Parbati Koer* (1892), 20 Calc. 895.

[6] *Lachmi Narain* v. *Kunji Lall* (1894), 16 All. 449; *Jagannath Prasad* v. *Sitaram* (1888), 11 All. 302; *Kali Charan* v. *Jewat* (1905), 28 All. 51; *Natasayyan* v. *Ponnusami* (1892), 16 Mad. 99; *Ariabudra* v. *Dorasami* (1888), 11 Mad. 413; *Venkatarama* v. *Senthivelu* (1890), 13 Mad. 265; *Karnataka Hanumantha* v. *Andukuri Hanumayya* (1882), 5 Mad. 232; *Juga Lal Chaudhuri* v. *Audh Behari Prosad Singh* (1900), 6 C. W. N. 223; *Suraj Prosad* (*Lala*) v. *Golab Chund* (1901), 28 Calc. 517; *Kali Krishna Sarkar* v. *Raghunath Deb* (1903), 31 Calc. 224.

[7] *Govind Krishna Gujar* v. *Sakharan Naraya* (1904), 28 Bom. 383; *Umed Hathising* v. *Goman Bhaiji* (1895), 20 Bom. 385.

[8] *Amar Chandra Kundu* v. *Sebak Chand Chowdhury* (1907), 34 Calc. 642; 11 C. W. N. 593.

[9] *Beni Pershad* v. *Parbati Koer* (1892), 20 Calc. 895.

[10] *Sivagiri Zamindar* v. *Tiruvengada* (1884), 7 Mad. 339; *Ponnappa Pillai* v. *Pappuvayyangar* (1881), 4 Mad. 1.

or only the father's undivided interest, depends upon the terms of the proceedings in execution. The Court will look at the substance of the proceedings to see what was intended to be sold, and what the purchaser could reasonably think he was buying.[1] It is a mixed question of law and fact.[2]

It is the duty of the judgment creditor to see that the orders of attachment and sale, or the sale certificate, clearly indicate the sale of all the interests in the property over which the judgment debtor had control.

Burden of proof.

There is some conflict as to whether there is any presumption that the whole interest passed,[3] or whether there is a presumption that the interest of the father only passed.[4] It is submitted that if there is any presumption one way or the other, it is upon the person supporting the sale.[5]

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[1] *Pettachi Chettiar* v. *Sangili Veera Pandia* (1887), 14 I. A. 84, at p. 85; 10 Mad. 241, at p. 248; *Simbhunath Panday* v. *Golab Singh* (1887), 14 I. A. 77, at p. 83; 14 Calc. 572, at p. 579; *Abdul Aziz Khan Sahib* v. *Appayasami Naicker* (1903), 31 I. A. 1; 27 Mad. 131; 8 C. W. N. 180. See *Umbica Prosad Tewary* v. *Ramsahay Lall* (1881), 8 Calc. 898; 10 C. L. R. 505; *Kagal Ganpaya* v. *Manjappa* (1888), 12 Bom. 691.

[2] In the following cases it was held that the interest of the father only passed by the sale: *Deendyal Lal* v. *Jugdeep Narain Singh* (1877), 4 I. A. 247; 3 Calc. 198; 1 C. L. R. 49; *Simbhunath Panday* v. *Golab Singh* (1887), 14 I. A. 77; 14 Calc. 572; *Hurdey Narain Sahu* (*Baboo*) v. *Rooder Perkash Misser* (*Pundit Baboo*) (1883), 11 I. A. 26; 10 Calc. 626; *Ram Sahai* v. *Kewal Singh* (1887), 9 All. 672; *Pettachi Chettiar* v. *Sangili Veera Pandia Chinnathambiar* (1887), 14 I. A. 84; 10 Mad. 241; *Bhikaji Ramchandra Oke* v. *Yashvantrav Shripat Khopkar* (1884), 8 Bom. 489; *Maruti Sakharam* v. *Babaji* (1890), 15 Bom. 87; *Beni Parshad* v. *Puran Chand* (1895), 23 Calc. 262; *Bika Singh* v. *Lachman Singh* (1880), 2 All. 800; *Chandra Sen* v. *Ganga Ram* (1880), 2 All. 899; *Bhagwat Dassa* v. *Gouri Kunwar* (1880), 7 C. L. R. 218; *Collector of Monghyr* v. *Hurdai Narain Shahai* (1879), 5 Calc. 425; 5 C. L. R. 112. In the following cases it was held that the interests of the sons passed by the sale: *Bhagbut Pershad* v. *Girja Koer* (*Mussumat*) (1888), 15 I. A. 99; 15 Calc. 717; *Meenakshi Naidu* v. *Immudi Kanaka Ramaya Kounden* (1888), 16 I. A. 1; 12 Mad. 142; *Mahabir Pershad* (*Rai Babu*) v. *Markunda Nath Sahai* (*Rai*) (1889), 17 I. A. 11; 17 Calc. 584; *Cooverji Hirji* v. *Dewsey Bhoja* (1893), 17 Bom. 718; *Verra Soorappa Nayani* v. *Errappa Naidu* (1906), 29 Mad. 484; *Kunhali Beari* v. *Keshava Shanbaga* (1887), 11 Mad. 64; *Sakharamshet* v. *Sitaramshet* (1886), 11 Bom. 42; *Sadashiv Dinkar Joshi* v. *Dinkarnarayan Joshi* (1882), 6 Bom. 520. As to a sale under a mortgage decree, see *ante*, p. 311.

[3] See *Muhammad Husain* v. *Dipchand* (1892), 14 All. 191; *Pem Singh* v. *Partab Singh* (1892), 14 All. 179; *Beni Madho* v. *Basdeo Patak* (1890), 12 All. 99.

[4] *Maruti Sakharam* v. *Babaji* (1890), 15 Bom. 87.

[5] See *Haza Hira* v. *Bhaiji Madan Isabji*, Bom. P. J. 1875, p. 97.

Duty of purchaser.

"The purchaser under the execution . . ." is "not bound to go further back than to see that there was a decree against" the father, "that the property was property liable to satisfy the decree, if the decree had been properly given against" him, "and having inquired into that, and having *bonâ fide* purchased the estate under the execution, and *bonâ fide* paid a valuable consideration for the property, the" sons "are not entitled to come in and to set aside all that has been done under the decree and execution, and recover back the estate from the" purchaser.[1]

"If his debt was of a nature to support a sale of the entirety," the father "might legally have sold it without suit, or the creditor might legally procure a sale of it by suit. All the sons can claim is, that, not being parties to the sale or execution proceedings, they ought not to be barred from bringing the fact or the nature of the debt in a suit of their own. Assuming they have such a right, it will avail them nothing unless they can prove that the debt was not such as to justify the sale. If the expressions by which the estate is conveyed to the purchaser are susceptible of application either to the entirety or to the father's coparcenary interest alone, . . . the absence of the sons from the proceedings may be one material consideration. But if the fact be that the purchaser has bargained and paid for the entirety, he may clearly defend his title to it upon any ground which would have justified a sale if the sons had been brought in to oppose the execution proceedings."[2]

Decree against sons.

A decree may be obtained against the sons during the lifetime of their father so as to bind the coparcenary property, provided that the money was not raised for an illegal or immoral purpose.[3]

Personal liability of father.

Although the coparcenary property may not be liable, the father remains personally liable for a debt.

As to the sale of a share in the coparcenary property, see *ante*, pp. 297, 300.

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[1] *Muddun Thakoor* v. *Kantoo Lall* (1874), 1 I. A. 321, at p. 334; 14 B. L. R. 187, at p. 200; 22 W. R. C. R. 56, at p. 59. In *Mahabir Prasad* v. *Basdeo Singh* (1884), 6 All. 234, the Court considered that a statement in the plaint amounted to notice. See *Bhagbut Pershad* v. *Girja Koer* (*Mussumat*) (1888), 15 I. A. 99; 15 Calc. 317; *Siva Sankara Mudali* v. *Parvati Anni* (1881), 4 Mad. 96; *Luchmi Dai Koori* v. *Asman Sing* (1876), 2 Calc. 213; 25 W. R. C. R. 421; *Anooragee Kooer* (*Mussamut*) v. *Bhugobutty Kooer* (1876), 25 W. R. C. R. 148; *Budree Lall* v. *Kantee Lall* (1875), 23 W. R. C. R. 260.

[2] *Nanomi Babuasin* (*Mussamut*) v. *Modun Mohun* (1885), 13 I. A. 1, at p. 18; 13 Calc. 21, at p. 36. See *Bhagbut Pershad* v. *Girja Koer* (*Mussamat*) (1888), 15 I. A. 99; 15 Calc. 317.

[3] See *Ramasami Nadan* v. *Ulaganatha Goundan* (1898), 22 Mad. 49; *Ramphul Singh* v. *Degnarain Singh* (1881), 8 Calc. 517; 10 C. L. R. 489.

Simple contract debts of father.

The debts of a father, or paternal grandfather, even when not charged upon the estate, must be paid by the son, or grandson, out of the property of the coparcenary in which the debtor was a coparcener, provided such debts have not been incurred for an illegal or immoral purpose.[1]

Interest.

The liability to pay a debt involves a liability to pay interest.[2]

Liability of son during father's lifetime.

Even during the lifetime of the father the son is liable to the extent of the coparcenary property, or of property of his father which comes into his hands; as, for instance, when the father has abandoned worldly affairs,[3] or has been absent for a time which raises a presumption as to his death.[4]

Limitation of suit.

The limitation for a suit against the son for a debt of his father is as provided by Article 120 of Schedule II. of the Limitation Act,[5] *i.e.* six years from the time when the cause of action arose.[6]

It has been held that the right of the creditor to sue the sons accrues during the father's lifetime, and that there is not a new cause of action on his death.[7]

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[1] *Muddun Thakoor* v. *Kantoo Lall* (1874), 11 I. A. 321: 14 B. L. R. 187; 22 W. R. C. R. 56; *Luchmun Dass* v. *Giridhur Chowdhry* (1880), 5 Calc. 855; 6 C. L. R. 473; *Periasami Mudaliar* v. *Seetharama Chettiar* (1903), 27 Mad. 243; *Udaram Sitaram* v. *Ranu Panduji* (1875), 11 Bom. H. C. 76, at pp. 83, 84; *Bhagirathi* v. *Anantha Charia* (1893), 17 Mad. 268; *Ponnappa Pillai* v. *Pappuvayyangar* (1881), 4 Mad. 1; *Sheo Proshad* v. *Jung Bahadoor* (1882), 9 Calc. 389; 12 C. L. R. 494; *Velliyammal* v. *Katha Chetti* (1882), 5 Mad. 61; *Narayanasami Chetti* v. *Samidas Mudali* (1883), 6 Mad. 293. This applies equally to an impartible estate. *Muttayan Chettiar* v. *Sangili Vira Pandia Chinnatambiar* (1882), 9 I. A. 128; 6 Mad. 1; *Veera Soorappa Nayani* v. *Errappa Naidu* (1906), 29 Mad. 484.

[2] *Lachman Das* v. *Khunnu Lal* (1896), 19 All. 26. See *Saunadanappa* v. *Shivbasawa* (1907), 31 Bom. 354; *ante*, p. 309.

[3] See Colebrooke's "Digest," vol. i. p. 266.

[4] An absence of twenty years was fixed by Vishnu (Colebrooke's "Digest," vol. i. p. 266); but the presumptions as to death now applicable are to be found in ss. 107, 108, of the "Indian Evidence Act" (I. of 1872).

[5] XV. of 1877.

[6] *Maharaj Sing* v. *Balwant Singh* (1906), 28 All. 508, at p. 516; *Narsingh Misra* v. *Lalji Misra* (1901), 23 All. 206; *Natasayyan* v. *Ponnusami* (1892), 16 Mad. 99; *Ramayya* v. *Venkataratnam* (1893), 17 Mad. 122.

[7] *Mallesam Naidu* v. *Jugala Panda* (1899), 23 Mad. 292. See *Ramasami Nadan* v. *Ulaganatha Goundan* (1898), 22 Mad. 49; *Natasayyan* v. *Ponnusami* (1892), 16 Mad. 99.

Debt not a charge on property.

Effect of alienation.

A simple contract debt even of a father is not a charge upon the coparcenary property, or upon his separate property. When the son or heir has alienated the property, the creditor cannot claim his debt against the alienee, except where the alienation has been, to the knowledge of the alienee, made in order to avoid the debt, or with the intention of avoiding it. In case of such alienation, the remedy of the creditor is against the son or heir personally.[1]

Remedy limited to assets.

The debts of the father cannot be recovered from the separate property of a son, even where such property has been the subject of a *bonâ fide* gift to the son by the father. They can only be recovered from the coparcenary property, or from property which was acquired by his sons on his death as his representatives.[2]

Liability after partition.

A creditor cannot enforce the payment of the debt of the father[3] against property which has been allotted on partition to the son, unless the partition was effected for the purpose of avoiding the father's debts.[4]

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[1] *Zuburdust Khan* v. *Indurmun* (1867), Agra High Court Full Bench Reports, ed. 1903, p. 71; ed. 1874, p. 55; *Unnopoorna Dassea* v. *Gunga Narain Paul* (1865), 2 W. R. C. R. 296; *Jamiyatram Ramchandra* v. *Parbhudas Hathi* (1872), 9 Bom. H. C. 116; *Gnanabhai* v. *C. Srinivasa Pillai* (1868), 4 Mad. H. C. 84; *Greender Chunder Ghose* v. *Mackintosh* (1879), 4 Calc. 897; 4 C. L. R. 193; cf. Act IV. of 1882, s. 128. The right of a creditor against an alienee or devisee of the heir would apparently be no greater than his right against the alienee or devisee of his debtor, see *Bishen Chand (Rai)* v. *Asmaida Koer (Mussumat)* (1883), 11 I. A. 164; 6 All. 560.

[2] *Dyamonee Debea* v. *Brindabun Chunder Banerjea*, Ben. S. D. A. 1856, p. 97; *Ponnappa Pillai* v. *Pappuvayyangar* (1881), 4 Mad. 1, at pp. 9, 21, 45; *Keval Bhagvan Gujar* v. *Ganpati Narayan* (1883), 8 Bom. 220; *Girdharlal Krishnavalabh* v. *Shiv (Bai)* (1884), 8 Bom. 309; *Omuthoonnissa (Mussamut)* v. *Puresmun Narain Singh* (1876), 25 W. R. C. R. 202; *Sakharam Ramchandra Dikshit* v. *Govind Vaman Dikshit* (1873), 10 Bom. H. C. 361; *Udaram Sitaram* v. *Ranu Panduji* (1875), 11 Bom. H. C. 76; *Lallu Bhagvan* v. *Tribhuvan Motiram* (1889), 13 Bom. 653. See *Dheraj Mahatab Chand Bahadoor (Maharajah)* v. *Huro Mohun Acharjee*, W. R. (1864), M. R. 1; *Jummal Ali* v. *Tirbhee Lall Dass* (1869), 12 W. R. C. R. 41; *Sangili Virapandia Chinnathambiar* v. *Alvar Ayyangar* (1881), 3 Mad. 42. Act VII. (Bo. C.) of 1866.

[3] This would not apply to a debt or a contract before partition entered into by the father as manager of the family. *Ramachandra Padayachi* v. *Kondayya Chetti* (1901), 24 Mad. 555.

[4] *Krishnasami Konan* v. *Ramasami Ayyar* (1899), 22 Mad. 519.

Bengal school.

As under the Bengal school of law sons do not acquire any interest by birth in ancestral property, a father can obviously charge his share in the coparcenary property for the payment of any of his debts, however incurred,[1] and after his death the payment of his debts can be enforced against the property, whether joint or separate, belonging to him at the time of his decease.

Obligation to pay debts out of assets inherited, etc.

Apart from the obligation of a son or grandson to pay the debts of his father or grandfather out of coparcenary property, the Hindu law, like other systems of law, requires the person who succeeds to the property of another as heir or devisee, to pay the debts of such other person to the extent of the assets received by him.[2] There is no obligation upon any other coparcener, who has acquired rights by survivorship, to pay the debts of the deceased coparcener.[3]

Debts can be recovered from the person who has wrongfully come into possession of the property of the deceased debtor.[4]

This would not apply to lands held on a tenure, which rendered it not transferable or saleable in execution of a decree.[5]

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[1] See *ante*, p. 297.

[2] W. Macnaghten's "Hindu Law," ii. p. 284; Colebrooke's "Digest," vol. i. 270; "Vyavahara Mayukha," chap. v. s. 4, para. 17; "Dayabhaga," chap. i. para. 47; "Narada Smriti," chap. iii. para. 22; cf. Act V. of 1881, ss. 101–105.

[3] As to the sale of a share, see *Kotta Ramasami Chetti* v. *Bangari Seshama Nayanivaru* (1881), 3 Mad. 145, at p. 167. As to impartible property, see *Nachiappa Chettiar* v. *Chinnayasami Naicker* (1906), 29 Mad. 453.

[4] See *Magaluri Garudiah* v. *Narayana Rungiah* (1881), 3 Mad. 359; *Kanakamma* v. *Venkataratnam* (1884), 7 Mad. 586; *Prosunno Chunder Bhuttacharjee* v. *Kristo Chytunno Pal* (1878), 4 Calc. 342; 3 C. L. R. 154; *Surbomungola Dabee* v. *Mohendronath Nath* (1874), 4 Calc. 508; *Kshitish Chandra Acharjya Chowdhury* v. *Radhika Mohun Roy* (1907), 12 C. W. N. 237.

[5] See *Nilmoni Singh* (*Rajah*) v. *Bakranath Singh* (1882), 9 I. A. 104; *Jajjivandas Javerdas* v. *Imdad Ali* (1882), 6 Bom. 211; *Muppidi Papaya* v. *Ramana* (1883), 7 Mad. 85; *Anundo Rai* v. *Kali Prosad Singh* (1884), 10 Calc. 677; S. C. on appeal, *Kali Pershad Singh* (*Tekait*) v. *Anund Roy* (1887), 15 I. A. 18; 15 Calc. 471; *Appaji Bapuji* v. *Keshav Shamrav* (1890), 15 Bom. 13.

CHAPTER IX.

PARTITION.

What is partition.

PARTITION is the process by which the members of a joint family become separate, and cease to be coparceners.[1]

Partition, according to the Mitakshara school, consists of the ascertainment of the shares of the coparceners, such shares not having existed before partition,[2] and the separation of such shares from one another.

According to the Dayabhaya school it consists only of the separation of the shares, such shares having previously existed.[3]

WHO IS ENTITLED TO PARTITION.

Who is entitled to partition.

"The ordinary rule is that if persons are entitled beneficially to shares in an estate, they may have a partition.[4]

Agreement not to partition.

Except in Bombay[5] an agreement not to partition coparcenary property binds the actual parties thereto,[6] but it does not bind their representatives, or, unless there be an agreement not to assign, their assignees.[7]

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[1] Cunningham's "Hindu Law," p. 136. As to the mode by which such separation is effected, see *post*, pp. 343–358.

[2] *Ante*, pp. 244, 245.

[3] *Ante*, p. 230.

[4] *Shankar Baksh* v. *Hardeo Baksh* (1888), 16 I. A. 71, at p. 75; 16 Calc. 397, at p. 405. See *Secretary of State* v. *Kamachee Boye Sahaba* (1859), 7 M. I. A. 476, at p. 537; 4 W. R. P. C. 42, at p. 45. This applies equally to widows, *Sellam* v. *Chinnammal* (1901), 24 Mad. 441.

[5] *Ramlinga Khanapure* v. *Virupakshi Khanapure* (1883), 7 Bom. 538.

[6] *Ramdhone Ghose* v. *Anund Chunder Ghose* (1865), 2 Hyde, 93; *Rajender Dutt* v. *Sham Chund Mitter* (1880), 6 Calc. 106. See *Subbaraya Tawker* v. *Rajaram Tawker* (1901), 25 Mad. 585.

[7] *Anath Nath Dey* v. *Mackintosh* (1871), 8 B. L. R. 60; *Anand Chandra Ghose* v. *Pran Kisto Dutt* (1869), 3 B. L. R. O. C. 14; 11 W. R. O. C. 19.

A direction in a will prohibiting partition has no effect, as it is a condition repugnant to the gift.[1] Similarly, the owner of property cannot by mere contract during his life prevent his heirs from partitioning property after his death.[2] Condition in will.

Except in the case of a suit by a minor,[3] the Court has no discretion to refuse partition.[4] Each coparcener is at liberty to elect to separate from the joint family, but he cannot force a separation among the others against their will.[5]

Under the Bengal school of law, every adult coparcener, male or female,[6] is entitled to enforce partition of the coparcenary property. Bengal school.

Except that there can be no partition directly between grandfather and grandson while the father is alive,[7] or between great-grandfather and great-grandson when the father or grandfather is alive, every adult coparcener is, under the Mitakshara school of law, entitled to enforce partition. Mitakshara school.

"The property in the paternal or ancestral estate acquired by birth

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[1] *Mokoondo Lall Shaw* v. *Gonesh Chunder Shaw* (1875), 1 Calc. 104; *Raikishori Dasi* v. *Debendranath Sircar* (1887), 15 I. A. 37; 15 Calc. 409. Act X. of 1865, s. 125, applied to Hindu wills under the Hindu Wills Act (XXI. of 1870) by s. 2 of the latter Act.

[2] *Rajender Dutt* v. *Sham Chund Mitter* (1880), 6 Calc. 106.

[3] *Post*, pp. 325, 326.

[4] *Sellam* v. *Chinnammal* (1901), 24 Mad. 441, at p. 443.

[5] *Manjanatha* v. *Narayana* (1882), 5 Mad. 362, at p. 367. In *Radha Churn Doss* v. *Kripa Sindhu Doss* (1879), 5 Calc. 474, at p. 476; 4 C. L. R. 428, at p. 430, the Court said, "It seems very doubtful whether by the Hindu law any partial partition of the family property can take place except by arrangement." See, however, *Upendra Narain Myti* v. *Gopee Nath Bera* (1883), 9 Calc. 817; 12 C. L. R. 356. As to the presumption of a general partition, see *ante*, p. 228.

[6] *Durga Nath Pramanick* v. *Chintamani Dassi* (1903), 31 Calc. 214; 8 C. W. N. 11. As to the case of a childless widow, who is entitled to a very small share, see *post*, p. 325, note 6.

[7] *Bishen Chand (Rai)* v. *Asmaida Koer (Mussumat)* (1884), 11 I. A. 164, at p. 179; 6 All. 560, at p. 574; "Mitakshara," chap. i. sec. 5, para. 3. A different view was adopted in *Jogul Kishore* v. *Shib Sahai* (1883), 5 All. 430. Although the grandson may be unable to enforce partition he is a coparcener. Apparently if his interest be sold (see *ante*, pp. 297, 298), the purchaser could not enforce partition (see *post*, p. 328), and might have to run the risk of waiting until the death of the father before suing for partition.

under the Mitakshara law is . . . so connected with the right to a partition that it does not exist where there is no right to it."[1]

Right of son, grandson, and great-grandson.

Under the Mitakshara law,[2] a son[3] is entitled to partition of the coparcenary estate, whether movable or immovable,[4] as against his father.[5] On his father's death he is entitled to partition as against his father's father.[6] On the death of his father and his father's father he has a similar right against his father's father's father.[7]

On the death of his father he represents his father's right to claim partition against his father's father.[8]

Even when his father and grandfather are both alive, a suit for partition may be brought by a coparcener, if they allow the property to be wasted and his interest to be imperilled.[9]

Partition between women.

Where two or more women hold property jointly, as in the cases of widows or daughters succeeding as heirs, one of them is entitled to enforce a partition,[10] but such partition does not affect the right of survivorship of the

[1] *Sartaj Kuari (Rani)* v. *Deoraj Kuari (Rani)* (1888), 15 I. A. 51, at p. 64; 10 All. 272, at p. 287.

[2] This question cannot arise under the Bengal school, *ante*, p. 230.

[3] As to illegitimate sons, see *ante*, pp. 233, 234.

[4] *Jugmohandas Mangaldas* v. *Mangaldas Nathubhoy (Sir)* (1886), 10 Bom. 528.

[5] *Suraj Bunsi Koer* v. *Sheo Proshad Singh* (1879), 6 I. A. 88, at p. 100; 5 Calc. 148, at p. 165; 4 C. L. R. 226, at p. 233; *Apaji Narhar Kulkarni* v. *Ramchandra Ravji Kulkarni* (1891), 16 Bom. 29, at pp. 32, 33; *Raja Ram Tewary* v. *Luchmun Persad* (1867), B. L. R. F. B. R. 731, at p. 738; 8 W. R. C. R. 15, at p. 20; *Laljeet Singh* v. *Rajcoomar Singh* (1873), 12 B. L. R. 373; 20 W. R. C. R. 336; *Subba Ayyar* v. *Ganasa Ayyar* (1895), 18 Mad. 179; *Kaliparshad* v. *Ramcharan* (1876), 1 All. 159; *Cassumbhoy Ahmedbhoy* v. *Ahmedbhoy Hubibhoy* (1887), 12 Bom. 280 (a case of Khoja Mahomedans). It was held by a majority of the full bench in *Apaji Narhar Kulkarni* v. *Ramchandra Ravji Kulkarni* (1891), 16 Bom. 29, that a son cannot in the lifetime of his father sue his father and uncles for partition, but the Madras High Court has dissented from this view, *Subba Ayyar* v. *Ganasa Ayyar* (1895), 18 Mad. 179, see also Bhattacharya's "Hindu Law," 2nd ed., pp. 324, 225. It is submitted that the view of the dissenting Judge (Telang, J.) in the Bombay case was correct.

[6] *Nagalinga Mudali* v. *Subbiramanaya Mudali* (1862), 1 Mad. H. C. 77.

[7] This follows from the fact that the great grandson acquires a right by birth, *ante*, pp. 232, 233.

[8] "Mitakshara," chap. i. sec. 5, para. 1.

[9] *Rameshwar Prosad Singh* v. *Lachmi Prosad Singh* (1903), 31 Calc. 111.

[10] *Sundar (Mussamat)* v. *Parbati (Mussammat)* (1889), 16 I. A. 186; 12 All. 51, and cases in 325, note 1. *Ariyaputri* v. *Alamelu* (1888), 11 Mad. 304; *Contrâ Kathaperumal* v. *Venkabai* (1880), 2 Mad. 194.

co-widow or sister,[1] and must be effected in such a way as not to prejudice the reversionary heirs.[2]

This case frequently occurs under the Bengal school of law. Under the Mitakshara school it could only occur with regard to the separate acquisitions of the husband or father, or in the case where the husband or father died without leaving any coparcener him surviving, or perhaps in a case where a share is allotted to wives on a partition.[3]

Where a widow or daughter is entitled to a partition a purchaser of her share is also entitled to partition.[4]

Where a Hindu widow is entitled to partition, and there is a reasonable apprehension that she will waste the movable property allotted to her share, sufficient provision should be made in the final decree for partition, for the prevention of such waste, to safeguard the interests of the reversioners.[5]

It has been held that in a suit for partition by a widow the Court has a discretion.[6]

Minor coparcener.

Where a coparcener is a minor, and his interests are likely to be prejudiced by the property remaining joint, as, for instance, where his coparceners are wasting the property, or setting up rights adverse to him, or decline to provide for his maintenance, it is for his interest that a suit[7] for a partition be brought,[8] even against his father,[9]

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[1] *Nilamani Patta Maha Devi Garu (Sri Gajapathi)* v. *Radhamani Patta Maha Devi Garu (Sri Gajapathi)* (1877), 4 I. A. 212; 1 Mad. 290; 1 C. L. R. 97; *Dal Koer (Musst.)* v. *Panbas Koer (Musst.)* (1904), 8 C. W. N. 658; *Rindnamma* v. *Venkataramappa* (1866), 3 Mad. H. C. 268; *Padmamani Dasi (Srimati)* v. *Jagadamba Dasi (Srimati)* (1871), 6 B. L. R. 134.

[2] *Dal Koer (Musst.)* v. *Panbas Koer (Musst.)* (1904), 8 C. W. N. 658; *Janokinath Mukhopadhya* v. *Mothuranath Mukhopadhya* (1883), 9 Calc. 580; 12 C. L. R. 215.

[3] *Post*, pp. 329, 330.

[4] *Janokinath Mukhopadhya* v. *Mothuranath Mukhopadhya* (1883), 9 Calc. 580; 12 C. L. R. 215.

[5] *Durga Nath Pramanik* v. *Chintamoni Dassi* (1903), 31 Calc. 214; 8 C. W. N. 11. See *Janokinath Mukhopadhya* v. *Mothuranath Mukhopadhya* (1883), 9 Calc. 580; 12 C L. R. 215.

[6] *Mohadeay Kooer* v. *Haruknarain* (1882), 9 Calc. 244, at p. 250. It was said in *Soudaminey Dossee* v. *Jogesh Chunder Dutt* (1877), 2 Calc. 262, at p. 271, that the Court would probably refuse partition by metes and bounds to a childless widow who was entitled to a very small share.

[7] *I.e.* either a suit in a Civil Court, or a proceeding in a Revenue Court.

[8] *Damoodur Misser* v. *Senabutty Misrain* (1882), 8 Calc. 537; 10 C. L. R. 402; *Mahadev Balvant* v. *Lakshman Balvant* (1894), 19 Bom. 99; *Thangam Pillai* v. *Suppa Pillai* (1888), 12 Mad. 401; *Kamakshi Ammal* v. *Chidambara Reddi* (1866), 3 Mad. H. C. 94; *Alimelammal* v. *Arunachellam Pillai* (1866), 3 Mad. H. C. 69; *Lekhraj Kooer (Mussamut)* v. *Dyal Singh (Sirdar)* (1876), 25 W. R. C. R. 497.

[9] *Bholanath* v *Ghasi Ram* (1907), 29 All. 373.

but if there be no such special circumstances, it is ordinarily not in the interest of the minor that such suit should be brought.[1]

The same principle would apply to reviving on behalf of a minor a suit for partition instituted by his father,[2] provided it be clear that the omission to continue the suit does not prejudice the minor's rights to the property.

It is not ordinarily in the interests of a minor member of a joint Hindu family, or of any other minor joint-owner, that his share should be separated. *Primâ facie*, a partition is not for a minor's benefit, because, ordinarily speaking, the family estate is better managed, and yields a greater ratio of profit in union than when split up and distributed among the several parceners, and moreover, by partition, a minor member of a Mitakshara family would lose the benefit of survivorship.[3] There is also the danger of the minor's property being wasted by the costs of litigation.

Such special circumstances, as would render a suit for partition necessary in the interest of the minor, would justify a guardian in arranging a partition.[4]

Where an adult co-sharer insists upon partition the guardian cannot resist it, but must do his best in the interests of the minor.[5]

A partition by arbitration,[6] or by arrangement,[7] or by the Collector,[8] is binding on a minor, and can be enforced by him,[9] provided that he be not injuriously affected

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[1] *Damoodur Misser* v. *Senabutty Misrain* (1882), 8 Calc. 537; 10 C. L. R. 401; *Alimelammal* v. *Arunachellam Pillai* (1866), 3 Mad. H. C. 69; *Svamiyar Pillai* v. *Chokkalingam Pillai* (1862), 1 Mad. H. C. 105. If the suit be not for the benefit of the minor, the Court will refuse to decree partition. *Bachoo Hurkissondas* v. *Mankorebai* (1907), 34 I. A. 107; 31 Bom. 373; 11 C. W. N. 769.

[2] *Parvathi* v. *Manjayakarantha* (1870), 5 Mad. H. C. 193.

[3] *Kamakshi Ammal* v. *Chidambara Reddi* (1861), 3 Mad. H. C. Rep. 94; Macnaghten's "Hindu Law," vol. ii. chap. i. s. 1, case 10; Mayne's "Hindu Law," 7th ed., pp. 642, 643.

[4] *Ante*, p. 325. West and Bühler, 2nd ed., p. 303.

[5] See *Nallappa Reddi* v. *Balammal* (1864), 2 Mad. H. C. 182.

[6] *Ramnarain Poramanick* v. *Sreemutty Dossee* (1864), 1 W. R. C. R. 281.

[7] *Deo Bunsee Kooer* (*Mussamut*) v. *Dwarkanath* (1868), 10 W. R. C. R. 273; S.C., *Deowanti* v. *Dwarkanath*, 8 B. L. R. 363, note.

[8] *Hari Prasad Jha* (*Baboo*) v. *Muddan Mohan Thakur* (1872), 8 B. L. R., Ap. 72; 17 W. R. C. R. 217.

[9] *Awadh Sarju Prasad Singh* v. *Sita Ram Singh* (1906), 29 All. 37.

thereby, that it be fair, that he be duly represented,[1] and that the person representing him in such proceedings act *bonâ fide* and with a due regard to his interest.[2]

"There is no doubt that a valid agreement for partition may be made during the minority of one or more of the coparceners. That seems to follow from the admitted right of one coparcener to claim a partition, and if an agreement for partition could not be made binding on minors, a partition could hardly ever take place. No doubt, if the partition were unfair or prejudicial to the minor's interests, he might, on attaining his majority, by proper proceedings set it aside so far as regards himself."[3]

Effect of birth of son after partition.

When a son is born to the father of a Mitakshara family, after there has been a partition between him and his sons, the afterborn son is not entitled to a redistribution, unless he was conceived at the time of the partition,[4] but he is to the exclusion of his separated brethren entitled as a coparcener to the share allotted to his father, and to succeed as heir to his father.[5]

It has been held that where the father has reserved no share for himself on the partition, an afterborn son is entitled to a share.[6]

In a case governed by the Bengal school, a posthumous son would be entitled to reopen a partition made by his brothers after his father's death and before his birth.[7]

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[1] *Lal Bahadur Singh* v. *Sispal Singh* (1892), 14 All. 498; *Krishnabai* v. *Khangowda* (1893), 18 Bom. 197.

[2] *Kales Sunkur Sannyal* v. *Denendro Nath Sannyal* (1874), 23 W. R. C. R. 68; *Chanvirapa* v. *Danava* (1894), 19 Bom. 593; *Nallapa Reddi* v. *Balammal* (1864), 2 Mad. H. C. 182. As to cases governed by Malabar law, see *Arayalprath Kunhi Pooker* v. *Kanthilath Ahmad Kuti* (1905), 29 Mad. 62.

[3] *Balkishen Das* v. *Ram Narain Sahu* (1903), 30 I. A. 139, at p. 150; 30 Calc. 738, at p. 752; 7 C. W. N. 578, at p. 590. As to the limitation for such suits, see *Lal Bahadur Singh* v. *Sispal Singh* (1892), 14 All. 498; *Krishnabai* v. *Khangowda* (1893), 18 Bom. 197; *Chanvirapa* v. *Danava* (1894), 19 Bom. 593.

[4] *Yekeyamian* v. *Agniswarian* (1869), 4 Mad., H. C. 307.

[5] See *Nawal Singh* v. *Bhagwan Singh* (1882), 4 All. 427. Where one son has separated, the afterborn son is entitled to share with the father and the united sons, but has no right to a share of the property allotted to the separated son. *Ganpat Venkatesh Despande* v. *Gopalrao Venkatesh Despande* (1899), 23 Bom. 636.

[6] See *Chengama Nayudu* v. *Munisami Nayudu* (1896), 20 Mad. 75; W. Macnaghten's "Hindu Law," vol. i. p. 47.

[7] "Dayabhaga," chap. vii. para. 10.

Absent coparceners.

As to the effect of a partition on the rights of coparceners who are absent, Sir Thomas Strange[1] says as follows: "Upon the same footing, in this respect, with minors are *absentees*, residing in a foreign country,[2] whose consent, at the time, not being attainable, partition may proceed without it, the law enjoining the preservation of their respective shares, till the one arrive at majority, and the other returns; and this is the case of the latter to the extent of the *seventh* in descent, the right of parceners remaining at home, being lost by dispossession beyond the *fourth*."[3]

This would, of course, be subject to the law for the limitation of suits.[4]

Purchaser of share.

The purchaser of the share of a coparcener, either at an execution sale[5] or by a voluntary transfer, where such transfer is valid,[6] has the same right of partition as the coparcener whose share was purchased by him, and is entitled to have a separate portion allotted to him,[7] but he may be compelled to sell to a coparcener a share of a dwelling-house purchased by him.[8]

A transferee, either by a private sale, or by a sale in execution of a decree, of the interest of a coparcener, in a

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[1] "Hindu Law," vol. i. pp. 206, 207.

[2] The rules as to what is a foreign country (Colebrooke's "Digest," vol. ii. p. 29), such as difference of language, the intervention of a mountain or great river, countries being accounted distant whence intelligence is not received in ten nights, would probably be disregarded in view of modern means of communication.

[3] "Dayabhaga," chap. viii.; Colebrooke's "Digest," vol. iii. pp. 440, 448; "Daya-Krama Sangraha," chap. ix.; Strange's "Hindu Law," vol. ii. pp. 327, 390.

[4] See Act XV. of 1877, Sched. II., Arts. 127, 144.

[5] *Ante*, p. 297.

[6] *Ante*, pp. 299, 300.

[7] *Bepin Behari Moduck* v. *Lall Mohun Chattopadhya* (1885), 12 Calc. 209; *Janoki Nath Mukhopadhya* v. *Mothuranath Mukhopadhya* (1883), 9 Calc. 580; 12 C. L. R. 215 (a suit by a purchaser from one of two widows); *Alamelu* v. *Rangasami* (1884), 7 Mad. 588; *Pandurang Anandrav* v. *Bhaskar Shadashiv* (1874), 11 Bom. H. C. 72; *Lall Jha* (*Baboo*) v. *Juma Buksh* (*Shaikh*) (1874), 22 W. R. C. R. 116; *Loohun Singh* v. *Nemdharee Singh* (1873), 20 W. R. C. R. 170; *Rughoonath Panjah* v. *Luckhun Chunder Dullal Chowdhry* (1872), 18 W. R. C. R. 23; *Anand Chandra Ghose* v. *Prankisto Dutt* (1869), 3 B. L. R. O. C. 14. As to his share on partition, see *ante*, p. 300.

[8] Act IV. of 1893, s. 4, *post*, pp. 355, 356.

portion only of the family property, is not entitled, as of right, to partition of such portion only.[1] Should he sue for a partition of such portion only, a coparcener may require him to include the whole of the family property in the suit,[2] but is not obliged to insist upon it.[3]

It has been said that in a case governed by the law of the Dayabhaga such partial partition can be claimed,[4] but it is submitted that no such distinction can be drawn.

RIGHTS OF WIFE AND WIDOW.

Rights of wife on partition.

Under the Mitakshara school of law, except in Southern India, on a partition of coparcenary property by a father and his son or sons (or purchasers of their shares[5]), the wife of the father is entitled to have allotted to her for her separate enjoyment a share equal to a son's share,[6] in order to provide for her maintenance.[7]

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[1] *Venkatarama* v. *Meera Labai* (1889), 13 Mad. 275; *Pandurang Anandrav* v. *Bhaskar Shadashiv* (1874), 11 Bom. H. C. 72.

[2] See *post*, pp. 351, 352. *Punchanun Mullick* v. *Shib Chunder Mullick* (1877), 14 Calc. 835.

[3] *Murarrao* v. *Sitaram* (1898), 23 Bom. 184.

[4] R. C. Mitra's "Law of Joint Property and Partition," p. 375.

[5] *Sumrun Thakoor* v. *Chundermun Misser* (1881), 8 Calc. 17; 9 C. L. R. 415.

[6] *Damoodur Misser* v. *Senabutty Misrain* (1882), 8 Calc. 537; 10 C. L. R. 401; *Dular Koeri* v. *Dwarkanath Misser* (1904), 32 Calc. 234; 9 C. W. N. 270; *Sumrun Thakoor* v. *Chundermun Misser* (1881), 8 Calc. 17; 9 C. L. R. 415; *Mahabeer Persad* v. *Ramyad Singh* (1873), 12 B. L. R. 90, at p. 99; 20 W. R. C. R. 192, at p. 196; *Laljeet Singh* v. *Rajcoomar Singh* (1873), 12 B. L. R. 373; 20 W. R. C. R. 337; *Pursid Narain Sing* v. *Hunoomun Sahay* (1880), 5 Calc. 845, at p. 854; 5 C. L. R. 576, at p. 585. In each of the above cases the partition was at the instance of a son, but it is submitted that the same principle would apply when the partition was at the instance of the father, see "Mitakshara," chap. i. s. 7, paras. 1, 2. See "Vyavahara Mayukha," chap. iv., paras. 4, 5, 11; "Smriti Chandrika," chap. ii. s. 1, para. 39; "Vivada Chintamani" (P. C. Tagore's translation), pp. 230, 231; Colebrooke's "Digest," vol. iii. p. 12. This includes a stepmother of the sons. Macnaghten's "Hindu Law," vol. i. p. 50.

[7] *Laljeet Singh* v. *Rajcoomar Singh* (1873), 12 B. L. R. 373, at p. 383; 20 W. R. C. R. 337, at p. 340; *Jairam Nathu* v. *Nathu Shamji* (1906), 31 Bom. 54. Strange's "Hindu Law," vol. i. p. 189. Banerjee's "Law of Marriage," 2nd ed., p. 141. See, however, *Dular Koeri* v. *Dwarkanath Misser* (1904), 32 Calc. 234, at p. 242; 9 C. W. N. 270, at p. 276.

Mr. Mayne[1] states that in Southern India the practice of allotting shares to wives is obsolete. Having regard to old authorities of the Dravida school it was not settled whether the father retained for them the shares which are assigned to his wives, or whether, as in the case of the Benares, Bombay, and Mithila schools, the shares should be made over to the wives themselves.[2]

Bengal school.

As under the law of the Bengal school a father is entitled to the absolute disposal of his property, whether ancestral or self-acquired,[3] this question cannot arise. In the rare case of a father partitioning his property amongst his sons, it is said that "his sonless wives are each entitled to a share equal to that of a son, or to half[4] of such share, according as they are unprovided, or provided, with *stridhana*."[5]

If the wife has previously had separate property given to her by her husband or father-in-law, she takes so much as with such separate property would amount to a share equal to that of one of the sons.[6]

Mother's share on partition.

Except in Southern India, where, it is said, the practice is obsolete,[7] a widow is, on a partition of coparcenary property[8] between her sons, or between her sons and grandsons[9] (or purchasers of their shares[10]), entitled to a share equal to that of one of her sons in lieu of maintenance.[11]

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[1] Mayne's "Hindu Law," 7th ed., p. 645; *Meenatchee* v. *Chedumbra Chetty*, Mad. dec. of 1853, 61

[2] See "Smriti Chandrika," chap. ii. s. 1, 39; "Parasara Madhavya-Dayavibhaga" (Burnell's translation), p. 8; Strange's "Hindu Law," vol. i. p. 189.

[3] *Ante*, p. 230.

[4] See, however, Colebrooke's "Digest," vol. iii. pp. 20-25.

[5] Banerjee's "Law of Marriage," 2nd ed., pp. 140, 141, 142; "Dayabhaga," chap. iii. ss. 2, paras. 31, 32; "Daya-Krama Sangraha," chap. vi. paras. 22-28; "Dayatattwa," chap. ii. paras. 13-18.

[6] "Mitakshara," chap. ii. s. 11, para. 5. *Jairam Nathu* v. *Nathu Shamji* (1906), 31 Bom. 54. See *Mahabeer Persad* v. *Ramyad Singh* (1873), 12 B. L. R. 90, at p. 99; 20 W. R. C. R. 192, at p. 196.

[7] Mayne's "Hindu Law," 7th ed., pp. 645, 646.

[8] She is not entitled to such right in property which has been acquired by the sons without any aid from the estate of their ancestors.

[9] *Badri Roy* v. *Bhugwat Narain Dobey* (1882), 8 Calc. 649; 11 C. L. R. 186; *Purna Chandra Chakravarti* v. *Sarojini Debi* (1904), 31 Calc. 1065; 8 C. W. N. 763; *Sibbosoondery Dabia* v. *Bussoomutty Dabia* (1881), 7 Calc. 191; *Prawnkissen Mitter* v. *Muttysondery* (1841), Fulton, 389; *contrâ Radha Kishen Man* v. *Bachaman* (1880), 3 All. 118.

[10] *Amrita Lall Mitter* v. *Manick Lall Mullick* (1900), 27 Calc. 551; 4 C. W. N. 764; *Jogendra Chunder Ghose* v. *Fulkumari Dassi* (1899), 27 Calc. 77; 4 C. W. N. 254.

[11] *Ganesh Dutt Thakoor* (*Chowdhry*) v. *Jewach Thakoorain* (*Mussummat*)

In Madras a mother is, according to the "Smriti Chandrika," entitled on partition between her sons to have allotted to her a portion sufficient for her maintenance, but not exceeding the share of one of her sons.[1]

Except under the Bengal school,[2] a sonless widow is entitled to a share on a partition between her stepsons,[3] but even in Bengal she is entitled to a share on a partition between her sons and stepsons.[4]

In a partition between sons by different wives the respective mothers are only entitled to share equally with their own sons the aggregate of the shares which an equal division among the brothers allots to those sons, or, in other words, the property must be first divided into as many shares as there are sons. Each widow then shares equally with each of her sons the portion allotted to her sons.[5]

In a Bombay case[6] where there was a partition between a son and his stepmother and her three sons, the stepmother was given one-fifth. According to the above rule, she would have been entitled to a three-sixteenth share.

(1903), 31 I. A. 10, at p. 15; 31 Calc. 262, at p. 271; 8 C. W. N. 146, at p. 150; *Hemangini Dasi (Srimati)* v. *Kedarnath Kudu Chowdhry* (1889), 16 I. A. 115; 16 Calc. 758; *Torit Bhoosun Bonnerjee* v. *Taraprosonno Bonnerjee* (1879), 4 Calc. 756; *Pursid Narain Sing* v. *Hunooman Sahay* (1880), 5 Calc. 845; 5 C. L. R. 576; *Kishori Mohun Ghose* v. *Monimohun Ghose* (1885), 12 Calc. 165; *Isree Pershad Singh* v. *Nasib Kooer* (1884), 10 Calc. 1017; *Bilaso* v. *Dina Nath* (1880), 3 All. 88; *Jodoonath Dey Sircar* v. *Brojonath Dey* (1874), 12 B. L. R. 385; *Jugomohan Haldar* v. *Sarodamoyee Dossee* (1877), 3 Calc. 149; *Damodardas Maneklal* v. *Uttamram Manecklal* (1892), 17 Bom. 271; *Lakshman Ramchandra Joshi* v. *Satayabhamabai* (1877), 2 Bom. 494, at p. 504; *Sheo Dyal Tewaree* v. *Judoonath Tewaree* (1868), 9 W. R. C. R. 61. In *Thukoo Bace Bhide* v. *Ruma Bace Bhide* (1824), 2 Borr. 446, at p. 454, the pundits declared that the mother had a right to a share, although there was only one son. See also cases in West and Bühler, 2nd ed., pp. 391, 392.

[1] Chap. iv. paras. 12–17. This is in accordance with the practice in Madras, Mayne's "Hindu Law," 7th ed. p. 646. *Mari* v. *Chinnammal* (1884), 8 Mad. 107, at p. 123; *Venkatammal* v. *Andyappa Chetti* (1882), 6 Mad. 130; Strange's "Hindu Law," vol. ii. p. 309. See Macnaghten's "Hindu Law," vol. i. p. 50.

[2] *Damoodur Misser* v. *Senabutty Misrain* (1882), 8 Calc. 537, at p. 542; 10 C. L. R. 401, at p. 405.

[3] *Damoodur Misser* v. *Senabutty Misrain* (1882), 8 Calc. 837; 10 C. L. R. 401 (a Mithila case); *Laljeet Singh* v. *Rajcoomar Singh* (1873), 12 B. L. R. 373; 20 W. R. C. R. 337; *Thakur Proshad (Chowdhry)* v. *Bhagbati* 1 C. L. J. 142.

[4] See *Torit Bhoosun Bonnerjee* v. *Taraprosono Bonnerjee* (1879), 4 Calc. 756.

[5] *Kristobhabiney Dossee* v. *Ashutosh Bosu Mullick* (1886), 13 Calc. 39; *Cdlly Churn Mullick* v. *Janova Dossee* (1866), 1 Ind. Jur. 284.

[6] *Damodardas Maneklal* v. *Uttamram Maneklal* (1892), 17 Bom. 271.

This right of the mother has been held only to apply to the case of a general partition, and not to a case where there has been only a partition of an item of the property at the instance of a stranger.[1]

It has also been held that this right only comes into operation when the partition is completed.[2]

Under the Bengal law a husband can by will deprive his wife of a share on partition.[3]

Right of grandmother.

On a partition between her son's sons, a widow is entitled to a share equal to that of a son's son.[4]

On a partition between son's sons and great-grandsons, she is entitled to the share of a son's son.[5]

When the partition is between grandsons by different sons, the share of the grandmother is to be ascertained by giving her such a share as she would take if each of the grandsons took equally. Thus if there be nine grandsons she will get one-tenth, and so on. The share which the grandsons themselves take depends upon the number in each stock, and upon whether their own mothers are alive.

Great-grandmother.

The right of a widow to a share on a partition between her great-grandsons is not expressly recognized by the Hindu law.[6] The right would, it is submitted, be admissible upon grounds similar to those which confer a right upon a mother and grandmother.[7]

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[1] *Barahi Debi* v. *Debkamini Debi* (1892), 20 Calc. 682.

[2] *Sheo Dyal Tewaree* v. *Judoonath Tewaree* (1868), 9 W. R. 61; explained in *Tej Protap Singh* v. *Champa Kaloe Koer* (1885), 12 Calc. 96.

[3] *Debendra Coomar Roy Chowdhry* v. *Brojendra Coomar Roy Chowdhry* (1890), 17 Calc. 886, following *Bhoobunmoyee Debea Chowdhrain* v. *Ramkissore Acharj Chowdhry*, Ben. S. D. A. 1860, p. 485.

[4] *Sorolah Dossee* v. *Bhoobun Mohun Neoghy* (1888), 15 Calc. 292, at p. 306; *Sheo Dyal Tewaree* v. *Judoonath Tewaree* (1868), 9 W. R. C. R. 61; "Dayabhaga," chap. iii. s. 2, para. 32; "Daya-Krama-Sangraha," chap. vii., paras. 4, 6; "Dayatattwa," chap. ii. para. 19; F. Macnaghten, 39, 41, 52, 54; Sircar's "Vyavastha Darpana," 2nd ed. pp. 493–498. *Contrà Puddum Mookhee Dossee* v. *Rayee Monee Dossee* 1869), 12 W. R. C. R. 409; S. C. on review *Rayee Monee Dossee* v. *Puddum Mookhee Dossee* (1870), 13 W. R. C. R. 66, which was a case on the same footing as a partition between sons. See *Purna Chandra Chakravarti* v. *Sarojini Debi* (1904), 31 Calc. 1065, at p. 1076; 8 C. W. N. 763, at p. 771.

[5] *Purna Chandra Chakravarti* v. *Sarojini Debi* (1904), 31 Calc. 1065; 8 C. W. N. 763. F. Macnaghten, 52.

[6] Colebrooke's "Digest," vol. iii. p. 27. F. Macnaghten, pp. 28, 51; doubted by Wilson, Works v. 25.

[7] See Sircar's "Vyavastha Darpana," 2nd ed., pp. 497, 498.

In fixing the amount of her share, the widow must be debited with the value of any gift or legacy which she may have received from her husband.[1] Gift by husband.

Apparently, as in the case of allotting maintenance, her separate property must be taken into account,[2] but the fact that she has inherited a share from one of her sons does not deprive her of her right to a share on partition.[3]

According to the Mitakshara, the share becomes the absolute property of the widow to whom it is allotted,[4] but, according to the Bengal school, on the death of the widow the share goes back to the sons or grandsons from whose shares it was deducted,[5] and she has no power to dispose of it by will.[6] Rights in share.

Although a right to maintenance is not a complete charge upon the property,[7] a right to a share in lieu of maintenance is not affected by a sale of an undivided share, whether before[8] or during the pendency of a partition suit.[9] Effect of sale on right.

It has been held that the loss of a right of maintenance would involve the loss of the right to a share on partition.[10] It is, it is submitted, clear that when the share had been allotted, want of chastity would not devest the right.[11]

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[1] *Kishori Mohun Ghose* v. *Monimohun Ghose* (1885), 12 Calc. 165; *Judoonath Dey Sircar* v. *Brojonath Dey Sircar* (1874), 12 B. L. R. 385. "Mitakshara," chap. i. s. 2, para. 9; "Vyavahara Mayukha," chap. iv. s. 4, para. 18.

[2] *Ante*, p 84. See "Vyavahara Mayukha," chap. iv. s. 4, para. 18.

[3] *Jugomohan Haldar* v. *Sarodamoyee Dassee* (1877), 3 Calc. 149.

[4] *Chiddu* v. *Naubat* (1901), 24 All. 67; *Sri Pal Rai* v. *Surajbali* (1901), 24 All. 82.

[5] *Sorolah Dossee* v. *Bhoobun Mohun Neoghy* (1888), 15 Calc. 292; *Hridoy Kant Bhattacharjee* v. *Behari Lal Mookerjee* (1906), 11 C. W. N. 239; *Tripura Sundari Debi* v. *Dakshina Mohun Roy* (1869), 11 C. W. N. 698.

[6] *Hridoy Kant Bhattacharjee* v. *Behari Lal Mookerjee* (1906), 11 C. W. N. 289.

[7] *Ante*, p. 88.

[8] *Bilaso* v. *Dinanath* (1880), 3 All. 88; *Amrita Lal Mitter* v. *Manick Lal Mullick* (1900), 27 Calc. 551; 4 C. W. N. 764. See *Deendyal Lal* v. *Jugdeep Narain Singh* (1877), 4 I. A. 247, at p. 256; 3 Calc. 198, at p. 209.

[9] *Jogendra Chunder Ghose* v. *Fulkumari Dassi* (1899), 27 Calc. 77; S. C. *sub nomine Jogendro Chunder Ghose* v. *Ganendra Nath Sircar*, 4 C. W. N. 254; *ante*, pp. 92, 93.

[10] *Sellam* v. *Chinnamal* (1901), 24 Mad. 441.

[11] See *Moniram Kolita* v. *Kerry Kolitany* (1880), 7 I. A. 115; 5 Calc. 776; 6 C. L. R. 322.

Enforcement of right.

A wife or widow cannot, until there has been a partition or separation, enforce her right to a share,[1] even if by arrangement a share of the profits has been assigned to her for her maintenance,[2] and until partition she has no alienable interest.[3] When there has been a partition, or a separation, she may sue for her share.[4] She is a necessary party to a suit by a son against her husband,[5] or to a suit between her sons, for partition; but the omission to reserve a share for the mother does not render the partition invalid.[6] She may acquiesce in such omission.[7]

No other right on partition.

A woman, who is not a coparcener, is not entitled to a share except on such partition as is above mentioned.[8]

Sister.

Although some of the ancient writers gave her the right to a one-fourth share,[9] a sister is not entitled to a share on a partition.[10] As she is entitled to her maintenance until marriage, and to her marriage expenses out of the family property,[11] provision therefor should be made at the time of the partition.

ALLOTMENT OF SHARES.

Shares on partition.

On a partition shares are allotted in accordance with the following rules. There is nothing in law to prevent an arrangement upon a different footing,[12] so far as the interest of adult coparceners are concerned, but an

[1] *Sunder Bahu* v. *Monohur Lal Upadhya* (1881), 10 C. L. R. 79, at p. 80; Strange's "Hindu Law," vol. i. pp. 188, 189; Colebrooke's "Digest," vol. iii. pp. 27, 422–427.

[2] *Bhoop Singh* v. *Phool Kower* (*Mussumat*) (1867), 2 Agra, 368.

[3] *Judoonath Tewaree* v. *Bishonath Tewaree* (1868), 9 W. R. C. R. 61.

[4] *Ram Joshi* v. *Laxmibai* (1864), 1 Bom. H. C. 189, and cases *ante*, p. 330, note 11.

[5] *Laljeet Singh* v. *Rajcoomar Singh* (1873), 12 B. L. R. 373, at p. 383; 20 W. R. C. R. 336, at p. 340.

[6] *Ganesh Dutt Thakoor* (*Chowdhry*) v. *Jewach Thakoorain* (*Mussumat*) (1903), 31 I. A. 10, at p. 15; 31 Calc. 263, at p. 271; 8 C. W. N. 146, at p. 150.

[7] *Ibid.*

[8] *Sheo Dyal Tewaree* v. *Judoonath Tewaree* (1868), 9 W. R. C. R. 61.

[9] "Manu," chap. ix. para. 118; "Mitakshara," chap. i. s. 7, paras. 5–10; "Dayabhaga," chap. iii. s. 2, paras. 38, 39; "Smriti Chandrika," chap. iv. paras. 32–34; "Vivada Chintamoni" (Tagore's translation), p. 248; Colebrooke's "Digest," vol. iii. pp. 93, 94.

[10] See *Damoodur Misser* v. *Senabutty Misrain* (1882), 8 Calc. 537, at p. 541; 10 C. L. R. 401, at p. 404; W. Macnaghten's "Hindu Law," vol. i. p. 50.

[11] *Ante*, pp. 48, 242, 272.

[12] See *Ram Nirunjun Singh* v. *Prayag Singh* (1881), 8 Calc. 138; 10 C. L. R. 66.

arrangement between the parties to a partition that the shares should be inalienable, and should revert to the original coparceners, cannot be upheld.[1]

Between father and sons.

Under the Mitakshara school of law, in a partition between a father and his sons, each of the sons take a share equal to that of the father.[2]

Unequal division by father.

Although under the Mitakshara a father is entitled to dispose of his self-acquired property,[3] and under the Bengal school he is entitled to dispose of all his property, whether ancestral or self-acquired, it does not seem settled upon the authorities whether in the former case he can divide his self-acquired property, or in the latter case any of his property in unequal shares between his sons.[4]

Some of the text writers[5] prohibited such inequality of division, except under special circumstances.

Mr. Mayne[6] sums up the authorities in the following words: "The result would be that a father under 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. If he conforms to the rules of partition, the transaction will be valid by mutual agreement, without actual apportionment followed by possession; but if he does not conform to those rules, then he must deliver the share to each of the sharers, so as to make a valid gift to each."

As to the Bengal school, Dr. Jogendra Nath Bhattacharya[7] said: "As the father can undoubtedly make a gift of ancestral property, even in favour of a stranger, there can be no doubt that the father can make an unequal partition of such property among his sons, though by doing so against the rules of the Shastras he incurs sin;" and R. C. Mitra[8] says: "It has been held that the injunctions against an

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[1] *K. Venkatrammanna* v. *K. Brammanna Sastrulu* (1869), 4 Mad. H. C. 345. As to an agreement not to partition, see *ante*, p. 322.

[2] "Mitakshara," chap. i. s. 5, para 5. *Ante*, p. 232.

[3] *Ante*, p. 255.

[4] *Ante*, p. 230.

[5] Colebrooke's "Digest," vol. ii. pp. 540, 541; "Vyavahara Nirnaya," Burnell's translation, p. 8; "Dayabhaga," chap. ii. paras. 15-20, 50, 86; Strange's "Hindu Law," vol. i. p. 194; Macnaghten's "Hindu Law," vol. ii. p. 147. "The Dayabhaga" makes a distinction between ancestral and self-acquired property, so does the "Daya-Krama Sangraha" (chap. vi. paras. 8 - 16). The "Mitakshara" seems to allow an unequal partition, chap. i. s. 2, paras. 6, 13, 14. See also "Smriti Chandrika," chap. ii. s. i., paras. 17 to 24.

[6] 7th ed., p. 665.

[7] "Hindu Law," 2nd ed., p. 361.

[8] "Law of Joint Property and Partition," p. 320.

unequal distribution by the father are mere moral precepts which no Court of law would enforce. A father bent upon making an unequal distribution may do so in more ways than one."

Between brothers, or their sons, etc.

According to all the schools, on a partition brothers take equal shares.[1]

Shares of deceased brothers.

Under the Mitakshara school, the share of a brother who has died is represented by his sons, grandsons, and great-grandsons.

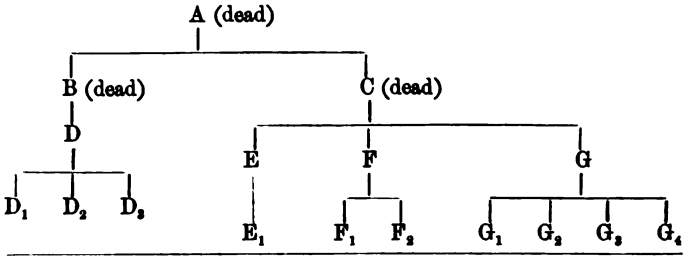
Under the Bengal school, the share of a brother, who is dead, is taken by his heir,[2] devisee, or assignee.

Different branches.

As between different branches of a family, division must be *per stirpes, i.e.* according to the stock,[3] and as between the sons of the same father, it must be *per capita.*[4]

This rule "is designed to ensure equality of partition in cases of vested interests held in coparcenary, and to carry out in those cases the principles that those who have capacity to confer equal spiritual benefits on the common ancestor ought to take equal shares."[5]

Illustration. (*Mitakshara School.*)



[1] *Lakshman Dada Naik* v. *Ramchandra Dada Naik* (1876), 1 Bom. 561; *Bhyroochund Rai* v. *Russoomunee* (1799), 1 Ben. Sel. Rep. 28 (new edition, 36); *Neelkunt Rai* v. *Munee Chowdrain* (1802), *ibid.* 58 (new edition, 77); *Taliwur Singh* v. *Pulwan Singh* (1824), 3 Ben. Sel. Rep. 301 (new edition, 402); "Mitakshara," chap. i. s. 2, para. 6; chap. i. s. 3, paras. 1–7; "Smriti Chandrika," chap. ii. s. 2, para. 2; s. 3, paras. 16–24; "Vyavahara Mayukha," chap. iv. s. 4; paras. 8–11, 17; "Dayabhaga," chap. iii. s. 2, para. 27; "Daya-Krama Sangraha," chap. vii. para. 13; "Viramitrodaya," chap. ii. part i. ss. 11, 14. As to a usage to the contrary, see *Sheo Buksh Sing* v. *Futteh Sing* (1818), 2 Ben. Sel. R. 265 (new edition, 340); Wm. Macnaghten's "Hindu Law," vol. ii. p. 16.

[2] *Ante*, p. 230.

[3] "Mitakshara," chap. i. s. 5, para. 2; *Rajnarain Singh* v. *Heeralal* (1878), 5 Calc. 142.

[4] "Mitakshara," chap. i. s. 3, paras. 1–7. See *Debi Pursad* v. *Thakur Dial* (1875), 1 All. 105, overruling *Madho Singh* v. *Bindessery Roy* (1868), 3 Agra H. C. 101.

[5] *Manjanatha Shanabhaga* v. *Narayana Shanabhaga* (1882), 5 Mad. 362, at p. 364.

The family having descended from two brothers, one half-share must be allotted to each branch. As to B's branch, D and his sons, D_1, D_2, and D_3, are each entitled to $\frac{1}{4}$ of $\frac{1}{2}$, *i.e.* $\frac{1}{8}$. As to C's branch, each of the sub-branches composed of C's sons, E, F, and G, with their sons respectively, will be entitled to $\frac{1}{3}$ of $\frac{1}{2}$, *i.e.* $\frac{1}{6}$, so E and E_1 will each get $\frac{1}{2}$ of $\frac{1}{6}$, *i.e.* $\frac{1}{12}$, F, F_1, and F_2 will each get $\frac{1}{3}$ of $\frac{1}{6}$, *i.e.* $\frac{1}{18}$, G, G_1, G_2, G_3, and G_4 will each get $\frac{1}{5}$ of $\frac{1}{6}$, *i.e.* $\frac{1}{30}$. This illustration will apply to the Bengal school, except that under that school the sons do not take during the lifetime of their fathers.

This rule is laid down with reference to cases in which all the coparceners desire partition at the same time. Where there is a partition by some only of the coparceners, and subsequently there is a partition between the coparceners who had remained united after the first partition, the allotment of shares of the second partition must have regard to the state of the family before the first partition, with such variations as may have arisen in consequence of the death of coparceners or the birth of new coparceners.[1] Partial partition.

Except where there is a family usage to the contrary, sons by different mothers take equally.[2] Sons by different mothers.

When daughter's sons,[3] or *gotraja sapindas*[4] other than descendants, succeed as heirs, they take on partition *per capita*.

SUBJECT OF PARTITION.

The coparcenary property,[5] movable or immovable, is alone the subject of partition. Subject of partition.

Partition cannot be made of property which has been proved to have, by ancient and invariable custom,[6] always descended to one member, and to have been enjoyed by him alone, and not to have been divided.[7] Impartible property.

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[1] See *Manjanatha Shanabhaga* v. *Narayana Shanabhaga* (1882), 5 Mad. 362.

[2] *Sumrun Singh* v. *Khadum Singh* (1814), 2 Ben. Sel. R. 116 (2nd ed., 147), Colebrooke's "Digest," vol. ii. p. 576.

[3] *Ramdhun Sein* v. *Kishen Kanth Sein* (1821), 3 Ben. Sel. R. 100 (2nd ed. 133).

[4] *Nagesh* v. *Gururao* (1892), 17 Bom. 303, at p. 305.

[5] *Ante*, pp. 245–255.

[6] See *ante*, pp. 22–24. *Koernarain Roy* (*Raja*) v. *Dhorinidhur Roy*, Ben. S. D. A. 1858, p. 1132.

[7] *Durriao Sing* (*Thakur*) v. *Davi Sing* (*Thakur*) (1873), 1 I. A. 1; 13 B. L. R. 165; *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayer* (1872), I. A. Sup. Vol. 1; 12 B. L. R. 396; 14 M. I. A. 570; 17 W. R. C. R. 553; *Adrishappa* v. *Gurushidappa* (1880), 7 I. A. 162; 4 Bom. 494; *Kachi Kaliyana Rengappa Kalakka Thola Udayar* v. *Kachi Yuva Rengappa*

The following are instances where the custom of impartibility is to be found:—

Raj. (*a*) Zemindaries, especially in the Madras Presidency, partaking of the nature of a Raj or sovereignty.[1]

Palayam. (*b*) Palayams (tracts of country governed by a Poligar or petty chieftain as a principality or Raj)[2] in the Madras Presidency.[3]

An estate which is neither a Raj nor a Palayam may also by family custom be impartible.[4]

Grants by Government. (*c*) Saranjams[5] or Jaghirs.[6] Although Saranjams are *primâ facie* impartible, they may be originally partible, or become so by family usage.[7]

Grants by Government, at any rate in the Southern Mahratta country, in the absence of any provision in the grant, or any custom would follow the ordinary rule of ancestral property,[8] especially where they are granted for the maintenance of the family.[9]

As to the descent of jaghirs in the Punjab, see Act IV. (Punj. C.) of 1900.

Desai. It has been held that land held as appertaining to the office of *desai*, who was formerly the officer employed in the Mahratta country in superintending the collection of the Government revenues and other duties, is *primâ facie* partible.[10]

Deshpande. Deshmukh. There is similar authority with regard to the office of *deshpande*, an

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Kalakka Thola Udayar (1905), 32 I. A. 261; 28 Mad. 508; 10 C. W. N. 95. S. C. in Court below, (1901) 24 Mad. 562. See *ante*, pp. 253, 254.

[1] See *Gavuridevamma Garu* (*Sri Rajah Yenumala*) v. *Ramandora Garu* (*Sri Rajah Yenumala*) (1870), 6 Mad. H. C. 93, at p. 105. See cases in Norton L. C. pp. 478–480.

[2] See Wilson's "Glossary," p. 391.

[3] *Kachi Kaliyana Rengappa Kalakka Thola Udayar* v. *Kachi Yuva Rengappa Kalakka Thola Udayar* (1905), 32 I. A. 261; 28 Mad. 508; 10 C. W. N. 95; *Naragunty Lutchmeda-vamah* v. *Vengama Naidoo* (1861), 9 M. I. A. 66; 1 W. R. P. C. 30.

[4] *Chintamun Singh* (*Chowdhry*) v. *Nowlukho Konwari* (*Mussamut*) (1875), 2 I. A. 263; 1 Calc. 153; *Shyamanand Das Mohapatra* v. *Rama Kanta Das Mohapatra* (1904), 32 Calc. 6; *Urjun Sing* (*Rawut*) v. *Ghunsiam Sing* (*Rawut*) (1851), 5 M. I. A. 169.

[5] Grants generally of Revenue made by Maratha sovereigns, see Wilson's "Glossary," p. 465. *Narayan Jagannath Dikshit* v. *Vasudeo Vishnu Dikshit* (1890), 15 Bom. 247; *Ramchandra Mantri* v. *Venkatrao* (1882), 6 Bom. 598.

[6] Grants by the Sovereign, see *Nilmoni Singh* (*Rajah*) v. *Bakranath Singh* (1882), 9 I. A. 104; 9 Calc. 187.

[7] *Madhavrav Manohar* v. *Atmaram Keshav* (1890), 15 Bom. 519. See *Gopal Hari* v. *Ramakant* (1896), 21 Bom. 458, at p. 460.

[8] *Bodhrao Hunmont* v. *Nursing Rao* (1856), 6 M. I. A. 426; *Panchanadayyan* v. *Nilakandayyan* (1883), 7 Mad. 191.

[9] *Visvanadha Naick* v. *Bungaroo Teroomala Naick*, Mad. Dec. of 1851, 74. See cases in Norton's L. C. pp. 279, 478.

[10] *Adrishappa* v. *Gurushidappa* (1880), 7 I. A. 162; 4 Bom. 494; *Shidhojirav* v. *Naikojirav* (1873), 10 Bom. H. C. 228.

hereditary revenue accountant of a district or a certain number of villages,[1] and to the office of *deshmukh*, who is a district Revenue officer.[2]

On partition, however, the right of the officer to allowances for the performance of the duties of his office must be reserved.[3]

A mere arrangement for the convenient performance of the services of the officer is on a different footing from a custom.[4]

Where the services have been abolished, a family custom might still render the property impartible.[5]

The terms of the grant might, of course, create impartibility.[6]

The office of *Pattam*, an office of dignity in a family governed by the Aliya Satana law, is impartible.[7] *Pattam.*

(*d*) Service tenures, such as the *ghatwal*[8] tenures in Manbhoom and Bheerbhoom,[9] and those attached to village offices in Madras.[10] Service tenures.

"Hereditary offices, whether religious or secular, are treated by the Hindu law writers as naturally indivisible; but modern custom, whether or not it be strictly in accordance with ancient law, has sanctioned such partition as can be had of such property, by means of a performance of the duties of the office, and the enjoyment of the emoluments by the different coparceners in rotation."[11] Hereditary offices.

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[1] *Ramrao Trimbak Deshpande* v. *Yeshvantrao Madhavrao Deshpande* (1885), 10 Bom. 327. In this case the custom of impartibility was established. See Steele, p. 229.

[2] *Gopalrav* v. *Trimbakrav* (1886), 10 Bom. 598. In that case also the custom of impartibility was established.

[3] *Adrishappa* v. *Gurushidappa* (1880), 7 I. A. 162; 4 Bom. 494. See Bom. Act III. of 1874, s. 8.

[4] See *Gopalrav* v. *Trimbakrav* (1886), 10 Bom. 598.

[5] *Rádhabai* v. *Anantrav Bhágvant Deshpánde* (1885), 9 Bom. 198; *Rámrao Trimbak Deshpande* v. *Yeshvantrao Madhávráo Deshpande* (1885), 10 Bom. 327.

[6] See *Gopál Hari* v. *Rámdkánt* (1896), 21 Bom. 458, at p. 462.

[7] *Timmáppa Heggade* v. *Mahalinga Heggade* (1868), 4 Mad. H. C. 28.

[8] "Lands granted either rent free or at a low rate of assessment to public ferrymen or to officers guarding passes in the hills. In Birbhum the lands were granted at a fixed rate of assessment in perpetuity to the holders and their descendants, as long as the revenue is paid, although apparently no longer connected with the performance of any particular duty.—Reg. XXIX., 1814." Wilson's "Glossary," p. 173. See Baden Powell's "Land Systems of British India," vol. i. pp. 532, 582–587.

[9] *Lelanund Sing Bahadoor* (*Raja*) v. *The Bengal Government* (1855), 6 M. I. A. 101, at p. 125; 1 W. R. P. C. 20; *Hurlall Singh* v. *Jorawun Singh* (1837), 6 Ben. Sel. R. 169 (new edition, 204). See *Nilmoni Singh* (*Rájah*) v. *Bákránáth Singh* (1882), 9 I. A. 104; 9 Calc. 187; *Doorgá Pershad Singh* (*Tekáet*) v. *Doorga Kooeree* (*Tekaetnee*) (1873), 20 W. R. C. R. 154.

[10] *Alymalummaul* v. *Vencatoovien*, 2 Mad. Dec. 85, referred to in Mayne's "Hindu Law," 7th ed. 633; *Bada* v. *Hussu Bhai* (1883), 7 Mad. 236.

[11] *Mancharam* v. *Pranshankar* (1882), 6 Bom. 298, at p. 299. As to priestly earnings, see Bhattacharya's "Law of the Joint Family," pp. 459–463; *Khedroo Ojha* v. *Deo Ranee Koomar* (*Mussámut*) (1866), 5 W. R. C. R. 222; *Bechâram Banerjee* v. *Thákoormonee Debia* (*Sreemuttee*) (1868), 10 W. R. C. R. 114.

As to savings from impartible property, see *ante*, p. 258.

Impartible property which has been sold[1] does not retain its character of impartibility.

Allotment to one of co-parceners.

When impartible property forms part of joint family property, it may, on a partition, be allotted to one of the coparceners, corresponding property being allotted to the others.[2] When it is excluded from the partition, the members of the family retain their rights with regard to it.[3]

Discontinuance of custom.

Except where the property is held under a grant which precludes partibility, there seems no reason why the family may not discontinue the custom of impartibility,[4] and make it subject to partition.[5]

All property to be divided.

A coparcener is entitled to insist that all the family property, except what is impartible, as above, shall be divided.

Leaseholds.

Leasehold property, including property held on a lease from Government, can be partitioned.[6]

Land in occupation of tenants.

Land in the possession of tenants can be partitioned,[7] either by metes and bounds, or by a division of the rent.

Family dwelling-house.

A coparcener[8] or purchaser[9] is entitled to insist that the family dwelling-house be partitioned; but a purchaser may be required to sell his share therein to a coparcener.[10]

He has a similar right with regard to a compound hitherto held in common, and such right is not affected by the fact that there is a public right of way over such compound.[11]

"The principle . . . of partition is that if a property can

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[1] *Ante*, p. 296.

[2] See Mayne's "Hindu Law," 7th ed., pp. 634, 635; *ante*, pp. 253, 254.

[3] *Mallikarjuna Prasada Nayudu* (*Raja Yarlagadda*) v. *Durga Prasada Nayudu* (*Raja Yarlagadda*) (1900), 27 I. A. 151; 24 Mad. 147; 5 C. W. N. 74.

[4] See *ante*, p. 24.

[5] See *Doorga Pershad Singh* (*Tekaet*) v. *Doorga Kooeree* (*Tekaetnee*) (1873), 20 W. R. C. R. 154, at pp. 157, 158.

[6] *Dattatraya Vithal* v. *Mahadaji Parashram* (1891), 16 Bom. 528.

[7] See *Uppala Raghava Charlu* v. *Uppala Ramanuja Charlu* (1902), 26 Mad. 78. As to partition between a coparcener and the ijaradar of another coparcener, see *Ram Lochi Koeri* v. *Collingridge* (1907), 11 C. W. N. 397.

[8] *Hullodhur Mookerjee* v. *Ramnauth Mookerjee* (1862), Marsh. 35.

[9] *Jhubboo Lall Sahoo* v. *Khoob Lall* (1874), 22 W. R. C. R. 294.

[10] Act IV. of 1893, s. 4, *post*, pp. 355, 356.

[11] *Ram Pershad Narain Tewaree* v. *Court of Wards* (1874), 21 W. R. C. R. 152.

be partitioned without destroying the intrinsic value of the whole property, or of the shares, such partition ought to be made. If, on the contrary, no partition can be made without destroying the intrinsic value, then a money compensation should be given instead of the share which would fall to 'a coparcener' by partition."[1]

Property in its nature indivisible.

Where property is in its nature indivisible, as, for instance, in the case of animals, furniture, etc., it can be allotted to individual coparceners, corresponding or equivalent parcels of the property being allotted to other coparceners, or the value being made up in money.

Where it is impossible or inequitable to allot a specific item to an individual, as where it consists of a right of way, a passage, a well, a bridge, it may be necessary that the item of property should continue to be jointly enjoyed by the several coparceners.

In some cases it may be necessary to sell the property and adjust the proceeds in the distribution.[2]

Places of worship, etc.

Places of worship and sacrifice,[3] and property dedicated to an idol or to other pious uses, cannot be physically partitioned.[4]

In one case,[5] where there were two idols belonging to the family, an arrangement by which one of the heirs took one of the idols and the property endowed for the worship thereof, and the other took the other idol and property, was approved by the Court.

Where merely a charge is treated for religious purposes, the property can be alienated or partitioned subject to the charge.[6]

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[1] *Ashanullah* v. *Kali Kinkur Kur* (1884), 10 Calc. 675. This was a suit by a purchaser, but the principle applies to any case. See Strange's "Hindu Law," vol. ii. p. 329.

[2] See Act IV. of 1893, s. 2, *post*, p. 355.

[3] *Anund Moyee Chowdhrain* v. *Boykantnath Roy* (1867), 8 W. R. C. R. 193.

[4] "Gautama Institutes," xxviii. 46; "Sacred Books of the East," vol. ii. p. 306; "Dayabhaga," chap. vi. s. 2, para. 26. *Rajender Dutt* v. *Sham Chund Mitter* (1880), 6 Calc. 106. See Bhattacharya's "Law of the Joint Hindu Family," pp. 450, 451.

[5] *Elder widow of Raja Chutter Sein* v. *Younger widow of Raja Chutter Sein* (1807), 1 Ben. Sel. R. 180 (new edition, 239).

[6] *Sonatun Bysack* v. *Juggutsoondree Dossee* (*Sreemutty*) (1859), 8 M. I. A. 66; *Ram Coomar Paul* v. *Jogender Nath Paul* (1878), 4 Calc. 56; 2 C. L. R. 310.

Apart from a dedication, the use to which property has been put, as, for instance, when it has been used as a *poojah dalan*, does not render it impartible, but the Court may, if the circumstances make it equitable, permit that portion to be allotted to a single sharer, and require him to pay owelty of partition, or to account for its value in the partition.[1]

Mode of allotment.

Where there is a family idol, or temple, or religious endowment belonging to the coparcenary, it is usual to allot to each of the coparceners an alternate recurring period of worship or holding in proportion to their shares.[2]

In a Bombay case,[3] the High Court on a partition gave the custody of the family idol and of the property appertaining thereto to the senior member of the family, reserving to the other members a right of access; but in Bengal it is the practice to provide for the worship and custody in "*palas*" or turns.[4] It is submitted that the latter practice is the right one.

A turn of worship is not alienable,[5] except perhaps to other persons entitled to turns, or to members of the family.

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[1] See *Rajcoomaree Dossee* v. *Gopal Chunder Bose* (1878), 3 Calc. 514.

[2] See *Mancharam* v. *Pranshankar* (1882), 6 Bom. 298; *Mitta Kunth Audhicarry* v. *Neerunjun Audhicarry* (1874), 14 B. L. R. 166; 22 W. R. C. R. 437; *Anund Moyee Chowdhrain* v. *Boykantnath Roy* (1867), 8 W. R. C. R. 193. Bhattacharya's "Law of the Joint Hindu Family," pp. 452, 453. As to the law of Limitation, see Act XV. of 1877, Sched. 2, art. 131. *Eshan Chunder Roy* v. *Monmohini Dassi* (1878), 4 Calc. 683; *Gopee Kissen Gossamy* v. *Thakoor Doss Gossamy* (1882), 8 Calc. 807; 10 C. L. R. 439; *Gaur Mohan Chowdhry* v. *Madan Mohan Chowdhry* (1871), 6 B. L. R. 352; 15 W. R. C. R. 29.

[3] *Damodardas Maneklal* v. *Uttamram Maneklal* (1892), 17 Bom. 271, at p. 288.

[4] See *Mitta Kunth Audhicarry* v. *Neerunjun Audhicarry* (1874), 14 B. L. R. 166; 22 W. R. C. R. 437; *Anund Moyee Choodhrain* v. *Boykantnath Roy* (1867), 8 W. R. C. R. 193. The refusal to deliver up the idol to a person entitled to a turn gives a right of suit. *Debendro Nath Mullick* v. *Odit Churn Mullick* (1878), 3 Calc. 390; *Anund Moyee Chowdhrain* v. *Boykantnath Roy* (1867), 8 W. R. C. R. 193; *Gaur Mohan Chowdhry* v. *Madan Mohan Chowdhry* (1871), 6 B. L. R. 352; 15 W. R. C. R. 29; *Eshan Chunder Roy* v. *Monmohini Dassi* (1878), 4 Calc. 683; *Gopee Kishen Gossamy* v. *Thakoordass Gossamy* (1882), 8 Calc. 807; 10 C. L. R. 439. K. K. Bhattacharya's "Law of Joint Hindu Family," p. 462.

[5] *Rajessur Mullik* v. *Gopessur Mullik* (1907), 11 C. W. N. 782; *Ukoor Doss* v. *Chunder Sekur Doss* (1865), 3 W. R. C. R. 152. See *Durga Bibi* v. *Chanchal Ram* (1881), 4 All. 81.

How Separation and Partition can be Effected.

Under the Mitakshara school of law, a father can effect a partition between his sons with or without their consent.[1]

Separation how effected.

Apart from the special powers given to a father by the Mitakshara law, the union of the coparceners in a joint family can be dissolved by any arrangement, express or implied, by which the coparceners alter, or intend to alter, their title as coparceners into a title either as tenants in common or as owners of separate shares, or by any change in the status of the coparceners, which is inconsistent with their being members of a joint family.[2]

Apart from the special powers given to a father by the Mitakshara law, a partition can be effected either by an arrangement between the coparceners, or by a decree of a competent Court,[3] or by the Revenue authorities.[4]

Parties.

All the coparceners should be parties to a partition by arrangement,[5] the guardians of minor coparceners acting on their behalf.[6]

Partial partition.

In the case of a partition by arrangement,[7] the partition may be partial as regards the persons separating, some of the coparceners electing to remain joint, their status *inter se* being unaffected by the separation.[8]

Coparceners may also by agreement arrange that a portion only of the property should be divided, the

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[1] *Kandasami* v. *Doraisami Ayyar* (1880), 2 Mad. 317. "Mitakshara," chap. i. s. 2, para. 2.

[2] A mere change in the mode of holding the property is not conclusive, *post*, pp. 348, 349.

[3] *Post*, p. 349.

[4] *Post*, p. 358.

[5] As to the parties to a suit, see *post*, p. 350.

[6] See *ante*, p. 326.

[7] *Cf. ante*, p. 328.

[8] See *Rewun Persad* v. *Radha Beeby* (*Mussumat*) (1846), 4 M. I. A. 137, at p. 168; 7 W. R. P. C. 35, at p. 37; *Sudarsanam Maistri* v. *Narasimhulu Maistri* (1901), 25 Mad. 149, at pp. 156, 157; *Kandasami* v. *Doraisami Ayyar* (1880), 2 Mad. 317, at p. 324; *Radha Churn Dass* v. *Kripa Sindhu Dass* (1879), 5 Calc. 474; 4 C. L. R. 428; *Gavrishankar Parabhuram* v. *Atmaram Rajaram* (1893), 18 Bom. 611. See *Upendranarain Myti* v. *Gopee Nath Bera* (1883), 9 Calc. 817; 12 C. R. 356. Their relation to those who have separated is as divided members of a family, see *Manjanatha Shanabhaga* v. *Narayana Shanabhaga* (1882), 5 Mad. 362. As to the presumption that the remainder of the family is joint, see *ante*, p. 328.

remainder remaining joint.[1] They can afterwards partition the remainder of the property.[2]

"Though there can be no compulsory partial partition either in respect of the joint property belonging to the family, or in respect of the persons constituting the undivided family,[3] yet by mutual agreement of parties the partition can be partial either in respect of the property[4] or of the persons constituting the family. And according to usage and custom the remaining members of an undivided family from which one or more alone have become divided, continue as an undivided family in its normal state and not as members, who after partition have been reunited."[5]

Actual partition unnecessary.

A separation in estate and interest can be effected, although there be no partition by metes and bounds.[6]

There may be a separation of the members of the family and at the same time an arrangement for the sake of convenience that the property should remain joint, but be held in defined shares. In that case the rights of the separating coparceners *inter se* are those of ordinary tenants in common, and are free from the incidents applicable to a joint family.[7]

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[1] *Muthusami Mudaliar* v. *Nallakulantha Mudaliar* (1894), 18 Mad. 418; *Hoolas Koonwer* (*Mussumat*) v. *Man Singh* (1868), 3 Agra, 37; *Sudarsanam Maistri* v. *Narasimhulu Maistri* (1901), 25 Mad. 149, at p. 153.

[2] See *Shamasoondery Dassee* v. *Kartick Churn Mittra* (1865), Bourke O. C. 326.

[3] *Post*, pp. 351, 352.

[4] *Hoolas Koonwer* (*Mussumat*) v. *Man Singh* (1868), 3 Agra, 37.

[5] *Sudarsanam Maistri* v. *Narasimhulu Maistri* (1901), 25 Mad. 149, at p. 157. See *Peddayya* v. *Ramalingam* (1888), 11 Mad. 406.

[6] *Balkishen Das* v. *Ramnarain Sahu* (1903), 30 I. A. 139, at p. 148; 30 Calc. 738, at p. 751; 7 C. W. N. 578, at p. 589; *Appovier* v. *Rama Subba Aiyyan* (1866), 11 M. I. A. 75; 8 W. R. P. C. 1; *Radhika Patta Maha Devi Garu* (*Sri Gajapathi*) v. *Nilamani Patta Maha Devi Garu* (*Sri Gajapathi*) (1870), 13 M. I. A. 497; 6 B. L. R. 202; 14 W. R. P. C. 33; *Doorga Pershad* (*Baboo*) v. *Kundun Koowar* (*Mussumat*) (1873), 1 I. A. 55; 13 B. L. R. 235; 21 W. R. C. R. 214; *Jusoda Koonwur* (*Mussamut*) v. *Gourie Byjonath Sohae Singh* (1866), 6 W. R. C. R. 139; *Sreepershad* (*Lalla*) v. *Akoonjoo Koonwar* (*Mussamut*) (1867), 7 W. R. C. R. 488; *Mohabeer Pershad* (*Lalla*) v. *Kundun Koowar* (*Mussamut*) (1867), 8 W. R. C. R. 116; *Badaruth Tewary* v. *Jagurnath Dass* (1869), 1 N. W. P. 75; *Jeonee* (*Mussumat*) v. *Dhurum Kooer* (1871), 3 N. W. P. 108; *Sobha Kooeree* (*Mussamut*) v. *Hurdey Narain Mohajun* (1876), 25 W. R. C. R. 97.

[7] *Appovier* v. *Rama Subba Aiyyan* (1866), 11 M. I. A. 75; 8 W. R. P. C. 1; *Narayan Ayyar* v. *Lakshmi Ammal* (1867), 3 Mad. H. C. 289; *Venkata Gopalla Narasimha Row Bahadoor* (*Rajah Suranem*) v. *Lakshma Venkama Row* (*Rajah Suranem*) (1869), 13 M. I. A. 113; 3 B. L. R. P. C.

There would, in the absence of a valid agreement,[1] be a right to enforce a partition of such property subsequently.[2]

A partition can be effected without an instrument in writing.[3]

"The true test of partition of property, according to Hindu law, is the intention of the family to become separate owners."[4] Question is one of intention.

The question is one of intention merely, viz. whether the intention of the parties, to be inferred from the instruments which they had executed and the acts they had done, was to effect a division such as to alter the status of the family.[5]

An agreement between the coparceners to hold and enjoy the property in severalty operates as a separation in estate, although there may have been no actual partition by metes and bounds,[6] and although the separate possession and enjoyment be postponed until the agreement be fully carried into effect.[7] Agreement to separate.

41; 12 W. R. P. C. 40; S.C. in Court below, (1866), 3 Mad. H. C. 40. See *Rewun Persad* v. *Radha Beeby* (*Mussumat*) (1846), 4 M. I. A. 137, at p. 168; 7 W. R. P. C. 35, at p. 37; *Ramabhadra* (*Rajah Setrucherla*) v. *Virabhadra Suryanarayana* (*Rajah Setrucherla*) (1899), 26 I. A. 167; 22 Mad. 470; 3 C. W. N. 533; *Muhesh Doobey* v. *Kishun Doobey* (1869), 1 N. W. P. 42.

[1] As to an agreement not to partition, see *ante*, p. 322.

[2] See *Subbaraya Tawker* v. *Rajaram Tawker* (1901), 25 Mad. 585.

[3] *Rewun Persad* v. *Radha Beeby* (*Mussumat*) (1846), 4 M. I. A. 137, at p. 168; 7 W. R. P. C. 35, at p. 37; *Budha Mal* v. *Bhagwan Das* (1890), 18 Calc. 302. By Act II. of 1884, effect was given to unregistered partition deeds which had been executed in the Madras Presidency.

[4] *Ram Pershad Singh* v. *Lakhpati Koer* (1902), 30 I. A. 1, at p. 10; 30 Calc. 23, at p. 253; 7 C. W. N. 162, at p. 168.

[5] *Doorga Pershad* (*Baboo*) v. *Kundun Koonwar* (*Mussumat*) (1873), 1 I. A. 55, at p. 68; 13 B. L. R. 235, at p. 239; 21 W. R. C. R. 214, at p. 215; *Balkishen Das* v. *Ram Narain Sahu* (1903), 30 I. A. 139, at p. 147; 30 Calc. 738, at p. 750; 7 C. W. N. 578, at p. 588.

[6] *Appovier* v. *Rama Subba Aiyan* (1866), 11 M. I. A. 75, at p. 90; 8 W. R. P. C. 1; *Balkishen Das* v. *Ramnarain Sahu* (1903), 30 I. A. 136; 30 Calc. 738; 7 C. W. N. 578; *Venkata Gopalla Narasimha Roy Bahadoor* (*Raja Suraneni*) v. *Lakshma Venkama Row* (*Raja Suraneni*) (1869), 13 M. I. A. 113; 3 B. L. R. P. C. 41; 12 W. R. P. C. 40; *Doorga Pershad* (*Baboo*) v. *Kundun Kowar* (*Mussumat*) 1 I. A. 55; 13 B. L. R. 235; 21 W. R. C. R. 214; *Madho Parshad* v. *Mehrban Singh* (1890), 17 I. A. 194; 18 Calc. 157.

[7] *Tej Protap Singh* v. *Champa Kalee Koer* (1885), 12 Calc. 96, at p. 103.

"When the members of an undivided family agree among themselves with regard to particular property, that it shall thenceforth be the subject of ownership, in certain defined shares,[1] then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with; and in the estate each member has thenceforth a definite and certain share, which he may claim the right to receive and to enjoy in severalty, although the property itself has not been actually severed and divided."[2]

An arrangement by which property was allotted to a younger brother for his maintenance does not make an impartible zemindary the separate property of the elder brother.[3]

The legal construction of the agreement cannot be controlled or altered by the subsequent conduct of the parties,[4] except where there has been in law a valid reunion.[5]

Mere agreement to divide.

It has been held that where there is no indication of an intention to presently appropriate and enjoy in a manner inconsistent with the ordinary state of enjoyment of an undivided family, an agreement to divide without more is of itself insufficient to effect a separation.[6]

Definition in petitions, etc.

The fact that in documents executed by the coparceners, such as petitions to the Revenue or other authorities, or under the Land Registration Act,[7] there is a definition of an interest in the joint estate, in terms of a fraction of the whole, without any indication of an intention to divide interests and liabilities, is insufficient to constitute a legal dissolution of a joint family, although it is evidence of a

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[1] A mere definement of shares is not sufficient, see cases, *post*, p. 347, note 1, and p. 348.

[2] *Appovier* v. *Rama Subba Aiyyan* (1866), 11 M. I. A. 75, at p. 90; 8 W. R. P. C. 1. See *Hurdwar Singh* v. *Luchmun Singh* (1868), 3 Agra, 41; *Ananta Balacharya* v. *Damodhar Makund* (1888), 13 Bom. 25; *Parsotam Rao Tantia* v. *Janki Bai* (1907), 29 All. 354; *Madho Parshad* v. *Mehrban Singh* (1890), 17 I. A. 194; 18 Calc. 157; *Budha Mal* v. *Bhagwan Das* (1890), 18 Calc. 302; *Shibnarain Bose* v. *Ram Nidhee Bose* (1868), 9 W. R. C. R. 87; *Kulponath Doss* v. *Mewah Lall* (1867), 8 W. R. C. R. 302; *Deo Bunsee Koer* (*Mussamut*) v. *Dwarkanath* (1868), 10 W. R. C. R. 273; S. C. *Deowanti Kunwar* (*Mussamut*) v. *Dwarkanath*, 8 B. L. R. 363, note (a case of the separation of two branches of a family).

[3] *Rajya Lakshmi Devi Garu* (*Sri Raja Viravara Thodramal*) v. *Surya Narayana Dhatrazu Bahadur Garu* (*Sri Raja Viravara Thodramal*) (1897), 24 I. A. 118; 20 Mad. 256.

[4] *Balkishen Das* v. *Ramnarain Sahu* (1903), 30 I. A. 139; 30 Calc. 738; 7 C. W. N. 578.

[5] *Post*, pp. 358, 359.

[6] *Babaji Parshram* v. *Kashibai* (1879), 4 Bom. 157.

[7] Act VII. (B. C.) of 1876.

separation.[1] Separation may be inferred from definement of shares, followed by entries of separate interests in the Revenue records.[2]

Sale of share.

When a cosharer sells his rights in the family property to another coparcener, such sale amounts to a separation, so far as the vendor is concerned.[3]

Act or declaration by one coparcener.

There is considerable authority that an unequivocal act or declaration by a coparcener, showing his intention to hold his share separately, effects a partition;[4] but if this be so, the mere filing of a suit for partition[5] would operate to effect a separation, whereas the authorities[6] only contemplate separation being effected by a decree in such suit, and moreover the expressions used in *Appovier's Case*,[7] and the cases following it, seem, it is submitted, to show that there must be an agreement.[8] Such signification of intention might perhaps, if not repudiated, be taken to imply an agreement.

Loss of share by limitation.

A loss by a cosharer of his rights by operation of the law of limitation amounts to a separation of that cosharer, so far as the family property is concerned.[9]

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[1] *In the matter of Phuljhari Koer* (*Mussamat*) (1872), 8 B. L. R. 385; 17 W. R. C. R. 102; *Muktakasi Debi* v. *Ubabati* (1870), 8 B. L. R. 396, note; 14 W. R. C. R. 31; *Ambika Dat* v. *Sukhmani Kuar* (1877), 1 All. 437; *Hoolash Koer* v. *Kassee Proshad* (1881), 7 Calc. 369.

[2] *Ram Lal* v. *Debi Dat* (1888), 10 All. 490; see *post*, p. 350.

[3] *Balkrishna Trimbak Tendulkar* v. *Savitribai* (1878), 3 Bom. 54. See *Appa Pillai* v. *Runga Pillai* (1882), 6 Mad. 71, as to an arrangement without consideration.

[4] *Raghubanund Doss* v. *Sadhuchurn Doss* (1878), 4 Calc. 425; 3 C. L. R. 534; *Bulakee Lall* v. *Indurputtee Kowar* (*Mussamut*) (1865), 3 W. R. C. R. 41; *Vato Koer* (*Mussamut*) v. *Rowshun Singh* (1867), 8 W. R. C. R. 82; *Sudaburt Pershad Sahoo* v. *Loft Ali Khan* (1870), 14 W. R. C. R. 339, at pp. 345, 346; *Joynarain Giri* v. *Goluck Chunder Mytee* (1876), 25 W. R. C. R. 355. The appeal from this last decision was decided on another ground, 5 I. A. 228; 4 Calc. 434. See *Phoolbas Kooer* (*Musst.*) v. *Juggessur Sahoy* (*Lalla*) (1872), 18 W. R. C. R. 48; *Debee Pershad* v. *Phool Koeree* (1869), 12 W. R. C. R. 510.

[5] A suit for possession of a share would not be sufficient. *In the matter of Phul Koeri* (1869), 8 B. L. R. 388, note; S. C. *Debee Pershad* v. *Phool Koeree* (1869), 12 W. R. C. R. 510.

[6] *Post*, p. 349.

[7] *Ante*, p. 346.

[8] See *Mouktakeshee Dubee* v. *Ubabati* (1870), 8 B. L. R. 396, note; 14 W. R. C. R. 31; *Ashabai* v. *Tyeb Haji Rahimtulla* (1882), 9 Bom. 115.

[9] See *Moro Vishvanath* v. *Ganesh Vithal* (1873), 10 Bom. H. C. 444, at p. 452.

Proof of separation.

Separation may be proved by acts which show such agreement and intention, such as cesser of commensality,[1] separate occupation of portions of the property,[2] separate enjoyment of distinct shares of the profits,[3] separate definement of shares in the Revenue records,[4] agreement to divide the proceeds in definite shares,[5] or other acts which are inconsistent with the family remaining joint, such as separate transactions between themselves or with others.[6]

Mere cesser of commensality,[7] division of the income,[8] definement of shares in the revenue[9] or land registration[10] records, separate occupation

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[1] See *Ganesh Dutt Thakoor (Chowdhry)* v. *Jewach Thakoorain (Mussummat)* (1903), 31 I. A. 10; 31 Calc. 262; 8 C. W. N. 146; *Joynarain Giri* v. *Goluck Chunder Mytee* (1876), 25 W. R. C. R. 355.

[2] *Murari Vithoji* v. *Mukund Shivaji Naik Golatkar* (1890), 15 Bom. 201; *Moro Vishvanath* v. *Ganesh Vithal* (1873), 10 Bom. H. C. 444, at p. 453; *Surbessur Methoor* v. *Gossain Doss Methoor* (1872), 17 W. R. C. R. 210.

[3] *Chyet Narain Singh* v. *Bunwaree Singh* (1875), 23 W. R. C. R. 395; *Jeonee (Mussumat)* v. *Dhurum Kooer* (1871), 3 N. W. P. 108; *Kalika Sahoy* v. *Gouree Sunkur* (1869), 12 W. R. C. R. 287; *Mohabeer Pershad (Lalla)* v. *Kundun Koowar (Mussamut)* (1867), 8 W. R. C. R. 116; *Adi Deo Narain Singh* v. *Dukharam Singh* (1883), 5 All. 532; *Mohroo Kooeree (Musst.)* v. *Gunsoo Kooeree (Musst.)* (1867), 8 W. R. C. R. 385.

[4] *Ram Lal* v. *Debi Dat* (1888), 10 All. 490; *Ram Pershad Singh* v. *Lakhpati Koer* (1902), 30 I. A. 1; 30 Calc. 231; 7 C. W. N. 162. See *Ambika Datt* v. *Sukhmani Kuar* (1877), 1 All. 437. See *ante*, p. 346.

[5] *Ram Kissen Singh (Maharajah)* v. *Sheonund Singh (Rajah)* (1875), 23 W. R. C. R. 412.

[6] *Sumundra Koonwar* v. *Kalee Churn Singh* (1870), 13 W. R. C. R. 197; 8 B. L. R. 390, note. "Narada," chap. xiii. paras. 40, 41; "Dayabhaga," chap. xiv. paras. 7, 8, 9; Colebrooke's "Digest," vol. iii. p. 407.

[7] *Ganesh Dutt Thakoor (Chowdhry)* v. *Jewach Thakoorain (Mussummat)* (1903), 31 I. A. 10; 31 Calc. 262; 8 C. W. N. 146; *Rewun Pershad* v. *Radha Becby (Mussumat)* (1846), 4 M. I. A. 137, at p. 168; 7 W. R. P. C. 35, at p. 37; *Anundee Koonwur (Mussumat)* v. *Khedoo Lal* (1872), 14 M. I. A. 412; 18 W. R. C. R. 69; *Belas Koer (Mussamut)* v. *Bhowanee Buksh (Baboo)* (1863), Marsh. 641; *Chhabila Manchand* v. *Jadavbai* (1866), 3 Bom. H. C. O. C. 87; *Kristnappa Chetty* v. *Ramasawmy Iyer* (1875), 8 Mad. H. C. 25; *Shibnarain Bose* v. *Ram Nidhee Bose* (1868), 9 W. R. C. R. 87. See *Khilut Chunder Ghose* v. *Koonjlall Dhur* (1868), 11 B. L. R. 194, note; 10 W. R. C. R. 333.

[8] *Sonatun Bysack* v. *Juggutsoondree Dossee* (1859), 8 M. I. A. 66, at p. 86.

[9] *Ambika Dat* v. *Sukhmani Kuar* (1877), 1 All. 437, commented on in *Tej Protap Singh* v. *Champa Kalee Koer* (1885), 12 Calc. 96, at p. 104; *Gajendar Singh* v. *Sardar Singh* (1896), 18 All. 176.

[10] *Hoolash Kooer* v. *Kassee Proshad* (1881), 7 Calc. 369.

of portions of the property,[1] or separate collection of rents,[2] or separate dealings,[3] are not conclusive, unless there is an intention to separate. They are all evidence of separation, and may lead to the inference that there was a separation.[4]

The fact that a man availed himself of his near agnatic relations in the administration of his property at the same time that he gave them maintenance and paid the expenses of their marriage and other ceremonies is not inconsistent with his position as a separated member.[5]

Conversion from Hinduism.

Conversion to Mahomedanism,[6] or to Christianity,[7] *ipso facto* separates the convert from the coparcenary.

Decree for partition.

A decree for partition is on the same footing as an agreement for partition.[8]

Decree.

A decree directing partition,[9] or a decree giving effect to a suit, which, though not in terms seeking a partition, indicates a distinct intention of obtaining a separation in estate, or an award by arbitrators,[10] operates as a separation.[11]

The fact that the decree postpones the vesting of the share does not make any difference.[12]

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[1] *Runjeet Singh* v. *Gujraj Singh* (*Kooer*) (1873), 1 I. A. 9; *Babashet* v. *Jirshet* (1868), 5 Bom. H. C. A. C. 71; *Moro Vishvanath* v. *Ganesh Vithal* (1873), 10 Bom. H. C. 444, at p. 453; *Chhabila Manchand* v. *Jadavbai* (1866), 3 Bom. H. C. O. C. 87. See *Luchmun Pershad* v. *Moonnoo Koonwer* (*Mussumat*) (1866), 1 Agra, 220.

[2] *Badamoo Kooer* v. *Wazeer Sing* (1866), 5 W. R. C. R. 78, differed from in *Vato Koer* (*Mussamut*) v. *Rowshun Singh* (1867), 8 W. R. C. R. 82.

[3] *Kristnappa Chetty* v. *Ramasawmy Iyer* (1875), 8 Mad. H. C. 25.

[4] See *JagunKooer* v. *Rughoonundun Lall Shahoo* (1868), 10 W. R. C. R. 128.

[5] *Deoki Singh* v. *Anupa* (*Musammat*) (1905), 10 C. W. N. 338.

[6] *Gobind Krishna Narain* v. *Abdul Qayyum* (1903), 25 All. 546, at p. 573; *Gobind Krishna Narain* v. *Khunni Lal* (1907), 29 All. 487.

[7] *Abraham* v. *Abraham* (1863), 9 M. I. A. 199, at p. 241; 1 W. R. P. C. 1, at p. 5.

[8] *Tej Protap Singh* v. *Champa Kalee Koer* (1885), 12 Calc. 96; *Babaji Parshram* v. *Kashibai* (1879), 4 Bom. 157.

[9] *Chidambaram Chettiar* v. *Gouri Nachiar* (1879), 6 I. A. 177; 2 Mad. 83; *Subbaraya Mudali* v. *Manika Mudali* (1896), 19 Mad. 345. In *Babaji Parshram* v. *Kashibai* (1879), 4 Bom. 157, a mere decree for partition was held not to operate as a separation.

[10] *Krishna Panda* v. *Balaram Panda* (1896), 19 Mad. 290; *Subbaraya Chetti* v. *Sadasiva Chetti* (1897), 20 Mad. 490.

[11] *Joy Narain Giri* v. *Grish Chunder Myti* (1878), 5 I. A. 228; 4 Calc. 434, distinguishing *Debee Pershad* v. *Phool Koeree* (1869), 12 W. R. C. R. 510. The mere determination of the shares by a preliminary decree is not tantamount to partition: *Jogendra Nath Roy* v. *Baladeb Das Marwari* (1907), 12 C. W. N. 127, at p. 129; but it may effect a separation.

[12] *Lakshman Darku* v. *Narayan Lakshman* (1899), 24 Bom. 182.

It has been held that the decree does not create a severance pending an appeal,[1] but if pending the appeal the parties treat the decree as creating a severance it has such effect.[2]

Where, in a suit for general partition of a family estate, the plaintiff succeeded with regard only to a small portion thereof, it was held that the family did not in consequence of these proceedings become a divided one.[3]

In a case under the Bengal school of law, where the parties disregarded the decree, and continued to live as a joint family, it was held that there was no separation.[4]

Order for sale of share.

An order for sale of a share of family property in execution of decree would not create a separation.[5]

"The disruption of a joint family cannot be effected by an order of Court against the intention of the parties, unless it be followed by an actual conversion of the joint tenancy into a tenancy in common, or an actual partition by metes and bounds."[6]

Suit for partition.

A suit for partition may be brought by a person who is entitled to partition.[7]

Limitation.

A suit for partition is barred when twelve years has expired from the time when exclusion of the plaintiff from the coparcenary property becomes known to him.[8]

Parties to suits.

All persons entitled to a share on partition, including the wife, mother, or grandmother, and purchasers of undivided shares[9] or mortgagees,[10] should be parties to a suit for partition.[11]

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[1] *Sakharam Mahadev Dange* v. *Hari Krishna Dange* (1881), 6 Bom. 113.

[2] See *Joynarain Giri* v. *Grish Chunder Myti* (1878), 5 I. A. 228; 4 Calc. 434.

[3] *Mallikarjuna Prasada Nayudu* (*Raja Yarlagadda*) v. *Durga Prasada Nayudu* (*Raja Yarlagadda*) (1900), 27 I. A. 151; 24 Mad. 147; 5 C. W. N. 74.

[4] *Prawn Kissen Mitter* v. *Ram Sunderee Dossee* (*Sreemutty*) (1842), Fulton, 410. See *Babaji Parshram* v. *Kashibai* (1879), 4 Bom. 157.

[5] *Mudit Narayan Singh* v. *Ranglal Singh* (1902), 29 Calc. 797, at p. 801.

[6] *Ibid.*

[7] See *ante*, pp. 322–327, as to who is entitled to partition.

[8] Act XV. of 1877, Sched. II. art. 127. See *Saroda Soondury Dossee* v. *Doyamoyee Dossee* (1880), 5 Calc. 938; *Jaganatha* v. *Ramabhadra* (1888), 11 Mad. 380; *Dhoorjeti Subbaya* v. *Dhoorjeti Venkayya* (1906), 30 Mad. 201.

[9] *Ante*, p. 347. *Laljeet Singh* v. *Raj Coomar Singh* (1873), 12 B. L. R. 373, at p. 383; 20 W. R. C. R. 336, at p. 340.

[10] *Ante*, pp. 328, 329.

[11] Civil Procedure Code, 1908, order i. rules 3, 4; Act XIV. of 1882, ss. 26, 28; *Pahaladh Singh* v. *Luchmunbutty* (*Mussamut*) (1869), 12 W. R. C. R. 256.

Property in suit.

A suit for partition must include all the property which is partible[1] and available for partition at the time,[2] and is within the limits of the jurisdiction of the Court in which the suit is brought.[3]

There is authority that when the suit does not include all the coparcenary property the suit should be dismissed,[4] but it is submitted that where the objection is raised, the proper course is to permit the plaintiff to amend his plaint so as to include the whole property.[5]

In a suit filed in the ordinary original jurisdiction of the High Courts there is no difficulty in including other property after an interlocutory decree for partition.

A defendant may insist that joint property which is not mentioned in the plaint be brought into the partition,[6] whether it be or be not within the jurisdiction of the Court in which the suit is brought,[7] but he cannot require the plaintiff to bring into the partition land which is outside British India.[8]

Partial partition.

Where no objection is raised by the parties there seems

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[1] Civil Procedure Code, 1908, Sched. I. order ii. r. 1; Act XIV. of 1882, s. 43; *Hasmat Rai (Koer)* v. *Sunder Das* (1885), 11 Calc. 396, and cases, note 2 below; *Trimbak Dixit* v. *Narayan Dixit* (1874), 11 Bom. H. C. 69; *Ganpat* v. *Annaji* (1898), 23 Bom. 144; *Nanabhai Vallabhdas* v. *Nathabhai Haribhai* (1870), 7 Bom. H. C. A. C. 46; *Narayan Babaji* v. *Nana Manohar* (1870), 7 Bom. H. C. A. C. 153, at p. 178; *Haridas Sanyal* v. *Pran Nath Sanyal* (1886), 12 Calc. 566. *Contrâ Padmamani Dasi (Srimati)* v. *Jagadamba Dasi (Srimati)*, 6 B. L. R. 134, at p. 140. See *Parbati Churn Deb* v. *Ain-ud-deen* (1881), 7 Calc. 577: 9 C. L. R. 170.

[2] See *Pattaravy Mudali* v. *Audimula Mudali* (1870), 5 Mad. H. C. 419. Thus, where property has been mortgaged with possession it need not be brought into the partition. *Kristayya* v. *Narasimham* (1900), 23 Mad. 608; *Balkrishna Vithal* v. *Hari Shankar* (1871), 8 Bom. H. C. A. C. 64; *Narayan Babaji* v. *Pandurang Ramchandra* (1875), 12 Bom. H. C. 148, at p. 155; *Shivmurteppa* v. *Virappa* (1899), 24 Bom. 128.

[3] *Punchanun Mullick* v. *Shib Chunder Mullick* (1887), 14 Calc. 835.

[4] See *Jogendra Nath Mukerji* v. *Jugobundhu Mukerji* (1886), 14 Calc. 122; *Ramjoy Ghose* v. *Ram Runjun Chuckerbutti* (1881), 8 C. L. R. 367; *Haridas Sanyal* v. *Pran Nath Sanyal* (1886), 12 Calc. 566.

[5] See *Punchanun Mullick* v. *Shib Chunder Mullick* (1887), 14 Calc. 835.

[6] See *Shivmurteppa* v. *Virappa* (1899), 24 Bom. 128.

[7] *Hari Narayan Brahme* v. *Ganpatrav Daji* (1883), 7 Bom. 272; *Lalljeet Singh (Baboo)* v. *Raj Coomar Singh (Baboo)* (1876), 25 W. R. 353; *Ram Lochun Pattuck* v. *Rughoobur Dyal* (1871), 15 W. R. C. R. 111; *Balaram Bhaskarji* v. *Ramchandra Bhaskarji* (1898), 22 Bom. 922, at p. 928.

[8] *Ramacharya* v. *Anantacharya* (1893), 18 Bom. 389.

to be no reason why a partial partition should not be effected even in a suit.[1]

Property within different jurisdictions.

When the coparcenary property is situate within the jurisdiction of more than one Court, suits can be brought in the several Courts having jurisdiction.[2]

When there is property of the family held jointly by the whole family with strangers, a separate suit should be brought for partition of such property,[3] except where they have bought the interests of coparceners in the coparcenary property.

A separate suit will lie with regard to property which belongs to some of the coparceners only.[4]

Purchaser of share.

It has been held in Bombay[5] and Allahabad[6] that a purchaser of a share of one of the coparceners in a portion of the coparcenary property is entitled to bring a suit for partition of that portion only, but that any coparcener may require his share in the whole of the coparcenary property to be ascertained and partitioned in such suit.

In Madras the purchaser is required to bring a suit for general partition,[7] and apparently the same view would be taken in Calcutta.[8]

A coparcener is entitled to bring against such purchaser a partition suit limited to the property so purchased.[9]

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[1] See *Manjanatha Shanabhaga* v. *Narayana Shanabhaga* (1882), 5 Mad. 362, *ante*, p. 343.

[2] *Subba Rau* v. *Rama Rau* (1867), 3 Mad. H. C. 376; *Punchanun Mullick* v. *Shib Chunder Mullick* (1887), 14 Calc. 835. *Balaram Bhaskarji* v. *Ramchandra Bhaskarji* (1898), 22 Bom. 922. See *Jairam Narayan Raje* v. *Atmaram Narayan Raje* (1880), 4 Bom. 482; *Padmamani Dasi* (*Srimati*) v. *Jagadamba Dasi* (*Srimati*) (1871), 6 B. L. R. 134.

[3] See *Puroshottam* v. *Atmaram Janardan* (1899), 23 Bom. 597.

[4] *Lachmi Narain* v. *Janki Das* (1901), 23 All. 216.

[5] *Murarrao* v. *Sitaram* (1898), 23 Bom. 184; *Shivmurteppa* v. *Virappa* (1899), 24 Bom. 128.

[6] *Ram Mohan Lal* v. *Mulchand* (1905), 28 All. 39.

[7] *Venkatarama* v. *Meera Labai* (1859), 13 Mad. 275, approved of in *Palani Konan* v. *Masa Konan* (1896), 20 Mad. 243. See *Subramanya Chettyar* v. *Padmanabha Chettyar* (1896), 19 Mad. 267.

[8] See *Hasmat Rai* (*Koer*) v. *Sunder Das* (1885), 11 Calc. 396, at p. 339.

[9] *Ram Charan* v. *Ajudhia Prasad* (1905), 28 All. 50; *Chinna Sanyasi Razu* (*Sripati*) v. *Suriya Razu* (*Sripati*) (1882), 5 Mad. 196; *Subramanya Chettyar* v. *Padmanabha Chettyar* (1896), 19 Mad. 267. See *Venkayya* v. *Lakshmayya* (1892), 16 Mad. 98.

Where a portion of the family property has passed entirely into the hands of strangers, there is no reason why the right thereto should not be determined without reference to the remaining property of the family.[1]

Inquiry as to property.

In the case of a decree for partition and of a partition by arrangement, it is necessary to ascertain the amount of the coparcenary property, and what is available for partition.

The presumption is that, "in the absence of evidence, the property for partition is such as exists at the time of the suit for partition."[2]

An inquiry as to what the coparcenary property consists of generally involves an account of the rents and profits which have been received by the manager.[3] Credit must be allowed to him for all expenditure properly made out of the purse of the coparcenary.[4]

As to the nature of the account which the manager is required to furnish, see *ante*, pp. 273, 274.

Account of mesne profits.

Where one member of the family has been entirely excluded from the enjoyment of the property, he would be entitled to an account of mesne profits on an ordinary footing.[5]

An account of mesne profits is also allowed when an arrangement for the enjoyment of the property in specific and definite shares has been disturbed.[6]

Improvements.

In the absence of an express agreement a coparcener is not entitled to credit for sums laid out by him in the improvement or upkeep of the coparcenary property.[7]

Provision for debts, etc.

Provision must first be made for all debts due by the family as such,[8] including debts due by the father of separating brothers,[9] and also for all proper charges upon

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[1] *Subbarasu* v. *Venkataratnam* (1891), 15 Mad. 234.

[2] *Damodardas Maneklal* v. *Uttamram Maneklal* (1892), 19 Bom. 271, at p. 279.

[3] See *ante*, p. 273.

[4] *Ante*, p. 274.

[5] *Krishna* v. *Subbanna* (1884), 7 Mad. 564; *Bhvrav* v. *Sitaram* (1894), 19 Bom. 532; *Konerrav* v. *Gurrav* (1881), 5 Bom. 589, at p. 595; *Venkata Narasimha Appa Row Bahadur* (*Rajah*) v. *Narayya Appa Row Bahadur* (*Rajah*) (1879), 7 I. A. 38, at p. 51; 2 Mad. 128, at p. 137; 6 C. L. R. 153, at p. 162. See Act XIV. of 1882, s. 211; Civil Procedure Code, 1908, order xx. rule 12.

[6] *Shankar Baksh* v. *Hardeo Baksh* (1888), 16 I. A. 71; 16 Calc. 397. See *Ramabhadra* (*Rajah Setrucherla*) v. *Virabhadra Suryanarayana* (*Rajah Setrucherla*) (1899), 26 I. A. 167; 22 Mad. 470; 3 C. W. N. 533.

[7] *Muttusvami Gaundan* v. *Subbiramaniya Gaundan* (1863), 1 Mad. H. C. 309. See *post*, p. 354.

[8] See *ante*, p. 276.

[9] *Tara Chand* v. *Reeb Ram* (1866), 3 Mad. H. C. 177, at p. 181; *Lakshman Dada Naik* v. *Ramchandra Dada Naik* (1876), 1 Bom. 561;

the family property for maintenance,[1] the marriages of dependent female members,[2] the expenses of whose marriages is not payable out of individual shares, and such religious ceremonies as are payable by the whole family,[3] and cannot be adjusted so as to be paid out of individual shares.

Each member of the coparcenary is obliged to bring into hotchpot, and submit to partition any coparcenary property, or property acquired from coparcenary funds which may be in his hands.[4]

He is not required to account for money which has been received by him for his expenses.[5]

Where a single coparcener has purported to deal with a defined portion of the family property as if it were his own, it may be equitable to allot such portion to the purchaser if possible.[6] Where he has dealt with a share in a defined portion, it may be equitable on partition to allot him a share in such portion. If such course be not equitable or practicable, the alienee would only have a right of compensation against the alienor personally.[7]

Where a coparcener has, by arrangement or without objection, occupied a particular portion of the family property, or where he has laid out his separate money on a certain portion of the property, it may be equitable to allot to him the portion occupied, or improved by him, provided that he does not thereby get more than his share.

"Dayabhaga," chap. i. para. 47; "Vyavahara Mayukha," chap. iv. s. 6, paras. 1, 2; chap. v. s. 4, para. 14; Colebrooke's "Digest," vol. iii. pp. 73, 389, 390.

[1] *Ante*, pp. 242, 272.

[2] "Dayabhaga," chap. iii. s. 2, para. 39; "Mitakshara," chap. i. s. 7, para. 5; Colebrooke's "Digest," vol. iii. p. 96; Strange's "Hindu Law," vol. ii. p. 313.

[3] As to the expenses of initiation, see "Mitakshara," chap. i. s. 7, paras. 3, 4; "Dayabhaga," chap. iii. s. 2, para. 41; Colebrooke's "Digest," vol. iii. pp. 96, 97. In a suit for partition brought by a Hindu against his father and brothers, the brothers (but not the children of brothers) are entitled to have set apart from the family property a sum sufficient to defray the expenses of their prospective thread, betrothal, and marriage ceremonies, such sum to be calculated according to the extent of the family property, *Jairam* v. *Nathu* (1906), 31 Bom. 54.

[4] *Lakshman Dada Naik* v. *Ramchandra Dada Naik* (1876), 1 Bom. 561. See *ante*, p. 252.

[5] *Ibid.*, *Konerrav* v. *Gurrav* (1881), 5 Bom. 589, at p. 595.

[6] *Pandurang Anandrav* v. *Bhaskar Shadashiv* (1874), 11 Bom. H. C. 72; *Udaram Sitaram* v. *Ranu Panduji* (1875), 11 Bom. H. C. 76.

[7] *Aiyyagari Venkataramayya* v. *Aiyyagari Ramayya* (1902), 25 Mad. 690, at pp. 718, 719.

In one case,[1] where a coparcener built with his separate money a house upon ground belonging to the family, the Court held that each of the coparceners was entitled to a share in the house and the site upon which it was built, equal in value to his share of the site.

When the property is partible and capable of partition, the Court will ordinarily order a partition by metes and bounds.

How partition made by Court.

Partition Act, 1893.

The following provisions of the Partition Act, 1893,[2] apply to all partitions by the Court, but do not affect any local law providing for the partition of immovable property paying revenue to Government.

Power to Court to order sale instead of division in partition suits.

Sec. 2. Whenever in any suit for partition in which, if instituted prior to the commencement of this Act, a decree for partition might have been made, it appears to the Court that, by reason of the nature of the property to which the suit relates, or of the number of the shareholders therein, or of any other special circumstance, a division of the property cannot reasonably or conveniently be made, and that a sale of the property and distribution of the proceeds would be more beneficial for all the shareholders, the Court may, if it thinks fit, on the request of any of such shareholders interested individually or collectively to the extent of one moiety or upwards, direct a sale of the property and a distribution of the proceeds.[3]

Procedure when sharer undertakes to buy.

Sec. 3. (1) If, in any case in which the Court is requested under the last foregoing section to direct a sale, any other shareholder applies for leave to buy at a valuation the share or shares of the party or parties asking for a sale, the Court shall order a valuation of the share or shares in such manner as it may think fit and offer to sell the same to such shareholder at the price so ascertained, and may give all necessary and proper directions in that behalf.

(2) If two or more shareholders severally apply for leave to buy as provided in sub-section (1), the Court shall order a sale of the share or shares to the shareholder who offers to pay the highest price above the valuation made by the Court.

(3) If no such shareholder is willing to buy such share or shares at the price so ascertained, the applicant or applicants shall be liable to pay all costs of or incident to the application or applications.

Partition suit by transferee of share in dwelling-house.

Sec. 4. (1) Where a share of a dwelling-house belonging to an undivided family[4] has been transferred to a person who is not a member of such family and such transferee sues for partition, the Court shall, if any member of the family being a shareholder shall undertake to buy the share of such transferee, make a valuation of such share in such manner as it thinks fit and direct the sale of such share to such

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[1] *Vithoba Bava* v. *Hariba Bava* (1869), 6 Bom. H. C. A. C. 54.

[2] Act IV. of 1893.

[3] *Hirakore* (*Bai*) v. *Trikamdas* (1907), 4 Bom. 103.

[4] Ownership, not occupation gives the right, *Vaman Vishnu Gokhale* v. *Vasudev Morbhat Kale* (1898), 23 Bom. 73.

shareholder, and may give all necessary and proper directions in that behalf.

(2) If in any case described in sub-section (1) two or more members of the family being such shareholders severally undertake to buy such share, the Court shall follow the procedure prescribed by sub-section (2) of the last foregoing section.

Representation of parties under disability.

5. In any suit for partition a request for sale may be made or an undertaking, or application for leave, to buy may be given or made on behalf of any party under disability by any person authorized to act on behalf of such party in such suit, but the Court shall not be bound to comply with any such request, undertaking or application unless it is of opinion that the sale or purchase will be for the benefit of the party under such disability.

Reserved bidding and bidding by shareholders.

6. (1) Every sale under section 2 shall be subject to a reserved bidding, and the amount of such bidding shall be fixed by the Court in such manner as it may think fit and may be varied from time to time.

(2) On any such sale any of the shareholders shall be at liberty to bid at the sale on such terms as to non-payment of deposit or as to setting off or accounting for the purchase-money or any part thereof instead of paying the same as to the Court may seem reasonable.

(3) If two or more persons, of whom one is a shareholder in the property, respectively advance the same sum at any bidding at such sale, such bidding shall be deemed to be the bidding of the shareholder.

Procedure to be followed in case of sales.

7. Save as hereinbefore provided, when any property is directed to be sold under this Act, the following procedure shall, as far as practicable, be adopted, namely:—

(*a*) if the property be sold under a decree or order of the High Court of Calcutta, Madras or Bombay in the exercise of its original jurisdiction, or of the Court of the Recorder of Rangoon,[1] the procedure of such Court in its original civil jurisdiction for the sale of property by the Registrar;

(*b*) if the property be sold under a decree or order of any other Court, such procedure as the High Court may from time to time by rules prescribe in this behalf, and until such rules are made the procedure prescribed in the Code of Civil Procedure[2] in respect of sales in execution of decrees.

8. Any order for sale made by the Court under section 2, 3, or 4 shall be deemed to be a decree within the meaning of section 2 of the Code of Civil Procedure.

Saving of power to order partly partition and partly sale.

9. In any suit for partition the Court may, if it shall think fit, make a decree for a partition of part of the property to which the suit relates and a sale of the remainder under this Act.

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[1] This now would be the Chief Court of Lower Burmah in the exercise of its original civil jurisdiction. See Act VI. of 1900.

[2] Act XIV. of 1882.

10. This Act shall apply to suits instituted before the commencement thereof, in which no scheme for the partition of the property has been finally approved by the Court. Application of Act to pending suits.

Partition of revenue-paying estate.

A Civil Court can make a decree for a partition of an estate paying revenue to Government, but cannot carry out its decree.[1] If the decree be for the partition, or for the separate possession of a share of an undivided estate assessed as such to the payment of undivided revenue to Government,[2] the partition of the estate or the separation of the share shall be made by the Collector according to the law, if any, for the time being in force for the partition, or the separate possession of such estate.[3]

The Civil Court may carry out the decree if no separate allotment of the revenue be asked for.[4]

Mortgage of undivided share.

Where a coparcener has mortgaged or sold his undivided share of coparcenary property, and the property has on partition been allotted to another member, the mortgagee or purchaser is entitled to a charge upon other property allotted on the partition to the person dealing with him.[5]

Accident, mistake, fraud.

Where, from accident, mistake, or fraud, a portion of the coparcenary property is not included in a partition, such portion must be divided amongst the persons who took under the partition.[6] The subsequent discovery will not justify an interference with the original partition,[7]

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[1] *Meherban Rawoot* v. *Behari Lal Barik* (1896), 23 Calc. 679; *Dattatraya Vithal* v. *Mahadaji Parashram* (1891), 16 Bom. 528; *Ramjoy Ghose* v. *Ramrunjun Chuckerbutti* (1881), 8 C. L. R. 367; *Parbhudas Lakhmidas* v. *Shankarbhai* (1886), 11 Bom. 662; *Chundernath Nundi* v. *Hur Narain Deb* (1881), 7 Calc. 153.

[2] This does not include a ryotwari estate in Madras, *Muttuchidambara* v. *Karuppa* (1884), 7 Mad. 382, or a share of a certain defined portion of a mahal, *Ram Dayal* v. *Megu Lal* (1884), 6 All. 452.

[3] Act XIV. of 1882, s. 265; Civil Procedure Code, 1908, s. 54.

[4] *Jogodishury Debea* v. *Kailash Chundra Lahiry* (1897), 24 Calc. 725; 1 C. W. N. 374.

[5] See *Byjnath Lall* v. *Ramoodeen Chowdry* (1873), 1 I. A. 106; 21 W. R. C. R. 233; *Hemchunder Ghose* v. *Thakomoni Debi* (1893), 20 Calc. 533; *Amolak Ram* v. *Chandan Singh* (1902), 24 All. 483.

[6] See *Lachman Singh* v. *Sanwal Singh* (1878), 1 All. 543; "Mitakshara," chap. i. s. 9, para. 1.; "Dayabhaga," chap. xiii. paras. 1–3; "Vyavahara Mayukha," chap. iv. s. 6, para. 3; *Jogendro Nath Roy* v. *Baladeb Das Marwari* (1907), 12 C. W. N. 127.

[7] "Dayabhaga," chap. xiii. para. 6; Colebrooke's "Digest," vol. iii. p. 400.

except perhaps where by concealment one of the parties has obtained some special advantage in the original partition.[1]

Where, after the partition, it appears that property allotted to one of the coparceners did not belong to the coparcenary,[2] or that a valid charge existed thereon,[3] the coparcener to whom such property was allotted can insist upon the partition being reopened, or, at any rate, can claim compensation from the other parties to the partition.

Partition by Revenue authorities.

The law relating to the partition of revenue-paying estates is to be found in the following enactments :—

For Ajmere.—Reg. II. of 1877.

For Bengal.—Regulations VIII. of 1793 and VII. of 1822; Act V. (Ben. C.) of 1897.

For Madras.—Mad. Reg. II. of 1803.

For Assam.—Reg. I. of 1886, ss. 96–121, 154.

For Bombay.—Act. X. of 1876; Act V. (Bom. C.) of 1879, ss. 113, 114; Act VI. (Bom. C.) of 1888.

For the Central Provinces.—Act XVIII. of 1881, s. 136, as amended by Act XVI. of 1889, s. 26.

For the United Provinces.—Act III. (N. W. P. C) of 1901, ss. 105–140.

For the Punjab.—Act XVII. of 1887, ss. 112–135, 158.

Effect of partition.

Partition does not annul the filial relation nor the right of inheritance incidental to such relation.[4]

REUNION.

Reunion.

The parties to a partition,[5] or some of them,[6] may reunite so as to constitute, after such reunion, a joint

[1] See *Moro Vishvanath* v. *Ganesh Vithal* (1873), 10 Bom. H. C. 444, at pp. 451, 469.

[2] *Maruti* v. *Rama* (1895), 21 Bom. 333.

[3] *Lakshman* v. *Gopal* (1898), 23 Bom. 385.

[4] *Marudayi* v. *Doraisami Karambian* (1907), 30 Mad. 348; *Ramappa Naicken* v. *Sithammal* (1879), 2 Mad. 182.

[5] *Balabux Ladhuram* v. *Rukhmabai* (1903), 30 I. A. 130, at p. 136; 30 Calc. 725, at p. 734; 7 C. W. N. 642, at p. 646; *Pran Kishen Paul Chowdry* v. *Mothooramohun Paul Chowdry* (1865), 10 M. I. A. 403; 4 W. R. P. C. 11; *Vishvanath Gangadhar* v. *Krishnaji Gangadhar* (1866), 3 Bom. H. C. A. C. 69. See *Lakshmibai* v. *Ganpat Moroba* (1867), 4 Bom. H. C. O. C. 150, at pp. 165, 166.

[6] See *Abhai Churn Jana* v. *Mangal Jana* (1892), 19 Calc. 634; *Tara Chand Ghose* v. *Pudum Lochun Ghose* (1866), 5. W. R. C. R. 249.

family, and to remit them to the same status as before the partition.

There must be a complete junction of estate, and not a mere living together,[1] or joint enjoyment of the property.[2]

Where any of their descendants think fit to unite, they may do so; but such a union is not a reunion in the sense of the Hindu law, and does not affect the inheritance.[3]

According to the Mitakshara,[4] reunion is restricted to three classes of cases, namely, (1) between father and son, (2) between brothers, (3) between paternal uncle and nephews.[5] The same view is taken in the Smriti Chandrika,[6] the Dayabhaga,[7] the Viramitrodaya,[8] and the Mayukha.[9] The Mithila school permits any of the late co-sharers to reunite.[10]

An agreement to reunite cannot apparently be made by, or on behalf of, a minor.[11]

The burden of proof of reunion is on the person alleging it.[12]

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[1] *Gopal Chunder Daghoria* v. *Kenaram Daghoria* (1867), 7 W. R. C. R. 35; *Kuta Bully Viraya* v. *Kuta Chudappavuthamulu* (1864), 2 Mad. H. C. 235.

[2] See *Balkishen Das* v. *Ramnarain Sahu* (1903), 30 I. A. 139; 30 Calc. 738; 7 C. W. N. 578.

[3] *Vishvanath Gangadhar* v. *Krishnaji Gangadhar* (1866), 3 Bom. H. C. A. C. 69. See *Krodesh Sen* v. *Kamini Mohun Sen* (1881), 10 C. L. R. 161; *Ram Hari Sarma* v. *Trihi Ram Sarma* (1871), 7 B. L. R. 336; 15 W. R. C. R. 442.

[4] Chap. ii. s. 9, paras. 2, 3.

[5] *Basanta Kumar Singha* v. *Jogendra Nath Singha* (1905), 33 Calc. 371; 10 C. W. N. 236.

[6] Chap. xii. para. 1. *Abhai Churn Jana* v. *Mangal Jana* (1892), 19 Calc. 634, at p. 638.

[7] Chap. xii. paras. 3, 4. See also "Daya-Krama-Sangraha," chap. v. para. 4.

[8] G. C. Sircar's translation, pp. 168, 169, 205.

[9] Chap. iv. s. 19, para. 1.

[10] "Vivada Chintamani" (P. C. Tagore's translation), p. 301; "Daya-Krama-Sangraha," chap. v. para. 5.

[11] *Balabux Ladhuram* v. *Rukmabai* (1903), 30 I. A. 130, at p. 136; 30 Calc. 725, at pp. 734, 735; 7 C. W. N. 642, at p. 646.

[12] *Gopal Chunder Daghoria* v. *Kenaram Daghoria* (1867), 7 W. R. C. R. 35.

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THE END.

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